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**“ALL (POOR) LIVES MATTER”: HOW CLASS-NOT-RACE LOGIC  
REINSCRIBES RACE AND CLASS PRIVILEGE**

*Jonathan P. Feingold*<sup>1</sup>

INTRODUCTION

In [\*An Intersectional Critique of Tiers of Scrutiny\*](#), Professors Devon Carbado and Kimberlé Crenshaw [infuse](#) affirmative action with an overdue dose of intersectionality theory. Their intervention, which highlights the disfavored remedial status of Black women, exposes equality law as an unmarked intersectional project that “privileges the intersectional identities of white antidiscrimination claimants.”

This latent racial privilege rests on two doctrinal pillars. First, single-axis tiers of scrutiny, which force claimants and courts to view discrimination in either/or terms (that is, race-based *or* gender-based *or* class-based), contravene intersectionality’s core insight that “people live their lives co-constitutively as ‘both/and,’ rather than fragmentarily as ‘either/or.’” Equal-protection doctrine, we might say, is “intersectionality-blind.”

Second, intersectional blindness [exists alongside colorblindness](#)—a racial ideology hostile to race-conscious remedies. This pairing yields an equality regime that favors intersectional subjects whose racial identity is decoupled from their disadvantage (e.g., poor whites) and those who reap racial advantage through the daily churn of ostensibly neutral “market forces” (e.g., class-privileged whites).

In this Essay, I draw upon *An Intersectional Critique* but shift the focus from race and gender to race and class. Specifically, I refocus the intersectional lens on an ongoing site of contestation: the argument that universities should consider an applicant’s socioeconomic class but not her race—what I refer to herein as “[class-not-race](#)” reforms. I make the class-race turn for three reasons.

First, we are witness [to unrelenting wealth disparities and their searing impact](#). The growing fissure between haves and have-nots exacerbates the increasingly steep cost of university membership (itself a key to social mobility). This tension calls on us to reckon with the causes and consequences of class stratification. But wealth gaps have never been race neutral. If anything, the ongoing pandemic and the economic crisis that followed throw into sharp relief the thread that binds race and class (and life chances) in

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America. This moment demands a serious intersectional class *and* race conversation.<sup>2</sup>

Second, we are heading towards a world of class-not-race university admissions. Class-not-race policies already enjoy preferential status under existing law.<sup>3</sup> Given the Supreme Court’s rightward turn since [Fisher v. University of Texas at Austin](#) (2016), it is easy to imagine a future in which this preference becomes a mandate.

Third, and my focus herein, class-not-race logic ultimately serves neither poor whites nor people of color. To be sure, economically disadvantaged students enjoy certain benefits under admissions regimes that attend to class (relative to ones that do not). It is also true that poor whites, whose racial identity neither compounds nor deepens their class disadvantage, are often favored intersectional subjects under class-not-race frameworks. But in meaningful respects, the modest racial privilege enjoyed by poor whites only masks how class-not-race constitutionalism fortifies structural and institutional arrangements that keep those on the top at the top, and those on the bottom—poor whites included—at the bottom. In so doing, equality law commits the ultimate intersectionality sin: reinforcing structural hierarchies.

## I. Class-Not-Race: The Supreme Court’s Preferred Approach

Class-not-race reform [enjoys preferential status](#) within constitutional doctrine and, often, public discourse. As a matter of doctrine, this preference operates across and within tiers of scrutiny.<sup>4</sup>

To begin, racial classifications [are subject to the most demanding tier of judicial review: strict scrutiny](#). Class-conscious policies, in contrast, are subject to the least demanding tier of judicial review: rational basis review. In other words, the law is most hostile to race-conscious policies (*even* those also attentive to class) and most deferential to class-conscious policies (*unless* they also employ racial classifications).

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<sup>2</sup> Cf. Devon W. Carbado, *Critical What What?*, 43 [Conn. L. Rev.](#) 1593, 1635 (2011) (“While the CRT literature on intersectionality and gender is far from complete, it is much more robust than the CRT literature on intersectionality and class.”). A focus on class and race need not displace other axes of identity. To the contrary, intersectionality theory encourages a dynamic conversation attentive to how axes of identity and structures of power interact.

<sup>3</sup> See Part I.

