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# REIMAGINING MERIT AS ACHIEVEMENT

Aaron N. Taylor\*

*Higher education plays a central role in the apportionment of opportunities within the American meritocracy. Unfortunately, narrow conceptions of merit limit the extent to which higher education broadens racial and socioeconomic opportunity. This article proposes an admissions framework that transcends these limited notions of merit. This “Achievement Framework” would reward applicants from disadvantaged backgrounds who have achieved beyond what could have reasonably been expected. Neither race nor ethnicity is considered as part of the framework; however, its nuanced and contextual structure would ensure that racial and ethnic diversity is encouraged in ways that traditional class-conscious preferences do not. The overarching goal of the framework is to help loosen the “Gordian Knot” binding race to class by ensuring that higher education opportunities are apportioned in true meritocratic fashion.*

## INTRODUCTION

I am very fortunate. I have a great job. I get paid a good wage, work manageable hours (often from the comfort of my home), and have a high level of professional autonomy. The most oppressive part of my job is choosing a suit and tie to wear on days that I teach. Interestingly, it is this choice of attire that often serves as a compelling reminder of how fortunate I am and how our meritocracy exalts some and devalues others.

When I walk into my law school, I am often struck by the extent to which I am different. Naturally drawn to familiar faces, I notice that those who look most like me are usually dressed very differently from me. I am in a suit. They are in a uniform. I am carrying the tools of my trade—textbooks, a laptop. They are carrying (and pushing) their tools—a

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broom and garbage can. I am living what many would describe as the American Dream. They are living what is often a nightmare of low wages, little independence, and little respect.

This scene is all-too-common in the United States, where your station in life is heavily dependent on your starting point. My law school is located in St. Louis, Missouri, a metropolitan area that typifies American inequality. The demographics of the City of St. Louis look very different from those of its distinct municipal neighbor, St. Louis County.<sup>1</sup> In 2010, median household income in the county was 71 percent higher than in the city.<sup>2</sup> Homeownership rates<sup>3</sup> and the home value<sup>4</sup> exhibit similar disparities, seemingly illogical given the geographical closeness of the city and the county.

Disparities play out in schools as well. Between St. Louis city and county, there are twenty-four school districts: one city district, twenty-two regular county districts, and one district serving special education students throughout the county.<sup>5</sup> Like other city school districts, St. Louis Public Schools (SLPS) suffers severe racial and socioeconomic isolation. Black students make up more than 80 percent of the district,<sup>6</sup> and more

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1. *See Websites for St. Louis Area Counties*, STATE OF MISSOURI, AND STATE OF ILLINOIS, SAINT LOUIS CITY RECORDER, <http://www.stlouiscityrecorder.org/areacounties.html> (last visited Dec. 26, 2012) (showing the City of St. Louis and St. Louis County are separate administrative entities and that the city is surrounded by the county on all sides, except the east, which borders the Mississippi River).

2. *Compare State & County QuickFacts, St. Louis County, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/29189.html> [hereinafter *County QuickFacts*] (listing median county income as \$57,561) (last updated June 27, 2013), *with State & County QuickFacts, St. Louis City, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29/2965000.html> [hereinafter *City QuickFacts*] (listing median city income as \$33,652) (last updated June 27, 2013).

3. *Compare County QuickFacts, supra* note 2 (listing the 2007–2011 county homeownership rate as 72.5%) (last updated June 27, 2013), *with City QuickFacts, supra* note 2 (listing the 2007–2011 city homeownership rate as 47.2 percent) (last updated June 27, 2013).

4. *Compare County QuickFacts, supra* note 2 (listing the 2007–2011 median county home value as \$179,300) (last updated June 27, 2013), *with City QuickFacts, supra* note 2 (listing the 2007–2011 median city home value as \$122,200) (last updated June 27, 2013).

5. *County School Districts*, SAINT LOUIS COUNTY MISSOURI, <http://www.stlouis.co.com/YourGovernment/OtherGovernmentAgencies/CountySchoolDistricts> (last visited Sept. 17, 2013).

6. *See District Demographic Data*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUCATION, <http://mcds.dese.mo.gov/Pages/default.aspx> (last updated Sept. 16, 2013) (click “district info” and select “St. Louis City” from the dropdown menu. Click “district” next “student demographics” and press the arrow to go to page “2 of 2”) (showing that in 2012 students of color overall made up 86.4 percent of the dis-

than 87 percent of students qualify for free or reduced lunch.<sup>7</sup> Racial and socioeconomic isolation are pervasive among the county districts as well. Eleven county districts have student populations that are at least 75 percent black or 75 percent white.<sup>8</sup> Also, there are ten districts where more than half the students qualify for free or reduced lunch.<sup>9</sup>

Unsurprisingly, disparities among St. Louis area school districts have an undeniable racial character. Of the seven area districts with black student enrollments above 50 percent, all have free or reduced lunch rates of at least 60 percent, compared to only two of the fifteen majority white districts.<sup>10</sup> All of the majority black districts have graduation rates below the state average, compared to only one of the majority white districts.<sup>11</sup> In five of the seven majority black districts, a lower proportion of graduates enter four-year colleges than the state average, compared to only four of the majority white districts.<sup>12</sup> Moreover, in three of the ma-

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trict's 22,516 students. Eighty percent of the students were black, 13.6 percent were white, 3.3 percent were Hispanic, 2.9 percent were Asian, and 0.2 percent were Native American).

7. *Id.*

8. See *District Demographic Data*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUCATION, <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Student%20Indicators/District%20Demographic%20Data.aspx> (choose desired school district and school year to view data) (showing five county school districts and the city district have black enrollments ranging from 77.5 percent to 97.9 percent; five county districts have white enrollments ranging from 76.8 percent to 86.3 percent).

9. *Id.* (showing that among these districts, the percentage of students who qualify for free or reduced lunch range from 50.7 percent to 92.2 percent).

10. See *id.* (excluding two districts for purposes of this discussion; the Special School District of St. Louis County is excluded because it serves students across all county school districts, and Ritenour School District is excluded because it is essentially equal parts white (41 percent) and black (39 percent), though its other demographics and outcomes look very similar to those of the majority black districts).

11. See *District Graduation Rates*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUCATION, <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Graduation%20and%20Dropout%20Indic/District%20Graduation%20Rates.aspx> (choose desired school district and school year to view data) (showing the average graduation rate for the state is 87 percent while the Graduation rates in the majority black school districts range from 63.2 percent to 86.7 percent and rates in the majority white districts range from 81.1 percent to 99.5 percent).

12. See *District Graduation Analysis*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUCATION, <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Graduation%20and%20Dropout%20Indic/District%20Graduate%20Analysis.aspx> (choose desired school district and school year to view data) (showing the average four-year college entry rate for the state is 36.6 percent while the average rate in the majority black districts ranges from 23.8 percent to 47 percent and rates in the majority white districts range from 19.1 percent to 83.2 percent).

jority black districts, the proportion of graduates immediately undertaking *any* post-secondary education is lower than the state average, compared to only one of the majority white districts.<sup>13</sup>

The disparities in graduation rates should not be surprising given that students in all of the majority black districts are more likely to receive long-term out-of-school suspensions, with the rate in one district being over eight times the state average.<sup>14</sup> The college-attendance disparities should not be surprising given disparities in average ACT scores<sup>15</sup>—to say nothing of disparities in the proportion of students who take the test in the first place.<sup>16</sup> And none of this should be surprising given that two of the seven majority black districts are only provisionally accredited by the state and two lack any accreditation at all.<sup>17</sup> Disparities such as these, which are intensified in the St. Louis metropolitan area by the presence of 345 private schools,<sup>18</sup> inevitably impact the demographic com-

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13. See *id.* (showing the state average for graduates entering a college or technical school of any type immediately after high school is 71 percent while the average rate in the majority black districts ranges from 61.7 percent to 92.8 percent and the rates in the majority white districts range from 62.8 percent to 95.4 percent).

14. See *District Discipline Incidents*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUCATION, <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Student%20Indicators/District%20Discipline%20Incidents.aspx> (choose desired school district and school year to view data) (showing that the state average for district students being suspended for ten or more consecutive days is 1.3 percent while the average rate in the majority black districts ranges from 2.2 percent to an astounding 12.4 percent and rates in the majority white districts range from 0.1 percent to 5 percent).

15. See *District ACT*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUCATION, <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20Building%20Student%20Indicators/District%20ACT.aspx> [hereinafter *District ACT*] (showing that the seven majority black districts had the seven lowest average ACT scores, ranging from 15.6 (18th percentile) to 18.7 (41st percentile) and the fifteen majority white districts had average scores ranging from 18.9 (41st percentile) to 26.4 (85th percentile)); see also *National Ranks for Test Scores and Composite Score*, ACT INC., (2012) <http://www.actstudent.org/scores/norms1.html> (listing ACT percentiles).

16. *District ACT*, *supra* note 15 (showing that four of the seven majority black districts had a lower percentage of students take the ACT than the state average of 66.82 percent and seven of the fifteen majority white districts had lower proportions).

17. *District Accreditation*, MISSOURI DEP'T OF ELEMENTARY AND SECONDARY EDUC., <http://mcds.dese.mo.gov/guidedinquiry/District%20and%20School%20Information/District%20Accreditation.aspx> (choose desired school district and school year to view data) (providing that for the 2012–2013 school year, Jennings and Normandy Districts are provisionally accredited by the state; Riverview Gardens and St. Louis City school district are unaccredited).

18. *Education (K–12) and Special Needs*, ST. LOUIS REGIONAL CHAMBER & GROWTH ASSOCIATION, <http://www.stlrcga.org/x439.xml> (last visited Dec. 26, 2012) (listing the number of private schools in the St. Louis metropolitan area).

position of my law school. Education reformer John Dewey stated that one of the functions of schools is “to see to it that each individual gets an opportunity to escape from the limitations of the social group in which he was born, and to come into living contact with a broader environment.”<sup>19</sup> Educational inequality in America forestalls this function. For too many, inequality has dampened the “invigorating sense of possibility” upon which this country is said to have been founded.<sup>20</sup> The adage “you’re a product of your environment” is alarmingly true, and at first blush seems un-American. But this selective conception of the American Dream may not be as diametrically opposed to our core values as we would like to think. After all, slave-owning and racism were common among the founders of this country.<sup>21</sup> The notion of all men being created equal surely did not apply equally to all men (and applied to no women) when it became a guiding principle.<sup>22</sup> Even today, most Americans believe that we live in a meritocracy, while also acknowledging (and accepting) the roles that wealth and social status play in preserving inequality.<sup>23</sup> As a result, the legacy of discrimination dating back to the birth of this country continues to manifest itself. Our meritocracy is its primary conduit.

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19. JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 39 (2009), available at <http://books.google.com> (type “Democracy and Education Dewey (2009)” in the search box and press enter; then select the book from the options that pop up).

20. David Kamp, *Rethinking the American Dream*, VANITY FAIR, Apr. 2009, <http://www.vanityfair.com/culture/features/2009/04/american-dream200904>.

21. See *Thomas Jefferson and Slavery*, THOMAS JEFFERSON’S MONTICELLO, <http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-slavery> (last visited Dec. 26, 2012). Thomas Jefferson provides the most glaring example of hypocrisy among the founders of the United States. He has been characterized as a “consistent opponent of slavery,” yet he owned African slaves himself and believed that blacks were childlike, inferior beings. *Id.*

22. See *Does “All Men Are Created Equal” Apply to Slaves? Calls for Abolition, 1773–1783*, National Humanities Center 4 (2010), <http://nationalhumanitiescenter.org/pds/makingrev/rebellion/text6/slaveryrights.pdf>. The hypocrisy of the Declaration of Independence, in light of the continued maintenance of African enslavement, was not lost on the commentators of the day. Thomas Day, a British abolitionist, argued “[i]f there be an object truly ridiculous in nature, it is an American patriot signing resolutions of independence with the one hand, and with the other brandishing a whip over his affrighted slaves.” *Id.*

23. See, e.g., Richard T. Longoria, *Meritocracy and Americans’ Views on Distributive Justice* 86 (2006) (unpublished Ph.D. dissertation, University of Maryland, College Park), available at <http://drum.lib.umd.edu/bitstream/1903/4286/1/umi-umd-4000.pdf> (“[Most Americans] believe that intelligence, skill, and hard work . . . are actually rewarded. But they also know that non-merit items, such as social connections, family background, and more opportunities to begin with, are reasons for peoples’ success.”).

This article proposes a new meritocracy—one that adheres to the idea that “merit . . . is not simply where you wind up, but what you did with what you were given.”<sup>24</sup> This new meritocracy goes beyond our obsession with limited indicators of ability and rewards actual achievement. The article describes an “Achievement Framework,” contextual in nature and inspired by the writings of John Rawls. Rawls stressed the vital nature of equality of opportunity and the need for society to eliminate inequality through affirmative measures.<sup>25</sup> In this article, the Achievement Framework—primarily designed to impact higher education—will be examined through the lens of law school admissions and the black/white racial paradigm. Through the framework, applicants from disadvantaged backgrounds who have achieved beyond what could have reasonably been expected, given their background, are rewarded. The fundamental goal is to convert disadvantages in life into advantages in the admissions process.

Given the current legal and political climate, race and ethnicity are not explicitly considered within the Achievement Framework. But while the framework is rooted in class-consciousness, it is designed to encourage racial and ethnic diversity. Most class-conscious affirmative programs are ineffective at fostering racial and ethnic diversity, due to the sheer number of poor whites and the programs’ blunt treatment of disadvantage.<sup>26</sup> For example, UCLA Law School’s class-conscious affirmative action program resulted in a 70 percent drop in the number of black students in its entering class.<sup>27</sup> But unlike typical class-conscious affirmative action programs, the Achievement Framework accounts for factors that would better reflect race-based wealth and educational disparities.

Part I of this article discusses how wealth disparities lead to broad inequality and how discrimination against black and Hispanic/Latino Americans (particularly in the areas of housing and education) has had a lasting impact on racial wealth disparities. Part II examines theoretical

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24. William J. Goggin, *A “Merit-Aware” Model for College Admissions and Affirmative Action*, 83 POSTSECONDARY EDUC. OPPORTUNITY 3, 8 (1999), available at <http://www.postsecondary.org/last12/83599Goggin.pdf>.

