

# NOTES

## TAX COLLECTORS FOR FAIR ADMISSIONS: ADVANCING STATE-LEVEL TAX INCENTIVES TO CURB LEGACY ADMISSIONS

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## INTRODUCTION

For most high school students who apply to college, the application process is stressful.<sup>1</sup> The process that once required a five-sentence essay to gain admission to Harvard<sup>2</sup> now begins in earnest years before students even consider submitting their applications. Demand for higher education has soared,<sup>3</sup> and the college admissions process has become a sweepstakes. In 2022, Harvard College received nearly sixty thousand applications for fewer than two thousand available slots in its freshman class.<sup>4</sup> The competitive nature of college applications, which is not unique to Harvard, has left high school students worse off.<sup>5</sup>

As the college application process has become more competitive, elite universities' admissions practices have come under increasingly loud criticism. In particular, many advocates have demanded the abolition of race-based affirmative action, which considers an applicant's race in the college admissions process. After litigating the issue unsuccessfully in the 2000s and 2010s,<sup>6</sup> affirmative action critics found a friendly Supreme Court in the 2020s.<sup>7</sup> In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*), an ideologically-divided Supreme Court banned the use of

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1. See Jeremy Bauer-Wolf, *Over Half of Students Rank College Applications as Their Most Stressful Academic Experience, Survey Finds*, HIGHER ED DIVE (Aug. 25, 2023), <https://www.highereddive.com/news/over-half-of-students-rank-college-applications-as-their-most-stressful-aca/691808/> [<https://perma.cc/Z5YP-DUH5>].

2. See Eleanor Barkhorn, *JFK's Very Revealing Harvard Application Essay*, ATLANTIC (Nov. 21, 2013), <https://www.theatlantic.com/education/archive/2013/11/jfks-very-revealing-harvard-application-essay/281699/> [<https://perma.cc/F7QG-TLFM>].

3. See Michael T. Nietzel, *College Applications Are Up Dramatically in 2023*, FORBES (Mar. 30, 2023, 3:11 PM), <https://www.forbes.com/sites/michaelnietzel/2023/03/30/college-applications-are-up-dramatically-in-2023/?sh=701d03449c4d> [<https://perma.cc/28N5-6EMV>].

4. See *Harvard Admits 3.4% of Students to the Class of 2027*, CRIMSON EDUC. (Mar. 31, 2023), <https://www.crimsoneducation.org/us/blog/harvard-acceptance-rate/> [<https://perma.cc/3YSQ-DCAN>].

5. See Scott White, *College Admission's Part in the Decline of Mental Health in Teens*, FORBES (Sept. 9, 2023, 12:41 PM), <https://www.forbes.com/sites/scottwhite/2023/09/09/the-nightmare-of-college-admissions/> [<https://perma.cc/2EUT-N7LH>].

6. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016).

7. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

race as a factor when considering a student's application.<sup>8</sup> The Court's divided decision, which affirmative action critics praised and its defenders lamented,<sup>9</sup> reflected the nation's division on the topic.<sup>10</sup>

Hidden in the weeds of the Court's contentious majority, concurring, and dissenting opinions, however, was a potentially unifying policy. Undeniably, the Justices sparred vigorously about the use of race as a factor in university admissions. But Justices appointed by Republican and Democratic presidents alike described the consideration of a student's "legacy" status<sup>11</sup> in admissions processes with skepticism at best and outright disdain at worst.<sup>12</sup> The Justices' apparent negative sentiments for legacy admissions practices align closely with the views of most Americans.<sup>13</sup>

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8. *Id.* at 2160, 2207.

9. See Erin Doherty, *Trump, DeSantis Praise Supreme Court Affirmative Action Ruling*, AXIOS (June 29, 2023), <https://www.axios.com/2023/06/29/supreme-court-affirmative-action-gop-candidates-2024> [<https://perma.cc/N2RA-HTCK>]; Mike Lillis & Mychael Schnell, *Affirmative Action Ruling Sharply Divides Dems, GOP*, HILL (June 29, 2023, 1:26 PM), <https://thehill.com/homenews/house/4073932-affirmative-action-ruling-sharply-divides-dems-gop/> [<https://perma.cc/JX59-K2DJ>].

10. See *More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity in Admissions Decisions*, PEW RSCH. CTR. (June 8, 2023), <https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions/> [<https://perma.cc/35KQ-J6SX>] (indicating that 50 percent of Americans disapprove of considering race in university admissions to increase diversity in higher education).

11. A former university president defines "legacy admissions" as "the practice of a college giving preferential admissions treatment to the children of its alumni." See Michael T. Nietzel, *Legacy College Admissions Come Under Fire in New Report*, FORBES (Oct. 31, 2022, 10:38 AM), <https://www.forbes.com/sites/michaelt Nietzel/2022/10/30/legacy-college-admissions-come-under-fire-in-new-report/> [<https://perma.cc/6MT6-EBL4>].

12. See *Students for Fair Admissions*, 143 S. Ct. at 2215 (Gorsuch, J., concurring) ("[Harvard's] preferences for the children of donors, alumni, and faculty are no help to applicants who cannot boast of their parents' good fortune or trips to the alumni tent all their lives. While race-neutral on their face, too, these preferences undoubtedly benefit white and wealthy applicants the most."); *id.* at 2264 (Jackson, J., dissenting) (describing through an example of two students applying to the University of North Carolina how legacy admissions programs could implicitly allow universities to consider a white student's race and ignore a Black applicant's race).

13. See Vianney Gómez, *As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions*, PEW RSCH. CTR. (Apr. 26, 2022), <https://www.pewresearch.org/short-reads/2022/04/26/u-s-public-continues-to-view-grades-test-scores-as-top-factors-in-college-admissions/> [<https://perma.cc/NM8D-X3NK>] (indicating that 75 percent of Americans believed that whether a relative attended a school should not be considered in college admissions).

Justice Gorsuch took the strongest stance against legacy admissions practices of any Justice, writing that the practice “undoubtedly benefit[s] white and wealthy applicants the most.”<sup>14</sup> As his concurring opinion points out, athletes and children of donors make up roughly 5 percent of Harvard’s applicant pool, yet members of those groups account for 30 percent of admitted students each year.<sup>15</sup> Seemingly inconsistent with the value of equality on which the majority based its *SFFA* decision, proposals to outlaw or disincentivize legacy admissions have come in diverse forms since the decision.

Part I of this Note will contextualize the practice of legacy admissions, describe its inherent unfairness and deleterious effects, and explain why—notwithstanding those concerns—some universities still employ the practice in their admissions processes. With that background, Part II of this Note will explain why fiscal incentives are the most appropriate mechanism to disincentivize legacy admissions practices. Part III will then evaluate the flawed federal fiscal proposals to curb legacy admissions, and Part IV will argue that state-level solutions should be preferred to federal ones to respect the values of federalism and promote the most narrowly-crafted, individualized, and state-specific solutions.

## I. BACKGROUND

Legacy admissions practices have come under fire as “affirmative action for the rich” following the Supreme Court’s *SFFA* decision.<sup>16</sup> Lawmakers across the country at the state and federal levels have proposed banning legacy admissions entirely,<sup>17</sup> and at least one

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14. *Students for Fair Admissions*, 143 S. Ct. at 2215 (Gorsuch, J., concurring).

15. *See id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 171 (1st Cir. 2020)).

16. *See* Liam Knox, ‘Affirmative Action for the Rich’, INSIDE HIGHER ED. (July 26, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/07/26/would-ending-legacy-admissions-improve-elite-college> [<https://perma.cc/5YD5-T2M3>] (explaining how some universities, like Wesleyan University, ended their legacy admissions consideration following the Supreme Court’s decision because it was hypocritical).

17. *See, e.g.*, Paige Rawiszer, *Pa. Senator Proposes State-Wide Ban on Legacy Admissions—Including at Penn*, DAILY PENNSYLVANIAN (Aug. 30, 2023, 9:52 PM), <https://www.thedp.com/article/2023/08/penn-pennsylvania-state-senate-legacy-admissions> [<https://perma.cc/9LGY-QVHP>]; Assemb. 1423--A, 2023-2024 Reg. Sess. (N.Y. 2023).

state has already banned the practice at its public universities.<sup>18</sup> Policy proposals seeking to curb legacy admissions align with the strong public opposition to the practice that existed even before the *SFFA* decision.<sup>19</sup> In fact, opposition to legacy admissions practices has become a rare unifying bipartisan issue.<sup>20</sup>

The public's opposition to legacy admissions should not be surprising.<sup>21</sup> First, as Justice Thomas pointed out in his *SFFA* concurrence, college admissions decisions should be based on an applicant's own merit.<sup>22</sup> That argument is broadly appealing; applicants who are less competitive than their peers should not be given a "golden ticket" to a university simply because of who their parents are. Even the liberal Justices who supported Harvard's consideration of race in admissions agree with this sentiment by acknowledging the importance of admitting students on their own merit.<sup>23</sup>

Second, the deleterious effects of legacy admissions on corresponding student bodies are widely reported. Critics of legacy admissions argue that the practice perpetuates racial underrepresentation at

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18. See 2021 Colo. Sess. Laws 993.