<sup>4</sup> Within this Essay, I focus on the Supreme Court’s Fourteenth Amendment equal-protection jurisprudence. The Fourteenth Amendment does not apply to private universities, such as Harvard, which are governed by Title VI. These two legal regimes are not identical. See Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 [UCLA L. Rev. Discourse](#) 590 (2017) (discussing disparate-impact standards under Title VI regulations). Nonetheless, parties and courts often transport the constitutional framework to Title VI challenges. See, e.g., *Students for Fair Admissions, Inc. v. Harvard*, [397 F. Supp. 3d 126](#), 189, 195–96 (D. Mass. 2019).

A second-layer preference exists within strict scrutiny itself. When subject to strict scrutiny, a defendant must establish that its race-conscious policy is “[narrowly tailored](#)”—a demand that requires, among other elements, the absence of “race-neutral alternatives.” In the admissions context, litigants and Justices often argue that class-not-race policies offer such alternatives.

As a matter of doctrine and policy, “[t]his formulation conceives of [considerations of class as possible, and even preferable, substitutes for race-conscious affirmative action policies](#).” As a practical matter, the doctrine incentivizes universities to either avoid or dilute any race-conscious components of their admissions regimes.<sup>5</sup> Moreover, the suspect status of all racial classifications—even those designed to desegregate our schools or counter institutional legacies of racial exclusion—communicates that antiracism is itself racist.<sup>6</sup> In effect, and as I describe further below, this constitutionalized class-not-race preference produces favored and disfavored intersectional racial subjects.

## II. Original Sin: Intersectional Blindness

We might consider intersectional blindness equality law’s original intersectionality sin. Just as colorblindness trivializes (if not denies) the ongoing relevance of race and racism, intersectional blindness betrays the interactive nature of our identities (e.g., race and class) and structures of power (e.g., racism and capitalism).<sup>7</sup>

In the admissions context, intersectional blindness facilitates the presumption that one can cleanly disentangle an applicant’s race and class. Put slightly differently, class-not-race “[arguments obscure the fact that race and class are coconstitutive yet distinct](#).” As a result, equality law overlooks the many ways in which class is *raced* and race is *classed*.

### A. When Class Is *Raced*

To say that class is *raced* is to suggest, at a minimum, that race mediates the class experience of individuals and groups. This dynamic manifests in multiple forms. Here, I address two: class *mobility* and class *meaning*.<sup>8</sup>

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<sup>5</sup> See *Fisher v. University of Texas at Austin*, [136 S. Ct. 2198](#), 2207 (2016) (describing the University of Texas’s consideration of applicant race a “factor of a factor of a factor”).

<sup>6</sup> Or in the words of Chief Justice Roberts: “The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, [551 U.S. 701](#), 748 (2007).

<sup>7</sup> See, e.g., Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, [133 Harv. L. Rev. 1](#), 79 (2019) (“Racial categories were invented to construct and maintain a white supremacist regime built on racial slavery and capitalism, and those categories continue to help govern systems in which racism has become embedded.”).

<sup>8</sup> These examples are not exhaustive. For a more comprehensive review, see, e.g., Harris, [Fisher’s Foibles](#); John A. Powell, *The Race and Class Nexus: An Intersectional*

### 1. Class mobility.

For purposes of this Essay, I employ the term “class mobility” to capture a person’s (or group’s) abilities (1) to accumulate wealth, and thereby ascend class hierarchies, and (2) to maintain a higher class status once attained.<sup>9</sup>

The relevant backdrop is well known. For much of this country’s history, legalized racism was weaponized to extract, hoard, and monopolize resources that [catalyzed generations](#) of white economic, political, and social capital accumulation. Redlining, for example, exemplifies how public policy facilitated the inequitable distribution of key resources; white communities got access, communities of color did not. But as Professor K-Sue Park has poignantly observed, the story of redlining transcends uneven resource distribution. It is also a story of racialized wealth creation. As Park [describes](#), redlining “engineer[ed] the mass-production of a new form of property whose value derived precisely from the segregated landscape it produced—the suburban single-family home.”

