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## The Legal College Admissions Scandal: How the Wealthy Purchase College Admission to the Nation's Elite, Private Universities Through Donations

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THE *LEGAL* COLLEGE ADMISSIONS SCANDAL:  
HOW THE WEALTHY PURCHASE COLLEGE  
ADMISSIONS TO THE NATION'S ELITE,  
PRIVATE UNIVERSITIES THROUGH  
DONATIONS

Gabrielle Wilson\*

INTRODUCTION

In March 2019, federal prosecutors charged fifty people in a scheme to secure spots for their children at the nation's top universities, including Yale, Stanford, and the University of Southern California. Included in the scandal were several prominent businessmen, actresses Felicity Huffman and Lori Loughlin, and several college athletic coaches.<sup>1</sup> In what prosecutors called the "largest

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<sup>1</sup> *College Admissions Scandal: Your Questions Answered*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/us/college-admissions-scandal-questions.html>. In June 2020, the district court denied defendants' motions to dismiss indictments, *United States v. Sidoo*, Crim. Action No. 19-10080-NMG, 2020 WL 3440990 (D. Mass. June 23, 2020), and on August 21, 2020 Lori Loughlin and Massimo Giannulli were sentenced to two months and five months in prison, which they completed in December of 2020 and April of

college admissions scam ever prosecuted by the Department of Justice,” wealthy parents paid William Singer to facilitate the acceptance of their children into elite universities, even if the applicants were not necessarily qualified.<sup>2</sup> Test scores were bought, bribes were given, and resumes were doctored.<sup>3</sup> The college admissions scandal, or Operation Varsity Blues, called attention to the privilege and entitlement of the nation’s wealthiest. But while the actions of those charged were illegal, there remains a legal way to manipulate the college admissions process—donations.

Jokes about “buying a building” at universities in exchange for acceptance are pervasive throughout popular culture. Perhaps such jokes reflect the country’s ambivalence about wealth—the rich remain on top, while the lower classes struggle to compete and gain access to the same opportunities. The unsettling truth of the matter is that this practice does in fact happen, and it is perfectly legal. The question, however, is whether this practice should continue. Accepting students

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2021, respectively. Brakkton Booker, *Lori Loughlin And Mossimo Giannulli Receive Prison Sentences For Admissions Scheme*, NPR (Aug. 21, 2020, 11:35 AM), <https://www.npr.org/2020/08/21/904640101/lori-loughlin-husband-set-to-be-sentenced-in-college-admissions-scheme#:~:text=Live%20Sessions-,Lori%20Loughlin%20And%20Mossimo%20Giannulli%20Sentenced%20In%20College%20Admissions%20Scheme,their%20daughters%20admission%20to%20USC>; Associated Press, *Mossimo Giannulli Released From Prison and Will Serve Remainder of Sentence From Home*, USA TODAY (Apr. 3, 2021, 1:46 PM), <https://www.usatoday.com/story/entertainment/celebrities/2021/04/03/mossimo-giannulli-released-prison-serving-rest-time-home/7075614002/>.

<sup>2</sup> *College Admissions Scandal: Your Questions Answered*, *supra* note 1.

<sup>3</sup> *Id.*

1] The Legal College Admissions Scandal

who could bring universities large sums of money has several implications. At the core of the issue, the practice ensures not only that the wealthy, albeit sometimes unqualified, receive greater educational opportunities than their less affluent counterparts, but it also reinforces socioeconomic and racial segregation. Donations, however, have long fueled the university system.<sup>4</sup> Without financial contributions, universities would have to decrease financial aid, could not maintain their facilities, or invest in their future.<sup>5</sup> Thus, those aiming to remedy the issue through legal outlets must consider all of the potential outcomes—not just the desired ones.

This Article targets the issue of purchasing admissions to elite, private universities through legal, albeit manipulative donations. It will identify the harms purchasing admissions poses to the higher education system, as well as offer an analysis of some of the potential legal remedies to the issues. While the legal community tends to favor bright-line rules and perfect solutions, this Article does not aim to provide a magic potion that would act as a cure-all. Rather, this Article calls upon the legal community to recognize an issue afflicting higher education and to assert that a legal solution is not impossible. As such, this Article will provide several potential remedies that could, with careful consideration of all of their effects, help solve the issue of the purchase of admissions.

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<sup>4</sup> See ANN E. KAPLAN, COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUC., VOLUNTARY SUPPORT OF EDUCATION 4 (2019) [hereinafter VOLUNTARY SUPPORT] (providing data on the amount of money American universities acquired in 2020).

<sup>5</sup> See AMERICAN COUNCIL ON EDUC., UNDERSTANDING COLLEGE AND UNIVERSITY ENDOWMENTS 4–5 (2011) [hereinafter UNIVERSITY ENDOWMENTS].

Part I explores the intricacies of university funding—how donations work, who makes them, and what universities do with the funds. Understanding how universities acquire and use capital is critical to understanding the issue at hand—the current system not only sanctions manipulative donations, but also demonstrates universities’ reliance on outside funding. Elite, private universities have a particular reliance upon massive donations and billion-dollar endowments.<sup>6</sup> Part II of this Article explores the relationship between large donations and the college admissions process. It will first identify the scope of the practice and its key players. This Part will then turn to the effect these shady donations can have upon the higher education system—how the practice discourages socioeconomic diversity and, in some circumstances, is a pretext for racial discrimination. Finally, Part III identifies some of the potential legal remedies for the issue. It will explore remedies at both a federal and state level, offering an analysis of each government’s ability to exert control over private universities. Part III will also offer an analysis of each remedy’s potential outcome—recognizing their strengths as well as addressing their weaknesses.

## I. THE BIG BUSINESS OF UNIVERSITY DONATIONS

The modern university is much more than a simple schoolhouse. Instead, it is part of a multibillion-dollar industry where institutions compete to attract students and provide the best

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<sup>6</sup> See *infra* notes 17–19 and accompanying text.

1] The Legal College Admissions Scandal

“college experience.”<sup>7</sup> Like any business, universities require capital to fund their endeavors. However, unlike other business ventures, universities are also nonprofit organizations, relying on large donations for a portion of their funding.<sup>8</sup> This portion of the Article will explore the business of university donations—explaining the difference between individual donations and endowments, exploring how universities utilize donations as part of a larger endowment system, and identifying the ways in which donations and endowments ensure the future success of an institution.

## A. Acquiring Funds...

In order to understand the intricacies of the university donation system, it is first critical to understand how universities raise funds and what the institutions subsequently do with the funds upon receipt. A donation is “[a] gift ... to a charity; something ... money, that someone gives to a person or an organization by way of help.”<sup>9</sup> Governed by the law of gifts, donations are made “without receiving consideration for the transfer.”<sup>10</sup> Individual donors, however, may place some conditions upon their agreement, which, if unobserved, can lead to

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<sup>7</sup> Jana Kasperkevic, *The Harsh Truth: US Colleges are Businesses, and Student Loans Pay the Bills*, THE GUARDIAN (Oct. 7, 2014, 8:15 AM), <https://www.theguardian.com/money/us-money-blog/2014/oct/07/colleges-ceos-cooper-union-ivory-tower-tuition-student-loan-debt>.

<sup>8</sup> UNIVERSITY ENDOWMENTS, *supra* note 5, at 3. While for-profit universities do exist, this Article will only explore the issue of donations with respect to non-profit universities subject to tax exemptions under the Internal Revenue Code. See *infra* Part III.A for a discussion about university tax exemptions.

<sup>9</sup> *Donation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>10</sup> *Donate*, BLACK’S LAW DICTIONARY (11th ed. 2019).

litigation.<sup>11</sup> Additionally, the Internal Revenue Code permits donors to claim tax deductions on such donations.<sup>12</sup>

Universities target a number of groups and individuals in soliciting donations. Traditionally, alumni are one of the largest groups of donors, with foundational donors only recently surpassing alumni donors.<sup>13</sup> In 2020, foundations contributed the largest amount of donations to universities, contributing 33.2% of all charitable donations.<sup>14</sup> However, in the aggregate, individuals surpassed foundations, with alumni contributing 22.3% of all donations and non-alumni contributing another 17.4% of donations.<sup>15</sup> Additionally, over 40% of foundation donations came from family foundations, over which alumni also may exert influence.<sup>16</sup> This group of data is significant when explored through the scope of college admissions, as an applicant relying on a donation to influence his or her acceptance is most likely to have ties to an individual donor. As such, the greater the pool of individual donors, the greater the chance that a donation will be used to grease the skids to acceptance.

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<sup>11</sup> See *Tennessee Div. of the United Daughters of the Confederacy v Vanderbilt Univ.*, 174 S.W.3d 98, 118 (Tenn. Ct. App. 2005) (recognizing that contract law may create a conditional gift, but that such contract should be interpreted strictly and the only recourse the donor qualified for was a return of the donation); see also UNIVERSITY ENDOWMENTS, *supra* note 5, at 4.