19. See Vimal Patel, *Why Legacy Admissions Are at the Center of a Dispute in Higher Education*, N.Y. TIMES (July 26, 2023), <https://www.nytimes.com/2023/07/26/us/legacy-admissions-colleges-universities.html> [<https://perma.cc/N3AK-FU7A>] (referencing Gómez, *supra* note 13).

20. Jeannie Suk Gersen, *The End of Legacy Admissions Could Transform College Access*, NEW YORKER (Aug. 8, 2023), <https://www.newyorker.com/news/daily-comment/the-end-of-legacy-admissions-could-transform-college-access> [<https://perma.cc/L62P-D8GE>] ("After the fall of affirmative action, liberals and conservatives want to eliminate benefits for children of alumni."); Eden Villalovas, *Tim Scott Calls for End to Legacy Admissions in Wake of Affirmative Action Decision*, WASH. EXAM'R (June 29, 2023, 11:02 PM), <https://www.washingtonexaminer.com/news/1240292/tim-scott-calls-for-end-to-legacy-admissions-in-wake-of-affirmative-action-decision/> [<https://perma.cc/6KQS-HVRH>] ("Let's make sure that all admissions are based on academic scores and not just eliminating affirmative action, but let's look at the legacy programs," Scott said.); *id.* ("Practices like legacy admissions and other systems expand privilege instead of opportunity," President Joe Biden said.).

21. See Gersen, *supra* note 20 ("This near-instantaneous consensus on legacy admissions may seem surprising. But we have seen versions of it before. After California banned affirmative action in public education, in 1996, the University of California system chose to end legacy preferences.").

22. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2206 (2023) (Thomas, J., concurring) ("Meritocratic systems, with objective grading scales ... have always been a great equalizer.").

23. *Id.* at 2278 (Jackson, J., dissenting) (praising the University of North Carolina's merit-based admissions rubric while arguing that merit "cannot be fully determined without understanding [an applicant] in full," which includes considering that applicant's race).

colleges because “[c]ollege students of previous generations were less diverse than today’s applicants, and legacy preferences allow those past enrollments to influence the current generation of admits.”<sup>24</sup> To that point, a significantly smaller percentage of racial minorities have “legacy” status than their overall proportion of the applicant pools at many universities.<sup>25</sup> Moreover, because the use of legacy admissions facially discriminates in favor of applicants with parents who are connected to the university, the practice creates latent disadvantages to applicants from a lower socioeconomic class.<sup>26</sup>

Already aware of the inherent unfairness of legacy admissions and the harmful effects it has, some universities did away with the practice long ago.<sup>27</sup> Other universities have eliminated legacy admissions practices in the wake of the *SFFA* decision.<sup>28</sup> For example, Wesleyan University’s president said giving donors’ children preference in admissions in the wake of the *SFFA* decision “would make us hypocrites.”<sup>29</sup>

Although some universities have changed their admissions practices following the *SFFA* decision, many elite colleges have not.<sup>30</sup> Some universities remain steadfast in their refusal to budge

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24. Kathryn Ladewski, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577, 583 (2010).

25. *See id.* at 584 (referencing a United States Department of Education study concluding that Black students made up 10 percent of the 2002 entering student body at the University of Virginia but only 3 percent of legacy applicants that same year were Black).

26. *See* Geoff Bennett, Murrey Jacobson, Dorothy Hastings & Karina Cuevas, *Study Outlines How College Admissions Practices Benefit Richest Applicants*, PBS NEWS (July 24, 2023, 6:30 PM), <https://www.pbs.org/newshour/show/study-outlines-how-college-admissions-practices-benefit-richest-applicants> [<https://perma.cc/39HS-YJ24>] (citing a sixteen-year study conducted by Opportunity Insights, a group of Harvard economists).

27. The University of California system ended legacy admissions practices in the 1990s, as did the University of Georgia and Texas A&M. Gersen, *supra* note 20.

28. Ayelet Sheffey, *Harvard’s Big Dumb Bet on Legacy Admissions*, BUS. INSIDER (Oct. 9, 2023, 5:58 AM), <https://www.businessinsider.com/harvard-elite-colleges-legacy-admissions-financial-endowments-alumni-donations-2023-10> [<https://perma.cc/JXM9-WHLX>] (explaining that Wesleyan, Carnegie Mellon, and Occidental College eliminated their use of legacy admissions in the wake of the *SFFA* decision).

29. Liam Knox, *First Out of the Gate*, INSIDE HIGHER ED. (July 31, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/07/31/wesleyan-president-discusses-why-he-ended-legacy> [<https://perma.cc/6GWP-9NL9>].

30. *See id.* (“[A]mong highly selective institutions, Wesleyan still stands alone.”).

on the issue.<sup>31</sup> Scholars have advanced two main arguments in support of legacy admissions that could provide a more nuanced view of the practice and help to explain why some colleges have not abandoned it entirely.

First, at least some university leaders argue that private universities rely on increased fundraising efforts—which often accompany legacy admissions—to further diversify the student body and provide additional monetary aid to students.<sup>32</sup> While this claim may be supported anecdotally, evidence suggests that the emphasis universities place on their ability to fundraise through legacy admissions is overstated.<sup>33</sup>

Second—and perhaps more convincingly—some scholars point out that attacks on legacy admissions have emerged right as the first large generation of Black college graduates are sending their children to college.<sup>34</sup> Black college attainment has undeniably increased over the past half century, and some scholars argue that shutting the doors on legacy admissions could function as another impediment for Black college applicants.<sup>35</sup> Accordingly, while the arguments against legacy admissions practices remain rooted in the ideal of equality, this reality suggests that perhaps a more nuanced approach than banning legacy admissions outright may be worth exploring.

Given these conflicting interests, political actors should be mindful of both the harmful effects of legacy admissions while also

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31. Nick Anderson, *Will Top Schools Continue 'Legacy' Admissions Preferences? Many Say Yes.*, WASH. POST (Sept. 29, 2023, 9:03 AM), <https://www.washingtonpost.com/education/2023/09/29/colleges-keep-legacy-admissions/> [<https://perma.cc/2DJU-ZS2N>] (“Yale, Cornell, Duke, Brown, Vanderbilt, and Emory universities, as well as the University of Pennsylvania, all confirmed ... that they would consider the legacy ties of high school seniors who apply.”).

32. See William F. Tate IV, President, La. State Univ., Panel Discussion at the William & Mary Law Review Symposium: *Brown* at 70 (Feb. 16, 2024) (transcript on file with the William & Mary Law Review).

33. Richard D. Kahlenberg, *Letter to Congress: College Legacy Preferences Must Go*, CENTURY FOUND. (Feb. 27, 2018) <https://tcf.org/content/commentary/letter-congress-college-legacy-preferences-must-go/> [<https://perma.cc/GFJ9-C83U>] (citing Chad Coffman, Tara O’Neil & Brian Starr, *An Empirical Analysis of the Legacy Preferences on Alumni Giving at Top Universities*, in AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN HIGHER EDUCATION 101, 119-21 (Richard D. Kahlenberg ed., 2010)).

34. See Stefan Bradley, Professor, Amherst Coll., Panel Discussion at the William & Mary Law Review Symposium: *Brown* at 70 (Feb. 16, 2024) (transcript on file with the William and Mary Law Review).

35. See *id.*

acknowledging these less-than-obvious realities that the practice presents. To balance those interests most effectively, political actors must disincentivize universities from employing legacy admissions, but not to the point where the disincentive becomes overbearingly punitive and strips universities of their decision. Accordingly, to encourage the most productive engagement with universities on legacy admissions, political actors must speak the language to which elite universities respond: that of their bottom lines.

## II. FISCAL POLICY AS THE PROPER MECHANISM TO ADDRESS LEGACY ADMISSIONS

The Internal Revenue Code classifies colleges and universities as non-profits devoted to a charitable cause.<sup>36</sup> Despite this classification, college coffers have never been in better shape, as university endowments and net investment income have skyrocketed over the past two decades.<sup>37</sup> Tuition rate hikes at elite colleges have far surpassed the rate of inflation,<sup>38</sup> and demand for higher education has never been greater than it is today.<sup>39</sup> Despite these record-breaking figures, many colleges distribute just a tiny fraction of their net investment income to the students who pay tens of thousands of dollars in tuition.<sup>40</sup>

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36. See John D. Colombo, *Why Is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 842-43 (1993) (“[T]ax exemption for private educational institutions has been virtually unquestioned since colonial times and remains so.”).