25. See generally JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001).

26. See, e.g., Anthony P. Carnevale & Stephen Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in *AMERICA’S UNTAPPED RESOURCES* 101, 153 (2003), available at [http://tcf.org/publications/pdfs/pb252/carnevale\\_rose.pdf](http://tcf.org/publications/pdfs/pb252/carnevale_rose.pdf). Carnevale and Rose argue that class-conscious affirmative action programs should not replace race-conscious programs, because “while African Americans and Hispanics are over represented among the poor, whites still constitute the majority of families, particularly those in the second lowest quartile.” *Id.*

27. Richard Sander, *Experimenting with Class-based Affirmative Action*, 47 J. LEGAL EDUC. 472, 473 (1997) (attributing a third of the decline to application trends).



notions of meritocracy and pinpoints some of the deficiencies of meritocracy in practice. Part III chronicles the role of standardized testing in American meritocracy. Part IV shows how the use of standardized testing against a backdrop of inequality is disadvantageous to black and Hispanic/Latino children. Part V describes preferences embedded into the American higher education meritocracy, with particular focus on law school admissions. Lastly, Part VI introduces the Achievement Framework.

## I. WEALTH, INEQUALITY, AND DISCRIMINATION

While the effects of income differences are often highlighted, it is wealth that has been described as “the buried fault line of the American social system.”<sup>28</sup> It is wealth, not income, which truly separates the haves and the have-nots. Comedian Chris Rock provided the following apt illustration of the difference between being asset-wealthy and income-rich: “Wealth is passed down from generation to generation; you can’t get rid of wealth. Rich is some shit you could lose with a crazy summer and a drug habit.”<sup>29</sup>

Wealth “signifies the command over financial resources that a family has accumulated over its lifetime [and] . . . across generations.”<sup>30</sup> Its intergenerational nature makes disparities very difficult to correct. Inequality is passed down generation to generation, gaining steam like a runaway train. So an individual’s starting point not only affects his ending point, but also the starting and ending points of his descendants. Therefore, wealth status can be a sticky phenomenon—particularly insofar as it is “imbued with the shadow of race.”<sup>31</sup>

A look at intergenerational income trends illustrates much about inequalities in wealth transmission. About 44 percent of children born into the top income quartile will remain there as adults.<sup>32</sup> Similarly, about

28. OLIVER & SHAPIRO, *infra* note 30, at 91.

29. *Very Funny Chris Rock About Wealth*, YOUTUBE.COM (Dec. 26, 2012) <http://www.youtube.com/watch?v=4m37JkkGjAY>.

30. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH 2* (1997) (asserting that wealth disparities expose “deep patterns of racial imbalance not visible when viewed only through the lens of income”); see also *id.* at 2 (distinguishing wealth, “what people own,” from income, “a flow of money over time”).

31. *Id.* at 6.

32. Tom Hertz, *The Intergenerational Economic Mobility of Black and White Families in the United States*, in *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* 182 (Samuel Bowles, Herbert Gintis, & Melissa Osborne Groves eds., 2005).



47 percent of children born into the bottom quartile will remain there.<sup>33</sup> These persistence rates are remarkable, given that they take place at the extreme, and presumably more volatile, ends of the income strata. But the real story behind these trends becomes clear when they are broken down by race. About 32 percent of white children born into the bottom quartile will remain there through adulthood, compared to a whopping 63 percent of black children.<sup>34</sup> At the other end, while about 45 percent of white kids born into the top quartile will remain there; only about 15 percent of black kids will. So, based on these statistics, a poor black child will likely grow to be a poor adult, and a rich black child will almost assuredly be a less rich adult.<sup>35</sup>

A compelling chapter in the American meritocratic narrative is the “rags to riches” story—the poor genius ascending to the upper-class (or natural aristocracy) based on his talents and efforts alone. But a look at the data shows that while the odds of a white child ascending from the bottom quartile to the top are low (about 14 percent), the odds of a black child doing so are barely perceptible (less than 4 percent).<sup>36</sup> In fact, for black children, a “riches to rags” experience is almost ten times more likely than the converse.<sup>37</sup>

Wealth disparities are “products of the past,”<sup>38</sup> and the contemporary trends are breathtaking. In 2009, the median net worth for white households was \$113,149, compared to a woeful \$5,677 for black households.<sup>39</sup> Put differently, the wealth of a typical white family is approximately twenty times greater than the wealth of a typical black family. This is the highest proportional difference since the Census Bureau began publishing such data in 1984.<sup>40</sup>

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33. *Id.*

34. *Id.*

35. *See id.* at 183. When incomes are adjusted for family size, income persistence among black children born into the top quartile increases to 37 percent, but the rate of persistence for black kids born in the bottom quartile remain above 60 percent. *Id.*

36. *Id.* at 184.

37. *See id.* (showing 35 percent of black children born into the top income quartile will fall to the bottom quartile as adults, compared to less than 4 percent who will ascend from the bottom to the top); *see also id.* at 185 (showing when incomes are adjusted for family size, about 19 percent of top quartile black children will fall to the bottom as adults, compared to 4 percent who will ascend).

38. OLIVER & SHAPIRO, *supra* note 30, at 2.

39. PAUL TAYLOR ET AL., PEW RESEARCH CENTER, WEALTH GAPS TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS 13 (2011), *available at* [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf) (illustrating whites possessed the highest net worth among all racial/ethnic groups).

40. *Id.* at 3.

Research conducted by sociologists Melvin L. Oliver and Thomas M. Shapiro found that 63 percent of blacks had negative net worth, compared to 28 percent of whites.<sup>41</sup> At the other end, only 3 percent of blacks had net worth above \$50,000, compared to 24 percent of whites—an eight-fold difference.<sup>42</sup> At every phase of life, yawning gaps in wealth exist. Blacks younger than thirty-six possessed 6 percent of the wealth of whites of similar ages.<sup>43</sup> Between ages thirty-six and sixty-four, blacks possessed 9 percent of white wealth, and above the age of sixty-four, blacks possessed 20 percent.<sup>44</sup> Not even differences in job prestige can disturb these trends. Blacks in high-skill professional jobs possessed only 18 percent of the wealth of similarly-situated whites;<sup>45</sup> more surprisingly, professional blacks had less wealth than whites in low-skill blue collar jobs.<sup>46</sup>

There was a time where these disparities would have been viewed as the manifestation of a meritocratic grand denouement—hereditary elitism—with blacks simply taking up their rightful places at the bottom of the wealth hierarchy. That view is unsupported.<sup>47</sup> Oliver and Shapiro found that only 29 percent of wealth disparities between whites and blacks are accounted for by differences in “human capital, sociological, and demographic factors.”<sup>48</sup> In other words, wealth disparities exist even among whites and blacks of similar education, years of work experience, and other factors that should hold meritocratic sway.

This finding prompted Oliver and Shapiro to conclude that “disparities in wealth between blacks and whites are not the product of haphazard events, inborn traits, isolated incidents, or solely contemporary individual accomplishments.”<sup>49</sup> Rather, they are the result of discrimination against black Americans, which, in the words of President Lyndon B.

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41. OLIVER & SHAPIRO, *supra* note 30, at 102.

42. *Id.*

43. *Id.* at 198.

44. *Id.*

45. *Id.* at 119 (listing the median net worth of blacks employed in “upper-white-collar” jobs as \$12,303, compared to \$66,800 for similarly-employed whites).

46. *Id.* (listing the median net worth of blacks employed in “upper-white-collar” jobs as \$12,303, compared to \$15,500 for whites employed in “lower-blue-collar” jobs).

47. See, e.g., James Fallows, *The Tests and the “Brightest”: How Fair Are the College Boards?*, THE ATLANTIC MONTHLY, Feb. 1980, available at <http://www.theatlantic.com/past/docs/issues/95sep/ets/fall.htm> (explaining that differences in innate intelligence “do not explain the lockstep correlation between parental income and student scores”).

48. OLIVER & SHAPIRO, *supra* note 30, at 169 (showing that these factors pertain to education, job prestige, and career mobility).

49. *Id.* at 12.

Johnson, has been of a “dark intensity . . . matched by no other prejudice in our society.”<sup>50</sup>

### A. *Housing Discrimination*

Homeownership is the centerpiece of wealth accumulation in America. Equity in homes and other forms of real estate provides a means for families to fund their children’s education, start businesses, and acquire political clout.<sup>51</sup> Therefore, unequal access to homeownership has fostered inequities in other areas of life.

Housing discrimination has always been a potent tactic used to retard and suspend the social and economic advancement of blacks. Truman’s Committee on Civil Rights asserted that black families faced a “double barrier” in seeking housing.<sup>52</sup> Like everyone, these families had to contend with post-WWII housing shortages; but unlike “white gentiles,” they also had to endure discrimination.<sup>53</sup> The restrictive covenant was a particularly effective tool.<sup>54</sup> These legal instruments would bind property owners into agreements not to sell or lease property to individuals deemed “undesirable,” including of course members of various racial and ethnic groups.<sup>55</sup>

Truman’s committee found restrictive covenants to be prevalent throughout the country, particularly in major cities in the North and West.<sup>56</sup> In Chicago alone, 80 percent of available real estate was subject to racially restrictive covenants.<sup>57</sup> These instruments were legally binding until 1948, when the Supreme Court deemed their enforcement unconstitutional.<sup>58</sup> Discriminatory housing practices were successful at keeping

50. IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 178 (2005).

51. OLIVER & SHAPIRO, *supra* note 30, at 22.

52. PRESIDENT’S COMM. ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS*, Chapter II: The Record: Short of the Goal VII 35, ¶ 67 (1947), <http://www.trumanlibrary.org/civilrights/srights1.htm#VII>.

53. *Id.* at 68 (explaining that, in addition to race and color, housing discrimination was based on religion and national origin).

54. *Id.* (“The restrictive covenant has become the most effective modern method of accomplishing such segregation.”).

55. *Id.*

56. *Id.*

57. *Id.* See also EDWARD GLAESER & JACOB VIGDOR, MANHATTAN INSTITUTE, *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA’S NEIGHBORHOODS, 1890–2010* 5 (2011), available at [http://www.manhattan-institute.org/pdf/cr\\_66.pdf](http://www.manhattan-institute.org/pdf/cr_66.pdf) (finding that Chicago was the third most segregated city in 2010).

58. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (“In granting judicial enforcement of the restrictive agreements . . . the States have denied petitioners the equal protection of the laws.”).

blacks isolated in “crowded slum areas,” prompting the Truman committee to call housing discrimination one of the country’s “most challenging problems.”<sup>59</sup>

The process of suburbanization is a prime example of how unequal access to housing has negatively affected blacks. The New Deal era saw increased migration out of central cities to new housing developments on the outskirts of town. This migration was encouraged by the federal government in three ways: 1) individual tax incentives that encouraged the acquisition of single-family homes, coupled with business tax incentives that encouraged the relocation of jobs to outlying communities;<sup>60</sup> 2) the building of roads and the provision of aid to the auto industry that fostered easier travel;<sup>61</sup> and 3) the advent of federally-backed mortgages that required only small down payments.<sup>62</sup> The federal government wanted to bolster the economy by fostering housing development, and a great deal of untapped land lay just outside the central cities.<sup>63</sup>

More than thirty-five million families took advantage of this federal encouragement between 1933 and 1978, but to unequal extents and with unequal results. For much of this time period, it was both federal and private sector policy to promote segregated neighborhoods.<sup>64</sup> These efforts adhered to “a national code of real estate ethics that endorsed the view that all-black and racially-mixed neighborhoods were inferior to all-white homogeneous neighborhoods.”<sup>65</sup> Until 1950, the government encouraged the use of restrictive covenants to preserve the segregated character of suburban neighborhoods.<sup>66</sup>

Even after restrictive covenants were deemed unconstitutional, the government and private actors used other means to preserve the racial make-up of neighborhoods and to restrict movement of black families.<sup>67</sup>

59. PRESIDENT’S COMM. ON CIVIL RIGHTS, *supra* note 52, at 69.

60. OLIVER & SHAPIRO, *supra* note 30, at 16.

61. *Id.*

62. *Id.* at 17.

63. *Id.*

64. Charles T. Clotfelter, *The Implications of “Resegregation” for Judiciary Imposed School Segregation*, 31 VAND. L. REV. 829, 838 (1978) (“FHA practices favoring low density dwelling and avoiding racially mixed neighborhoods in making loans . . . have fostered both economic and racial residential segregation.”). *See also id.* (“Outright discrimination by loan institutions, real estate brokers, and homeowners strengthens segregated patterns.”).

65. Kevin Fox Gotham, *Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri*, 34 AM. STUDIES 13 (2010), available at <https://journals.ku.edu/index.php/amerstud/article/viewFile/3050/3009>.

66. OLIVER & SHAPIRO, *supra* note 30, at 18.

67. *Id.* at 18. *See, e.g.*, Gotham, *supra* note 65, at 18 (describing how “blockbusting,” or the practice of moving blacks into an all-white neighborhood and then stok-

Between 1950 and 1974, the proportion of whites who lived in city centers fell from 55 percent to 38 percent; the black proportion remained constant at about 75 percent.<sup>68</sup> The publicly-subsidized gold-rush that was suburban homeownership was mostly unavailable to blacks. Moreover, federal policies isolated blacks in the inner cities at a point when these same policies were encouraging the relocation of jobs to the suburbs, further “deepening [the] ghettoization of the black population.”<sup>69</sup>

The GI Bill became another tool of discrimination against blacks seeking homeownership. The effects of GI Bill discrimination became most apparent in the 1980s, when the bulk of the mortgages taken out during the GI Bill era matured. In 1984, almost 70 percent of white families owned homes, with an average value of about \$52,000.<sup>70</sup> In contrast, only about 40 percent of blacks owned homes, with an average value of about \$30,000.<sup>71</sup> Thus, a far lower proportion of GI Bill-era blacks owned homes, and these homes were significantly less valuable on average. This “double-whammy” of lower homeownership rates and lower average home value was the main reason why in 1984, blacks held only 9 percent of the wealth of whites<sup>72</sup>—a paltry amount, though much higher than today’s 5 percent proportion.<sup>73</sup>

Sadly, housing discrimination remains a problem today. In July 2012, Wells Fargo agreed to pay \$175 million to settle claims that it steered black and Latino borrowers into subprime and high-cost mortgages.<sup>74</sup> Blacks were four times more likely to be offered subprime loans than similarly-qualified white applicants; Latinos were three times more likely than white applicants.<sup>75</sup> Additionally, blacks and Latinos who got prime loans nonetheless paid higher fees—an extra \$2,064 for blacks on a \$300,000 loan and an extra \$1,251 for Latinos.<sup>76</sup> A Department of Justice

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ing fears of “impending racial turnover and property devaluation” among whites in order to secure their property at depressed prices, served to encourage segregation in Kansas City).