<sup>12</sup> I.R.C. § 170(b) (2018).

<sup>13</sup> See VOLUNTARY SUPPORT, *supra* note 4, at 5 (providing a line graph capturing “Voluntary Support by Source as a Percentage of Total Voluntary Support, 1990–2020.”)

<sup>14</sup> *Id.* at 6.

<sup>15</sup> *Id.* In sum, individual donors contributed over \$19.69 billion to the higher education system in 2020. *Id.*

<sup>16</sup> *Id.* at 5.

1] The Legal College Admissions Scandal

In 2020, U.S. higher education institutions received \$49.5 billion in voluntary support.<sup>17</sup> Private universities in particular reap the benefit of donations,<sup>18</sup> perhaps because private universities have a stronger alumni network or because public universities require less voluntary support on account of state funding. This can prove especially troublesome with respect to regulating college admissions, as private universities generally fall outside the scope of many federal regulations.<sup>19</sup>

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<sup>17</sup> *Id.* at 4. This figure, while staggering, actually presents a slight decline from 2019's record-setting accumulation of \$49.60 billion. *Id.* Yet researchers speculate that the COVID-19 pandemic may have been a cause of this, as the pandemic caused economic downturn and also "may have led donors to shift giving to causes such as human services." *Id.* at 7–8. Additionally, researchers note that if Michael Bloomberg's 2019 donation of \$1.8 billion to Johns Hopkins University was subtracted from the calculus, giving in 2020 would have actually demonstrated a 3.6% increase. *Id.* at 4.

<sup>18</sup> A 2019 study ranking universities by gross private donations found that the top 20 private institutions received a total of \$13.2 billion dollars, while the top 20 public institutions received \$7.9 billion. *See Colleges That Raised the Most in Private Donations, FY 2019*, CHRON. HIGHER EDUC.: THE ALMANAC (Aug. 16, 2020), <https://www.chronicle.com/article/colleges-that-raised-the-most-in-private-donations-fy-2019>. *See also* Jillian Berman, *20 Schools Received Nearly 30% of All The Money Donated To Colleges Last Year*, MARKET WATCH (Feb. 6, 2019, 8:13 AM), <https://www.marketwatch.com/story/these-20-schools-received-nearly-30-of-all-the-money-donated-to-colleges-last-year-2018-02-06> (identifying the 20 schools that received the most donations in 2017—the majority of which are private institutions); Josh Moody, *10 Universities Where the Most Alumni Donate*, U.S. NEWS (Dec. 18, 2018, 9:00 AM), <https://www.usnews.com/education/best-colleges/the-short-list-college/articles/universities-where-the-most-alumni-donate> (identifying the 10 universities that received the most alumni donations in 2015-2016 and 2016-2017 school years—all of which are private institutions).

<sup>19</sup> Constitutionally, the federal government may not directly regulate private universities. However, there are still many channels, namely federal funding and taxation, that the federal

B. ... And Spending Them

Universities receive two types of donations—funds that are for immediate use and funds that are invested for later use. Donations that are raised through annual funding campaigns are typically for the school’s immediate use and must be used within the fiscal year that they are received.<sup>20</sup> While important to a university’s day-to-day operations, these annual funds are typically smaller than their counterparts. For some universities, donors may select which annual fund they wish to support, as a condition of their gift.<sup>21</sup>

Donations that are intended for later use, on the other hand, are streamlined into larger aggregations known as endowments. “The endowment of an institution of higher learning is commonly understood to include all the property, of whatever character, given to the institution for its *permanent support . . .*.”<sup>22</sup> Endowments could be considered “rainy day” savings—universities rarely use the principal of endowments to fund day-to-day operations. Universities typically spend about 5% of their endowment annually, even in years of greater

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government may use to exert control over private universities. See *infra* Part III.A.

<sup>20</sup> See AAD Staff, *It Takes Two: Annual Fund Gifts and Endowment Gifts*, CORNELL UNIVERSITY, (Jan. 8, 2018), [https://giving.cornell.edu/story/annual-fund-gifts-endowment-gifts-takes-two/#:~:text=](https://giving.cornell.edu/story/annual-fund-gifts-endowment-gifts-takes-two/#:~:text=,), for one university’s explanation of how the two major types of donations work together.

<sup>21</sup> *Id.*; see *supra* notes 9–11 and accompanying texts.

<sup>22</sup> Daniel M. Erwin, *Academic Questions: A Practical Response to the University Endowment Crisis*, 24 QUINNIPIAC PROB. L.J. 43, 51 (2010) (emphasis added).

1] The Legal College Admissions Scandal

returns.<sup>23</sup> Rather, endowments help protect against enrollment declines or economic downturns leading to a decline in government support, or they can help pay for unexpected costs arising from new regulations or natural disasters.<sup>24</sup> Since endowments reflect the savings of a university, many institutions invest the majority of their endowments, in turn using investment returns for annual spending related to the endowment. In some cases, individual donors may stipulate as much in order to see an increase in the value of their donation.<sup>25</sup>

In the mid-1980s, David Swensen, chief investment officer of Yale University, began investing the university's endowment in private equity and hedge funds.<sup>26</sup> After its initial success, what became known as the Yale Model took off amongst other nonprofit institutions, bringing higher education further into the folds of the greater financial market.<sup>27</sup> Like any dalliance with the stock market, the Yale Model has demonstrated both pros and cons.

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<sup>23</sup> *Id.* at 51–52. Although universities are not private foundations with respect to the Internal Revenue Service's requirement that private foundations use 5% of their endowments annually, they still generally abide by this guidance. *Id.*

<sup>24</sup> UNIVERSITY ENDOWMENTS, *supra* note 5, at 6. The COVID-19 pandemic, for example, caused cash-strapped colleges and universities to dip into their endowments more than usual—one study reporting institutions drew \$23.3 billion from their endowments in 2020, up 4% from the previous year. NATIONAL ASSOCIATION OF COLLEGE AND UNIVERSITY BUSINESS OFFICERS, 2020 NACUBO-TIAA STUDY OF ENDOWMENTS: SUMMARY & KEY INSIGHTS 4 (2020).

<sup>25</sup> UNIVERSITY ENDOWMENTS, *supra* note 5, at 4.

<sup>26</sup> Erwin, *supra* note 22, at 54. Traditionally, university endowments had been invested in stocks and bonds, which universities considered to be safe, conservative investments that could be sold quickly whenever an institution requires liquid capital. *Id.* at 52.

<sup>27</sup> *Id.* at 44–45.

When the market is rising, universities reap the benefits as their endowments grow and donors become more generous. In 2018, the five universities with the largest endowments saw on average a \$2.6 billion increase in their endowments.<sup>28</sup> Although endowments largely secure the future funds of a university, growth in endowments can also lead to increased financial aid.<sup>29</sup> Additionally, the larger an endowment, the less funding a university needs from corporations and the government—securing “academic independence.”<sup>30</sup> On the other hand, when the market takes a negative turn, universities, like any investor, encounter loss. In 2008 when the market collapsed, Harvard, Yale, Princeton, and Stanford alone lost a combined \$31 billion.<sup>31</sup> Reed College, a small institution in Portland, Oregon, had to rescind the admissions of 100 students after losing \$100 million in the wake of the Great Recession.<sup>32</sup>

The financial collapse of 2008 revealed just how dependent universities are on their endowments and, in turn, their donations. Even if endowments are largely used for future funds, if donations are reduced and endowments shrink, universities may have to decrease admissions and financial aid, rely more on government aid, or halt the

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<sup>28</sup> See NAT’L CTR. FOR EDUC. STAT., *Endowment Funds of the 120 Degree-Granting Postsecondary Institutions with the Largest Endowments, by Rank Order: Fiscal Year 2018* in DIGEST OF EDUCATION STATISTICS (2020). While the return of investments accounts for a portion of this growth, the NCES does note that the endowment growth recorded in its report is the aggregate result of returns on investments, new donations, and reductions in expenditures and withdrawals. *Id.*

<sup>29</sup> Erwin, *supra* note 22, at 60; *supra* note 24 and accompanying text.

<sup>30</sup> Erwin, *supra* note 22, at 60.

<sup>31</sup> *Id.* at 46.

<sup>32</sup> *Id.* at 43.

1] The Legal College Admissions Scandal

implementation of new programs. Thus, donations are critical to universities—to limit donations would be to put a chokehold on the present and future of higher education.

## II. DONATIONS AND UNIVERSITY ADMISSIONS

Substantial donations to universities, on their face, seem to be beneficial to the advancement of higher education. Donations provide universities with the opportunity to increase their endowments, provide greater financial aid to students, and update their facilities.<sup>33</sup> Unquestionably, such donations are vital to maintaining institutions that annually cost hundreds of millions of dollars to maintain.<sup>34</sup> But at what cost? This portion of the Article will raise the key issue surrounding donations—how universities accept the children or relatives of donors, even when the applicant is less qualified than another. This section will also consider the potential implications on the higher education system surrounding such a practice.