37. See Mae C. Quinn, *Wealth Accumulation at Elite Colleges, Endowment Taxation, and the Unlikely Story of How Donald Trump Got One Thing Right*, 54 WAKE FOREST L. REV. 451, 453 (2019) (“For decades [higher education] institutions have been allowed to accumulate overflowing asset portfolios while continuing to call for millions in tax-free donations.”); Michael T. Nietzel, *Elite University Endowments Soar as Higher Ed Divide Grows*, FORBES (Oct. 18, 2021, 3:28 PM), <https://www.forbes.com/sites/michaelt Nietzel/2021/10/15/elite-university-endowments-soar-to-record-highs/?sh=10789ca52d5f> [<https://perma.cc/NSV3-5UHG>] (“Endowment returns at the Ivy League universities and numerous other elite colleges have soared to new highs this year.”).

38. See Brianna McGurran, *College Tuition Inflation: Compare the Cost of College over Time*, FORBES (May 9, 2023, 1:46 PM), <https://www.forbes.com/advisor/student-loans/college-tuition-inflation/> [<https://perma.cc/35AL-AE66>] (describing how the price to attend a four-year full-time college has increased by 180 percent, when adjusted for inflation, since 1980).

39. See Nietzel, *supra* note 3.

40. See MOLLY F. SHERLOCK, CONG. RSCH. SERV., IN12126, COLLEGE AND UNIVERSITY ENDOWMENTS: PAYOUT RATES AND SPENDING ON STUDENT FINANCIAL AID 1 (2023) (“Since



This reality has drawn criticism from political leaders for well over a decade. As early as 2008, Senator Chuck Grassley and the Senate Finance Committee probed over one hundred colleges about their tuition rates and the size of their endowments.<sup>41</sup> But subsequent efforts to investigate rising tuition costs and endowment sizes stalled following the Great Recession.<sup>42</sup> Around the same time, at least one statewide effort to probe taxing endowments arose in Massachusetts, where state legislators proposed a 2.5 percent tax on the net investment income of endowments valued at over one billion dollars.<sup>43</sup> Like the federal investigation, this effort “quickly fizzled.”<sup>44</sup>

Though unsuccessful at their outset, these proposals and investigations paved the way for increased scrutiny of university finances in the decade that followed. When the Republican-led Congress sought to pass corporate tax cuts through the Tax Cuts and Jobs Act (TCJA) in 2017, university endowment investment income seemed ripe as a source of potential tax offsets.<sup>45</sup> Similarly, statewide proposals to tax endowment income followed federal proposals in the 2010s. For example, in 2016, Connecticut state legislators proposed bills that would have taxed not only Yale’s endowment income but also the value of its academic buildings.<sup>46</sup>

While scrutiny of university income failed to pick up steam years earlier, Congress was armed with a variety of social and political factors in the mid-2010s that motivated and ultimately sustained

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2017, the average spending (or payout) rate across all institutions has fluctuated, with a period high of 4.8% in 2021, and a period low of 4.2% in 2022.”)

41. Wally Hilke & Amit Jain, *Public Interests, Private Institutions? Public Policy Challenges to Tax-Free Universities*, 127 YALE L.J.F. 94, 94 (2017).

42. Quinn, *supra* note 37, at 460 (“[A]ny further efforts to change the financial practices of the nation’s most prestigious higher education entities, were set to the side during the Obama Administration following the 2008 Wall Street crash.”).

43. Doug Lederman, *Endowment Debate Seeps into the States*, INSIDE HIGHER ED. (Apr. 30, 2008), <https://www.insidehighered.com/news/2008/05/01/endowment-debate-seeps-states> [<https://perma.cc/7WGT-BYW4>].

44. Hilke & Jain, *supra* note 41, at 112.

45. See Quinn, *supra* note 37.

46. See *FAQs on State Legislation to Tax Yale’s Academic Property*, YALENEWS (Apr. 21, 2016), <https://news.yale.edu/2016/04/21/faqs-state-legislation-tax-yale-s-academic-property> [<https://perma.cc/W2BG-8SM3>].

the push to tax university endowments.<sup>47</sup> Fearing that their bottom line was now in danger, universities responded swiftly. College presidents throughout the country publicly opposed and lobbied against the endowment tax before the TCJA passed.<sup>48</sup> Despite their efforts, the TCJA became law and imposed a 1.4 percent tax on the endowment investment income of private colleges and universities that met certain requirements.<sup>49</sup>

After the endowment tax passed, forty-nine university presidents and chancellors penned a letter to Congress to express their “deep objections to ... [the] unprecedented and damaging tax on the charitable resources at ... American colleges and universities.”<sup>50</sup> In the years since its implementation, university leaders have done all they can to advocate for the repeal or reduction of the endowment tax. Some school administrators have sharply criticized the tax, going so far as to call it “un-American.”<sup>51</sup> Some college presidents personally met with high-ranking lawmakers to lobby for the repeal

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47. For a discussion of the social factors that motivated the push to tax university endowment income, see Quinn, *supra* note 37, at 462-66, and see also Ben Trachtenberg, *The People v. Their Universities: How Popular Discontent Is Reshaping Higher Education Law*, 108 KY. L.J. 47 (2020).

48. Nick Anderson & Danielle Douglas-Gabriel, *Colleges Mobilize to Fight House GOP's Proposed Endowment Tax*, WASH. POST (Nov. 8, 2017, 5:44 PM), [https://www.washingtonpost.com/local/education/colleges-mobilize-to-fight-house-gops-proposed-endowment-tax/2017/11/08/9dbf8e04-c499-11e7-aae0-cb18a8c29c65\\_story.html](https://www.washingtonpost.com/local/education/colleges-mobilize-to-fight-house-gops-proposed-endowment-tax/2017/11/08/9dbf8e04-c499-11e7-aae0-cb18a8c29c65_story.html) [<https://perma.cc/679D-PA9U>] (“The American Council on Education and 45 other education groups sent the Ways and Means Committee a letter ... expressing ‘grave concerns’ with the [endowment tax bill].”); Brandon J. Dixon, *Faust Calls Republican Tax Plan ‘Blow at the Strength of American Higher Education,’* HARV. CRIMSON (Nov. 6, 2017), <https://www.thecrimson.com/article/2017/11/6/faust-criticizes-republican-tax-plan/> [<https://perma.cc/G7LN-E42X>] (“University President Drew G. Faust called a Republican proposal to tax large university endowments a ‘blow at the strength of American higher education.’”).

49. 26 U.S.C. § 4968(a); Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13701, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.); see James J. Fishman, *How Big Is Too Big: Should Certain Higher Educational Endowments' Net Investment Income Be Subject to Tax?*, 28 CORNELL J.L. & PUB. POL'Y 159, 160-61 (2018).

50. Letter from University Presidents to Congressional Leadership (Mar. 7, 2018), <https://www.insidehighered.com/sites/default/files/media/3-7-18%20Universities%20letter%20re%20endowment%20tax.pdf> [<https://perma.cc/Z6SY-8HR7>].

51. Gwen O'Brien, *Endowment Pool Has Made a Notre Dame Education Possible for Thousands More Students*, NDWORKS (Sept. 20, 2019), <https://ndworks.nd.edu/news/taxing-notre-dames-endowment-pool-would-be-un-american-says-chief-investment-officer/> [<https://perma.cc/2MYA-3A9H>] (quoting University of Notre Dame Vice President and Chief Investment Officer Scott Malpass).

of the tax.<sup>52</sup> Other universities hired lobbying firms to do their work for them on Capitol Hill.<sup>53</sup> Even more universities appealed to the public to emphasize that their endowment income goes towards scholarship assistance and other student-related benefits.<sup>54</sup>

It is not surprising that universities sprang to action when their endowment investment income was at stake. Even a relatively minor tax, like the 1.4 percent that the TCJA imposed,<sup>55</sup> amounts to a tax bill in the millions for universities.<sup>56</sup> Stanford University reported an estimated tax liability of \$42.9 million due to the endowment tax, while Harvard reported a \$37.7 million tax bill.<sup>57</sup> While these bills are the highest that universities have publicly reported, the median tax bill of thirteen universities that responded to a survey still surpassed \$1 million.<sup>58</sup>

The particular structure of the TCJA endowment tax, compared to prior endowment tax proposals, likely contributed to the outrage associated with the tax. While other endowment tax proposals (though none that were officially introduced as a bill) limited a school's liability if they spent a high enough percentage of their endowment on student services,<sup>59</sup> there is no way to avoid the

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52. Lee Fang, *Ivy League Universities Push for Special Tax Cut*, INTERCEPT (July 25, 2022, 2:14 PM), <https://theintercept.com/2022/07/25/harvard-university-endowment-tax-cut/> [<https://perma.cc/4CM6-97UB>].

53. See Princeton's LD-2 2023 Disclosure Form (on file with author) (hiring lobbyists to support H.R. 5152, The Higher Education Endowment Tax Reform Act, and oppose H.R. 8883, The Higher Education Accountability Tax Act).