This legacy of racialized wealth accumulation transcends individuals and communities. It also implicates America’s most prestigious educational institutions—universities such as Harvard, Yale, and Princeton—as profiteers that leveraged slavery (and racism more broadly) to finance, and literally construct, their educational empires.<sup>10</sup>

Inseparable from this history, whiteness remains a valued asset in America. Proximity to it (and inclusion within it) grants access to opportunities, resources, and networks that fuel the acquisition and retention of wealth.<sup>11</sup> It should be no surprise, therefore, that immigrant and ethnic communities have long asserted their “whiteness” to improve their social, legal, and economic standing.<sup>12</sup>

Beyond wealth accumulation, whiteness also buffers against wealth loss. This dynamic has manifest in the racially uneven fallout triggered by the current pandemic. The 2009 financial crisis bred similar results. Importantly, this racial buffering transcends moments of acute societal economic decline. As one salient example, race predicts whether children—even those born to

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*Perspective*, [25 Law & Ineq. 355](#) (2007); Lisa R. Pruitt, *The False Choice Between Race and Class and Other Affirmative Action Myths*, [63 Buff. L. Rev. 981](#), 982 (2015).

<sup>9</sup> This definition is underinclusive, but sufficient for purposes of this Essay.

<sup>10</sup> See Craig Steven Wilder, *Ebony and Ivy* (2013).

<sup>11</sup> See Cheryl Harris, *Whiteness as Property*, [106 Harv. L. Rev. 1707](#) (1993); Laura Gomez, *Inventing Latinos* 125 (2020); Neil Foley, *The White Scourge: Mexicans, Blacks, and Poor Whites in Texas Cotton Culture* (1999) (“[Mexicans were] in the ethnoracial middle ground between Anglo Americans and African Americans, not white enough to claim equality with Anglos and yet, in many cases, white enough to escape the worst features of the Jim Crow South.”).

<sup>12</sup> See Ian Haney Lopez, *White by Law: The Legal Construction of Race* (2006); Gomez, *Inventing Latinos* 127 & n.104.

wealthy parents—maintain class status or suffer economic decline during their lifetimes.<sup>13</sup>

## 2. Class meaning.

By “class meaning,” I refer to dominant narratives concerning class in America. Often, these narratives *describe* class status (*who* is poor) and *explain* economic inequality (*why* the poor are poor). On the surface, common class narratives are race-less. When we discuss the vulnerabilities of poverty (which burden *the poor*) or the privileges of wealth (which benefit *the rich*), we conjure a universalized class experience that transcends and, in ways underdescribes, racial identity. Yet if we push at all, race—and the conceptual work it performs—rises to the surface.

Consider how race informs conceptions of the “deserving” or “undeserving” poor.<sup>14</sup> This distinction is embodied by two phrases etched into the American vernacular: “working class” and “welfare queen.” Both terms are facially race neutral. Yet both are racially encoded and invoke divergent stories about poverty’s causes and prescriptions.

“Welfare queen” conjures powerful associations between poverty, Blackness (Black womanhood, in particular), and social deviance.<sup>15</sup> Professor Priscilla Ocen [explains](#): “Black women have been viewed as an omnipresent danger through designation as sexually promiscuous, incompetent mothers and welfare queens who threaten society . . . their reproductive capacities are deemed to be the source of crime, dependency, and disorder.” This racialized class story has roots in the now-infamous Moynihan Report, which [suggested](#) that Black women as mothers were responsible for a ‘[tangle of pathology](#)’ that engulfed the African-American community, spawning unemployment, criminality, out of wedlock births, poverty, and the like.”

“Working class,” a term tethered to whiteness, offers a distinct picture of the poor and their plight. The term evokes industrious laborers who suffer class disadvantage *in spite of* their individual effort. Thus, whereas “welfare queen” (read: Black woman) depicts culturally deficient subjects undeserving of public assistance, the “working class” (read: poor whites) portrays an honorable community that deserves a leg up.

<sup>13</sup> See Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective* (2018) ([link](#)) (“[A] black child born to parents in the top quintile is roughly as likely to fall to the bottom family income quintile as he or she is to remain in the top quintile; in contrast, white children are nearly five times as likely to remain in the top quintile as they are to fall to the bottom quintile.”).