### A. The Purchase of Admissions

In 2014, the Students for Fair Admissions filed a complaint against Harvard College alleging that the

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<sup>33</sup> See UNIVERSITY ENDOWMENTS, *supra* note 5, at 4–5.

<sup>34</sup> See NAT'L CTR. FOR EDUC. STAT, *Expenditures in FAST FACTS* (2019) (reporting that in the 2017–18 school year, postsecondary institutions spent a total of \$604 billion); *see also College and University Endowments*, ASSOCIATION OF AMERICAN UNIVERSITIES (Feb. 13, 2019), <https://www.aau.edu/key-issues/college-and-university-endowments> (reporting that universities with large endowments rely on endowments for 20–50% of their operating budget).

school was intentionally discriminating against Asian Americans during the admissions process, as part of their affirmative action program.<sup>35</sup> During discovery related to the case, emails from Harvard administrators and admissions officers revealed that the College favored applicants with ties to deep pockets.<sup>36</sup> Court filings highlighted the “Dean’s Interest List,” circulated every admissions cycle, which indicated not only that members on the list were often related to or of interest to large donors, but that persons on the list had a significantly greater chance of acceptance than those not on the list.<sup>37</sup> Other emails regarded the acceptability of certain students based on their potential for continued donations.<sup>38</sup>

Harvard is not alone in its practice of accepting students who promise to bring elite universities big donations. In 2014, the Cohen Foundation donated \$5 million dollars to the University of Southern California’s School of

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<sup>35</sup> *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff’d*, 980 F.3d 157 (1st Cir. 2020), *cert. filed*, (No. 20-1199) (Mar. 1, 2021). The merits of Harvard’s affirmative action program are beyond the scope of this Article.

<sup>36</sup> Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), <https://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/>.

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* (identifying one email from the Dean of the Harvard Kennedy School to an admissions officer thanking him for his help in securing the acceptance of students tied to large donors and identifying another email from the Dean of the Harvard Kennedy School to the Vice President for Alumni Affairs and Development weighing the pros and cons of accepting a student related to a former top donor whose donations seemingly decreased).

1] The Legal College Admissions Scandal

Cinematic Arts—the same year Steven Cohen’s daughters received acceptances to the university.<sup>39</sup> Following the college admissions scandal, rapper Dr. Dre bragged about his daughter’s seemingly merit-based acceptance to USC, until it was revealed he had recently made a \$70 million donation to the university.<sup>40</sup> Harrison Frist, son of former Senate majority leader Bill Frist, received an exceedingly low evaluation during the admissions process at Princeton, but was later accepted to the university, likely thanks to the Frist family’s continued alumni donations of millions of dollars.<sup>41</sup> Stanford admitted only one applicant from the Groton School in Massachusetts in 1998, Margaret Bass—the daughter of oil executive Robert Bass, an alumnus and chairman of the university board who had donated \$25 million to the institution.<sup>42</sup>

While the notable names of these accepted students caught the attention of the press, it raises the question of whether these examples of manipulative donations are just the tip of the iceberg. Daniel Golden, an investigative journalist who

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<sup>39</sup> Jason McGahan, *How USC Became the Most Scandal Plagued Campus in America*, L.A. MAG. (Apr. 24, 2019), <https://www.lamag.com/citythinkblog/usc-scandals-cover/>.

<sup>40</sup> Ben Unglesbee, *Do Donations Influence College Admissions?*, EDUCATION DIVE (Apr. 2, 2019), <https://www.educationdive.com/news/through-the-back-door-how-much-influence-do-donations-have-on-admissions/551528/>.

<sup>41</sup> Shamus Khan, *How to Weasel Your Kid Into an Elite College Without Paying Bribes*, WASH. POST (Mar. 14, 2019, 4:59 PM), [https://www.washingtonpost.com/outlook/the-college-admissions-game-is-rigged-arresting-cheaters-wont-change-that/2019/03/14/2127b340-4606-11e9-90f0-0ccfeec87a61\\_story.html](https://www.washingtonpost.com/outlook/the-college-admissions-game-is-rigged-arresting-cheaters-wont-change-that/2019/03/14/2127b340-4606-11e9-90f0-0ccfeec87a61_story.html).

<sup>42</sup> *Report Card on Tax Exemptions and Incentives for Higher Educ.: Pass, Fail, or Need Improvement?: Hearing before S. Comm. on Finance, 109th Cong.*, at 168–72 (2006) (statement of Daniel Golden).

explores these controversial donations, refers to these scenarios as “development cases”—situations where the development or financial office of the university flags applicants whose parents are not alumni but are expected to provide money and visibility to the university.<sup>43</sup> “Development case” applicants are typically the children of Hollywood celebrities, corporate executives, or political or media leaders.<sup>44</sup> The daughters of Cohen and Dr. Dre provide apt examples of “development cases.” In addition to “development cases,” donors tied to applicants may be alumni of the institution, such as the cases of Harrison Frist and Margaret Bass.

## B. The Implications of Purchasing Admissions

Unlike the actions of the parents in the college admissions scandal, these donations, while appearing to be bribes, are perfectly legal.<sup>45</sup> But there is question as to whether this practice should continue. The preferences demonstrated by admissions boards creates an unfair system that leads to homogeneity in elite, private universities. By continuing to accept applicants tied to donations, universities are reinforcing socioeconomic segregation, and in scenarios of legacy acceptance, racial segregation.

The 1954 decision of *Brown v. Board of Education*<sup>46</sup> marked a turning point for diversity in education—the racial desegregation of public institutions. Although the Supreme Court did not directly address diversity in *Brown*, the Court

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Elizabeth Vulaj, *Endowment or Inducement?* N.Y. St. B.J., Sept./Oct. 2019, at 46.

<sup>46</sup> 347 U.S. 483 (1954).

addressed new studies evidencing the detriments of segregation.<sup>47</sup> Over the next seven decades, as equal rights continued to advance, diversity in education became a central concept, with courts and social scientists alike recognizing its importance and benefits.<sup>48</sup> While diversity has mainly been addressed in the context of racial and ethnic diversity, the Supreme Court has specifically held that an educational institution's interest in diversity is only permissible when it encompasses a broad range of qualifying factors—not only race, but also gender, socioeconomic background, and personal background.<sup>49</sup>

In accepting students on the basis of contributions their parents or relatives make, universities are reinforcing a lack of socioeconomic diversity. The wealthy, even when they are unqualified, receive opportunities to attend elite universities, while qualified middle-class and lower-

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<sup>47</sup> *Id.* at 494–95 (“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting... inferiority... Separate educational facilities are inherently unequal.”).

<sup>48</sup> *See, e.g.,* Regents of University of California v. Bakke, 438 U.S. 265, 311–12 (1978) (recognizing that the attainment of a diverse student body is a constitutionally permissible goal for universities); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding University of Michigan Law School's narrowly tailored use of race in admissions decisions was permissible in furthering a compelling state interest in educational diversity); *see also* Patricia Gurin et. al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 19 (2004) (finding that a diverse student body in higher education fosters better democratic understanding and relationships); *see generally* Jeffrey F. Millem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, COMPELLING INTEREST (2002)

<sup>49</sup> *Bakke*, 438 U.S. at 314; *Grutter*, 539 U.S. at 334–39; *Fisher v. University of Texas at Austin*, 570 U.S. 297, 311 (2013).

class students may be shut out of admissions. Such class divisions in the United States have long been accepted, but such divisions have several implications.

Since the late 1990s, education scholars and experts have increasingly asserted that socioeconomic diversity in schools has its own unique benefits to learning, distinct from the benefits of racial diversity.<sup>50</sup> For economically disadvantaged students, socioeconomic integration increases performance and potential upward mobility—test results reflect that, on average, low-income students attending more-affluent schools perform higher than their peers attending low-income schools.<sup>51</sup> Increased socioeconomic diversity enhances the education of all students by providing them with insights into a greater range of backgrounds, similar to what they will experience in the “real world.”<sup>52</sup> Greater socioeconomic diversity in undergraduate and graduate schools also has the potential of bringing greater legitimacy to professional fields, as professionals with a range of backgrounds are better equipped to respond to public need.<sup>53</sup>

Additionally, racial gaps persist with respect to socioeconomic status. Minorities, particularly

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<sup>50</sup> Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367, 368 (2013).

<sup>51</sup> RICHARD D. KAHLBERG ET. AL, CENTER FOR EDUC. EQUITY, MID-ATLANTIC EQUITY CONSORTIUM, SOCIOECONOMIC INTEGRATION FROM AN EQUITY PERSPECTIVE 3–4 (2017). While most research, including Kahlenberg’s, about socioeconomic diversity occurs on primary and secondary education level, similar findings of increased opportunities could generally apply to academic performance in the universities.

<sup>52</sup> Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 475 (1997).