54. For an example of how universities characterize the impacts of the endowment tax, see Swarthmore College's response: "Swarthmore is one of only a few colleges in the country that's able to offer need-blind admissions.... That's only possible through the support of our endowment, and this tax diminishes our ability to do so. In essence, it's a punitive tax that threatens to reduce access to a college education for students from lower-income families." Rick Seltzer, *How Much Are Most Colleges Paying in Endowment Tax?*, INSIDE HIGHER ED. (Feb. 17, 2020), <https://www.insidehighered.com/news/2020/02/18/wealthiest-universities-are-paying-big-endowment-tax-bills-how-much-are-others-who> [<https://perma.cc/PCV5-FZDF>].

55. See SHERLOCK, *supra* note 40 ("The endowment excise tax, as a 1.4% tax on net investment income of taxable institutions raising \$68.1 million in 2021, is small when compared to total endowment assets or endowment distributions.").

56. See Seltzer, *supra* note 54.

57. *Id.*

58. *Id.*

59. Thomas Kaplan, *Senator Proposes Mandating Greater Use of Endowment*, YALE DAILY NEWS (Oct. 19, 2007, 12:00 AM), <https://yaledailynews.com/blog/2007/10/19/senator-proposes-mandating-greater-use-of-endowment/> [<https://perma.cc/6Q5E-5FEQ>] ("Grassley's proposal would require colleges with endowments exceeding \$500 million to spend at least 5 percent

liability under the TCJA.<sup>60</sup> So long as universities meet the educational and financial requirements under the statute, they are required to pay the 1.4 percent tax.<sup>61</sup>

In that context, universities did everything they could to prevent the endowment tax from becoming law. Once it became law, they devoted their political capital, public resources, and administrators' time to reduce or repeal a low 1.4 percent net investment tax.<sup>62</sup> When their endowment investment income was on the line, university administrators sprang to action. If the public wants universities to act on legacy admissions—and they do<sup>63</sup>—then legislators and legislatures alike need to speak a language to which college administrators know how to respond: tax policy.

### III. IMPERFECT FEDERAL FISCAL OPTIONS

There are a variety of federal tax policy changes that could disincentivize legacy admissions practices among colleges and universities, some of which have even been threatened in the past to discourage other university behavior.

#### A. *TCJA Endowment Tax Hike*

Political leaders have been calling for universities to pay out a higher portion of their annual endowment for years.<sup>64</sup> Some

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of their endowments on an annual basis.”).

60. See 26 U.S.C. § 4968.

61. See *id.*

62. See *supra* notes 50-56 and accompanying text.

63. See Gómez, *supra* note 13 (indicating that 75 percent of Americans believe that whether a relative attended that school should not be considered in college admissions).

64. See Press Release, Charles Grassley, Senator, United States Senate, Grassley Praises Yale's Endowment Announcement, Looks for More Action on Tuition Affordability (Jan. 7, 2008), <https://www.grassley.senate.gov/news/news-releases/grassley-praises-yales-endowment-announcement-looks-more-action-tuition> [<https://perma.cc/W6WS-BQ2X>] (“[O]ther tax-exempt entities, such as most private foundations, have a mandatory pay-out requirement of 5 percent a year. It’s reasonable to consider a mandatory endowment pay-out requirement for colleges.”); *University Endowments Should Help Lower Students’ Costs or Risk Losing Tax-Favored Status, Says Trump*, EY TAX NEWS UPDATE (Sept. 30, 2016), <https://taxnews.ey.com/news/2016-1672-university-endowments-should-help-lower-students-costs-or-risk-losing-tax-favored-status-says-trump> [<https://perma.cc/93GK-V79C>] (“In 2008, then-Chair of the Senate Finance Committee, Max Baucus, together with Senator Charles Grassley, proposed a mandatory 5% payout for university endowments.”).

politicians have suggested that universities should be subject to a higher endowment tax if their endowment payout rate does not meet a federally prescribed minimum.<sup>65</sup> Similarly, politicians have threatened a higher endowment tax for universities that raise the cost of tuition above the rate of inflation.<sup>66</sup> Clearly politicians are not afraid to leverage the endowment tax to incentivize colleges to act on matters that they deem to be important.

Accordingly, one possible way to disincentivize legacy admissions would be to threaten universities with a higher federal endowment tax rate if they continue to engage in the practice. The last time universities faced a minor 1.4 percent tax, they responded rapidly.<sup>67</sup> When faced with an actual choice—pay a higher tax rate or continue the practice of legacy admissions—there is a real chance that some hold-out universities would respond with their bottom line in mind.

This plan likely would not face significant constitutional hurdles because Congress's taxing power has always been interpreted broadly,<sup>68</sup> and this has especially been the case under the Roberts Court.<sup>69</sup>

Nevertheless, a federal tax hike has the potential to be both over-inclusive and under-inclusive—as the original TCJA endowment tax

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65. Press Release, Tom Reed II, Congressman, House of Representatives, Reed Fights for Students, Working Families (Dec. 5, 2016), <https://justfacts.votesmart.org/public-statement/1146450/reed-fights-for-students-working-families> [<https://perma.cc/7A48-93UF>]; Scott Jaschik, *New Version of Proposal to Regulate Endowments*, INSIDE HIGHER ED. (Dec. 6, 2016), <https://www.insidehighered.com/quicktakes/2016/12/07/new-version-proposal-regulate-endowments> [<https://perma.cc/4MS2-ETC8>] (describing Representative Reed's legislative proposal that would have required universities with endowments valued at \$1 billion or higher to pay 25 percent of their investment gains to "students from middle- and working-class families" or pay a higher endowment investment tax rate).

66. See Higher Education Accountability Tax Act, H.R. 8883, 117th Cong. (2022) (proposing a 20 percent endowment tax to universities that raise the cost of tuition over the cost of inflation).

67. See *supra* notes 50-56 and accompanying text.

68. Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 1035 (2011) ("[T]he taxing power is the Constitution's hidden giant. The Supreme Court has interpreted the taxing power broadly.").

69. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (concluding that the individual mandate of the Affordable Care Act was constitutional under Congress's taxing power). Chief Justice Roberts's expansive view of Congress's taxing power has drawn criticism. See Brett W. Hastings, *Taxation Without Limitation: The Prohibited Pretext Doctrine v. The Sebelius Theory*, 15 MARQ. ELDER'S ADVISOR 229, 240 (2014) ("Under the Sebelius Theory, it is nearly impossible to identify any legislation that would be unconstitutional, if framed as a tax.").

was<sup>70</sup>—towards the end goal of promoting diversity in higher education. A tax eyed at universities that engage in legacy admissions may establish a “tight fit” targeting that practice, but other, more subtle admissions practices that are inequitable or reduce diversity could slip through the cracks of such a tax. For example, if universities do not engage in legacy admissions practices but still make no effort to promote socioeconomic or racial diversity on their campus, they could avoid federal tax liability. This is problematic because while legacy admissions is a specific practice, its negative effects stem in part from its reduction of racial and socioeconomic diversity on college campuses.<sup>71</sup>

Similarly, universities that engage in legacy admissions practices but that put significant resources into attracting diverse applicants and compiling a diverse student body could now be saddled with a tax liability. That would seem to punish the exact type of conduct that legacy admissions opponents hope to see out of universities.

While such over- and under-inclusivity appears to be a detriment of any tax that is triggered by legacy admissions practices, these concerns are particularly worrisome on the federal level. When the TCJA imposed the endowment tax, fewer than forty institutions qualified for tax liability,<sup>72</sup> which is hardly an inspiring number considering the thousands of higher education institutions that are active in the United States.<sup>73</sup> Moreover, not all universities that currently pay the TCJA endowment tax engage in legacy admissions practices,<sup>74</sup> which further weakens the strength of a federal tax

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70. See Fishman, *supra* note 49, at 194 (explaining that the endowment tax did not capture the endowments of many wealthy universities, like Columbia, Cornell, Johns Hopkins, and Northwestern, just to name a few, all of whom have endowments valued in the billions).

71. See Kahlenberg, *supra* note 33.

72. See Melissa Korn & Richard Rubin, *Endowment Tax on Wealthiest Universities Netted a Fraction of Predictions in 2021*, WALL ST. J. (Oct. 4, 2022, 8:31 AM), <https://www.wsj.com/articles/endowment-tax-on-wealthiest-universities-netted-a-fraction-of-predictions-in-2021-11664886683> [<https://perma.cc/7RTT-LB5T>] (reporting that thirty-three universities paid the endowment tax in 2021).

73. See Fishman, *supra* note 49, at 161 n.8 (“The National Association of Independent Colleges and Universities estimates the tax will affect 35 colleges—0.8% of the nation’s 4,583 colleges.”).