<sup>14</sup> See Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, [66 Emory L.J. 1049](#), 1092 (2017) (“[T]he line between the deserving and undeserving poor has shifted to maintain black people on the undeserving side of the binary.”).

<sup>15</sup> Contrary to public perceptions, white Americans [remain the largest beneficiaries](#) of government assistance.

These legitimating myths do more than stigmatize Blackness and Black communities. They [also buttress](#) a white middle-class identity moored to ideals of independence, merit, and self-sacrifice. In this sense, our societal preoccupation with “welfare queens” does more than denigrate Black poverty. It also insulates the white middle-class from [having to reckon with](#) the indelible link between white wealth and anti-Black racism (and genocide, and internment, and conquest, the list goes on).

## B. When Race Is *Classed*

Racial stereotypes are embroidered into America’s cultural fabric. As with class narratives, racial stereotypes [describe and explain](#) racial hierarchy. Stereotypes also inform how we perceive and interact with racialized individuals and groups.<sup>16</sup> Accordingly, when society associates race with socioeconomic status, the relevant racial stereotypes—in effect—*classes* race.

Americans associate Blackness with poverty.<sup>17</sup> Beyond informing how we treat individual people, this link also affects how we evaluate entire neighborhoods.

A 2008 study from Professor Maria Krysan and colleagues is instructive.<sup>18</sup> Participants viewed one of thirteen videos, each of which depicted a neighborhood across five socioeconomic tiers and three racial compositions.<sup>19</sup> Notably, participants downgraded otherwise identical neighborhoods as the proportion of Black residents increased—racially disparate treatment that affected perceptions of property values and school quality. The researchers explain: “[N]eighborhoods with the exact same observable characteristics [were] presumed by Whites to be lower-quality neighborhoods simply because of the race of the residents.”<sup>20</sup>

The foregoing discussion, albeit incomplete, explores the dynamic and layered relationship that binds race and class. Even this partial review reveals how intersectional blindness erases key dimensions of both. These erasures, when fused to colorblindness, fuel a constitutional scheme that privileges the experiences and remedial needs of white intersectional subjects.

## III. Colorblind Intersectionality: Unmarked Racial Privilege

“Colorblind intersectionality,” a term [coined by Carbado](#), refers to “instances in which whiteness helps to produce and is part of a cognizable

<sup>16</sup> See Galen Bodenhausen & Kurt Hugenberg, *Attention, Perception and Social Cognition*, in *Social Cognition: The Basis of Human Interaction* (2009).

<sup>17</sup> See Maria Krysan et al., *In the Eye of the Beholder: Racial Beliefs and Residential Segregation*, 5 Du Bois. Rev. Soc. Sci. Res. Race 1 (2008).

<sup>18</sup> See Krysan, *In the Eye of the Beholder*.

<sup>19</sup> See Krysan, *In the Eye of the Beholder* (racial composition was either (a) all white, (b) all black, or (c) racially mixed).

<sup>20</sup> Krysan, *In the Eye of the Beholder*.

social category but is invisible or unarticulated as an intersectional subject position.” This description captures class-not-race reforms, which formally attend to class but not race. Given this discursive and prescriptive posture, such policies are prone to privilege constitutional subjects whose economic subordination is untethered to their racial identity—that is, poor whites.<sup>21</sup> As I discuss below, this relative privilege entails material and symbolic dimensions.

#### A. Material Consequences: Remedial Gaps

The material impact of class-not-race reform depends, in large part, on existing baselines. At least two baselines deserve note.

First, we should always ask: “As compared to what?” In the admissions context, this translates to: “What is the alternative to class-not-race?” Critically, the alternative to class-not-race is not race-not-class. Rather, the alternative [is almost always class-and-race](#): admissions regimes that permit the formal consideration of a student’s race and class statuses.

Second, we should ask whether race-blind admissions are race-neutral projects. In other words, absent racial affirmative action, do white applicants enjoy racial advantages unavailable to similarly situated students of color? As I and others have argued, the answer to this latter articulation is yes.<sup>22</sup> Across income brackets, whiteness confers racial advantages before and during the admissions process.<sup>23</sup>

Against this backdrop, the racial preferences entailed by class-not-race reform come into focus. To begin, class-not-race frameworks baseline to the experience and remedial needs of poor whites—whose economic subordination is decoupled from their racial status. Whiteness [does not immunize poor whites](#) from the indignities of poverty. But as Cheryl Harris has [observed](#), “whiteness mitigates risk through racial/spatial structures that sort probabilities and distribute access and opportunity.”