68. Clotfelter, *supra* note 64, at 836.

69. OLIVER & SHAPIRO, *supra* note 30, at 18. *See also id.* at 15 (associating “The Suburbanization of America” with “The Making of the Ghetto”).

70. KATZNELSON, *supra* note 50, at 164.

71. *Id.*

72. *Id.* (listing the median net worth of white households as \$39,135, compared to \$3,397 for black households).

73. TAYLOR ET AL., *supra* note 39, at 14.

74. Ylan Q. Mui, *Wells Fargo, Justice Department Settle Discrimination Case for \$175 Million*, WASH. POST, Jul. 12, 2012, available at [http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for175million/2012/07/12/gJQAX66ZgW\\_story.html](http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for175million/2012/07/12/gJQAX66ZgW_story.html).

75. *Id.*

76. *Id.*

lawyer termed these higher fees a “racial surtax.”<sup>77</sup> In December 2011, Bank of America agreed to pay a record \$335 million to settle similar claims.<sup>78</sup>

The Wells Fargo and Bank of America settlements merely scratch the surface of the problem of housing discrimination.<sup>79</sup> The systematic steering of blacks into subprime loans and into properties with little prospect of appreciation played a major role in the post-recession widening of the white/black wealth disparity.<sup>80</sup> In 2009, 35 percent of black homeowners had zero or negative equity in their homes, compared to just 15 percent of white homeowners.<sup>81</sup>

### *B. Unequal Access to Schooling*

Wealth acquisition is tied to access to quality schooling, and the local nature of education funding means that higher-performing, better-funded schools tend to be located in communities composed of higher-value homes.<sup>82</sup> Moreover, the command over resources concomitant with wealth allows families to invest financially in education for their children, whether it is private K–12 education or higher education. A Pew study concluded that for every \$35,000 of home equity, the college enrollment rate of a family’s children increases by 5 percent.<sup>83</sup> These trends are even more profound among middle- and low-income families. For families with

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77. *Id.*

78. Charlie Savage, *Countrywide Will Settle a Bias Suit*, N.Y. TIMES, Dec. 21, 2011, available at <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html/>.

79. U.S. Dep’t of Just., *Housing and Civil Enforcement Cases*, (last visited Oct. 3, 2013), <http://www.justice.gov/crt/about/hce/caselist.php> (providing links to court documents relating to discrimination cases being pursued by the Housing and Civil Enforcement Section of the Department of Justice).

80. *See, e.g.*, TAYLOR ET AL., *supra* note 39, at 13 (discussing the extent to which declines in home equity resulted in steep declines in household wealth among Hispanic, black, and Asian households).

81. *Id.* at 16 (listing the percentage of Latinos with zero or negative home equity as 31 percent).

82. *See, e.g.*, OFFICE OF PLANNING, EVALUATION AND POLICY DEVELOPMENT POLICY AND PROGRAM STUDIES SERVICE, U.S. DEPT. OF EDUC., *COMPARABILITY OF STATE AND LOCAL EXPENDITURES AMONG SCHOOL WITHIN DISTRICTS: A REPORT FROM THE STUDY OF SCHOOL-LEVEL EXPENDITURES* 18 (2011), available at <http://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf> (“[M]ore than 40 percent of Title I schools had lower personnel expenditures per pupil than did non-Title I schools at the same school grade level.”).

83. Michael Lovenheim et al., THE PEW CHARITABLE TRUSTS, *HOUSING WEALTH AND HIGHER EDUCATION: BUILDING A FOUNDATION FOR ECONOMIC MOBILITY* 14 (2011), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Pew\\_EMPProject\\_FamilyWealth.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Pew_EMPProject_FamilyWealth.pdf).

income below \$70,000 and no equity in their home, the college-going rate is 9 percent.<sup>84</sup> That rate, however, increases more than three-fold to 29 percent with \$35,000 in equity and to 94 percent with \$150,000 in equity.<sup>85</sup> For these families, the college enrollment rate increases 6 percent for every additional \$10,000 of home equity.<sup>86</sup> Once again, wealth matters in ways that mimic merit, and the nature of wealth inequality ensures that race matters as well.

Throughout much of American history, blacks have been denied adequate access to education—originally by law and later by practice. A central tenet of the enslavement of Africans in the United States was the “containment and repression of literate culture.”<sup>87</sup> Hiding behind false notions of black inferiority, Southern planters recognized the threat that hordes of literate enslaved Africans would pose to the Southern economy and the “peculiar institution” itself.<sup>88</sup> Education was viewed as power and thus a “contradiction of oppression.”<sup>89</sup> Enslaved Africans who learned to read and write in defiance of their masters were considered “rebel literates.”<sup>90</sup> It should be no surprise that the act of teaching blacks, enslaved or free, to read and write was criminalized throughout the South.<sup>91</sup>

This climate of deprivation did not, however, dampen the desire of enslaved Africans to be educated. By 1860, upwards of 5 percent of those enslaved were literate, an admirable proportion given the restrictions and threats literate blacks faced.<sup>92</sup> Additionally, after the end of their enslavement, blacks continued their “tradition of educational self-help” and

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84. *Id.* at 16.

85. *Id.* (noting that there are few families in the latter, low-income/high-home equity, group).

86. *Id.*

87. JAMES D. ANDERSON, *THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935* 1 (1988).

88. *See, e.g.*, WILLIAM H. WATKINS, *THE WHITE ARCHITECTS OF BLACK EDUCATION: IDEOLOGY AND POWER IN AMERICA, 1865–1954* 12 (2001) (“Education was anathema to the interests of keepers of chattel slaves.”). *See generally*, INDEPENDENCE HALL ASSOCIATION IN PHILADELPHIA, *U.S. HISTORY: PRE-COLUMBIAN TO THE NEW MILLENNIUM: 27 Peculiar Institution*, <http://www.ushistory.org/us/27.asp> (“The ‘peculiar institution’ is slavery.”).

89. ANDERSON, *supra* note 87, at 17 (“Former slaves were the first among native southerners to . . . campaign for universal, state-supported public education.”).

90. *Id.*

91. *See, e.g.*, William A. Hotchkiss, *Codification of the Statute Law of Georgia* (1848), available at <http://academic.udayton.edu/race/02rights/slavelaw.htm#11> (stipulating that such actions “shall be punished by fine and whipping, or fine or whipping, at the discretion of the court”).

92. ANDERSON, *supra* note 87, at 16.



pushed for publicly-funded education.<sup>93</sup> The very notion of universal public education in the South was a distinctly black idea.<sup>94</sup> Poor Southern whites did not begin demanding public education until the late 19th century, more than twenty years after blacks had pushed for such accommodation.<sup>95</sup>

Sadly, it would be well into the 20th century before blacks would receive anything other than severely restricted access to public schooling in the South.<sup>96</sup> In 1933, only 18 percent of blacks were enrolled in high school in the Southern states, compared to 54 percent of whites.<sup>97</sup> In Mississippi, 7 percent of high school age blacks attended school, compared to 66 percent of whites.<sup>98</sup> The disparities were less stark at the elementary and middle school levels,<sup>99</sup> eventually reaching parity by 1940.<sup>100</sup> But statistical parity could not shield the inescapable fact that black public education looked very different than the white version. The Truman Committee's report sums it up well:

There is a marked difference in quality between the educational opportunities offered white children and Negro children in the separate schools. Whatever test is used—expenditure per pupil, teachers' salaries, the number of pupils per teacher, transportation of students, adequacy of school buildings and educational equipment, length of school term, extent of curriculum—Negro students are invariably at a disadvantage.<sup>101</sup>

The educational accommodations afforded blacks in the South were motivated mostly by the planters' desire to preserve their low-wage workforce by stemming black migration out of rural areas.<sup>102</sup> Equal accommodations for all races—the guiding *farce* of “separate but equal”—

93. *Id.* at 18.

94. *Id.* at 4.

95. *See e.g., id.* at 19. Black politicians used the Military Reconstruction Acts, passed in 1867, to use “southern constitutional conventions to legalize public education in the . . . former Confederate states.” *Id.*

96. *Id.* at 148.

97. *Id.* at 236.

98. *Id.*

99. *Id.* at 151 (stating that in 1900, 22 percent of southern black children age five to nine attended school, compared to 37 percent of white children; among children age ten to fourteen, 52 percent of black children were enrolled, compared to 76 percent of white children).

100. *Id.* at 182.

101. PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS, CH. II, *supra* note 52, at 63.

102. ANDERSON, *supra* note 87, at 159 (“[A]s the migration of blacks from the rural South to southern and northern cities accelerated, white landowners, fearful of losing

was neither the goal nor the result. And this inequality “seriously affected the long-term development of education in the black community.”<sup>103</sup>

The unyielding achievement gaps we see between the races are an enduring legacy of past inequity. The National Assessment of Educational Progress (NAEP)<sup>104</sup> captures the nature of race-based achievement gaps. White students scored higher than black students at every relevant grade level (4th, 8th, and 12th) and across the reading, math, and science assessments. In 2009, for example, the average science score for 12th grade white students was 34 percent higher than the average for their black peers.<sup>105</sup> In math, the white average was 30 percent higher than the black average.<sup>106</sup> In reading, the white average was 26 percent higher than the black average.<sup>107</sup>

More significant, however, are educational outcome disparities. The high school dropout rate for black students is 10 percent, double the white rate.<sup>108</sup> Among those who graduate high school, about 60 percent of blacks begin college the following fall, compared to 71 percent of their white peers.<sup>109</sup> Once in college, about 45 percent of black students find themselves in need of remedial coursework; 31 percent of white students find themselves in a similar predicament.<sup>110</sup> Only about 40 percent of black students seeking a bachelor’s degree graduate within six years, compared to 60 percent of white students.<sup>111</sup> Only 19 percent of blacks between the ages of twenty-five and twenty-nine possess a bachelor’s degree, less than half the white rate of 39 percent.<sup>112</sup>

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a critical mass of [black workers], returned larger shares of public tax funds to support the construction of rural schoolhouses. . . .”).

103. *Id.* at 237.

104. NAEP is a test of academic proficiency in various subjects, including reading, math, and science. The purpose of NAEP is to “periodically assess[ ] students’ performance in several subjects in grades 4, 8, and 12.” The test takes two principal forms: an assessment of current proficiency and an assessment of long-term trends. SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., THE CONDITION OF EDUCATION 2011 332 (2011), available at <http://nces.ed.gov/pubs2011/2011033pdf>.

105. *Id.* at 51.

106. *Id.* at 49.

107. *Id.* at 45.

108. The rates range from a high of 15 percent for Native American students to a low of 2 percent for Asian students. *Id.* at 67.

109. *Id.* at 68.

110. *Id.* at 70 (listing the percentage of white first-year undergraduate students in 2007–2008 who reported that they had ever taken a remedial course in college at 31 percent).

111. *Id.* at 73.

112. *Id.* at 74.

The aforementioned emergence of suburban communities fostered an unequal system of school funding that has a pervasively racial character. The creation of strong schools in all-white suburbs fostered further flight of people and resources out of central cities, leaving underfunded, crowded, and racially-isolated schools in its wake.<sup>113</sup> Even after the Supreme Court deemed segregated schools unconstitutional in *Brown v. Board of Education*,<sup>114</sup> this process was aided and solidified by gerrymandered school district boundaries and discriminatory housing practices.<sup>115</sup> These policies exploited the “reflexive relationship between schools and housing”<sup>116</sup> for discriminatory purposes.

But in the end, it all comes down to wealth. Like their geological analogues, wealth fault lines have been divisive and destructive. The deck has been stacked against blacks in ways that have produced crippling disparities. The “desperate and refractory” nature of black poverty<sup>117</sup> has prompted some to conclude that there is an economic “cost of being a Negro.”<sup>118</sup> And given the relationship between wealth and our conceptions of merit, this cost is a substantial one.

In light of this country’s appalling history of structural and state-imposed inequality, how can children born into the “wrong” families ever compete within the meritocracy? How can inequality caused by ancient brutality, past injustice, and present prejudice ever be corrected? Can distributive mechanisms be adopted that reward achievement rather than hollow notions of merit—and in the process, provide the universal opportunity that is America’s great theoretical promise?

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113. Kevin Fox Gotham, *Missed Opportunities, Enduring Legacies: School Segregation and Desegregation in Kansas City, Missouri*, 43:2 *American Studies* 30 (2002) <https://journals.ku.edu/index.php/amerstud/article/viewFile/3050/3009> (“Creation of quality schools in the suburbs combined with new housing primed by FHA and VA housing subsidies expanded the housing and school choices of whites and stimulated them to move out of the city.”).

114. 347 U.S. 483 (1954).

115. Gotham, *supra* note 115, at 30 (describing tactics used to preserve racial segregation in metropolitan Kansas City schools long after the Brown decision).

116. *Id.* at 6.

117. Duncan considered the poverty problem essentially a race problem. Otis Dudley Duncan, *Inheritance of Poverty or Inheritance of Race*, in *ON UNDERSTANDING POVERTY: PERSPECTIVES FROM THE SOCIAL SCIENCES* 108 (Daniel P. Moynihan ed., 1969), available at [http://faculty.washington.edu/charles/562\\_f2011/Week%208/Duncan%201969.pdf](http://faculty.washington.edu/charles/562_f2011/Week%208/Duncan%201969.pdf). See also KATZNELSON, *supra* note 50, at xi (referencing “the deep, even chronic dispossession that continues to afflict a large percentage of black America”).