74. The Massachusetts Institute of Technology is required to pay the 1.4 percent endowment tax. See Jessica Shi, *Endowment Excise Tax to Cost MIT \$10 Million a Year*, *Reif Says*, TECH (Jan. 17, 2018), <https://thetech.com/2018/01/17/endowment-excise-tax> [<https://>

hike. Given this reality, it is wise to let state legislatures evaluate university endowments in each of their states to determine how to craft a tax that applies to their local institutions. State control of the endowment tax is especially important because Congress demonstrated that a nuanced endowment tax is difficult to craft on the federal level when it passed a binary tax.<sup>75</sup>

### B. The Bob Jones “Public Interest” Option

Another potential federal policy to combat the use of legacy admissions—which has been written about at length in similar contexts<sup>76</sup>—would be to strip a university’s tax-exempt status if they engage in legacy admissions.<sup>77</sup> Such a proposal follows from the Supreme Court’s decision in *Bob Jones University v. United States*.<sup>78</sup>

For non-profits to qualify for tax-exempt status under the Internal Revenue Code, they must fulfill a “charitable” purpose<sup>79</sup> and “not be contrary to public policy.”<sup>80</sup> Bob Jones University imposed a series of racially discriminatory policies in the 1970s, such as forbidding interracial dating.<sup>81</sup> These actions triggered scrutiny from the IRS, and the Fourth Circuit determined that the university’s racially discriminatory policies “violated the clearly defined

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perma.cc/BX4G-25PS]. But they do not consider a student’s “legacy status” as part of an applicant’s application. See *Does MIT Consider Legacy?*, MIT ADMISSIONS, <https://mitadmissions.org/help/faq/legacy/> [<https://perma.cc/N5XY-ZL29>] (“MIT doesn’t consider legacy or alumni relations in our admissions process.”).

75. See 26 U.S.C. § 4968 (explaining the criteria for applicable educational institutions that must pay the tax).

76. See Gabrielle Wilson, *The Legal College Admissions Scandal: How the Wealthy Purchase College Admission to the Nation’s Elite, Private Universities Through Donations*, 2021 B.Y.U. EDUC. & L.J. 143, 167 (“One particularly notable example of the exercise of taxation powers to regulate universities can be identified in *Bob Jones University v. United States*.”); Colombo, *supra* note 36, at 853 (“Perhaps no aspect of tax exemption for educational institutions ... has received more commentary than the IRS’s decision to withhold exemption from racially discriminatory schools.”).

77. See Wilson, *supra* note 76.

78. See 461 U.S. 574, 605 (1983) (“The IRS properly denied tax-exempt status to [Petitioners].”).

79. 26 U.S.C. § 501(c)(3) (extending the tax exemption to “[c]orporations ... organized and operated exclusively for religious, charitable ... or educational purposes”).

80. *Bob Jones Univ.*, 461 U.S. at 582.

81. *Id.* at 580-81.

public policy, rooted in our Constitution, condemning racial discrimination.”<sup>82</sup> The Supreme Court agreed.<sup>83</sup>

Importantly, the Supreme Court noted that Congress vested in the IRS “very broad authority” to interpret the nation’s tax laws.<sup>84</sup> Despite this authority, the Court emphasized the significance of the IRS’s actions: “[A] declaration that a given institution is not ‘charitable’ should be made *only* where there can be *no doubt* that the activity involved is contrary to a fundamental public policy.”<sup>85</sup> The policy at issue, of course, was explicit racial discrimination, which presents the greatest weakness to applying *Bob Jones* to the current climate of legacy admissions.<sup>86</sup>

The Court emphasized that it was undeniable that racial discrimination in education was “not ‘charitable’ within the common law concepts.”<sup>87</sup> The Court then explained that racial discrimination had already been rejected by all three branches of the federal government.<sup>88</sup>

True, legacy admissions practices most frequently benefit white and wealthy college applicants.<sup>89</sup> But the practice of legacy admissions is not explicitly a racialized policy; the benefits to white applicants are the result of a disproportionate impact of the policy. On its surface, the beneficiaries of legacy admissions are not necessarily of a particular race.<sup>90</sup> That does not present the same type of

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82. *Id.* at 582 (quoting *Bob Jones Univ. v. United States*, 639 F.2d 147, 151 (1980)).

83. *Id.* at 595 (“There can thus be no question that the interpretation of § 170 and § 501(c)(3) announced by the IRS in 1970 was correct.... It would be wholly incompatible with the concepts underlying tax exemption to grant the benefit for tax-exempt status to racially discriminatory educational entities.”).

84. *Id.* at 596.

85. *Id.* at 592 (emphasis added).

86. Gabrielle Wilson does a phenomenal job synthesizing *Bob Jones* and applying it to the current climate of “buying” admissions through donations. She adequately describes the challenges of employing a *Bob Jones* framework to the current reality of university admissions. See Wilson, *supra* note 76, at 167-170. This Note reiterates the critiques she raises and includes an analysis under the Major Questions Doctrine. See *infra* note 95 and accompanying text.

87. *Bob Jones Univ.*, 461 U.S. at 598 (quoting Rev. Rule 71-447, 1971-2 C.B. 231).

88. *Id.*

89. See Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. ECON. 133, 135 (2022).

90. This reality is echoed in the criticism about ending legacy admissions practices when the first large generation of Black college graduates are sending their children to college. See, e.g., Nick Chiles, *OPINION: Banning Legacy Admissions Will Deliver Another Blow to the*



facially discriminatory conduct that Congress and the Court have remedied in the past.

Similarly, as Gabrielle Wilson identifies, there is far less clarity from the federal government as to the legality of particular admissions practices than there is about explicit racialized discrimination in higher education.<sup>91</sup> While the Department of Education opened a civil rights investigation into legacy admissions practices<sup>92</sup> and Senators across the political spectrum have denounced the use of legacy admissions,<sup>93</sup> opposition to the practice is hardly as settled as the issue of explicit race discrimination.

Additionally, stripping a university's tax exemption is a significant act, especially when unelected officials from the IRS would be the actors if they followed the same course of action that they did in *Bob Jones*. As the Supreme Court noted, stripping a university's tax-exempt status for failing to be charitable sends a strong message to the community, and such a move should be made *only* when there is no doubt that a policy is contrary to a fundamental public policy.<sup>94</sup> While one could argue that inequitable access to higher education violates a "fundamental public policy," the recent evolution of the Major Questions Doctrine by the Roberts Court has strongly limited the ability of executive agencies to unilaterally decide controversial politically-coded questions.<sup>95</sup>

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*Children of Black Alumni*, HECHINGER REP. (Mar. 30, 2024), <https://hechingerreport.org/opinion-banning-legacy-admissions-will-deliver-another-blow-to-the-children-of-black-alumni/> [<https://perma.cc/3TM2-GUYU>]. In a world without legacy admissions, some Black applicants will lose an advantage that many white families have been able to exploit for decades. *Id.*

91. Wilson, *supra* note 76, at 169; *see also* Colombo, *supra* note 36, at 855 ("[L]ower courts have not yet fully defined how strong or definitely-stated a public policy must be in order to affect exempt status.").

92. Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html> [<https://perma.cc/DDC6-HR73>].

93. *See, e.g.*, Lauren Sforza, *Tim Scott Calls on Universities to End Legacy Admissions*, HILL (June 29, 2023, 3:54 PM), <https://thehill.com/homenews/campaign/4074428-tim-scott-calls-on-universities-to-end-legacy-admissions/> [<https://perma.cc/VF9F-ZY9A>].

94. *Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983).

95. *See* Allison Orr Larsen, *Why the Word 'Doctrine' Matters in the Major Questions Doctrine*, BLOOMBERGL. (July 6, 2023, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/why-the-word-doctrine-matters-in-the-major-questions-doctrine> [<https://perma.cc/UNN5-8TDQ>] ("In the past two years, the [major questions] doctrine has been invoked in Supreme Court decisions striking down the Clean Power Plan, the pandemic eviction moratorium, and now student debt relief.").

Moreover, interpreting the Internal Revenue Code's definition of "public policy" and determining whether universities that engage in legacy admissions operate counter to that "public policy" has wide-ranging impacts. Universities have demonstrated that they are invested in their tax status<sup>96</sup> and could make a compelling argument, as Justice Powell did in his *Bob Jones* concurrence, that the job of interpreting and clarifying this provision of the tax code should be left to the elected officials in Congress.<sup>97</sup>

Put simply, interpreting the tax code in a way that would strip universities of their tax-exempt status because of their legacy admissions practices poses significant legal challenges.