<sup>53</sup> *Id.*

1] The Legal College Admissions Scandal

Black<sup>54</sup> and Hispanic families, fall far behind the national median household income.<sup>55</sup> While socioeconomic diversity is not a replacement for racial diversity in higher education, an increase in socioeconomic diversity can help increase racial diversity. In addition to the standalone benefits of both socioeconomic and racial diversity,<sup>56</sup> the interconnection of these enhances higher education by encouraging cross-racial and cross-cultural interactions.<sup>57</sup> Where there is greater socioeconomic diversity in a university, there are fewer opportunities for affluent White students to socialize only with other affluent White students, a practice which strengthens “racial boundaries.”<sup>58</sup> Furthermore, socioeconomic diversity promotes greater equality between racial groups in universities, as students of color will not be as marginalized on account of lower affluence.<sup>59</sup>

The acceptance of legacies whose alumni parents make donations poses another problem—the reinforcement of racial segregation. Universities have been giving legacy preferences to students since

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<sup>54</sup> Cognizant of the current debate surrounding the capitalization of racial and ethnic terms, this Article follows the American Psychological Association’s style guide, in which both “Black” and “White” are capitalized.

<sup>55</sup> JESSICA SEMEGA ET AL., U.S. CENSUS BUREAU, P60-270, INCOME AND POVERTY IN THE UNITED STATES: 2019 (2020). In 2019, the national median household income was \$68,703, but Black and Hispanic household medians were \$45,438 and \$56,113 respectively. *Id.*

<sup>56</sup> See *supra* notes 48–53 and accompanying text.

<sup>57</sup> See Julie J. Park et. al, *Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 AM. EDUC. RES. J. 466 (2012).

<sup>58</sup> *Id.* at 476.

<sup>59</sup> *Id.* at 476–77.

the 1920s.<sup>60</sup> These policies reflected racial discrimination at the outset. Elite universities, concerned about their growing population of Jewish students, implemented legacy programs to maintain their long tradition of a homogenous (White and Christian) student body.<sup>61</sup> Today, universities posit that they continue to give legacies preferences for purely financial reasons—alumni are more likely to be donors. After all, alumni are the second largest group of donors from whom universities receive funds.<sup>62</sup>

Yet, such preferential treatment demonstrates a disparate impact on racial minorities, as they are less likely to be the children of alumni. Schools in the South were still segregated until the 1950s and, as a result, the number of legacies of color is markedly low. In 2002, for example, only 11% of accepted students at the University of Virginia were Black, and only 3% of legacy applicants were Black,<sup>63</sup> despite the fact that nearly 20% of Virginia's population was Black.<sup>64</sup> And such statistics are not confined to

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<sup>60</sup> Kathy Ladewski, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577, 579 (2010).

<sup>61</sup> *Id.*

<sup>62</sup> VOLUNTARY SUPPORT *supra* note 4, at 6.

<sup>63</sup> *Institutional Research and Analytics: Undergraduate Admissions*, UNIVERSITY OF VIRGINIA <https://ira.virginia.edu/university-stats-facts/undergraduate-admissions> (last visited July 16, 2021); Ladewski, *supra* note 60, at 584.

<sup>64</sup> U.S. CENSUS BUREAU, C2KPROF/00-VA, VIRGINIA: 2000 at 2 (2002). In 2002, UVA offered admissions to 39% of its applicants, 53% of whom came from in-state. *Institutional Research and Analytics: Undergraduate Admissions*, *supra* note 63. Twenty years later, these demographic trends are very much the same—20% of Virginia's citizens are Black, yet in 2020 Black

1] The Legal College Admissions Scandal

schools of the Jim Crow South—a detailed review of Harvard’s admissions data from 2014 to 2019 found that 70% of all legacy students were White, which researchers argue is likely indicative of all “Ivy League and highly selective institutions.”<sup>65</sup>

The chances of a Black applicant being a legacy are significantly lower than those of a White applicant where, as of 2019, only 27% of Black children have at least one parent with a college degree, as opposed to 54% of White children.<sup>66</sup> Simply put, legacy admissions benefit White applicants an overwhelming majority of the time,<sup>67</sup>

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students made up only 6.74% of the entire University of Virginia undergraduate student body. See U.S. CENSUS BUREAU, VIRGINIA: QUICK FACTS (2020); *Undergraduate Students-All-2020*, UNIVERSITY OF VIRGINIA: DIVERSITY DASHBOARD. <https://diversitydata.virginia.edu/Home/Details/Undergraduate%20Students> (last visited July 14, 2021).

<sup>65</sup> Peter Arcidiacono, et al., *Legacy and Athlete Preferences at Harvard* 3–4, 3.5 (Nat’l Bureau of Econ. Research, Working Paper No. 26316, 2019). The results of this research are especially important because, at present, such data from universities is not readily available to the public. The researchers in this study note that the Students for Fair Admissions litigation, see *supra* note 35, has “provided unprecedented access to how Harvard makes admissions decisions and to the data underlying those decisions.” Peter Arcidiacono, et al., *supra*. New legislation, however, may help change how this data is accessed though, as universities may be required to report more about the admissions process. See *infra* notes 129–133 and accompanying text.

<sup>66</sup> NAT’L CTR. FOR EDUC. STAT, *Characteristics of Children’s Families* in ANNUAL REPORTS AND INFORMATION STAFF (2021).

<sup>67</sup> See, e.g., Cameron Howell & Sarah E. Turner, *Legacies in Black and White: The Racial Composition of the Legacy Pool*, 45 RES. IN HIGHER EDUC. 325 (2004) (“[I]t is undisputed that [legacy admissions] ha[ve] disproportionately benefited white applicants. The established white admissions advantage replicates itself through policies that favor children of alumni because the overwhelming majority of alumni from elite colleges and universities are white”) (internal quotations omitted).

despite the fact that White and Black enrollment rates are virtually the same.<sup>68</sup> With such low numbers of minority legacies, it would be nearly impossible for universities to demonstrate that policies of legacy preference do not reflect historical racial discrimination. And while accepting legacy applicants—even those who are otherwise qualified for the institution—helps reinforce these statistics, the accepting of legacy applicants *solely* because their admission was purchased by a donation is particularly disconcerting. Under such conditions, not only are qualified minority groups being edged out, but they are being edged in favor of unqualified students who are likelier to underperform.<sup>69</sup>

Finally, in addition to the demonstrated benefits that socioeconomic and racial diversity bring to the student body, it is notable that many of the perks an education at an elite university offers only benefits those groups marginalized by the practice of purchasing admissions.<sup>70</sup> While it may be

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<sup>68</sup> In 2019, 41% of White 18- to 24-year-olds were enrolled in college, while 37% of Black 18- to 24-year-olds were. NAT'L CTR. FOR EDUC. STAT, *College Enrollment Rates in ANNUAL REPORTS AND INFORMATION STAFF* (2021).

<sup>69</sup> The practice of admitting legacy students, especially where qualified legacy students are concerned, has a number of complexities that this Article only hopes to partially address. By highlighting the issues of legacy admissions and racial divides, this Article attempts to bring further attention to how the purchase of admissions is detrimental to higher education, but only with respect to unqualified legacy students, who—outside of their financial benefits—offer little to no other benefit to the academic integrity of the institution.

<sup>70</sup> See Stacy Dale & Alan Krueger, *Estimating the Return to College Selectivity Over the Career Using Administrative Earnings Data*, (Nat'l Bureau of Econ. Research, Working Paper 17159, 2011); see also Kevin Carey, *How Much Does Getting Into an Elite College Actually Matter?* N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/upshot/elite-colleges-actual-value.html>.

1] The Legal College Admissions Scandal

perceived that elite universities open career doors,<sup>71</sup> studies indicate that highly selective universities actually provide virtually no economic advantage for most students with respect to their post-graduate entry into the labor market.<sup>72</sup> In fact, the only students who have been demonstrated to receive some economic advantage from attending elite, private universities are those who are typically cut out of acceptance by the purchase of admissions. Black and Hispanic and low-income students benefit from the universities' networks to which they otherwise would not have access.<sup>73</sup> In short, purchasing of admissions to an elite university offers little to no advantage to the beneficiary, but instead harms the overall education of the student body, as well as those shut out of elite universities in favor of those with purchased seats.

### III. CLOSING THE GAP: POTENTIAL REMEDIES TO END THE USE OF DONATIONS TO PURCHASE ADMISSIONS

While the college admissions process has long been criticized for a number of reasons,<sup>74</sup> the college

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<sup>71</sup> Indeed, perceptions about subsequent career success or, more frustratingly, bragging rights alone appear to be the driving forces behind the wealthy's purchase of admissions, rather than a bona fide interest in the quality of education. *See, e.g., infra* note 142 and accompanying text (demonstrating, through Massimo Giannulli, the scorn the elite have for public universities or schools without the "elite" title.)

<sup>72</sup> Dale & Krueger, *supra* note 70, at 2–4.