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<sup>21</sup> The relative racial privilege enjoyed by poor whites tracks historical expressions of racism in this country. See Carbado, [Critical What What?](#), at 1614 (“[H]istorically, racism has been bi-directional: It gives to whites (e.g., citizenship) what it takes away from or denies to people of color. Framing discrimination in this way helps to reveal an uncomfortable truth about race and power: The disempowerment of people of color is achieved through the empowerment—material or psychological—of whites.”).

<sup>22</sup> See, e.g., Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 [U.C. Davis L. Rev.](#) 1117, 1140 (2019); Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 [S. Cal. L. Rev.](#) 307, 330–39 (2015); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 [Cal. L. Rev.](#) 1063, 1064 (2006); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 [Harv. Blackletter L.J.](#) 1 (1994).

<sup>23</sup> See *supra* note 22.



For poor people of color, whose disadvantaged subject position transcends class status, class-not-race reforms comprise [underinclusive remedial projects](#). This is not to suggest that class consciousness is necessarily inattentive to structural barriers confronted by the poor of all races. But as the experience of institutions such as the University of California reveals, class-not-race policies—in part due to their attenuated nexus to *racial* subordination—are ill-equipped to counter white racial advantages embedded within standard admissions processes.<sup>24</sup> The resulting remedial gaps, in turn, leave behind those “[on the bottom](#).” For class-not-race proponents who criticize racial affirmative action for purportedly failing to uplift society’s “truly disadvantaged,” these gaps should be cause for concern.<sup>25</sup>

Class-not-race reforms also privilege poor whites relative to middle- and upper-class people of color—who remain subject to racial headwinds notwithstanding their class privilege.<sup>26</sup> To be sure, this gap is a feature—not a bug—of class-not-race reforms. Moreover, it is often justified by the fallacy that middle-class status insulates students of color from race-based disadvantage.<sup>27</sup>

Notably, this proposition is betrayed by class-not-race proponents themselves. A salient example comes from an unexpected source: Students for Fair Admissions (SFFA), the organizational plaintiff challenging Harvard University’s admissions practices. SFFA [alleges](#) that Harvard discriminates against Asian Americans to the benefit of white applicants—a claim tied to race, not class. SFFA identifies implicit biases as a potential source of the alleged disparate treatment. Assuming SFFA is correct, class-not-race reform would do little to remedy this harm—nor would it address other advantages white applicants enjoy vis-à-vis Asian Americans within, and before, Harvard’s admissions process. To the contrary, and [as I have argued elsewhere](#), a more responsive remedy would involve a targeted “race-conscious policy capable of redressing the specific harm of negative action” that disadvantages Asians

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<sup>24</sup> See William C. Kidder, *How Workable Are Class-Based and Race-Neutral Alternatives at Leading American Universities?*, 64 [UCLA L. Rev. Discourse](#) 100, 110–11 (2016) (“The crux of the problem is that, as noted in many of the earlier studies, although there is a meaningful positive correlation between race/ethnicity and socioeconomic status, the correlation is not so strong that class can effectively substitute for race.”).

<sup>25</sup> See *Fisher*, [136 S. Ct. at 2232](#) (Alito, J., dissenting) (suggesting that the university’s desire to admit more “privileged minorities . . . turned the concept of affirmative action on its head”).

<sup>26</sup> Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 [UCLA L. Rev. Discourse](#) 174, 199 (2016) (“[B]lack students across class, and not just class-disadvantaged black students, experience multiple disadvantages that likely affect their academic performance and the overall competitiveness of their admissions files.”).

<sup>27</sup> Though as Professors Luke Harris and Uma Narayan observe, “[n]o one argues that middle class status shields white women from the inequities that often result from institutional sexism.” Harris & Narayan, *Affirmative Action and the Myth of Preferential Treatment*, at 9.

relative to whites.<sup>28</sup> Simply put, SFFA's turn to implicit bias reveals the inability of class-not-race policies to counter white racial advantages that transcend class privilege.