### *C. Current Federal Proposals: Fair College Admissions for Students Act & MERIT Act*

The federal mechanism aimed at curbing legacy admissions that has gained the most support has been through legislation amending the Higher Education Act. Even before the *SFFA* decision, federal lawmakers eyed legacy admissions as a target. In 2022, Senator Jeff Merkley and Congressman Jamal Bowman proposed the Fair College Admissions for Students Act, which would amend the Higher Education Act of 1965 to prohibit universities from engaging in legacy admissions programs.<sup>98</sup> Under that proposal, universities that consider a student's "legacy" status would be ineligible to participate in federal student aid programs.<sup>99</sup>

Senator Merkley and Congressman Bowman reintroduced this bill to the 118th Congress in July 2023 following the *SFFA* decision.<sup>100</sup> A variety of activist groups have endorsed the bill, including

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96. See *supra* notes 50-56 and accompanying text.

97. See Colombo, *supra* note 36, at 855 ("As a concurring Justice worried, if not adequately restrained, the Court's decision could reach organizations with unpopular ideas that contribute to diversity of viewpoint .... [I]n any event, the IRS should not be making such substantive decisions.").

98. Press Release, Jeff Merkley, Senator, United States Senate, Merkley, Bowman Introduce Bill to End Legacy Admission Preferences at Colleges and Universities (Feb. 2, 2022), <https://www.merkley.senate.gov/merkley-bowman-introduce-bill-to-end-legacy-admission-preferences-at-colleges-and-universities-22/> [<https://perma.cc/8H9J-JMXV>].

99. *Id.*

100. Press Release, Jeff Merkley, Senator, United States Senate, Merkley, Bowman: No More Legacy Admissions at Colleges and Universities (July 26, 2023), <https://www.merkley.senate.gov/merkley-bowman-no-more-legacy-admissions-at-colleges-and-universities-23/>.

the NAACP, the Thurgood Marshall College Fund, and the National Education Association.<sup>101</sup>

Senators Todd Young and Tim Kaine proposed similar legislation in November 2023 titled the Merit-Based Educational Reforms and Institutional Transparency (MERIT) Act.<sup>102</sup> Their bill would also amend the Higher Education Act to require schools to abandon the use of “preferential treatment” in their admissions practices or face losing their accreditation.<sup>103</sup> Accreditation is a requirement to receive Title IV federal funds under the Higher Education Act,<sup>104</sup> so such a policy could amount to universities losing their federal funds.

Some student groups at elite colleges support similar federal solutions, arguing that “[t]he federal government should leverage the [\$642 million in federal] funding it provides institutions such as Harvard to universally mandate the abolition of legacy preferences in admissions.”<sup>105</sup>

While these proposals are straightforward and have undeniably garnered a level of legislative support,<sup>106</sup> they are flawed for critical reasons. First, most aid that the federal government supplies universities with goes towards student financial aid: “[S]tudent financial aid accounts for the lion’s share of federal dollars that go to colleges and universities.”<sup>107</sup> In fiscal year 2022, the federal

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senate.gov/merkley-bowman-no-more-legacy-admissions-at-colleges-and-universities [https://perma.cc/6E2D-844W].

101. *Id.*

102. Press Release, Tim Kaine, Senator, United States Senate, Young, Kaine Introduce Bill to End Legacy Admissions (Nov. 7, 2023), <https://www.kaine.senate.gov/press-releases/young-kaine-introduce-bill-to-end-legacy-admissions> [https://perma.cc/L5QL-64Z5].

103. *Id.*

104. ALEXANDRA HEGJI, CONG. RSCH. SERV., R43159, INSTITUTIONAL ELIGIBILITY FOR PARTICIPATION IN TITLE IV STUDENT FINANCIAL AID PROGRAMS 1 (2023), <https://sgp.fas.org/crs/misc/R43159.pdf> [https://perma.cc/2D9K-M5SG].

105. The Crimson Editorial Board, *Legacy Admissions Is a Federal Issue, Not a State One*, HARV. CRIMSON (Apr. 17, 2023), <https://www.thecrimson.com/article/2023/4/17/editorial-legacy-admissions-state/> [https://perma.cc/MQF6-KB35].

106. At least thirty federal lawmakers have joined Senator Merkley’s proposal as co-sponsors. See Merkley, *supra* note 100.

107. Brian Schwartz, *Hearings, Subpoenas, Crackdowns: Inside House Republicans’ Long-Term Plan to ‘Defund’ Elite Universities*, CNBC (Dec. 19, 2023, 12:28 PM), <https://www.cnbc.com/2023/12/18/ivy-league-crackdown-house-republicans-plan-to-defund-top-universities.html> [https://perma.cc/8ZUP-7N8J].

government provided 9.8 million students with over \$111 billion in federal financial assistance.<sup>108</sup>

Accordingly, low-income students that rely on federal student aid programs like Pell Grants are precisely the students who will be hurt the most by such a restriction on federal aid to these universities. While the restriction of federal funds on its surface seems to harm the universities, it harms the students whom such a bill is intended to protect the most, since the bulk of federal funds to universities goes towards federal student aid.<sup>109</sup>

Second, universities rely heavily on the federal funds that do not go towards student aid programs. Up to 67 percent of Harvard's sponsored revenue in 2021 came from federal funds, accounting for a majority of the funds the university received that year.<sup>110</sup> Threatening to withhold this amount of funding from universities not only harms students, but it amounts to strong-arming colleges to the point of holding a proverbial gun to their head. While this type of "nuclear" option may be appropriate for the explicit race-based discrimination at play in *Bob Jones*, as an example,<sup>111</sup> it is not clear that such an action is appropriate with respect to legacy admissions. This is especially true because legacy admissions proponents advance at least two justifications in support of their position.<sup>112</sup> Essentially, under these proposals, the federal government could hold university budgets hostage to force their hand on legacy admissions. Such a reality is unduly coercive and amounts to even further oversight of an already heavily regulated industry.<sup>113</sup>

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108. KYLE D. SHOHI & RITA R. ZOTA, CONG. RSCH. SERV., R43351, THE HIGHER EDUCATION ACT (HEA): A PRIMER 1 (2023), <https://crsreports.congress.gov/product/pdf/R/R43351/21> [<https://perma.cc/M668-9R3V>].

109. See Schwartz, *supra* note 107.

110. *Id.*

111. See *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

112. See *supra* notes 32-34 and accompanying text.

113. For a discussion about federal regulation applied to colleges and universities, see *infra* note 139 and accompanying text.

## IV. STATE OPTIONS

A. *Brief Overview of State Responses*

The federal government is not the only potential actor in the fight against legacy admissions. State governments around the country have begun targeting legacy admissions through a variety of mechanisms. In 2021, Colorado banned the use of legacy admissions practices in the state's public colleges and universities,<sup>114</sup> and at least four other states have followed suit in some capacity.<sup>115</sup> Republican and Democratic governors alike have signed these bans into law,<sup>116</sup> indicating once more the bipartisan disapproval of legacy admissions practices. In states where bans have been proposed but have not yet been implemented, like New York,<sup>117</sup> legislatures have faced "opposition from Ivy League institutions and associations of colleges."<sup>118</sup>

Interestingly, state proposals to curb legacy admissions vary throughout the country. Some states have banned the practice outright, in both public and private colleges,<sup>119</sup> while others have implemented "symbolic" bans that target public universities that already did not consider a student's legacy status in their admissions processes.<sup>120</sup>

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114. See 2021 Colo. Sess. Laws 993-94.

115. Blake Jones, *Why Legacy Admissions Bans Have Exploded in the US*, POLITICO (Oct. 2, 2024, 5:00 AM), <https://www.politico.com/news/2024/10/02/affirmative-action-legacy-admission-bans-00181942> [<https://perma.cc/U5PA-UKZA>].

116. See, e.g., Janet W. Lee, *Virginia Has Banned Legacy Admissions at Its Public Colleges*, NPR (Mar. 11, 2024 3:55 PM), <https://www.npr.org/2024/03/11/1237630465/virginia-legacy-admissions-college> [<https://perma.cc/77H3-SRYB>] (describing Virginia's ban on legacy admissions at state colleges and universities, which Governor Glenn Youngkin, a Republican, signed into law); Michael T. Nietzel, *Legacy Admission Ban Passes in Maryland, Falters in Connecticut*, FORBES (May 2, 2024, 2:07 PM), <https://www.forbes.com/sites/michaelt Nietzel/2024/05/02/legacy-admission-ban-passes-in-maryland-falters-in-connecticut/> [<https://perma.cc/FM94-8CEQ>] (describing Maryland's ban that Governor Wes Moore, a Democrat, signed into law).

117. See Assemb. 1423--A, 2023-2024 Reg. Sess. (N.Y. 2023).

118. See Jones, *supra* note 115.

119. See, e.g., Nietzel, *supra* note 116 (describing Maryland's ban, which applies to both public and private universities).