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.,* Jonathan R. Cole, *Why Elite-College Admissions Need an Overhaul*, THE ATLANTIC (Feb. 14, 2016), <https://www.theatlantic.com/education/archive/2016/02/whats->

admissions scandal brought new attention to the flawed system and the need for change. Shortly after news of the scandal broke, several lawmakers proposed new measures to crack down on the purchasing of admissions through donations.<sup>75</sup> Like many laws, however, there is no perfect solution here that would completely eradicate the practice without some negative side effects. At the outset, if legislators wish to intervene, they must provide a legitimate way to regulate private universities. Furthermore, many of the proposed remedies could stifle donations, which in turn place a chokehold on university funds. This portion of the Article will explore potential remedies to discourage or end the purchase of admissions, as well as identify the underlying issues and potential side effects of abolishing the purchase of admissions.

#### A. Proposed Federal Remedies

Before proceeding, federal legislators must first identify how they can constitutionally regulate private universities. Although many public universities have excellent credentials and are

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wrong-with-college-admissions/462063/ (criticizing elite universities' current admissions processes that put an emphasis on specific standards, at the cost of diversity); David C. Schwebel & Jingzhen Yang, *Elite US College Admissions: Could the Quest for Admission Increase Overuse Injury Risk?* 8 J. INJ. & VIOLENCE RES. 109 (2016) (asserting that selective universities' preference for high accomplishment in non-academic extracurriculars leads to overexertion and higher risk of injury from overuse); Richard C. Atkinson & Saul Geiser *Reflections on a Century of College Admissions Tests*, 38 EDUC. RESEARCHER 665 (2009) (reviewing and critiquing universities' reliance on standardized tests to make admissions decisions).

<sup>75</sup> Vulaj, *supra* note 45, at 47–48.

1] The Legal College Admissions Scandal

ranked among the nation's best,<sup>76</sup> the focus of the present issue is on highly selective, private institutions. While public universities may be regulated by the federal government because they are created by a state action, private universities generally fall outside the direct reach of the federal government.<sup>77</sup>

The federal government, however, may exert control over private universities through a variety of side channels. Under its spending power and the principles of the General Welfare Clause,<sup>78</sup> Congress has provided financial aid to students enrolled in private universities, offered research grants to private universities, and implemented a number of other financial programs benefitting private universities.<sup>79</sup> In providing private universities with federal funds under its spending powers, Congress also may place conditions, subject to limitation, on the funds.<sup>80</sup> Congress has made various civil rights provisions applicable to private universities as a

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<sup>76</sup> One 2021 report ranked 19 private universities in its list of top 20 universities in the nation, with University of California-Los Angeles being the only public institution on the list. *2021 Best National University Rankings*, US NEWS <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited July 15, 2021). Additionally, private universities have some of the largest endowments, and accept more donations than their public counterparts. *See supra* note 18. *See supra* Part II.A for an identification of four private universities known to accept students in exchange for donations.

<sup>77</sup> H. Kathryn Merrill, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 BYU EDUC. & L.J. 63.

<sup>78</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>79</sup> Merrill, *supra* note 77, at 64–66.

<sup>80</sup> *See South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (holding that Congress may place conditions on federal funds so long as the action is (1) for the general welfare, (2) the conditions are unambiguous, (3) the conditions are related to the particular interest, and (4) the conditions are not otherwise unconstitutional).

condition of receiving federal funds, including student financial aid.<sup>81</sup> Congress may also regulate universities through the Commerce Clause.<sup>82</sup> Under this principle, Congress can reach the activity of private universities that have a substantial effect on interstate commerce.<sup>83</sup> Congress has used Commerce Clause legislation to regulate a broad range of private university activity, including how the institutions may pay their employees, obtain patents, and conduct research.<sup>84</sup>

Perhaps the most powerful mechanism for regulating private universities at a federal level, however, is through Congress's taxation power.<sup>85</sup> Congress may disallow tax deductions for donations, discouraging individual donors. Additionally, elite, private universities operate as nonprofit organizations. Accordingly, under the Internal Revenue Code, these institutions are tax-exempt.<sup>86</sup> In having discretion to grant universities tax exemptions, Congress may attach many conditions, regulations, qualifiers, and restrictions as it deems appropriate.<sup>87</sup> In other words, the federal government may give universities the option of complying with their requests, or paying taxes.

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<sup>81</sup> Merrill, *supra* note 77, at 69.

<sup>82</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>83</sup> Merrill, *supra* note 77, at 68–69.

<sup>84</sup> *Id.*

<sup>85</sup> U.S. CONST. art. I, § 8 cl. 1; *see also* Merrill, *supra* note 77, at 66–67 (asserting that the taxing power is more influential over private universities than public universities, because public universities may be exempt from some taxes under principles of state sovereignty).

<sup>86</sup> *See* I.R.C. § 501(c)(3) (2018) (granting tax exemptions to corporations whose sole function is to serve a public purpose, including an educational purpose).

<sup>87</sup> Merrill, *supra* note 77, at 67.

One particularly notable example of the exercise of taxation powers to regulate universities can be identified in *Bob Jones University v. United States*.<sup>88</sup> Bob Jones University is a small, private university located in Greenville, South Carolina which, although officially nondenominational, commits itself to the teaching of fundamentalist Christian beliefs.<sup>89</sup> During the mid-twentieth century, one such belief the university defended was anti-miscegenation.<sup>90</sup> Beginning in 1975, Bob Jones admitted unmarried Black applicants, but strictly forbade interracial dating and continued to deny acceptance of applicants who supported interracial marriage or were of that status themselves.<sup>91</sup> As a result of its racial policies, in 1970 the Internal Revenue Service withheld Bob Jones's tax-exempt status.<sup>92</sup> In the resulting litigation, the Supreme Court was required to determine whether the IRS had authority to deny a university its tax-exempt status because of its racial policies, when Congress had not explicitly given the IRS such authority in the Internal Revenue Code.<sup>93</sup> Ultimately, the Supreme Court affirmed the IRS's action, asserting that the responsibility of construing the Internal Revenue Code largely falls to the IRS, and that the IRS had

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<sup>88</sup> 461 U.S. 574 (1983).

<sup>89</sup> *Id.* at 579–80.

<sup>90</sup> *Id.* at 580.

<sup>91</sup> During the early 1970s, the university fully denied acceptance to unmarried Black applicants and interracial couples but changed its policies in 1975 on account of a Supreme Court ruling prohibiting racial exclusion from private schools. *Id.* at 580–81.

<sup>92</sup> *Id.* While this Article offers only Bob Jones as an example of the IRS's action in the 1970s, Bob Jones was just one of several private schools from which the IRS withheld tax-exempt status.

<sup>93</sup> *Id.* at 596.

properly determined that Bob Jones no longer served a public purpose—a central qualification for institutions receiving tax exemptions—in enforcing racially motivated policies.<sup>94</sup>

In light of such taxation powers, one solution worth consideration would be for the IRS to mirror the actions in *Bob Jones*.<sup>95</sup> In other words, the IRS could remove a university's tax-exempt status if it demonstrates, through mandatory reporting,<sup>96</sup> an ongoing history of selling admissions. This solution would place greater accountability on universities—giving them the option of accepting large, albeit manipulative donations, or maintaining their tax-exempt status. Given the size of some universities' endowments alone, it is likely they will opt to maintain their status with the IRS.<sup>97</sup> Furthermore, *Bob Jones* demonstrates the importance universities place on retaining their tax-exempt status—the

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<sup>94</sup> See *id.* at 596–600. Upon losing its tax-exempt status, Bob Jones continued its interracial dating ban, only revoking the ban in 2000. In 2017, 34 years after the initial Supreme Court ruling, it was announced that Bob Jones would regain its nonprofit status. Nathaniel Cary, *Bob Jones University to Regain Nonprofit Status*, USA TODAY (Feb. 16, 2017, 8:13 PM), <https://www.usatoday.com/story/news/nation-now/2017/02/16/bob-jones-university-regain-nonprofit-status/98020998/>.

<sup>95</sup> See *supra* notes 88–94.

<sup>96</sup> See *infra* notes 106–108 and accompanying text.

<sup>97</sup> See *supra* note 28 for a discussion about the size of endowments. Lawmakers have recently recognized that these massive funds should no longer qualify for full tax exemption and have thus implemented an excise tax on certain endowment funds. See Doug Lederman, *Endowment Tax Picture Becomes Modestly Clearer*, INSIDE HIGHER ED (July 1, 2019), <https://www.insidehighered.com/news/2019/07/01/us-provides-some-clarity-about-tax-endowments>. However, universities remain exempt from corporate income taxes. I.R.C. § 501.

1] The Legal College Admissions Scandal

university litigated all the way to the Supreme Court in an attempt to retain its position as tax-exempt.<sup>98</sup>

In *Bob Jones*, the Supreme Court affirmed the IRS's authority to remove a tax exemption in light of racial discrimination.<sup>99</sup> With respect to the purchase of admissions, however, it would be more effective for Congress to amend the Internal Revenue Code and explicitly grant the IRS the authority to make determinations, rather than requiring the courts to make a determination of the IRS's implied authority every time a tax exemption issue arises.