118. Duncan, *supra* note 117.

## II. AMERICAN NOTIONS OF MERITOCRACY

Most Americans believe that the United States is a meritocracy—a place where those most deserving of power, wealth, and influence will succeed through innate aptitude and hard work. Conversely, those lacking natural talents will fail under the weight of their own inadequacies. The concept of meritocracy is central to the American story. It provides justification for the many inequities that pervade American life.<sup>119</sup> It allows us to rationalize the apportionment of opportunities based on a narrow range of arbitrarily weighted factors.<sup>120</sup>

Merit by its very nature is subjective; but embedded in all its conceptions is the notion of worthiness.<sup>121</sup> Some are worthy, others unworthy. That is the paradigm within which merit is conceived and the meritocracy operates. Thus, the contours of the paradigm are critically important, as they determine winners and losers.

The term “meritocracy” entered the popular lexicon in 1958 with the publication of Michael Young’s aptly named book, *The Rise of the Meritocracy*.<sup>122</sup> Young’s book offered a wryly satirical account of life in a Britain that had adopted a system where leaders were chosen by talents, instead of birthright. The coming of the industrial age and the transition away from an agrarian economy provided the requisite necessity for the transition.<sup>123</sup> This new society needed to be run efficiently by the “cleverest people,” not “morons” of gentle birth.<sup>124</sup>

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119. See, e.g., Longoria, *supra* note 23, at 60 (displaying survey results showing that most respondents agree that people are rewarded for their effort, intelligence, and skill, and that everyone has equal opportunities to succeed).

120. See, e.g., NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 6 (2000) (“A test of one narrow quality, the ability to perform well in school, stands firmly athwart the path to success.”).

121. Oxford defines “merit” as “the quality of being particularly good or worthy, especially so as to deserve praise or reward.” OXFORD DICTIONARIES, *available at* <http://oxforddictionaries.com/definition/english/merit>.

122. Young “made up” the word and structured his book around it over the objection of a “classical scholar” friend who predicted Young would be the target of scorn for combining Latin and Greek words in such a way. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* xii (1999).

123. *Id.* at xiii. See also JAMES S. COLEMAN, *THE CONCEPT OF EQUALITY OF EDUCATIONAL OPPORTUNITY* 1 (1967), *available at* <http://www.eric.ed.gov/PDFS/ED015157.pdf> (discussing how a child’s mobility in pre-industrial Europe was dictated not only by his father’s “station in life” but also by the lifelong obligations to the agricultural-based “family production enterprise”).

124. Young made liberal usage of “moron” to describe people of lesser intelligence. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* 4 (1999).

Young's concept of meritocracy was based on two premises: 1) Class divisions are universal and inevitable,<sup>125</sup> and 2) inequality of outcome is tolerated when everyone has equality of opportunity.<sup>126</sup> This was Young's "code of morality." Equality of opportunity would lead to the acceptance of meritocratic outcomes—a philosophy of "equal status for equal intelligence."<sup>127</sup>

Each social class was seen as a microcosm of society as a whole.<sup>128</sup> Each had its own share of individuals "enlivened by excellence" and many others who were "deadened by mediocrity."<sup>129</sup> Under the nepotistic system, geniuses and morons of the upper-classes were allowed to ascend to positions of power and prestige, while geniuses of the lower-classes were most often consigned to lesser roles.<sup>130</sup> It was this "basic injustice" that Young's meritocracy sought to end.<sup>131</sup>

Young's book chronicles the imposition of meritocracy, opposition to meritocracy,<sup>132</sup> and the evolving role of schools in meritocracy.<sup>133</sup> But it is Young's projection of British society after the meritocratic system has been in place for over a century that is most interesting. He imagines a society where all the formerly lower-class geniuses have ascended to the upper-class. Conversely, the upper-class morons previously shielded by their lineage now inhabit the lower class. The eventual effect of this sorting is that social class becomes a reflection of innate talent, creating an intellectual "gulf between the classes."<sup>134</sup> In this society, social classes are no longer microcosms of society. The upper-class enjoys its status due to its talents; the lower-class endures its status due to its lack of talent.

To Young's mind, imposition of meritocracy promised to have profound effects on broader society. The meritocratic code of morality would be embraced; everyone would accept his place.<sup>135</sup> Dissension ema-

125. *Id.* at 142.

126. *Id.* at 97.

127. *Id.* at 142, 105.

128. *Id.* at 4.

129. *Id.* at 30.

130. *Id.* at 151.

131. *Id.*

132. Young illustrated opposition as principally coming from individuals who disagreed with the idea of innate superiority among humans, and thus disagreed with the inequality created by the meritocracy. *See id.* at 158.

133. Young saw the role of schools as diminishing the effect of upper-class families conferring advantages to their children that were unavailable to lower-class families. A principle role of schools was to sort and track children based on their ability, irrespective of social class. *See id.* at 30.

134. *Id.* at 96.

135. *Id.* at 97 ("Today all persons, however humble, know they have had every chance [to demonstrate their talents].").

nating from the lower classes would be squelched by utter inability to dissent effectively<sup>136</sup> and by the hope that an Untouchable might one day become a Brahmin.<sup>137</sup> Lastly, according to Young, traditional notions of equality would become obsolete because inequality would come to reflect unequal talents—an accepted, even desired result.<sup>138</sup> Elitism would become hereditary.<sup>139</sup>

Young characterized *The Rise of the Meritocracy* as a “counterargument as well as argument” for the broad-based population sorting being implemented in Britain and the United States in the mid-20th century. His fundamental premises—the inevitability of class divisions and the belief in an ability-based conception of equality—remain powerful meritocratic principles today. The legitimacy of these premises, however, is called into question by the inequality of opportunity that pervades our society. We have a meritocracy in theory only; that is, we use differential sorting without a moral code to guide it.

### III. THE ROLE OF STANDARDIZED TESTS IN THE AMERICAN MERITOCRACY

In *The Rise of the Meritocracy*, education played a central role in the apportionment of opportunities.<sup>140</sup> Standardized test scores signaled merit and thus determined who received the best educational benefits. The history of standardized tests dates back to the early 20th century. The tests with which we are familiar descend, in principle, from the first test of intelligence—developed in 1905 by psychologist Alfred Binet.<sup>141</sup> Binet’s test required written responses, unlike the multiple choice tests of today; its purpose was to identify students in need of remedial help.<sup>142</sup> Binet’s purpose was turned on its head when Lewis Terman, a psychologist and

136. *Id.* at 101 (“[The lower classes] are unambitious, innocent, and incapable of grasping clearly enough the grand design of modern society to offer any effective protest.”).

137. *Id.* at 100 (“As long as all have opportunity to rise through the schools, people can believe in immortality: they have a second chance though the younger generation.”).

138. *Id.* at 116 (“Once equality of opportunity was a fact, to go on preaching equality was obviously . . . unnecessary.”).

139. *Id.* at 166 (“The top of today are breeding the top of tomorrow . . . the elite is on the way to becoming hereditary; the principles of heredity and merit are coming together.”).

140. *Id.* at xiv (“Practically and ethically, a meritocratic education underpins meritocratic society.”).

141. LEMANN, *supra* note 120, at 17.

142. *Id.*

prominent eugenicist, introduced the term “intelligence quotient” and pioneered the introduction of intelligence testing.<sup>143</sup>

The belief that a test could measure innate intelligence had mythical appeal. Per the narrative, the test could analyze a person’s brain (“see the invisible”) and based on that analysis assess his chances of academic success (“predict the future”).<sup>144</sup> The otherworldly allure of intelligence testing enthralled many, especially eugenicists. The idea of meritocracy, with its emphasis on fostering the ascension of those deemed superior in intellect, was compatible with the eugenicist aim of “securing that humanity [is] represented by the fittest races.”<sup>145</sup> Thus, the promise of intelligence testing as a tool of base social engineering struck a resounding chord.

The Army was the first large-scale consumer of intelligence tests. During World War I, more than two million soldiers took IQ tests.<sup>146</sup> The purpose of administering the tests was two-fold: to identify officer candidates and to build up statistical evidence of the tests’ validity and reliability.<sup>147</sup> Shortly thereafter, these tests would make their entry into higher education—and, unsurprisingly, Harvard would provide a prominent early perch.

When the standardized tests that grew out of the earliest IQ tests made their first appearance in the United States, the notion of meritocracy (though not yet so named) had long been part of the national dialogue. In promoting his idea of universal public education (for white males), Thomas Jefferson proffered the idea of using advanced education to train what he called a “natural aristocracy.”<sup>148</sup> The natural aristocracy would be comprised of individuals who became leaders of the young republic based on “virtue and talents,” as opposed to the “artificial aristocracy” that ascended due to “birth and wealth.”<sup>149</sup>

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143. Mitchell Leslie, *The Vexing Legacy of Lewis Terman*, STANFORD MAGAZINE (Jul./Aug. 2000) <http://www.stanfordalumni.org/news/magazine/2000/julaug/articles/terman.html>.

144. LEMANN, *supra* note 120, at 18.

145. FRANCIS GALTON, *Eugenics; Its Definition, Scope, and Aims*, 10 *American Journal of Sociology* no.1, 1–25 (1904) available at <http://galton.org/essays/1900-1911/galton-1904-am-journ-soc-eugenics-scope-aims.htm>. See also *id.* (analogizing “barbarous races . . . like the negro” to domesticated animals and lamenting their persistent fertility).

146. LEMANN, *supra* note 120, at 24.

147. *Id.*

148. Thomas Jefferson, *Thomas Jefferson to John Adams*, in 1 THE FOUNDER’S CONSTITUTION ch. 15, doc. 61 (Philip B. Kurland & Ralph Lerner eds., 2000), available at <http://presspubs.uchicago.edu/founders/documents/v1ch15s61.html>.

149. In extolling his natural aristocracy, Jefferson writes in a tone surprising for its eugenicist flair about how the “commerce of love” has been “made subservient . . . to



Inspired by Jefferson's writings, James Conant (Harvard President from 1933 until 1953) sought to devise a way of breaking the influence of the preparatory school network that dominated Ivy League admissions.<sup>150</sup> Conant was seeking to change Harvard's mostly un-academic, insular culture<sup>151</sup> by shifting the focus of admissions consideration from non-academic criteria such as legacy status, athletic ability, and "character" to that of academic merit.<sup>152</sup> Upon hearing about the awesome potential of IQ testing, he decided that it would be his tool of choice. Harvard's foray into standardized testing began as an attempt to select scholarship recipients. The Harvard National Scholarship was Conant's brainchild. He saw the scholarship program as a means of instilling Jeffersonian meritocratic ideology.<sup>153</sup> The purpose was to bring "any man with remarkable talent . . . whether he be rich or penniless" to Harvard for his education.<sup>154</sup>

Merit, as defined by Conant, was "native intelligence"<sup>155</sup> and the "potential for success in college work."<sup>156</sup> Specifically, Conant wanted the scholarships "to be awarded only to those expected to be the top-ranking scholars of the class."<sup>157</sup> The question for many, however, was how to identify such potential (given the logistical difficulty of implementing a nationwide open-application process in the mid-20th century). It did not take long for Conant to be convinced that the SAT, a descendant of the standardized tests administered by the Army, provided the most promising means of identifying academic merit.<sup>158</sup> For Conant, the SAT provided

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wealth and ambition by marriages without regard to the beauty, the healthiness, the understanding, or virtue of the subject from which we are to breed." *Id.*

150. JEROME KARABEL, *THE CHOSEN* 169 (2005).

151. In a series of essays published in the mid/late 1940s describing Harvard's admissions process, Wilbur Bender, dean of the College, stated that the most significant institutionalized preferences benefitted legacies, athletes, and full-payers. *Id.* at 186. *See also id.* at 192 (discussing how "attracting top scholars was by no means [Harvard's] primary goal").

152. The reliance on non-academic criteria is said to have allowed Harvard to discriminate against Jews "while shielding [itself] from external scrutiny." *Id.* at 170.

153. Conant's higher education meritocracy was a departure from the norm of that time, but is very familiar to contemporary observers. Central tenets include "the principle that admission to college should be based . . . on talent and accomplishment," be need-blind and full-aid, and be heavily reliant on the SAT. *Id.* at 139.

154. *Id.*

155. LEMANN, *supra* note 120, at 38.

156. KARABEL, *supra* note 150, at 140.

157. *Id.*

158. *See, e.g., id.* Conant charged two of his freshman deans to find an appropriate test for measuring academic talent. They settled on the SAT, which had been recently developed by the College Board. *Id.*

both a mythical and a practical means of finding the talent for which he was looking.<sup>159</sup>

In 1934, Harvard began using the SAT, in conjunction with transcripts and recommendations, to select its first ten National Scholars.<sup>160</sup> Eight of the ten would go on to be elected Phi Beta Kappa, providing a measure of vindication for Conant's reliance on the test.<sup>161</sup> The success of Conant's experiment induced other Ivy League schools to join Harvard "in a system to make multiple-choice mental tests the admission device for all scholarship students."<sup>162</sup> By the late 1930s, these examinations were being administered to more than 2000 high school seniors all over the country seeking scholarship admission to Ivy League schools.<sup>163</sup> But the ultimate effect of the system's success is that it serves as the model for the "basic mechanism for sorting the American population" to this day.<sup>164</sup>

Around the time Harvard was searching for a scholarship selection tool, Carl Brigham, one of the original developers of the SAT, began expressing grave reservations about the conclusions he and others had reached. Brigham, like many early developers of intelligence tests, was a eugenicist. As such, he adhered to the "central tenet" that intelligence tests "measured a biologically grounded, genetically inherited quality that was tied to ethnicity."<sup>165</sup>

In his seminal work, *A Study of American Intelligence*, Brigham used data showing score disparities among various demographic groups in the military to buttress his fundamental theories.<sup>166</sup> But in 1928, two years after the SAT was first administered,<sup>167</sup> he publicly recanted those

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159. LEMANN, *supra* note 120, at 28 (discussing how Conant was concerned about uncovering the best high school seniors among the "vastness of public education").

160. *Id.* at 38.

161. *Id.* at 39.

162. *Id.*

163. *Id.* (explaining that the tests were given in the afternoon after the students took the SAT).

164. *Id.* at 28. See also Fallows, *supra* note 47 (Fallows quotes a representative from the NAACP thus: "Standardized tests are used from the cradle to the grave, to select, reject, stratify, classify, and sort people.").

165. LEMANN, *supra* note 120, at 33.

166. *Id.* at 30 ("Officers score higher than enlisted men, the native-born scored higher than the foreign-born, less recent immigrants scored higher than more recent immigrants, and whites scored higher than Negroes.").