120. See Jones, *supra* note 115.

Massachusetts's proposed plan to combat legacy admissions invokes up to a 0.2 percent tax on the value of university endowments that engage in legacy admissions practices.<sup>121</sup> One of the bill's sponsors, Simon Cataldo, explained that the Massachusetts bill offers universities a choice: "[E]nd unfair practices that hurt working-class students, like legacy preference[s] ... or supply a modest fee relative to their massive endowments."<sup>122</sup>

The Massachusetts proposal has faced opposition from the Association of Independent Colleges and Universities in Massachusetts, which calls the bill "likely unconstitutional."<sup>123</sup> A key distinction between that Massachusetts bill and other endowment tax plans is that the Massachusetts bill does not tax endowment *income*; it taxes endowment *value*.<sup>124</sup> Such a tax on an endowment's value would be a tax on unrealized gains, and at the time of writing, it is unclear whether such a tax is constitutional.<sup>125</sup>

Even assuming that a tax on an endowment's *value* is unconstitutional as a tax on unrealized gains, it remains undisputed that a tax on an endowment's *investment income* is fair game; the TCJA endowment tax has remained in place for almost a decade.<sup>126</sup> Accordingly, states that wish to impose an endowment tax like Massachusetts's proposal<sup>127</sup> could tax universities' endowment income and avoid a pending constitutional question. Such a proposal has the same benefits of federal fiscal solutions with the added benefits of state and local processes described in greater detail below.

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121. H. No. 3760, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

122. Christian M. Wade, *Lawmakers Want to Tax Colleges over "Legacy" Admissions*, SALEM NEWS, Aug. 10, 2023, 2023 WLNR 27564017 (statement of Representative Simon Cataldo).

123. *Id.*

124. See H. No. 3760, 193d Gen. Ct., Reg. Sess. (Mass. 2023) (taxing "0.2 per cent [sic] of *endowment* for any offending higher education institution [that meets certain financial minimums]" (emphasis added)).

125. The Supreme Court punted on an opportunity in *Moore v. United States* to announce whether a tax on unrealized gains is constitutional. See 144 S. Ct. 1680, 1697 (2024) ("To decide this case, we need not resolve [the] disagreement over realization. Those are potential issues for another day.").

126. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13701, 131 Stat. 2054, 2167 (2017).

127. See H. No. 3760, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

## *B. Preference for State and Local Options*

### *1. Universities as “Local” Institutions*

At their core, even the most internationally recognizable colleges and universities are inherently local institutions. While the students attending these colleges hail from across the globe, the faculty and staff serving those institutions are local residents, and the institutions are often critically intertwined with a region’s local identity.<sup>128</sup> Indeed, colleges and universities are often a source of local pride and, in many cases, contribute significantly to the local economy.<sup>129</sup>

This especially is shown by the mechanism through which residents, students, faculty, and staff voice concerns about these institutions. Notably, stakeholders impacted by a university policy often seek local solutions. For example, when local outrage grew in New Haven, Connecticut over Yale University’s local property tax exemption, residents expressed their concern to the New Haven city council.<sup>130</sup> Months later, these residents returned to downtown New Haven as a “new coalition of Yale union workers and residents” and brought local traffic to a halt through protests.<sup>131</sup> This phenomenon is not unique to New Haven; Philadelphia residents and University of Pennsylvania students organized protests regarding the university’s police force budget, which culminated in a \$100 million charitable gift to Philadelphia’s public schools.<sup>132</sup>

Local issues like the conduct of a university’s police force or its exemption from paying local property taxes garnering local protests should not be a surprise. But these responses demonstrate that

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128. See PATRICK HARKER, DEBORAH DIAMOND & DAVID REED, FED. RSRV. BANK OF PHILA., ANCHOR IMPACT: UNDERSTANDING THE ROLE OF HIGHER EDUCATION AND HOSPITALS IN REGIONAL ECONOMIES 7-10 (2022), <https://www.philadelphiafed.org/-/media/frbp/assets/community-development/reports/anchor-economy-report-92022.pdf> [<https://perma.cc/M4B9-FN3Z>].

129. See *generally id.* (describing the extent to which metropolitan areas rely on colleges and hospital systems as “anchor institutions” contributing to the region’s employment and income impact in millions of dollars).

130. See Davarian L. Baldwin, *Higher Education Has a Tax Problem and It’s Hurting Local Communities*, TIME (Apr. 7, 2021, 3:00 PM), <https://time.com/5952901/universities-tax-exemption/> [<https://perma.cc/4ZGA-EXSX>].

131. *Id.*

132. *Id.*

while universities have national and global reputations, they are still uniquely accountable and responsive to local stakeholders.

Additionally, the classification of universities as “local institutions” is even clearer for public colleges. In many states, the governor or state legislature appoints and confirms the president and board of directors of public colleges,<sup>133</sup> a function of direct supervision and control that the federal government, even with its robust regulations, does not have over universities.

Similarly, state colleges and universities contribute significantly to state governments’ budgets to the extent that they are inextricably linked to statewide economies. In addition to the indirect economic impact that universities have on local communities,<sup>134</sup> 5 percent of state government general revenue in 2021 came from charges paid to state-affiliated colleges, like tuition fees and revenue from athletics and bookstores.<sup>135</sup> Such revenue amounted to over \$100 billion in 2021<sup>136</sup> and is particularly relevant to state lawmakers, as forty states require the governor to sign a balanced budget.<sup>137</sup> Compare this reality to the fact that Congress has not passed a balanced budget since 2001.<sup>138</sup> Put simply, because universities generate a significant portion of a state’s general revenue, universities are more economically intertwined with their state and local governments than they are with the federal government.

True, the federal government regulates colleges and universities with excruciating precision. As Barbara A. Lee explains, “[i]t is difficult, and perhaps impossible, to think of an area of higher

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133. See, e.g., VA. CODE ANN. § 23.1-1300(A) (2019) (“Members [of governing boards are] appointed by the Governor ... [and] are subject to confirmation by the General Assembly.”).

134. See generally HARKER ET AL., *supra* note 128.

135. Urb. Inst. & Brookings Inst., *Briefing Book: State and Local Tax Policies*, TAX POL’Y CTR. (Apr. 20, 2023), <https://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-revenues-charges-work> [<https://perma.cc/CDN7-2M26>].

136. *Id.*

137. See KIM RUEBEN & MEGAN RANDALL, URB. INST., *BALANCED BUDGET REQUIREMENTS: HOW STATES LIMIT DEFICIT SPENDING 1* (2017), [https://www.urban.org/sites/default/files/publication/94891/balanced-budget-requirements\\_2.pdf](https://www.urban.org/sites/default/files/publication/94891/balanced-budget-requirements_2.pdf) [<https://perma.cc/628R-GY69>] (“[I]n 40 states, the governor must ultimately sign a balanced budget.”).

138. U.S. Dep’t of the Treasury, *What Is the National Deficit?*, FISCAL DATA, <https://fiscal.data.treasury.gov/americas-finance-guide/national-deficit/> [<https://perma.cc/YE4P-YUFG>] (“The last surplus for the federal government was in 2001.”).



education that is not touched by federal regulation.”<sup>139</sup> Similarly, while universities subsidize a significant part of state budgets, the federal government supports colleges and universities to the tune of billions of dollars in federal student aid and research grants a year.<sup>140</sup> Even so, despite federal regulation and ample federal funds, there is little standardization across the thousands of colleges in the United States, and entire systems of higher education may vary greatly between the states.<sup>141</sup>

As such, while the federal government undeniably plays an omnipresent role in the regulation of colleges and universities, that oversight does not change the fact that these institutions function as local operations, diverse in their structure across the fifty states.

## 2. *The Values of Federalism Supporting “Local Spheres of Influence”*

When mandates are handed down by the federal government instead of state and local authorities, the values of federalism are “jeopardize[d]” and “the federal government ... reduces the scope [of] policy experimentation and competition.”<sup>142</sup> Synthesizing arguments that federal spending can jeopardize the values of federalism, Ruth Mason highlights Justice Kennedy’s dissent in *Davis v. Monroe County Board of Education*: “[T]he Spending Clause power ... has the potential to obliterate distinctions between national and local spheres of interest.”<sup>143</sup> The values of federalism support local and state-level solutions to problems faced by colleges and universities—inherently local institutions.<sup>144</sup> If a fiscal solution is preferred to attack legacy admissions, as this Note argues it should be, then such a fiscal solution should come at the state and local levels.

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139. Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J. COLL. & U. L. 649, 679 (2010).

140. See SHOEFI & ZOTA, *supra* note 108.

141. See, e.g., Bret Smith, JoAnn Taricani & Thaïsa Way, *Standards Versus Standardization in Higher Education*, SEATTLE TIMES (Aug. 30, 2018, 3:47 PM), <https://www.seattletimes.com/opinion/standards-versus-standardization-in-higher-education/> [https://perma.cc/2DCZ-KXYX].

142. See Mason, *supra* note 68, at 993.

143. *Id.* at 977 n.3 (quoting *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 654 (1999) (Kennedy, J., dissenting)).