The Supreme Court affirmed the IRS's contested act in *Bob Jones* because the Court held the IRS had the implied authority to interpret the Internal Revenue Code and that its determination that Bob Jones no longer met the basis for charitable exemptions—the entity confers a public benefit on society—was an acceptable interpretation.<sup>100</sup> With respect to Bob Jones's racial policies, the Court relied on decades of precedent and social policies against racial discrimination to affirm the IRS's decision and to determine that Bob Jones's actions so outweighed its public benefits as to qualify it for tax exemption.<sup>101</sup> The selling of admissions for donations, on the other hand, does not have precedent and policy to support a negative finding. Therefore, it may be more difficult for the Court to affirm the IRS's action as it did in *Bob Jones*. Should the matter be litigated, the courts would

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<sup>98</sup> Bob Jones was just one of several petitioners in action, as many private schools of the time challenged the IRS's authority to remove their tax-exempt status. *Bob Jones University v. United States*, 461 U.S. 574 (1983); *supra* note 92.

<sup>99</sup> *Bob Jones*, 461 U.S. at 591–92.

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 592–97 (citing the Court's major segregation cases, as well as legislative and executive branch action, to support the assertion that racial segregation is contrary to public policy efforts).

be required to make a determination based largely upon social science.<sup>102</sup> This task, although not impossible, complicates judicial deliberation and determinations. While the Court has cited social science to set new precedent in the past, social science has rarely, if ever, been the sole basis for a judicial determination and more likely only serves as further support of an opinion.<sup>103</sup> It is also worth noting that standing may be difficult to demonstrate for students seeking judicial remedy, as students would need to demonstrate that they did not receive admissions as a direct result of the unfair admission of a less qualified student.<sup>104</sup> Thus, perhaps a stronger use of the *Bob Jones* precedent would be not through further, similar litigation, but through legislation that amends the Internal Revenue Code to give the IRS explicit authority to interpret the code and make determinations regarding tax exemptions.

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<sup>102</sup> See *supra* Part II.B for a discussion about the negative effects of the purchasing admissions—including socioeconomic segregation and a skewed racial impact.

<sup>103</sup> In *Brown*, the Court cited psychological and sociological studies reporting the long-term, negative effects of racial segregation as justification for deeming racial segregation in schools unconstitutional. *Brown v. Board of Ed.*, 347 U.S. 483, 492–94 (1954). But there is no proof that the Court would have made a different determination with respect to racial discrimination in the absence of such studies.

<sup>104</sup> In May 2020, the Northern District of California held that rejected students who were denied general spots to universities did not have standing to allege harm as a result of the college admissions scandal because they were not competing for the athletic positions impacted by the scandal. See *Tamboura v. Singer*, No. 5:19-cv-03411-EJD, 2020 WL 2793371 (N.D. Cal., May 29, 2020); Maeve Allsup, *Rejected Students Lack Standing in College Admissions Fraud Suit*, BLOOMBERG LAW (June 1, 2020, 7:19 PM), [https://www.bloomberglaw.com/document/XBO98RQK000000?u dv\\_expired=true](https://www.bloomberglaw.com/document/XBO98RQK000000?u dv_expired=true).

While this tax legislation could potentially be beneficial to other non-profit sectors in a stand-alone bill, for the purpose of college admissions, the amendment would perhaps be most effective when paired with other pieces of legislation that aim to curb the behavior. Legislators are not oblivious to the college admissions issue and have already taken affirmative steps to combat the issue. In June 2019, U.S. Senator Ron Wyden introduced the College Admissions Fairness Act,<sup>105</sup> which proposes the following: (1) to amend the Higher Education Act of 1965,<sup>106</sup> requiring a college or university receiving federal funds to develop a written policy declaring that it does not consider donations or the ability to donate in the admissions process, as well as report the number of applicants, admitted students, and enrolled students related to donors, and (2) to amend the Internal Revenue Code<sup>107</sup> to limit tax deductions to \$100,000 over a six-year period prior to and when the student is enrolled in a college that does not institute this policy.<sup>108</sup> A promising bill in its own right, adding a provision that further amends the Internal Revenue Code and holds universities accountable could only serve to strengthen the effect of the College Admissions Fairness Act.

The College Admissions Fairness Act, which was referred to the Senate Committee on Finance and remains there as of July 2021,<sup>109</sup> has received both support and criticisms from various members of the academic community. Many of the documented responses have been largely critical and point out the flaws that any federal remedy, including

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<sup>105</sup> S. 1732, 116th Cong. (2019)

<sup>106</sup> 20 U.S.C. § 1015(a)(1) (2018).

<sup>107</sup> 26 U.S.C. § 170(f) (2018).

<sup>108</sup> S. 1732.

<sup>109</sup> *Id.*

amendments to the Internal Revenue Code, would have. The Council for Advancement and Support of Education (CASE) opposed the bill, citing the importance of philanthropic giving in higher education and asserting that the current bill would decrease the amount of donations universities receive annually.<sup>110</sup> The National Association for College Admissions Counselling (NACAC) also expressed concerns, asserting that the legislation would create an undue burden for universities and has the potential to improperly implicate students and families.<sup>111</sup> These critiques are not unfounded. While Wyden's bill serves a noble purpose, it is not a perfect solution for several reasons.

First, as CASE aptly pointed out, the bill poses the potential to decrease the donations a university receives. If a donor no longer receives a tax deduction on his contribution, he may no longer be motivated to provide a university with a large sum of money. As identified in Part II, some contributions made by donors consist of millions—these donations, where they are deductible, help reduce the donor's tax liability. As a result, a donor may deem a donation to purchase admission as no longer "worth it." While this may help reduce the number of purchased admissions, it may also substantially reduce the amount of money a university receives annually. As identified in Part I, universities have a reliance on donations which, if diminished, could affect the

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<sup>110</sup> Scott Jaschik, *Should Colleges Reveal How Many Donor Children They Admit?* INSIDE HIGHER ED (June 10, 2019), <https://www.insidehighered.com/admissions/article/2019/06/10/senator-offers-legislation-respond-admissions-scandal>.

<sup>111</sup> Shanda T. Ivory, *NACAC Addresses College Admissions Fairness Act*, NAT'L ASS'N FOR COLLEGE ADMISSIONS COUNSELLING (June 19, 2019), <https://www.nacacnet.org/news--publications/newsroom/press-releases/wydenact/>.

1] The Legal College Admissions Scandal

amount of financial aid a university may offer to qualifying students.<sup>112</sup> Therefore, this solution is a double-edged sword—on the one hand the purchase of admissions may be halted, but on the other hand financial aid may take a hit because of fewer donations.

Nonetheless, while this potential side-effect should not be taken lightly, it is difficult to predict how large an impact it will actually have. One example that could contradict CASE's objection lies with John Hopkins University, which over the past ten years, has begun phasing out legacy admissions altogether, over concerns about the identified issues with continued racial segregation.<sup>113</sup> While phasing out legacy admissions would seem to discourage donations, the university asserts that it has not lost any donations as a result of these efforts.<sup>114</sup> Furthermore, given the structure of the donations and endowment system, it would be difficult to determine whether the loss of one or two manipulative donations was the direct cause of diminished financial aid for a given year, or if there were other outside forces affecting the university's funds.<sup>115</sup> Thus, while CASE's assertions should not be taken lightly, to reject federal legislation because of the potential of lost donations would be to throw the baby out with the bathwater—it is impossible to

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<sup>112</sup> See *supra* Part I.

<sup>113</sup> Nell Gluckman, *Johns Hopkins Has Quietly Stopped Giving Children of Alumni Preference in Admissions. Here's Why*, CHRON. HIGHER EDUC. (Jan. 13, 2020), [https://www.chronicle.com/article/Johns-Hopkins-Has-Quietly/247846?cid=wcontentlist\\_hp\\_latest](https://www.chronicle.com/article/Johns-Hopkins-Has-Quietly/247846?cid=wcontentlist_hp_latest).

<sup>114</sup> *Id.*

<sup>115</sup> See *supra* Part II (identifying that financial aid and university funding, while greatly impacted by donations, is also subject to outside influences such as the rise and fall of the stock market and government funding).

predict this specific outcome will even occur, much less how resounding its impact will be.

Admittedly, Wyden's bill has potential to burden universities, as NACAC observes, and fails to consider the extent to which universities and donors collaborate in the process of purchasing admissions. While the cases of the Cohen daughters, Dr. Dre's daughter, Frist, and Bass<sup>116</sup> are clearer examples of donations with improper motivations, sometimes the actions are not so blatantly obvious. Is a donation of \$3 million made by a parent 30 years prior to their child's application to the university really coercive? A donation made by a family friend of the applicant?