## B. Symbolic Consequences: All Poor Lives Matter

I do not mean to overstate the material benefits that poor whites enjoy under class-not-race reforms.<sup>29</sup> Given the demographic dynamics of university applications and a baseline of class-*and*-race admissions, the impact on a poor white student's likelihood of admission is likely marginal at best.<sup>30</sup>

Even so, a constitutionalized class-not-race preference confers distinct and meaningful psychological benefits to poor whites.<sup>31</sup> When the Supreme Court speaks, its words convey powerful symbolic and "cultural meaning."<sup>32</sup> By embracing *class*-conscious policies and frowning upon *race*-conscious policies, our highest judicial body projects a worldview that either denies racism's enduring presence or deems that reality constitutionally irrelevant or insufficient to justify even modest race-conscious remedies.<sup>33</sup>

In a sense, the cultural meaning that animates class-not-race tracks that embodied by the controversial phrase: "All Lives Matter"—or, tweaked for present purposes, "All *Poor* Lives Matter." In the abstract, "All Lives Matter" constitutes a thin and innocuous platitude. But this phrase does not exist in the abstract. It is a direct rebuke to Black Lives Matter—a resounding call to name the inherent dignity of Black lives and condemn anti-Black violence and anti-Black racism more generally. It is from this contestatory posture and societal backdrop that All Lives Matter is cognizable. An otherwise empty slogan emerges as a racial project that recenters whiteness by decentering Blackness and denying (or shrugging off) anti-Blackness. Moreover, in ways

<sup>28</sup> Moreover, a class-*not*-race regime at Harvard [would harm the many Asian-American applicants](#) who benefit from Harvard's current class-*and*-race policy.

<sup>29</sup> See Harris, [Fisher's Foibles](#), at 681 ("[W]hiteness is no insurance against the effects of structural inequality: Whites who are poor are solicited and summoned to the stage to argue against race-conscious remediation, but their specific concerns are rarely if ever addressed.").

<sup>30</sup> See generally Sherick Hughes et al., *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 [Educ. Pol'y](#) 63 (2016) (concluding that were all African Americans and Latinos removed from Harvard's 2013 admissions pool, the likelihood of white applicants being admitted would increase by 1 percent).

<sup>31</sup> Whiteness' psychological benefits extend to all whites but are often most meaningful for the poor. See Harris, [Fisher's Foibles](#), at n.104.

<sup>32</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 [Stan. L. Rev.](#) 317, 356 (1987) (proposing a "cultural meaning" test that would "evaluate governmental conduct to see if it conveys a symbolic message to which the culture attaches racial significance").

<sup>33</sup> Justice Anthony Kennedy is associated with the latter position. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 [U.S.](#) 701, 789 (2007). Chief Justice Roberts, among others, appears to embrace the former. See [id.](#) at 748.

that parallel equal-protection doctrine's antipathy for racial classifications, replacing the particularized *Black* with the universal *All* carries the accusation that antiracism—that is, naming race and confronting racism—is the true source of racism.

It requires only a slight lift to map the cultural meaning of All Lives Matter onto class-not-race—a constitutional framework that proclaims “All *Poor* Lives Matter.” Class-not-race constitutionalism did not arise in a contextual vacuum. To the contrary, it constitutes a direct response to modest gains for racial equality that followed the fall of Jim Crow—gains that included a range of race-conscious remedies.<sup>34</sup> And paralleling the turn from Black Lives Matter to All Lives Matter, the Supreme Court's turn to All *Poor* Lives Matter symbolically centers whiteness by relegating concerns about anti-Blackness to the margins of equality law. In effect, the Supreme Court contributes to, and reinvests in, the psychological “wages of whiteness.”<sup>35</sup>

#### IV. Hidden Victors: Wealthy Whites and Elite Institutions

Up to this point, I have argued that class-not-race constitutionalism privileges poor whites. This is only half true—true as to *relative* advantages vis-à-vis people of color. The other half, to which I have gestured, exists in the space between poor whites and those at the top: wealthy whites and elite institutions—the ultimate beneficiaries of colorblind intersectionality.