167. See, e.g., *id.* at 32 ("The official date of the introduction of the SAT into American life is June 23, 1926 . . . 8,040 high school students . . . took the test that day and had their scores reported to the colleges they wanted to attend.").

views.<sup>168</sup> One quote in particular, which appeared in a manuscript that unfortunately went unpublished, deserves full presentation:

The test movement came to this country some twenty-five or thirty years ago accompanied by one of the most glorious fallacies in the history of science, namely, that the tests measured native intelligence purely and simply without regard to training or schooling. I hope nobody believes that now. The test scores very definitely are a composite including schooling, family background, familiarity with English and everything else, relevant and irrelevant. The ‘native intelligence’ hypothesis is dead.<sup>169</sup>

As a eugenicist and a father of the SAT, Brigham had professional *and* personal reasons to believe in the power of so-called intelligence tests—and yet he harbored fundamental doubts about them. He wanted to make known that the narrative he helped promote was a fraud. His new message was simple: intelligence tests measure nurture, not nature. They measure the benefits of being born to the “right” family and the burdens of being born to the “wrong” one. Therefore, overreliance on intelligence tests is incompatible with the Jeffersonian concept of meritocracy, which was premised, at least ostensibly, on identifying those worthy of leadership roles, irrespective of social class or family background.<sup>170</sup>

In *The Rise of the Meritocracy*, Young wrote that intelligence, as operationalized within the meritocracy, is merely a “convenient” reference to “qualities needed to benefit from higher education,” not “all-round intelligence.”<sup>171</sup> But no serious argument can be made for apportioning life’s opportunities based on deceptive and narrow convenience. Standardized tests are ubiquitous because they are convenient.<sup>172</sup> Unfor-

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168. Brigham’s first public recantation, in 1928, was delivered in a speech before a group of eugenicists. He then followed up with two written recantations: a formal retraction of *A Study of American Intelligence* in 1930 and follow-up titled, *A Study of Error*. *Id.* at 33.

169. *Id.* at 34.

170. Fallows, *supra* note 47. A representative from the NAACP argued that standardized tests “are used in ways that keep certain segments of the population from realizing their aspirations. Most of all they limit the access of blacks and other minorities to higher education.” *Id.*

171. YOUNG, *supra* note 32, at 61.

172. See, e.g., COLLEGE BOARD, FAQs, <http://press.collegeboard.org/sat/faq> (last visited Dec. 26, 2012) [hereinafter College Board FAQs] (asserting that “nearly all four-year, not-for-profit undergraduate colleges and universities” require the SAT). See also A.B.A., 2012–13 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 36 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_)

tunately, misuse renders them a powerful means of preserving the prevailing power structure.<sup>173</sup> This misuse fosters the association of test scores with innate intelligence and, thus, merit. Almost a century ago, Brigham expressed hope that this farce had fallen outside the realm of belief. Sadly, his wish was unfulfilled then—and it remains unfulfilled today.

### A. *The Association of Class and Scores*

There is an undeniably direct association between economic class and standardized test scores. If standardized test scores are allowed to serve as a quick-look proxy for merit, then we dangerously risk conflating merit with mere financial advantage.<sup>174</sup> On the 2009 SAT, students from families with incomes above \$200,000 scored highest on every section. When compared to the poorest students (those from families with incomes of \$20,000 or less), the richest students scored 30 percent higher on the Critical Reading section, 27 percent higher on the Mathematics section, and 30 percent higher on the Writing section.<sup>175</sup> The higher correlation holds for each section of the test across the ten income parameters used by the College Board.<sup>176</sup>

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and\_rules.authcheckdam.pdf (requiring law schools to use the LSAT in the admissions process or another test that the school has determined to be “valid and reliable”).

173. Fallows, *supra* note 47 (citing arguments that assert that standardized tests “reinforce and legitimize every inequality that now exists”). See also, LAW SCHOOL ADMISSION COUNCIL, CAUTIONARY POLICIES CONCERNING LSAT SCORES AND RELATED SERVICES (2005), available at <http://www.lsac.org/LSACResources/Publications/PDFs/CautionaryPolicies.pdf> (“The LSAT should be used as only one of several criteria for evaluation and should not be given undue weight solely because its use is convenient.”).

174. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 67 (1997) (“The consummate genius of America—the chance for the individual to get ahead on his own merits and rise [and fall] according to his own talent—is thus seriously compromised by a wealthy and powerful upper class.”).

175. SAT scores for the poorest students were 434 on Critical Reading, 457 on Mathematics, and 430 on Writing. Scores for the richest students were 563, 579, and 560 on these sections respectively. COLLEGE BOARD, 2009 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 4 (2009), available at <http://professionals.collegeboard.com/profdownload/cbs-2009-national-TOTAL-GROUP.pdf>.

176. *Id.* (showing the income parameters, in ascending order, along with their proportion of the total pool (in parentheses) are as follows: \$0–\$20,000 (10 percent); \$20,000–\$40,000 (15 percent); \$40,000–\$60,000 (15 percent); \$60,000–\$80,000 (15 percent); \$80,000–\$100,000 (13 percent); \$100,000–\$120,000 (11 percent); \$120,000–\$140,000 (5 percent); \$140,000–\$160,000 (4 percent); \$160,000–\$200,000 (5 percent); more than \$200,000 (5 percent). In addition, non-responders made up 35 percent of the pool).

Class-based score disparities are apparent in other ways too. Students who planned to apply for college financial aid scored lower on each section than both students who did not plan to apply and students who were not sure.<sup>177</sup> Also, higher parental education resulted in higher SAT scores for their children.<sup>178</sup> These class-based disparities contribute to race-based disparities. White students scored 23 percent higher on the Critical Reading section, 26 percent higher on the Mathematics section, and 23 percent higher on the Writing section than black students.<sup>179</sup>

Regrettably, the SAT is by no means unique in the manner in which background factors influence performance. Similar trends have been found on the ACT,<sup>180</sup> the General Record Examination (GRE),<sup>181</sup> and the Law School Admission Test (LSAT).<sup>182</sup> And these disparities are not lost

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177. Students who planned to apply for college financial aid made up 71 percent of the pool of test-takers and scored 498 on Critical Reading, 508 on Mathematics, and 488 on Writing. Scores for the 7 percent of students who did not plan to apply were 529, 551, and 526 on the sections respectively. Scores for the 21 percent of students who did not know if they would apply for financial aid were 515, 534, and 508. *Id.*

178. Students whose parents had no high school diploma made up 5 percent of the pool of test-takers and scored 420 on Critical Reading, 443 on Mathematics, and 418 on Writing. Scores for the 31 percent of students whose parents had only high school diplomas were 464, 474, and 454 on these sections respectively. Scores for the 9 percent of students whose parents had associate's degrees were 482, 491, and 469. Scores for the 30 percent of students whose parents had a bachelor's degree were 521, 535, and 512. Scores for the 25 percent of students whose parents had graduate degree were 559, 572, and 552. *Id.*

179. *Id.* at 3.

180. Based on 2005 data, 70 percent of students from families with incomes above \$100,000 met the ACT College Readiness reading benchmark, compared to 54 percent of students from families with incomes of \$30,000 to \$100,000 and 33 percent of students from families below \$30,000. The overall rate was 51 percent. Stark racial disparities between white and black students exist as well. Fifty-nine percent (59 percent) of white students met the benchmark—the highest percentage. Only 21 percent of black students met it—the lowest percentage. ACT, INC., *READING BETWEEN THE LINES: WHAT THE ACT REVEALS ABOUT COLLEGE READINESS IN READING 2* (2006), available at [http://www.act.org/research/policymakers/pdf/reading\\_summary.pdf](http://www.act.org/research/policymakers/pdf/reading_summary.pdf).

181. See JERILEE GRANDY, EDUCATIONAL TESTING SERVICE, *TRENDS AND PROFILES: STATISTICS ABOUT GRE GENERAL TEST EXAMINEES BY GENDER, AGE, AND ETHNICITY* 88 (1999), available at <http://www.ets.org/Media/Research/pdf/RR-99-16-Grandy.pdf>.

182. See SUSAN P. DALESSANDRO ET AL., LAW SCHOOL ADMISSION COUNCIL, *LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL/ETHNIC BREAK-DOWNS: 2003-2004 THROUGH 2009-2010 TESTING YEARS* 19 (2010), available at [http://www.lsac.org/docs/default-source/Research-\(lsac-resources\)/Tr-12-03.pdf](http://www.lsac.org/docs/default-source/Research-(lsac-resources)/Tr-12-03.pdf) (listing average LSAT score for white test-takers as 153, compared to 142 blacks).

on individuals with nefarious intent. In *United States v. Fordice*,<sup>183</sup> the Supreme Court found that Mississippi officials used ACT score minimums as an unconstitutional means of preserving the racial composition of the state's public universities.<sup>184</sup>

One's starting point—specifically one's family life—can be a major determinant of opportunities within our meritocracy. Indeed, the College Board acknowledges that test score disparities reflect “the unfortunate reality” of background disparities, and argues that these trends should represent “a call to take action to ensure equal opportunity and access to education for all students.”<sup>185</sup>

#### IV. DISADVANTAGED CHILDREN IN THE AMERICAN MERITOCRACY

In order for a meritocracy to be legitimate, there must be equality of opportunity. But what is equality of opportunity? Philosopher John Rawls explains:

Supposing that there is a distribution of native endowments, those who have the same level of talent and ability and the same willingness to use these gifts should have the same prospects of success regardless of their social class of origin, the class into which they are born and develop until the age of reason.<sup>186</sup>

Rawls's explanation aligns very closely with both Thomas Jefferson's concept of natural aristocracy and Michael Young's meritocracy. Everyone should have an equal opportunity to demonstrate his talents and work ethic—or, in the words of President Lyndon Baines Johnson, to “become whatever his qualities of mind and spirit [will] permit.”<sup>187</sup> Back-

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183. 505 U.S. 717 (1992).

184. State officials set minimum ACT requirements for entry into each public university. Four of the five majority white universities had a minimum score of fifteen; the fifth had a minimum of fifteen if the applicant did not have a 3.0 high school GPA. In 1985, more than seventy percent of Mississippi's black high school graduates scored below a fifteen, foreclosing opportunity for them to attend any of the five majority white universities. The minimum score for entry into the three majority black universities was thirteen. The Supreme Court found the minimum scores to be traceable to discriminatory intent and not justified by “sound educational policy.” *Id.* at 734.

185. College Board FAQs, *supra* note 172.

186. RAWLS, *supra* note 25, at 44.

187. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE 181 (2005) (quoting President Lyndon B. Johnson's Commencement Address at Howard University, June 4, 1965).

ground factors should have little, if any, influence on whom ascends to the top of the meritocratic pyramid.

The term equality is synonymous with fairness. Thus, equality of opportunity is synonymous with fair opportunity. Fairness is also related to notions of justice.<sup>188</sup> Rawls argued that a publicly-embraced conception of justice is critical to the well-ordered function of a democratic society.<sup>189</sup> If citizens are “free and equal,” then justice, as fairness, is essential.<sup>190</sup> Fairness is the mechanism that allows democratic societies to remain tolerant of pluralism without descending into chaos.

There are many impediments to fairness and equality of opportunity; among them, the family unit is a central obstructing force. It is within the family that wealth disparities and other relics of historic inequality are operationalized. Sociologist Annette Lareau described this process in her groundbreaking study, *Unequal Childhoods*:<sup>191</sup>

Social group membership structures life opportunities. The chances of attaining key and widely sought goals—high scores on

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188. *Id.* at 181 (quoting LBJ, “For what is justice? It is to fulfill the fair expectations of man.”).

189. RAWLS, *supra* note 25, at 9 (“A well-ordered society is a society effectively regulated by some public [political] conception of justice, whatever that conception may be.”). *See also id.* at 32 (“In a well-ordered society the political conception is affirmed by what we refer to as a reasonable overlapping consensus.”).

190. Rawls asserted that a democratic society with “free and equal” citizens is not a community (“body of persons . . . unified in affirming the same [or similar] doctrine”) or an association (society that people entered freely). Rather, such a society is a “system of social cooperation.” Therefore, “profound and irreconcilable differences” on issues of doctrine are inevitable, making a broad notion of “justice as fairness” among citizens essential. *Id.* at 3–4.

191. In *UNEQUAL CHILDHOODS*, Lareau reported the findings of a study she led on the means in which different childrearing practices foster class-based inequality. She conducted intense “naturalistic” observations of the daily lives of twelve families, with a focus on one child within each. She classified each family into one of three social classes: middle-class, working-class, and poor. She found that middle-class parents engaged in “concerted cultivation” childrearing practices, typified by “an emphasis on children’s structured activities, language development and reasoning in the home, and active intervention in schooling.” On the other hand, parents in working-class and poor homes engaged in “natural growth” childrearing practices, typified by less structured leisure activities for children, but “clear directives” and “limited negotiation” in their interactions with parents. Lareau concluded that the childrearing practices favored by middle-class parents comported with prevailing practices adopted by various institutions with which families must interact, including schools. This compatibility gives concerted cultivation “greater promise of being capitalized into social profits than does the strategy of . . . natural growth found in working-class and poor homes.” ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* 244 (2003).



standardized tests such as the SAT, graduation from college, professional jobs, and sustained employment—are not equal for all the infants whose births are celebrated by their families. It turns out that the family into which we are born, an event over which we have no control, matters quite a lot.<sup>192</sup>

Young described the potential for “serious harm” caused by both the “selfishness” and the “failings” of the family.<sup>193</sup> The failings, according to Young, were often manifested in orphans, whose lack of self-assurance prevented them from converting their natural talents into “actual ability.”<sup>194</sup> Young characterized parental love as “biochemistry’s chief assistant” and lamented that the state was a poor substitute for the family because public investments in equal opportunity were politically unpopular.<sup>195</sup> Conversely, Young discussed how families, particularly those of means, seek to “gain unfair advantages for their offspring,” at the expense of other children.<sup>196</sup> Young saw the state’s role as a check against the “undue influence” families exert within the meritocracy.<sup>197</sup>

The transmission of cultural norms is the primary means by which families militate against equality of opportunity. Of course, it is not surprising when families go to great lengths to ensure that their children have every advantage possible.<sup>198</sup> Most of us see nothing wrong with parents sending their children to the best schools, exposing them to high culture, or reading to them at bedtime.<sup>199</sup> “Parental altruism” of this type helps build familial bonds and instill values that are often good for soci-

192. *Id.* at 256.