To begin, the reporting requirement of the College Admissions Fairness Act could be burdensome to universities. To ensure they are in compliance with the Act's parameters, universities would need to review data regarding what admitted students were related to donors, and when the donation occurred in relation to acceptance. This review would require cross-referencing data from multiple departments, having potential of costing universities a large amount of time and money. As with the concern of lost donations though, this side effect of the College Admissions Fairness Act, while not to be dismissed, is not necessarily fatal to the bill. Congress should first issue an economic impact report related to the bill. If the report suggests that the financial cost to universities is, in fact, too burdensome, the Act can still be saved—lawmakers could amend the bill to address, and perhaps limit, those aspects of the bill that the economic impact report identifies as most expensive.

Notably, however, such data may not even exist—universities suspected of accepting donations

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<sup>116</sup> *See supra* Part II.A.

1] The Legal College Admissions Scandal

as quasi-bribes for admissions are less than likely to record such incidents. And although the bill defines parameters for determining what is an illicit donation, the scope is narrow and still presents opportunities for dishonest behavior. A former president of Missouri State University appropriately pointed out, “Colleges are not unfamiliar with how to wiggle through loopholes, and Wyden’s bill, in its current form, has them.”<sup>117</sup> The College Admissions Fairness Act currently sets a six-year time limit on deeming donations disallowed, and restricts only parents or benefactors acting on the direction of parents from making contributions.<sup>118</sup> The current parameters fail to consider the scope of the practice in question. First, a six-year time limit, while reasonable, may be ineffective in some cases. Consider the case of Harrison Frist, whose family had been making donations to Princeton for decades at the time of his acceptance.<sup>119</sup> Second, contributors may not necessarily be the student’s parents or acting on behalf of the student’s parents. Extended family,

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<sup>117</sup> Michael T. Nietzel, *Senator Wyden’s “College Admissions Fairness Act”: Paper-Tiger or Lion-Heart?* FORBES (June 11, 2019, 10:45 AM), <https://www.forbes.com/sites/michaelt Nietzel/2019/06/11/senator-wydens-college-admissions-fairness-act-paper-tiger-or-lion-heart/#518751ad263c>.

<sup>118</sup> S. 1732, 116th Cong. (2019).

<sup>119</sup> See *supra* note 41 and accompanying text. Harrison Frist’s situation poses a peculiar problem where the donation that facilitated Harrison’s acceptance may not have been directly made with Harrison in mind. Rather, since the Frist family had been attending Princeton and making donations for decades, the donations may have been designed not to facilitate the admission of one particular Frist, but to encourage the university to accept more generations of Frist’s. Such an example of multi-generational donations and acceptances in particular would fail to be served by Wyden’s bill and could be much harder to pinpoint as an illicit contribution.

family friends, or mentors all may have an interest in purchasing the applicable student's admission through a donation. Thus, universities, eager to accept students accompanied by large donations, may work with potential donors to exploit such gaps.

While this issue of scope shows the bill's loopholes, such an issue is not unique to this bill. To reject Wyden's bill because of its gaps would require lawmakers to reevaluate many, if not all laws. Statutory rape laws, for example, have often been criticized for their gaps with respect to defining age of consent and consent itself.<sup>120</sup> If the College Admissions Fairness Act is unacceptable, would it also be expected for legislators to reject statutory rape laws, because of the gaps they present? The task, or perhaps the burden, of legislators is to determine what parameters of legislation best serve the public interest. Legislators cannot be expected to find the perfect solution where the perfect solution does not exist. Rather, they must find the solution that has the most potential of achieving the desired outcome. Here, while Wyden's bill does have gaps, the parameters currently in place are reasonable measures—many of the cases of purchased admissions illustrated in Part II did in fact fall within the scope of the Act, and therefore could have been avoided.

In sum, exercising control over private university admissions at a federal level is plausible under Congress's enumerated powers. Targeting tax deductions and exemptions provides a promising

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<sup>120</sup> See Russell Christopher & Kathryn Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505 (2012); Matthew J. Malone, *Age Gap in Teenage Sex Continues to Stir Debate*, N.Y. TIMES (June 24, 2007), <https://www.nytimes.com/2007/06/24/nyregion/nyregionspecial2/24topicct.html>.

1] The Legal College Admissions Scandal

solution, but each solution is not without flaws. Nonetheless, to regulate the issue at a federal level may be a powerful option—it provides a solution to the problem at a uniform, nationwide level, and the consequences universities face would likely merit at least some level of response or compliance.

### B. Proposed State Remedies

Should combating the purchase of admissions at a federal level prove unsatisfactory or unworkable, states also have the potential of implementing policies against the practice. In the early twentieth century, the Supreme Court established the fundamental right to choose private education.<sup>121</sup> The Supreme Court has also recognized, however, that a state has an interest in regulating private schools, as the education of the citizenry is necessary for participation in a democratic society.<sup>122</sup> Thus, state legislators may regulate private education to the extent that it furthers the government's interest.<sup>123</sup>

The college admissions scandal helped cast light on the inequalities of the college admissions process and inspired several state legislatures to begin addressing unfair policies and procedures. In May 2021, Colorado became the first state to ban its

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<sup>121</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923)

<sup>122</sup> Office of Innovation and Improvement, *State Regulation of Private and Home Schools*, U.S. DEPT. OF EDUC. (Jul. 26, 2013), <https://www2.ed.gov/about/offices/list/oii/nonpublic/stateregulationofprivateandhomeschool.html>.

<sup>123</sup> States also are constrained in their regulation of education with respect to the First Amendment's guarantee of the free exercise of religion, but First Amendment concerns are not within the scope of this Article.

public universities from considering legacy status during the admissions process,<sup>124</sup> and both Colorado and Illinois have followed universities' lead in mandating test-blind admissions.<sup>125</sup> Perhaps because of its universities' widely publicized involvement in the college admissions scandal, California lawmakers have been the most proactive thus far in addressing the specific issue of admission-by-donation. In October 2019, Governor Gavin Newsom signed three new laws addressing college admissions, which became effective in 2020.<sup>126</sup> Cal. Rev. & Tax § 17275.40, like the College Admissions Fairness Act, removed tax deductions from donations related to college admissions.<sup>127</sup> The statute, however, only applies to donations made to Key Worldwide Foundation and Edge College & Career Network—organizations directly tied to the college admissions scandal.<sup>128</sup>

Cal. Educ. Code § 66018.5, also like the College Admissions Fairness Act, requires California universities to disclose any admissions based on preferential treatment, releasing statistics about

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<sup>124</sup> HB 21-1173, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021); see also Elissa Nadworny, *Colorado Becomes 1st State To Ban Legacy College Admissions*, NPR (May 27, 2021, 2:54 PM) [npr.org/2021/05/27/1000868262/colorado-becomes-first-state-to-ban-legacy-college-admissions](https://www.npr.org/2021/05/27/1000868262/colorado-becomes-first-state-to-ban-legacy-college-admissions).

<sup>125</sup> Colo. HB 21-1067, HB0226, 102nd Gen. Assemb., Reg. (Ill. 2021); see also Michael T. Nietzel, *Illinois Passes Law Requiring Its Public Universities To Use Test Optional Admissions*, FORBES (July 11, 2021, 6:00 AM), <https://www.forbes.com/sites/michaelt Nietzel/2021/07/11/illinois-passes-law-requiring-its-public-universities-to-use-test-optional-admissions/?sh=1ea97625aa63>.

<sup>126</sup> Adam Beam, *New California Laws Address College Admissions Scandal*, AP NEWS (Oct. 4, 2019), <https://apnews.com/8cedaf12617e42e7b5d400659c24a0fe>.

<sup>127</sup> CAL. REV. & TAX. CODE § 17275.40 (2020).

<sup>128</sup> *Id.*

1] The Legal College Admissions Scandal

admitted students with ties to alumni or donations networks.<sup>129</sup> Like the College Admissions Fairness Act, this new statute poses the same issue of burdening universities to report data from multiple departments or data that may not even exist.<sup>130</sup> On the other hand, Cal. Educ. Code § 66018.5 can and has served as a laboratory for other states, as well as the federal government, who wish to implement such policies. California began reporting admissions data in 2020, and it is not readily apparent that schools had any unnecessary burden or objections to gathering and collecting such information.<sup>131</sup> Instead, the immediate issue related to the statute appears to relate to the statute's scope. The initial reports mandated by the statute were relatively unsurprising—while all of California's public institutions and a handful of competitive private colleges denied giving special treatment to legacy or donor-related applicants, six private universities—including Stanford and USC—admitted to accepting otherwise unqualified students to “encourage philanthropy.”<sup>132</sup> Yet, the reports raised further questions, as one scholar pointed out that, while the universities were only required to report admission of otherwise unqualified students, “most four-year colleges do not have a hard floor of academic requirements for admission.”<sup>133</sup> Thus, whether this statute will effect long-term change remains to be seen. As the only state to pass such a measure, it is

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<sup>129</sup> CAL. EDUC. CODE § 66018.5 (2020).