144. See generally *id.*

First, given the diverse needs and political preferences of constituents in different states, state officials are in the best position to narrowly and most effectively structure fiscal responses towards legacy admissions practices. This is shown by the variety of legacy admissions bans that have been enacted in recent years.<sup>145</sup> State responses also allow for creativity and variety on the part of state legislatures. For example, in Massachusetts, the revenue gained from a proposed endowment tax would be redirected to fund community colleges.<sup>146</sup> This appropriation presumably indicates that Massachusetts leaders and citizens would view such an allocation as a worthwhile response to revenue gained from a tax against universities that engage in legacy admissions.

Elsewhere, revenue from fiscal responses like an endowment tax could contribute to whatever project or policy that local and state leaders deem appropriate. For example, following the previously discussed protests by the University of Pennsylvania students,<sup>147</sup> the university gifted the City of Philadelphia \$100 million to invest in local public schools,<sup>148</sup> presumably because that is how local leaders felt money received from the college should be allocated. Similarly, in Massachusetts, activists organized a rally in November 2023 to support a bill that would tax university endowments and allocate the funds to support K-12 public education throughout the commonwealth.<sup>149</sup>

The point is that local and state leaders have flexibility to target local, tangible issues when dealing with tax revenue. Such specificity has not shown up in federal proposals; revenue from the 1.4 percent endowment tax imposed via the TCJA went to the general government fund,<sup>150</sup> and neither the MERIT Act nor the Fair

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145. See *supra* notes 115-23 and accompanying text.

146. See H. No. 3760, 193d Gen. Ct. Reg. Sess. (Mass. 2023).

147. See *supra* note 132 and accompanying text.

148. See Baldwin, *supra* note 130.

149. *Rally: Tax Amherst College's Endowment to Support Public Education*, AMHERSTINDY (Nov. 17, 2023), <https://www.amherstindy.org/2023/11/17/rally-tax-amherst-colleges-endowment-to-support-public-education/> [<https://perma.cc/6VTT-TVZC>].

150. See Quinn, *supra* note 37, at 480-81 (“[T]he excise tax will be placed in the federal government’s general revenue fund.”).

College Admissions for Students Act specifies how the federal funds withheld from colleges would be allocated.<sup>151</sup>

Additionally, in the same way that the funds generated from such statewide policies can be specifically allocated to local issues, the incentives themselves can be narrowly structured to provide colleges and universities with an actual choice, not a federal mandate that amounts to a gun to the head. The Massachusetts plan targets up to 0.2 percent of a university's endowment's value,<sup>152</sup> as opposed to federal fiscal plans that would strip universities of over 50 percent of the revenue they receive.<sup>153</sup> However, because the Massachusetts plan is not as fiscally burdensome as federal proposals, some have criticized the plan as "the elite university version of a parking ticket."<sup>154</sup> But such a criticism does not reflect the reality of the proposal, and in fact, it is not even a *vice* of the proposal.

First, such a proposal penalizes universities more harshly than critics have stated, and such a penalty could be just enough to force universities into action against legacy admissions. Harvard's endowment is valued at roughly \$51 billion,<sup>155</sup> and a 0.2 percent endowment tax would amount to roughly \$100 million a year.<sup>156</sup> This represents over 50 percent of Harvard's operating surplus in fiscal year 2023,<sup>157</sup> which could hardly be described as "the elite university version of a parking ticket."<sup>158</sup>

But even if universities demonstrate a willingness to pay such a significant fee, it is not as though they avoid public scrutiny. Indeed, the public's opposition to legacy admissions practices is overwhelming,<sup>159</sup> and choosing to pay a fee rather than change their admissions practices to be more equitable likely would only *increase* that public criticism. Universities would have to justify their decision

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151. See MERIT Act, S. 3232, 118th Cong. (2023); Fair College Admissions for Students Act, S. 3559, 117th Cong. (2022).

152. H. No. 3760, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

153. See *supra* notes 110-13 and accompanying text.

154. See The Crimson Editorial Board, *supra* note 105.

155. HARV. UNIV., FINANCIAL REPORT: FISCAL YEAR 2023, at 7 (2023), [https://finance.harvard.edu/files/fad/files/fy23\\_harvard\\_financial\\_report.pdf](https://finance.harvard.edu/files/fad/files/fy23_harvard_financial_report.pdf) [<https://perma.cc/C6DW-UBLW>].

156. See The Crimson Editorial Board, *supra* note 105 (alternatively, multiply \$51 billion by .002).

157. See HARV. UNIV., *supra* note 155, at 5.

158. The Crimson Editorial Board, *supra* note 105.

159. See Gómez, *supra* note 13.

and publicly exclaim that they are willing to sacrifice a more equitable admissions policy in lieu of a significant tax bill. While doing so, these state taxes would generate revenue for programs that local leaders and constituents deem appropriate to potentially offset harmful social effects of the admissions practices.

Additionally, if a constituency remains displeased with a university's use of legacy admissions practices in their state, they are not hamstrung. Policies can be amended, further penalties can be imposed, and legacy admissions practices can be banned outright, as some states have already done.<sup>160</sup> But a state-level fiscal plan leaves each state with options to determine the right course for its constituents; a federal threat to withhold a majority of a university's budget, however, effectively strips any autonomy on both the state and institutional levels.<sup>161</sup> It prevents the states from having any say in the regulation of admissions practices at local institutions, and it seemingly saves universities from having to publicly reckon with their admissions practices by making their decision for them.<sup>162</sup>

Finally, returning to Ruth Mason's point about policy and experimentation among the states, state-level fiscal plans support the idea that the "states may devise different ways to pursue similar policy goals ... serving, in Justice Brandeis' famous words, as 'laborator[ies]' for 'social and economic experiments.'"<sup>163</sup> Allowing for state-level solutions provides states the opportunity to develop a variety of proposals to curb the use of legacy admissions. While Massachusetts may experiment with a tax penalty,<sup>164</sup> other states may ban the practice outright, as is their prerogative.<sup>165</sup> When the federal government operates unilaterally, however, it strips the states of any creativity to address issues in unique ways.

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160. *See, e.g.*, 2021 Colo. Sess. Laws 993.

161. *See generally*, Mason, *supra* note 68.

162. *See supra* Part III.

163. *See* Mason, *supra* note 68, at 993 (alteration in original) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

164. *See* H. No. 3760, 193d Gen. Ct., Reg. Sess. (Mass. 2023).

165. *See, e.g.*, 2021 Colo. Sess. Laws 993.

## CONCLUSION

While colleges and universities are beholden to a variety of interested stakeholders—students, parents, faculty, staff, and local residents—they are uniquely and near instantaneously responsive to one particular motivation: their bottom line.<sup>166</sup> Although some colleges have refused to condemn legacy admissions practices in the face of fierce and bipartisan public opposition,<sup>167</sup> there is little doubt that they will be responsive when their financial assets are at stake.<sup>168</sup> In fact, they have already shown the pace and ferocity with which they will defend their investment income in the wake of the endowment tax imposed in the TCJA.<sup>169</sup>

However, this Note argues, for a variety of reasons, that it is not appropriate to threaten universities' federal funds—the majority of which goes to student aid—to effectively force universities to engage in a federal mandate.<sup>170</sup> Such a policy is disrespectful to local and institutional choice and amounts to the federal government commanding local institutions how to behave. Instead, this Note argues that reasonable, yet still fiscally burdensome, state-level incentives are the most effective way to curb the use of legacy admissions practices throughout the country.<sup>171</sup> Such policies accord with the values of federalism and could help disincentivize legacy admissions without a proverbial gun to the head of college administrators. Additionally, such policies can be narrowly tailored to the institutions in each respective state, as opposed to sweeping catch-all federal legislation that often lacks a tight fit.<sup>172</sup>

A nuanced proposal like state-level tax incentives presents a win-win for all relevant stakeholders in the fight over legacy admissions. State and local leaders establish a reasonable, yet firm financial choice. Universities must face that choice, and they should do so in the face of a significant financial penalty and a population that

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166. *See supra* Part II.

167. *See supra* notes 19-20, 30-31 and accompanying text.

168. *See, e.g., supra* note 48 and accompanying text.

169. *See supra* notes 54-58 and accompanying text.

170. *See* Schwartz, *supra* note 107.

171. *See supra* Part IV.B.2.

172. *See supra* Part III.A.

overwhelmingly opposes legacy admissions. Such a policy not only disincentivizes legacy admissions, but it affords due respect to the states and the universities who inhabit them as critical cultural and economic drivers.

Republicans and Democrats agree—college admissions should be based on the applicant’s merit, not on who their parents are. If both sides are genuine in their concern to create an even playing field in higher education, they should continue that fight by targeting legacy admissions practices. No plan can single-handedly wipe away inequities at play in university admissions practices. But state-level tax incentives can put just the right amount of pressure on universities to think long and hard about whether to continue with a practice that puts an applicant’s lineage over their individual merit.

*Patrick J. LaBella\**

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