193. YOUNG, *supra* note 122, at 20.

194. *Id.* at 20.

195. *Id.*

196. *Id.* at 21 (“[Families] desire equal opportunity for everyone else’s children, extra for their own.”).

197. *Id.*

198. Adam Swift, *Justice, Luck, and the Family: The Intergenerational Transmission of Economic Advantage From a Normative Perspective*, in *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* 258 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005) (“The family is . . . a sphere within which partiality is not merely morally legitimate but morally required, perhaps one where impartial thinking is positively out of place.”).

199. Most of us adhere to a “conventional” conception of equality of opportunity that accepts that some inequality, such as in the way parents choose to raise their children, is acceptable. There is, however, a “radical” view that “all inequalities due to differential luck [e.g. the family in which you were born] are unjust and give justice grounds for equalization.” *Id.* at 263.

ety.<sup>200</sup> Therefore, completely removing the militating effects of the family is neither possible nor “morally desirable.”<sup>201</sup> Nonetheless, the transmission of culture is often in direct conflict with notions of equal opportunity.<sup>202</sup>

Sociologist Pierre Bourdieu introduced the concept of cultural capital. He defined culture as “the general . . . knowledge, disposition, and skills that are passed from one generation to the next.”<sup>203</sup> He theorized that certain cultural traits have tangible value—and thus take the form of capital.<sup>204</sup> All children are exposed to culture within the family unit, and no culture is superior to another in any absolute sense.<sup>205</sup> But in the United States, the most valuable culture is based on white, middle-class values.<sup>206</sup> The extent of exposure to this culture is a proxy for merit.

For instance, within schools, the most “acculturated” students are better able to understand prevailing instructional methods, as they are based on the modes of interaction that take place within “cultured” homes.<sup>207</sup> A better understanding of teacher instructions leads to better grades and test scores, which in turn lead to better future opportunities.<sup>208</sup> On the other hand, those who come to school least “acculturated” often struggle with low grades and test scores, and thus develop low opinions of themselves and their academic abilities. These feelings in turn lead to

200. Samuel Bowles, *Introduction*, in *UNEQUAL CHANCES: FAMILY BACKGROUND AND ECONOMIC SUCCESS* 1, 21 (Samuel Bowles, Herbert Gintis & Melissa Osborne Groves eds., 2005).

201. *Id.* See also Swift, *supra* note 198, at 272 (asserting that “we have reason to value and protect” the familial transmission of culture).

202. *Id.* at 256 (“The family hinders the attainment of equality of opportunity.”).

203. Pierre Bourdieu, *The Forms of Capital*, in *Handbook of Theory and Research for the Sociology of Education* 241–58 (John C. Richardson ed., 1986).

204. Bowles et al., *supra* note 200, at 19 (asserting that certain valuable traits, such as sense of personal efficacy and risk-taking, “covary with . . . wealth”).

205. Value from a cultural capital perspective is not synonymous with inherent superiority or rectitude. In her study of class-based childrearing practices, Annette Lareau proffered that both of the cultures she encountered conferred “intrinsic benefits (and burdens) for parents and their children.” LAREAU, *supra* note 191, at 241.

206. Cf. Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in *POWER AND IDEOLOGY IN EDUCATION* 487, 496 (Jerome Karabel & Albert Henry Halsey eds., 1977).

207. See, e.g., LAREAU, *supra* note 191, at 244 (asserting that the “concerted cultivation” childrearing practices favored by middle-class families are preferred by teachers over the “natural growth” practices favored by working-class and poor families).

208. See, e.g., RICHARD ROTHSTEIN, *CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP* 24 (2005) (explaining how middle-class children have an easier time grasping inquiry style teaching methods than working-class children).

negative experiences in school and fewer and less attractive future opportunities.

Bourdieu described this process as a “crude and ruthless affirmation of the power relationship” within which social hierarchies are converted to academic hierarchies, and a student’s level of dominant class acculturation is rewarded or sanctioned accordingly.<sup>209</sup> The lack of valuable culture goes beyond being a mere meritocratic disadvantage; it is an active hindrance.<sup>210</sup>

## V. APPLYING RAWLSIAN PRINCIPLES TO THE HIGHER EDUCATION MERITOCRACY

Rawls’s conception of justice as fairness is intently concerned with equality of opportunity. He acknowledges that the “nature and role of [society’s] basic structure” encourages inequality.<sup>211</sup> But within a “fair system of cooperation,” the operative question is “by what principles are . . . differences in life-prospects<sup>212</sup> made legitimate and consistent with the idea” of fairness?<sup>213</sup> In attempting to answer this question, Rawls devised “two principles of justice”:

- *Each person has the same infeasible claim to an adequate scheme of equal basic liberties; and*
- *Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least-advantaged members of society.*<sup>214</sup>

The first principle is a general statement of basic equality. The second principle mandates that opportunities be open to all in an environment of complex equality, and that inequalities can exist only to benefit the least-advantaged citizens.

Rawls termed this construct the “difference principle.” In essence, inequalities should be resolved in favor of the least-advantaged—and

209. Bourdieu, *supra* note 203, at 496.

210. LAREAU, *supra* note 191, at 241 (“There are signs that some family cultural practices, notably those associated with [middle class culture], give children advantages that other cultural practices do not.”).

211. RAWLS, *supra* note 25, at 40.

212. *Id.* at 55 (arguing that an individual’s life-prospects are determined by her social class, native endowments, opportunities to develop those endowments, and “good or bad luck, over the course of a life”).

213. *Id.* at 40.

214. *Id.* at 42–43.

given that inequality rarely benefits the least-advantaged, it should be rarely tolerated under Rawls's principles of justice. This view is rooted in the concept of distributive justice, which asserts that public institutions "must work to keep property and wealth evenly enough shared over time to preserve . . . fair equality of opportunity."<sup>215</sup>

Rawls's view of justice as fairness provides a good framework for reimagining merit as a contextual, or achievement-based, construct. The legitimacy of our meritocracy requires equality of opportunity. Such equality can only be had after the effects of past injustices are acknowledged and remedied. Acknowledging the problem of inequality of opportunity is difficult because it forces beneficiaries of injustice to question their own legitimacy within the meritocracy. It also requires a grasp of history and an appreciation for its radiating effects. Solving the problem of inequality of opportunity is difficult because it often requires the use of compensatory preferences to reduce the effects of unjust preferences.<sup>216</sup> Preferences are often zero-sum, or at least perceived to be. Thus, preferences are controversial by their very nature. Moreover, even with the use of preferences, it is difficult—perhaps impossible—to make an aggrieved party whole.

Economist and Nobel laureate Paul Krugman once wrote, "If you admit that life is unfair, and that there's only so much you can do about that at the starting line, then you can try to ameliorate the consequences of that unfairness."<sup>217</sup> The goal of the Achievement Framework proposed in this article is to ameliorate inequality of opportunity—unfairness at the starting line—by embedding a new set of preferences within our higher education meritocracy. Under Rawls's conception of justice as fairness, these preferences would favor the least-advantaged applicants, irrespective of race or ethnicity, in ways that would encourage racial and ethnic diversity.

Within the higher education meritocracy, standardized test scores and grade point averages are considered objective indicators of one's merit. Students with high test scores and undergraduate grade point averages are typically preferred over students with lower scores and grades. For example, the average median LSAT score for the fourteen highest

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215. RAWLS, *supra* note 25, at 51 (Rawls also sought to preserve political liberties.).

216. KATZNELSON, *supra* note 50, at xiii (discussing the controversial nature of "compensatory discrimination").

217. Paul Krugman, *More Thoughts on Equality of Opportunity*, N.Y. TIMES (Jan. 11, 2011), <http://krugman.blogs.nytimes.com/2011/01/11/more-thoughts-on-equality-of-opportunity/>.

ranked law schools, the so-called “T14,”<sup>218</sup> is higher than the next fourteen highest ranked schools and so on.<sup>219</sup> This is not to say that LSAT scores and UGPAs are the only admissions factors law schools consider; but in general, the better an applicant performs on these indicators, the better her chances of admission.

Preferences such as high test scores and grades are an accepted part of the higher education meritocracy. Most of us do not even view them as preferences, but rather as indisputable indicators of innate ability and merit. But the predictive value of these indicators shows that their assumptive power is overstated. In 2010, the median correlation between LSAT score and first-year law school grades was 0.36<sup>220</sup>—a low to slightly moderate relationship.<sup>221</sup> When combined with UGPA, the median correlation with first-year grades rose to 0.48—a moderate relationship.<sup>222</sup> Correlations become weaker when these factors are measured against subsequent year grades and bar passage.<sup>223</sup>

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218. The fourteen highest ranked law schools according to the US News Best Law Schools list are grouped together in popular parlance because the composition of the group has remained essentially the same since the list's inception. *See, e.g.,* Anne Chaconas, *Why are the “Top 14” Law Schools called the “Top 14”?*, POWERSCORE LSAT BLOG (Aug. 23, 2012, 8:59 AM), [blog.powerscore.com/lsat/bid/211356/Why-are-the-Top-14-law-schools-called-the-Top-14](http://blog.powerscore.com/lsat/bid/211356/Why-are-the-Top-14-law-schools-called-the-Top-14).

219. The average median LSAT for T14 schools is 170, compared to 166 for the next fourteen. Law School Admission Council, 2013 ABA/LSAC Law School Searchable Database, <https://officialguide.lsac.org/Release/SchoolsABADData/SchoolsAndLocation.aspx> (providing admissions statistics for every ABA-approved law school) (last visited Jan. 9, 2013) (calculations by author). *See also* U.S. NEWS & WORLD REPORT, *Best Law Schools*, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Jan. 9, 2013) (providing law school rankings).

220. Law School Admission Council, *LSAT Scores as Predictors of Law School Performance*, <http://www.lsac.org/jd/pdfs/lsat-score-predictors-of-performance.pdf> (last visited Dec. 26, 2012) [hereinafter *LSAT Correlations*].

221. *Compare* Keith G. Calkins, *Applied Statistics—Lesson 5: Correlation Coefficients*, ANDREWS UNIVERSITY, <http://www.andrews.edu/~calkins/math/edrm611/edrm05.htm> (last visited Dec. 26, 2012) (describing such correlations as low), *with* Bud Gerstman, *Correlation*, SAN JOSE STATE UNIVERSITY, <http://www.sjsu.edu/faculty/gerstman/StatPrimer/correlation.pdf> (describing such correlations as moderate) (last visited Dec. 26, 2012).

222. *LSAT Correlations*, *supra* note 220, at 63.

223. Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of College Admissions Decisions* 12 (U. OF HOUS. LAW CTR., INST. FOR HIGHER EDUC., Monograph 97-1, 1997) <http://www.law.uh.edu/ihelg/monograph/97-1.pdf> (highlighting the difficulties associated with using admissions criteria to predict outcome variables, such as third-year GPA and bar exam passage).

None of this is to question the value of the LSAT and UGPA to the law school admission process; they serve useful functions when used correctly. But one must question the logic of our largely unchallenged acceptance of certain imperfect preferences and our vociferous objections to other preferences, such as race-conscious affirmative action. An LSAT score may convey information about where a student is in the *present*, but it conveys no information about where the student was in the past and little information about where the student will end up in the future. Future potential can only be assessed by placing the past side-by-side with the present. At least two points of reference are needed to calculate a trajectory.

The Achievement Framework is structured with the goal of encouraging racial and ethnic diversity, using contextual indicators of merit. While technically a class-conscious affirmative action program, the framework differs in the manner in which it accounts for race-based wealth and educational disparities. A major shortcoming of class-conscious affirmative action programs is that they do not typically broaden racial and ethnic diversity. However, an affirmative action program based on a contextual conception of merit could prove to be an efficient race-neutral means of promoting racial diversity. While people of all races and ethnicities face poverty and limited opportunities, black and Hispanic people bear the brunt of them.

Given the U.S. Supreme Court's recent decision in *Fisher v. Texas*,<sup>224</sup> the race-neutral nature of the Achievement Framework is particularly important. In *Fisher*, the Court held that before schools may consider race in the admissions process, they must first consider viable race-neutral alternatives, and, if challenged, demonstrate their race-neutral efforts to an extent unseen in earlier Supreme Court challenges of race-conscious affirmative action.<sup>225</sup> The Court also held that schools will receive no deference when questions are raised regarding undue utilization of race as an admissions criterion.<sup>226</sup> Given this recent development in the affirmative action case law and the continued controversy surrounding race-conscious affirmative action generally, it is important that schools have a robust set of race-neutral admissions alternatives from which to choose. The Achievement Framework offers one such alternative.

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224. *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_, 133 S.Ct. 2411 (2013).

225. *Id.* at 2417–20 (discussing *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

226. *Id.* at 2421.

## VI. THE ACHIEVEMENT FRAMEWORK AND A NEW MERITOCRACY

Legal scholar Michael Olivas once wrote that “selective admissions have always been the preserve of the advantaged.”<sup>227</sup> Similarly, scholar Bryan K. Fair argued that selective admissions processes are “social engineering to preserve the elites.”<sup>228</sup> The wealthy and advantaged fare well in selective admissions because the embedded preferences favor them. It is this effect that the Achievement Framework would most directly challenge. The framework employs Rawlsian social engineering to the benefit of non-elites, particularly those from underrepresented racial and ethnic groups. It is based on a fundamental belief that indicators of merit become indicators of achievement only when context is considered.

An examination of the law school admissions process will demonstrate the usefulness of the framework. The law school admissions process is one of the most selective in higher education. There are 201 law schools accredited by the American Bar Association, and, in 2011, 154 of them had admission rates under 50 percent.<sup>229</sup> Most law schools consider a range of factors, numerical (e.g., LSAT) and non-numerical (e.g., personal statements).<sup>230</sup> Admissions processes take many forms. Some law schools use an index-based process where they apply an applicant’s LSAT score and UGPA to a numerical formula, and use the resulting value to classify the applicant based on his relative strength.<sup>231</sup> The formulas are usually designed to correlate with, or predict, certain outcomes.<sup>232</sup> For example, a higher index value might be (imperfectly) associated with higher first-year grades.

227. Olivas, *supra* note 223, at 60.

228. Bryan K. Fair, *Re(Caste)ing Equality Theory: Will Grutter Survive Itself By 2028*, 7 U. PA. J. CONST. L. 721, 733 (2005).