<sup>130</sup> See *supra* Part III.A for a discussion on the issues of reporting and reviewing data related to preferential treatment.

<sup>131</sup> Scott Jaschik, *A Little More Information on Legacy Applicants*, INSIDE HIGHER ED (July 6, 2020), <https://www.insidehighered.com/admissions/article/2020/07/06/california-law-sheds-light-how-private-colleges-handle-applications>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

necessary to continue to observe the effects of the statute on California universities' admissions processes. Should the statute overcome the current obstacles regarding scope of reporting and prove successful, it could help bolster support for the College Admissions Fairness Act. Like the College Admissions Fairness Act at the federal level, while legislators should not disregard the negative aspects of Cal. Educ. Code § 66018.5, it should not be entirely discounted until the statute's enforcement has been more firmly established and more carefully examined.

Cal. Educ. Code § 6602.5 limits schools' ability to accept students who do not meet the schools' identified admission requirements—situations known as admissions by exceptions.<sup>134</sup> The statute would require three senior campus administrators to approve the admission of applicants who do not meet prescribed eligibility requirements, but indicate a potential for success at the university.<sup>135</sup> Currently, the statute applies only to public schools receiving state funding—the University of California and California State University systems.<sup>136</sup> Even if Cal. Educ. Code § 6602.5 were to apply to private universities, such as USC and Stanford, this proposed issue has one flaw worth noting—it fails to account for how deep-rooted corruption may be in college admissions offices. The discovery exposed in the Harvard affirmative action cases demonstrates that the acceptance of students tied to donors does not involve just a handful of administrators, but multiple deans and admissions officers.<sup>137</sup> Likewise, the college admissions scandal involved a broad range of

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<sup>134</sup> CAL. EDUC. CODE § 6602.5 (2020).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See supra* notes 35–38, and accompanying text.

1] The Legal College Admissions Scandal

university officials, including athletic coaches.<sup>138</sup> Thus, requiring three administrators to grant special approval, while having the potential of limiting the number of admissions by exceptions, appears to be somewhat naïve—it supposes that three administrators would not be willing to grant approval for an acceptance that is attached to a multimillion dollar donation. Nonetheless, adding the hurdle to the process may be enough to slow or lessen the practice.

While the federal legislation identified in Part III.A may be more compelling since it has the potential to serve as a uniform solution to a nationwide issue and imposes an arguably more significant penalty on universities engaged in the practice of accepting manipulative donations, state legislation should not be entirely discounted—as California has already demonstrated, state legislation can be passed and implemented faster than legislation at a federal level.<sup>139</sup> Given that state legislation may be applied at a much faster rate, the states could serve as a model for subsequent federal

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<sup>138</sup> See *College Admissions Scandal: Your Questions Answered*, *supra* note 1.

<sup>139</sup> California lawmakers proposed its package of bills in March 2019, almost immediately after the indictments related to the college admissions scandal. Patrick McGreevy, *College Admissions Scandal Prompts California Lawmakers to Move Ahead with Reforms*, L.A. TIMES (Mar. 28, 2019, 3:50 PM), <https://www.latimes.com/politics/la-pol-ca-college-admission-cheating-california-legislature-bills-20190328-story.html>. A mere six months later, the bills were signed by Governor Newsom and were in effect by 2020. Beam, *supra* note 126. Meanwhile, the College Admissions Fairness Act, introduced in June 2019, is still sitting in the Senate Committee on Finance, two years later, with no indication of any pending action. S. 1732, 116th Cong. (2019).

legislation.<sup>140</sup> Regardless of whether state legislation arises as a result of state initiatives or in the light of failed federal legislation, it should be given fair consideration, as it presents a viable option to remedy the issue of purchased admissions.

### C. A Final Roadblock

In addition to the obstacles to legislation already identified, there is one final roadblock legislators must consider in implementing any regulations discouraging the purchase of admissions. Currently, this donation practice is entirely legal.<sup>141</sup> Implementing legislation that would prohibit such donations, or limit the ability of donors to make such donations, has the potential to push the wealthy to look for other avenues to ensure their students' acceptance to an elite university. The college admissions scandal serves as an important reminder of America's obsession with elite universities,<sup>142</sup> even though there is often no long-term benefit in obtaining post-graduate employment, and attendance does not guarantee career success.<sup>143</sup> As long as the wealthy remain transfixed with the notoriety of elite universities and their perceived

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<sup>140</sup> The College Admissions Fairness Act could potentially be amended after seeing the effects of state legislation. *See supra* notes 129–133 and accompanying text.

<sup>141</sup> *See* Vulaj *supra* note 45, at 47.

<sup>142</sup> *See* Alexandra Robbins, *Kids Are the Victims of the Elite-College Obsession*, THE ATLANTIC (Mar. 12, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/college-bribe-scandal-shows-elite-college-obsession/584719/> (revealing that Giannulli Mossimo, in coordinating his daughter's illegal admission to USC stated, "make sure we have a roadmap for success as it relates to [our daughter] and getting her into a school other than ASU!").

<sup>143</sup> *See supra* notes 70–72 and accompanying text.

1] The Legal College Admissions Scandal

benefits, many will still go to any length to ensure admissions. Thus, limiting legal donations may drive desperate actors to *illegal* action, such as the bribes and wire fraud seen in the college admissions scandal.

Nonetheless, the potential for illegal behavior should not be a reason to reject legislative efforts to curb the practice. Regardless of the laws in place, society will always have members who are willing to bend or break the rules to get ahead. The purpose of the law, however, is to limit as much of the behavior as possible. The issue of college admissions goes beyond a legal solution—to remedy the issue entirely would require Americans to reevaluate how they view education, opportunity, and success. The legislative remedies identified in this section are not purported to be a perfect solution. However, they do have potential to have a mitigating effect on the practice. The purchase of admissions demonstrates the dilemma many legislators face—they are choosing between better and worse, not perfect or nothing. Such a dilemma—the potential for continued illegal behavior—should not, however, discourage efforts to implement legislation, as some change is better than none.

## CONCLUSION

The use of donations to secure admissions to elite universities is pervasive in the American higher education system. The practice is bolstered by a system reliant on large monetary gifts. While large donations can be seen as beneficial to the maintenance of higher education and elite institutions, it is crucial to consider whether some of the donations are worth the toll they take on the higher education system. Not only is the student body

of these universities affected by less on-campus diversity, but entire groups of applicants are shut out of admissions in favor of their wealthier, but sometimes less qualified, peers. This practice further entrenches the economic and racial divides that currently beset our nation.

Perhaps the greater issue, however, is not the actual practice, nor the racial and economic divides it perpetuates, but is the fact that there is no perfect legal solution. From removal of tax deductions, to denial of tax exemptions, to stricter admission policies, all proposed solutions have a number of side effects.<sup>144</sup> As all of the proposed remedies currently stand, legislators are currently faced with choosing which is more important: ending the purchase of admissions, or ensuring the continuation of university funding and financial aid. Furthermore, drawing parameters for the law has the potential of leaving gaps for the wealthy and college administrators to exploit. Nonetheless, as observed in Part III, no law is perfect.<sup>145</sup> While some laws may have clearer parameters with less negative side effects, ultimately, there is no law that does not warrant some criticisms or produce undesirable responses. Here, ambiguity and gaps in the law may, ultimately, serve the greater purpose of ending the purchase of admissions.

This Article does not purport to place one proposed solution over another. Both at a state and federal level, proposed remedies have pros and cons. Rather, this Article should shed light on the intricacies of the college admissions process and

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<sup>144</sup> See *supra* Part III for an analysis of various legal solutions and their potential downsides.

<sup>145</sup> See *supra* Parts III.A & .C for a brief discussion on the imperfections of the law and such impurities' relationship to the justice system.

1] The Legal College Admissions Scandal

higher education. While none of the proffered solutions are perfect, none are unconscionable. The challenge now is for legislators to make reasonable considerations regarding what needs to be done to remedy the issues plaguing college admissions. With the college admissions scandal only recently bringing attention to the overall flaws in the process, an acceptable solution may take time to achieve. Perhaps further sociological studies, demonstrating the negative effects of the purchase of admissions, are necessary to provide a stronger basis on which lawmakers can act. However, both state governments and the federal government are already making small steps towards finding a plausible solution to the issue. For now, the best option for the legal community is to observe and consider—to observe whether the states' laws have been effectively enforced, and to consider whether federal legislation is possible, and what changes should be made to improve it.

Ultimately, perhaps the best solution to solving the problem of purchasing admissions is not a legal one, but instead involves a social restructuring of how Americans perceive higher education. If there is a de-emphasis on elite universities ab initio, questionable admissions—whether they be via legal donations or illegal bribes—may decrease naturally. Such a task, however, is no small feat. It would require the breaking down of current and long-held attitudes in favor of new perspectives about success and achievement, likely taking multiple generations to achieve. Nonetheless, it is still notable to consider that perhaps the best solution to the purchase of admissions is not a legal solution at all.