##### A. Wealthy Whites

To begin, class-not-race appeals [locate](#) middle-class Blacks (and racial classifications) as *the* admissions barrier for poor whites. In other words, the class-not-race frame portrays a zero-sum game that pits poor whites (who deserve admission) against “privileged” Blacks (who gain admission only through “racial preferences”). This framing distorts the admissions competition in two key regards. First, it discursively extracts middle- and upper-class whites—who remain overrepresented at many elite institutions—from the admissions competition.<sup>36</sup> Second, it [reinforces](#) the contestable proposition that admissions regimes are racially neutral projects *until* universities formally consider applicant race. Taken together, these distortions reinscribe class-privileged whites “[as natural features](#) of the [university] landscape—presumed members of a university community admitted on their individual ‘merit.’”

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<sup>34</sup> See Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, [101 Harv. L. Rev. 1331](#), 1363 (1988).

<sup>35</sup> See Harris, *Fisher's Foibles*, at 680 (“The wages of whiteness . . . are an expression of the relative value of not being part of a group at the absolute bottom of the social and economic hierarchy.”).

<sup>36</sup> For those who would question the *overrepresentation* characterization, I [might ask](#) how *overrepresentation* is not the inevitable outcome of, *inter alia*, legacy preferences—which are untethered to merit, common at elite institutions, and disproportionately benefit class-privileged whites.

Two noteworthy consequences result. First, these distortions insulate from meaningful critique the shallow yet routinized measures of merit that systematically exclude talented and otherwise qualified students of color (and poor whites). Class-privileged whites, in turn, receive a material benefit: an uneven playing field that rewards inherited race and class privilege. Second, race consciousness is maligned as a deviation from race-neutrality, not a corrective for it. Class-privileged whites, in turn, receive a psychological benefit: they can pass through a racially uneven admissions process without having to confront the racial preferences they enjoy along the way.<sup>37</sup>

## B. Elite Institutions

Class-not-race constitutionalism also benefits elite institutions to the detriment of poor whites and people of color. To begin, universities benefit from frames that shield from serious and sustained scrutiny institutional practices that reward and reproduce accumulated race and class privilege. This includes legacy preferences, an unpopular and antimeritocratic practice that disproportionately benefits wealthy whites (via admission) and institutions (via donor relations). Legacy preferences call for cross-racial resistance; class-not-race logic gets in the way.

But equality law does more than defuse potentially potent allyship. It also safeguards elite universities from criticism from the Left. The Harvard litigation is demonstrative. As noted above, SFFA [claims](#) that Harvard discriminates against Asian Americans, perhaps because of implicit biases. In the abstract, many progressives would reflexively support—or at least demand further inquiry of—such claims (which are plausible given pervasive anti-Asian stereotypes). But SFFA’s naked goal is to eliminate racial affirmative action at Harvard and beyond—not to counter anti-Asian biases that pervade society and elite institutions. For this reason, and given affirmative action’s legal precarity, the Left has closed ranks around Harvard. This has included vigorous denials of anti-Asian bias, even though that claim—even if proven—[would not implicate](#) Harvard’s racial affirmative-action program. As a result, and cloaked under the associational halo of civil-rights allies, Harvard avoids the scrutiny that ought to follow a plausible claim of “[negative action](#).”

Finally, class-not-race constitutionalism enables elite institutions to portray themselves as racially progressive without taking meaningful steps to advance racial justice. The Harvard litigation is again instructive. Juxtaposed against SFFA’s openly regressive agenda, Harvard can brand itself as a righteous defender of affirmative action and racial equality more broadly. In a political moment marked by increasing calls for antiracist reform and institutional accountability, brand matters—even for elites like Harvard. And yet, this portrayal masks the limited intervention performed by race-consciousness at Harvard and distracts from Harvard’s reluctance to part with

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<sup>37</sup> Note the parallels to the earlier discussion about racialized class narratives that simultaneously (a) justify Black poverty (the ostensible product of cultural deficiencies, not racial discrimination) and (b) legitimate white wealth (the ostensible product of neutral market forces, not racial discrimination).

institutional practices—such as legacy admits and an overreliance on standardized tests—that confer racial (and class) preferences on wealthy whites.

This, in turn, reveals class-not-race constitutionalism's ultimate intersectionality sin: the invisible reinscription of existing hierarchies.

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