229. Calculations by author. 2013 ABA/LSAC Law School Searchable Database, LAW SCHOOL ADMISSIONS COUNCIL (Jan. 9, 2013) <http://officialguide.lsac.org/Release/SchoolsABADData/SchoolsAndLocation.aspx>.

230. See, e.g., *J.D. Admissions*, SAINT LOUIS UNIVERSITY SCHOOL OF LAW (Dec. 26, 2012), <http://www.slu.edu/school-of-law-home/admissions/jd-admissions>.

231. For example, the University of Arkansas School of Law uses the following formula to select students: (LSAT score) + (13.4 x UGPA) = Prediction Index. In-state applicants with index values of 200 or higher and out-of-state applicants with values of 205 or higher are automatically offered admission. *J.D. Program*, UNIVERSITY OF ARKANSAS SCHOOL OF LAW (Dec. 26, 2012), <http://law.uark.edu/academics/jd/>.

232. Olivas, *supra* note 223, at 3 (“Institutions strive to adopt admissions criteria that will accurately and reliably predict optimum performance in their programs. . .”).



Common applicant classifications include presumptive-admit (high index value), committee review (middling index value), and presumptive-deny (low index value).<sup>233</sup> These classifications determine the treatment an applicant receives in the admissions process and, therefore, his chances of admission. For “presumptive” applicants, law schools will likely perform only a cursory review of the application materials to ensure that nothing necessitates a departure from the underlying presumption. As a result, “presumptive admit” applicants tend to be offered admission and “presumptive deny” applicants tend to be denied admission.<sup>234</sup> “Committee review” applicants usually receive the fullest consideration within an index-based process, and final decisions are harder to predict.

The Achievement Framework is modeled on an index-based admissions process. Two types of indexes are used to classify applicants: the Overachievement Index and the Disadvantage Index.<sup>235</sup>

#### A. *Overachievement Index*

The Overachievement Index measures the extent to which an applicant has achieved a higher LSAT/UGPA index value than could have been reasonably expected. It is a method of measuring an applicant’s LSAT/UGPA index value against the following two benchmarks: 1) the median LSAT/UGPA index value of the law school’s prior-year entering class and 2) the median LSAT/UGPA index value of other law applicants from the same undergraduate school.<sup>236</sup> If the applicant’s value exceeds either benchmark, the applicant is an “Overachiever.” If the applicant’s value exceeds either benchmark by a preset amount (or more), the appli-

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233. *Presumptive Admit, Presumptive Deny, and Discretionary*, DELOGGIO ADMISSIONS ACHIEVEMENT PROGRAM (Dec. 26, 2012), <http://www.deloggio.com/admproc/presumptive.html> (providing an overview of how this process works).

234. A “presumptive” classification is by no means a final determination. Factors such as character and fitness issues could cause a presumptive admit to be denied admission, and a compelling background can prompt an admissions committee to offer admission to a presumptive denied applicant. *Id.*

235. These titles are borrowed from the University of Colorado’s class- and race-based affirmative action admissions process. See Matthew N. Gaertner, *Assessing a New Approach to Class-Based Affirmative Action*, UNIVERSITY OF COLORADO AT BOULDER, SCHOOL OF EDUCATION (2011) (unpublished submission for the 2011 Association for Institutional Research Annual Forum), available at <http://researchnetwork.pearson.com/wp-content/uploads/GaertnerAIRCBAAPaper.pdf>.

236. The Law School Admissions Council (LSAC) provides law schools with a report for every applicant listing, among other things, the median GPA for all law school applicants from an applicant’s undergraduate institution. It seems within the realm of possibility that median LSAT scores could be provided in a similar way.



cant is a “High Overachiever.” (The significance of these classifications will be explained later.) If the applicant’s value exceeds one benchmark, but not the other, only the exceeding value will be considered for classification purposes.

The purpose of using the LSAT/UGPA index value among the previous year’s entering class as a benchmark is to contextualize merit in light of the most recent cohort of new students. Statistical profiles tend to remain relatively stable from year-to-year. So the median value from a given year is usually a useful guide for the year after. This type of contextualization is already common among law schools.

The purpose of using the value among an applicant’s undergraduate peers as a benchmark is to contextualize merit in light of the applicant’s background. An applicant’s choice of undergraduate institution reflects many factors—academic, social, personal, and financial.<sup>237</sup> These factors often have a routing effect, creating broad homogeneities within institutions.<sup>238</sup> For example, wealthier students tend to attend certain schools while poorer students tend to attend others. Thus, consideration of an applicant’s index value as compared to his peers provides a better way of contextualizing his level of achievement. It is against this benchmark where black and Hispanic applicants would benefit most. Lower median LSAT scores and UGPAs often place these applicants at a disadvantage in the admissions process. But a contextual review of these indicators would likely frame them more favorably.

Consider the following example: Jane Smith, an applicant to Great Law School, has an LSAT/UGPA index value of fifty-two. The median value for Great Law’s previous entering class was fifty-four, but the median value among law school applicants from Jane’s undergraduate school was forty-seven. Per the Overachievement Index, Jane would be an Overachiever because her index value (fifty-two) exceeds the median among her undergraduate peers (forty-seven). Jane would be a High Over-

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237. See generally Melanie L. Hayden, Factors That Influence the College Choice Process for African American Students (May 10, 2000) (unpublished M.A. thesis, Virginia Polytechnic Institute and State University), available at <http://scholar.lib.vt.edu/theses/available/etd-05182000-14100013/unrestricted/thesis.pdf>.

238. See, e.g., Laura W. Perna et. al, Showing Them The Money: The Role of Institutional Financial Aid Policies and Communication Strategies in Attracting Low-Income Students 3 (2009) (draft book chapter presented at the College Board’s Forum 2009), available at <http://media.routledgeweb.com/files/9780415803229/perna-chapter.pdf> (referencing the “continued stratification of college choice by family income”); see also SUSAN AUD, ET AL., NAT’L CTR. FOR EDUC. STAT., U.S. DEPT. OF EDUC., THE CONDITION OF EDUCATION 2010 117 (2011), available at <http://nces.ed.gov/pubs2010/2010028.pdf> (showing racial and ethnic disproportions in the type of higher education institutions attended).

achiever if Great Law decided to confer that status on any applicant whose value exceeded either benchmark by, say, three or more points. This contextual framing of Jane's index value would probably result in her receiving more favorable consideration than she would have received if her value was only compared to the previous year's class.

### B. Disadvantage Index

The Disadvantage Index measures the extent to which an applicant has overcome socioeconomic and educational disadvantages. The index is comprised of six factors:

- 1) *Applicant's net worth (if under age thirty, parents' net worth)*<sup>239</sup>  
Net worth is positively associated with college-going and educational attainment rates.<sup>240</sup> In calculating net worth, schools would require applicants to provide an accounting of all assets (e.g., real estate, automobiles, stocks and bonds, jewelry, cash) and all liabilities (e.g., mortgages, students loans, credit card debts). Applicants of lower net worth would benefit most from inclusion of this factor in the index.
- 2) *Applicant's income (if under age thirty, parents' income)*  
Income is positively associated with college-going and educational attainment rates.<sup>241</sup> Applicants with lower income would benefit most from inclusion of this factor in the index.
- 3) *Applicant's first-generation college student status*  
First-generation college student status is negatively associated with college attendance and completion.<sup>242</sup> Applicants who

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239. The purpose of requiring applicants under the age of thirty to report their parents' net worth and income is to account for the financial support that many parents provide adult children, especially those in school. The requirement is also a recognition that the effects of parental wealth and income persist throughout the life of the child, even into adulthood. Many law schools impose a similar requirement for students applying for need-based financial aid. *See, e.g., Presumptive Admit, Presumptive Deny, and Discretionary*, UNIVERSITY OF CALIFORNIA AT BERKLEY SCHOOL OF LAW (Dec. 26, 2012), <http://www.law.berkeley.edu/12689.htm>.

240. *See, e.g., Su Jin Jez, The Differential Impact of Wealth vs. Income in the College-Going Process 14*, available at [http://www.usc.edu/programs/serpp/docs/The\\_Differential\\_Impact\\_of\\_Wealth\\_vs\\_Income\\_110426.pdf](http://www.usc.edu/programs/serpp/docs/The_Differential_Impact_of_Wealth_vs_Income_110426.pdf) (unpublished draft article) ("Wealth has a statistically significant effect on who attends college, as students from families with greater wealth are more likely to attend college than their less wealthy counterparts.").

241. *See, e.g., WILLIAM G. BOWEN ET AL., CROSSING THE FINISH LINE: COMPLETING COLLEGE AT AMERICA'S PUBLIC UNIVERSITIES 81* (2009).

242. *Id.* at 23 (charting the effects of parental education on educational attainment of their children).

are first-generation college students would benefit most from inclusion of this factor in the index.

4) *Applicant's Pell Grant status*

Pell Grants are federal education grants for undergraduate students with unmet financial need.<sup>243</sup> Lower socioeconomic status is negatively associated with college completion.<sup>244</sup> Applicants who received Pell Grants in college would benefit most from inclusion of this factor in the index.

5) *Percentage of Pell-eligible students at applicant's undergraduate college or university*

An institution's percentage of Pell-eligible students is a reflection of the socioeconomic status of its students. Selective, well-endowed institutions tend to enroll fewer Pell-eligible students than less selective and less well funded institutions.<sup>245</sup> Applicants who attended institutions that enrolled high percentages of Pell-eligible students would benefit most from inclusion of this factor in the index.

6) *Graduation rate at applicant's undergraduate college or university*

Colleges and universities with lower graduation rates send proportionally fewer students to graduate and professional school than institutions with higher graduation rates. These schools tend to have fewer resources, serving students of lower socioeconomic status and offering fewer safety nets for those who encounter academic or financial problems.<sup>246</sup> A student who graduates from such an institution has likely had to work harder and overcome more obstacles, with less institutional assistance, than the typical graduate of a school with a high graduation rate. Applicants who attended undergraduate schools with lower graduation rates would benefit most from inclusion of this factor in the index.

243. *Id.* at 155.

244. *Id.* at 37 (“We find a strong, highly consistent relationship between a student’s socioeconomic background and his or her probability of graduating.”).

245. *See, e.g.,* Beck Supiano & Andrea Fuller, *Elite Colleges Fail to Gain More Students on Pell Grants*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 27, 2011) <http://chronicle.com/article/Pell-Grant-Recipients-Are/126892/> (noting that during the 2008–2009 school year, Pell-eligible students represented just 15 percent of the enrollment at the nation’s fifty wealthiest colleges, compared to 26 percent of students overall).

246. *See, e.g.,* Daniel de Vise, *Grad-rate Ranking Reveals Elite List of Small, Wealthy Schools*, WASH. POST, Mar. 5, 2012, *available at* [http://www.washingtonpost.com/blogs/college-inc/post/grad-rate-ranking-reveals-elite-list-of-small-wealthy-schools/2012/03/05/gIQAqHSosR\\_blog.html](http://www.washingtonpost.com/blogs/college-inc/post/grad-rate-ranking-reveals-elite-list-of-small-wealthy-schools/2012/03/05/gIQAqHSosR_blog.html) (“The colleges with the very highest four-year graduation rates tend to have fairly small undergraduate enrollments and to spend a lot of money on their students.”).

In constructing the Disadvantage Index, each factor will have numerical values associated with it.<sup>247</sup> Binary factors, such as first-generation status, could be assigned values for each of their two possible outcomes. Continuum-based factors, such as income, could be contextualized using national data or intra-applicant comparisons.<sup>248</sup> For example, an applicant's income could be assigned a particular value based on the percentile in which it falls nationally.

It would be vital to the goal of increasing racial and ethnic diversity that assigned values are nuanced. Class-conscious affirmative action programs are typically too blunt. For example, providing a boost to all applicants with below-median wealth would likely ensure that poorer whites would benefit disproportionately, given their sheer numbers. But providing different numerical boosts based on nuanced assessments of wealth percentiles would ensure that the particularly grinding poverty that disproportionately affects black and Hispanic people is considered.

The resulting Disadvantage Index value could then be compared to a benchmark, such as the median Disadvantage Index value of the previous year's entering class. If the applicant's value indicates that he has overcome more disadvantages than the benchmark, the applicant would be deemed "Disadvantaged." If the applicant's level of disadvantage is particularly acute, he would be deemed "Highly Disadvantaged."<sup>249</sup>

Consider the following example: John Smith, an applicant to Rich Law School, has a Disadvantage Index value of twenty-one. The median value for Rich Law's previous entering class was thirteen. Rich Law uses a formula that assigns higher values to higher levels of disadvantage, thus, John would be deemed "Disadvantaged" by Rich Law. John would be considered "Highly Disadvantaged" if Rich Law decided to confer that status on any applicant whose value exceeded the previous year's median by, say, five or more points.

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247. See generally *Handbook on Constructing Composite Indicators: Methodology and User Guide*, ORG. FOR ECON. CO-OPERATION AND DEVELOPMENT (2008), available at <http://www.oecd.org/std/leadingindicatorsandtendencysurveys/42495745.pdf>. (explaining the mechanics of constructing a composite index).

248. In contextualizing an applicant's net worth, schools could use relevant national data, or they could compare applicants' net worth against each other. See, e.g., *Wealth and Asset Ownership*, U.S. CENSUS BUREAU, <http://www.census.gov/people/wealth/> (providing national data on income and wealth).

249. The significance of a particular index value will be determined by the index itself. Some schools could adopt formulas that assign index values directly reflecting levels of disadvantage (i.e., the more disadvantaged the applicant, the higher his index value). Other schools could adopt formulas assigning indirect values (i.e., the more disadvantaged the applicant, the lower his index value).

### C. Index Classifications

Each Index has different potential classifications. Through the Overachievement Index, an applicant can be deemed an “Overachiever” or a “High Overachiever,” or can be deemed not to have overachieved at all. Through the Disadvantage Index, an applicant can be deemed “Disadvantaged,” “Highly Disadvantaged,” or not disadvantaged. An applicant’s classification on each Index determines the underlying presumption, if any, assigned to his application for admission. The following table provides a guide:

	No overachievement	Overachiever	High Overachiever
No disadvantage	<b>Presumptive Deny</b>	<b>Committee Review</b>	<b>Presumptive Admit</b>
Disadvantaged	<b>Committee Review</b>	<b>Presumptive Admit</b>	<b>Presumptive Admit</b>
Highly Disadvantaged	<b>Presumptive Admit</b>	<b>Presumptive Admit</b>	<b>Presumptive Admit</b>

As exhibited in the table, overachievement and disadvantage are preferred and rewarded in the Achievement Framework. “High Overachiever” applicants are considered presumptive admits, irrespective of their level of disadvantage. This means that admission is likely for any applicant whose LSAT/UGPA index value exceeds either of the two benchmarks by a certain threshold set by the law school. The relative nature of overachievement ensures that consideration of LSAT scores and UGPAs is rendered fairer through the appreciation of context. Similarly, “Highly Disadvantaged” applicants receive favorable treatment in the Achievement Framework. These applicants are considered presumptive admits, irrespective of their level of overachievement.

Conversely, applicants who have suffered no disadvantage and have exhibited no overachievement are considered presumptively denied. Many of these applicants would have LSAT scores and UGPAs that look acceptable, if not impressive, when viewed out of context. But the Achievement Framework requires either disadvantage or overachievement in order for an applicant to receive committee review or presumptive admit consideration. The egalitarian goals of the framework ensure that applicants of privilege who fail to distinguish themselves academically and on the LSAT are in the weakest position.

#### D. Benefits and Burdens

The purpose of a selective admissions process is to assemble the “best” class possible through the assessment of applicants’ qualifications. Typically, there are some elements of relative comparison among applicants, but they tend to lack depth. Standardized test scores are considered as if all applicants had the same opportunities to score highly. The same superficiality pervades the consideration of other factors, such as past grades. The Achievement Framework, however, seeks to facilitate the assessment of applicant qualifications in a manner that accounts for societal inequality. It is through such assessment that racial and ethnic diversity can be encouraged in our nation’s selective higher education institutions, even if these factors are not considered directly.

The value of considering test scores and grades in a manner that accounts for background inequality is supported by research. Education researcher William Goggin proposed a “merit-aware” admissions model, upon which the Achievement Framework is largely based.<sup>250</sup> Goggin argued that students who exceed reasonable expectations should be rewarded in the scrum for seats in selective schools. He offered his model as a response to the increasingly voluble opposition to race-conscious affirmative action.<sup>251</sup> He argued that a consideration of merit “given the hand that [an applicant] has been dealt”<sup>252</sup> could be an effective substitute for the explicit consideration of race.<sup>253</sup> Tests of Goggin’s model show promise: one such test concluded that the model predicted persistence beyond freshman year as well as an SAT score, while also increasing student diversity.<sup>254</sup> A recent report on the University of Colorado’s class-conscious affirmative action program concluded that it would encourage racial and ethnic diversity, even if the university used it without the race-conscious elements currently appended.<sup>255</sup> Colorado’s program shares philosophical moorings with Goggin’s model.

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250. Goggin, *supra* note 24.

251. *Id.* at 2.

252. *Id.* at 3.

253. *Id.* at 4 (“Make no mistake, incorporated in the right admissions model, such a merit measure would be as powerful as race and ethnicity in achieving the goals of affirmative action.”).

254. Edward P. St. John, et al., *Merit-Aware Admissions in Public Universities*, THE NEA HIGHER EDUC. J. 39–40 (2005). Researchers have also concluded that a merit-aware selection process would increase racial and ethnic diversity among state-funded merit scholarship recipients. See also Edward P. St. John & Choong-Guen Chung, *Merit and Equity: Rethinking Award Criteria in the Michigan Merit Scholarship Programs*, in PUBLIC FUNDING OF HIGHER EDUCATION: CHANGING CONTEXTS AND NEW RATIONALES 132 (Edward P. St. John & Michael D. Parsons eds., 2004).

255. Gaertner, *supra* note 235, at 23.

The Achievement Framework offers promise as a means of encouraging racial and ethnic diversity by accounting for race-neutral background disparities that nonetheless bear racial characteristics. Standardized test scores and UGPAs are reflections of past academic preparation, which is a reflection of past academic opportunity. As discussed earlier, opportunities for black and Hispanic children tend to be restricted throughout their educational careers. The Overachievement Index and Disadvantage Index capture these lingering realities. The consideration of LSAT scores and UGPAs in light of an applicant's peers accounts for not only background inequality, but also better reflects achievement. In addition, the preferential consideration of disadvantage in the admissions process reflects the meritorious aspects of overcoming adversity.

Implementation of an achievement-based affirmative action program would not be without difficulties. The most fundamental difficulty would be gaining buy-in. Conventional notions of merit are mostly dismissive of context—and the rare instances of contextual consideration usually benefit the privileged. Ask an admissions committee to compare a 3.4 from Stanford to a 4.0 from Mississippi Valley State: the assumption will often be that the Stanford student's GPA is more impressive, despite being significantly lower. The Achievement Framework, however, would add contextual considerations that validate the experiences of students who attend schools like Mississippi Valley State.<sup>256</sup> An applicant who overcomes poverty, subpar primary and secondary education, and under-resourced higher education, and still manages to overachieve should be boosted in the same manner as someone who has excelled in more traditional ways.

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256. Mississippi Valley (MVSU) and Stanford serve very different student populations. Eighty-two percent of MVSU students qualify for Pell Grants, compared to just 16 percent of Stanford students. Unsurprisingly, Stanford's six-year graduation rate of 96 percent greatly exceeds MVSU's rate of 24 percent. *Compare College Navigator: Mississippi Valley State University*, U.S. DEPT. OF EDUCATION (Jan. 8, 2012) <http://nces.ed.gov/collegenavigator/?q=mississippi+valley&s=all&id=176044> (listing MVSU's statistics), with *College Navigator: Stanford University*, U.S. DEPT. OF EDUC. (Jan. 8, 2012), <http://nces.ed.gov/collegenavigator/?q=stanford&s=all&id=243744> (listing Stanford's statistics). In addition to the socioeconomic differences between the student bodies, the graduation disparities are also aided by differences in institutional resources. Stanford's endowment of \$16.5 billion is one of the highest in higher education and is almost 10,000 times the size of MVSU's endowment of \$1.7 million. *Compare Colleges: Stanford University*, U.S. NEWS & WORLD REPORT, Jan. 8, 2012, available at <http://colleges.usnews.rankingsandreviews.com/best-colleges/stanford-1305> (listing Stanford's endowment), with *Colleges: Mississippi Valley State University*, U.S. NEWS & WORLD REPORT (Jan. 8, 2012), <http://colleges.usnews.rankingsandreviews.com/best-colleges/mississippi-valley-state-2424> (listing MVSU's endowment).



The process of constructing the indexes would have to begin with a discussion of institutional values. Indexes are mechanical, but they are in no way value-neutral. The factors that are considered, the manner in which they are weighted, and the outcomes attached to them are expressions of values and goals. Thus, constructing indexes would require more than mere manipulation of numerical formulas; it would require difficult discussions about how merit is defined and the institution's role in correcting social injustice. The Achievement Framework's very premise challenges long-held perceptions about what merit looks like. Overcoming these perceptions would be difficult.

Another difficulty relates to the complicated nature of the framework. A comprehensive consideration of relevant factors is labor-intensive and relatively expensive. It is much easier to take an indicator at face value than to do a deeper, individualized assessment. This seductive efficiency is a major reason why standardized test scores and GPAs have such outsized influence in the admissions process. An inherent inefficiency is the indirect consideration of race and ethnicity. Ideally, these factors would be considered directly and, thus, more efficiently,<sup>257</sup> but the current legal and political climate makes such consideration infeasible. An institution seeking to implement the framework would have to make sufficient investments of human and financial resources.

The third principal difficulty would be providing necessary safety nets to ensure the successful matriculation of students who may experience academic and financial difficulty. The effects of background inequalities do not end with a grant of admission; they often linger.<sup>258</sup> Schools not only have an obligation to broaden educational opportunity, but they must also ensure that these opportunities are premised on success. For example, law school accreditation standards dictate that "[a] law school shall not admit applicants who do not appear capable of satisfactorily completing its educational program and being admitted to the bar."<sup>259</sup> Mandates like this are often used to justify restricting admission only to applicants who satisfy limited notions of merit. The Achievement Framework, however, would necessitate the framing of these mandates as requiring robust support services as a response to the broadening of opportunity. Critics often assert that academic difficulties betoken an un-

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257. Olivas, *supra* note 223, at 33 (“[N]o other criterion delivers racial results more than does race itself. There is no good proxy, no narrower tailoring, no statistical treatment that can replace race.”).

258. Gaertner, *supra* note 235, at 35 (discussing the expectation of lower graduation rates and other outcomes among students admitted through Colorado's class-based affirmative action program).

259. A.B.A., *supra* note 172, at 35.

deserved opportunity and can actually harm the student.<sup>260</sup> But this largely discredited and rather elitist trope only ensures that selective admissions remain the preserve of the advantaged.<sup>261</sup> The egalitarian goals of the Achievement Framework, however, would necessitate the embedding of academic and financial support programs premised on accounting on the back end for unjust inequality on the front end.

Finally, there is the possibility that the adoption of the Achievement Framework might create difficulties by its very success—leaving admissions officers with more presumptive admits than there are available seats in an entering class. In such instances, the timing of application submissions may become very important. Most law schools use a rolling admissions process where applications are considered roughly in the order in which they are received. As offers are made and seats fill up, the process gets increasingly competitive. Applicants who would be readily admitted to a school in December might be waitlisted or denied admission in May by simple virtue of seat scarcity. But when it comes down to deciding which of two presumptive admits is admitted to a school in May, a number of the traditional admissions factors may of course be considered: LSAT scores, UGPA, residency status, gender, race/ethnicity, and whatever other factors a particular school deems relevant to predicting the success of incoming students.

It is up to schools to determine which factors they consider most desirable at any given point of their admissions processes. The hope, however, is that schools would use the Achievement Framework as a straightforward race-neutral beginning to the admissions process, and would consider the underlying purposes of the framework prior to each final admissions decision. To suggest that a new criterion—achievement, viewed contextually—should become the starting point for admissions analysis is not to suggest that inquiry into LSAT scores and UGPA is unimportant to that analysis (as even a cursory reading of the methodology described in this article will show). It is merely to suggest the Rawlsian justice in viewing LSAT scores and UGPA through the lens of a student's contextual achievement.

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260. Richard H. Sander, *Class in American Legal Education*, 88 DENVER U. L. REV. 631, 666 (2011) (“The current large preferences used by law schools nearly double the bar failure rate among African American law graduates.”).

261. See e.g., Bowen et al., *supra* note 241, at 209 (arguing that attending a more selective college actually improved graduation rates among black males, in direct contradiction of the “overmatch” hypothesis proffered by opponents of race-conscious affirmative action).

## CONCLUSION

In its best form, a meritocracy operates in an environment of equality and social cooperation. Every person has a fair chance of ascending the meritocratic hierarchy. In its worst form, a meritocracy preserves power relationships and maintains inequality. Unfortunately, the American meritocracy does the latter, tightening the “Gordian knot binding race to class.”<sup>262</sup> This inequality does more than deprive people of money and opportunities; it humiliates them, while also stunting their imagination and sense of possibility.<sup>263</sup> When a child’s success or failure in life is determined largely by the family into which he is born, and not by his own talents and work ethic, then meritocracy has become a dead letter. To fix it, our notions of merit need to be reimagined in ways that reward achievement—one’s accomplishments in light of one’s background. Achievement Frameworks of the type proposed in this article have the potential to spark this reimagination by explicitly accounting for disadvantage when assessing applicants for admission to programs of higher education.

On election night in 2012, conservative political commentator Bill O’Reilly was asked to explain how President Barack Obama could be reelected, in spite of the country’s sour mood. O’Reilly offered:

The demographics are changing. It’s not a traditional America any more. And there are 50 [percent] of the voting public who want stuff . . . many of them, feel as if the economic system is stacked against them. And they want stuff.<sup>264</sup>

Unsurprisingly, O’Reilly caught much criticism for these comments. Many people viewed them as racially insensitive and motivated by political sour grapes.<sup>265</sup> Comedian Jon Stewart lampooned them as out of touch.<sup>266</sup> But O’Reilly is mostly correct. The demographic changes are

262. KATZNELSON, *supra* note 50, at 143.

263. *Id.* at 172.

264. FOX TV Host Bill O’Reilly: “The White Establishment Is Now The Minority,” YOUTUBE.COM (Dec. 26, 2012), <http://www.youtube.com/watch?v=IhoOIG-dxeU>.

265. See, e.g., Bill “Sore Loser” O’Reilly: Traditional America is Gone, CURRENT, Nov. 16, 2012, [http://current.com/community/93964026\\_bill-sore-loser-oreilly-traditional-america-is-gone.htm](http://current.com/community/93964026_bill-sore-loser-oreilly-traditional-america-is-gone.htm).

266. The Daily Show with Jon Stewart, *It Was the Best of Times, It Was the Best of Times*, COMEDY CENTRAL (Nov. 15, 2012), <http://www.thedailyshow.com/watch/thu-november-15-2012/it-was-the-best-of-times—it-was-the-best-of-times> (“Bill O’Reilly celebrates America’s greatest tradition—a fevered ruling class lamenting the rise of a diverse new class that will destroy the American experiment.”).

well-documented.<sup>267</sup> Traditional America, as lamenters of O'Reilly's ilk define it, is gone—and good riddance. There is a significant proportion of Americans who rightly feel the system is stacked against them. And, yes, they want stuff. In a verse illustrating the perils facing poor black urban youth, rapper Nasir Jones remarked, “I would be Ivy League if America played fair.”<sup>268</sup> This assertion, which is believable given the depth of Nas's intelligence and creativity, captures the “stuff” that *all* Americans desire: fairness, equality, and opportunity—true meritocracy.

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267. See, e.g., Sarah Kliff et. al, *The 2012 Election in Charts*, WASH. POST, Nov. 7, 2012, <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/07/the-2012-election-in-charts/> (noting changes, some dramatic, in the racial composition of the electorate).

268. Rick Ross “*Triple Beam Dreams*” Lyrics, YOUTUBE.COM (Dec. 31, 2012), <http://www.youtube.com/watch?v=YBp-v2n2Aok>.