

## SOCIOECONOMIC STATUS DISCRIMINATION

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*This Article makes the case for protecting socioeconomic status (SES) under discrimination statutes that govern employment, housing, education, voting, public accommodations, and credit/lending. While others have argued that poverty should be a protected class under the Fourteenth Amendment, the courts have rejected this idea. The possibility of protecting SES under discrimination statutes has received little consideration. I argue that this idea deserves more serious attention. I advance four arguments in favor of adding SES to the list of protected traits. Two moral, one political, and one legal.*

*First and most straightforward, the values animating discrimination law apply to poverty: Existing discrimination laws protect traits that are subject to pervasive and illegitimate social bias. They cover both immutable and mutable traits. The logic animating these laws applies to poverty, regardless of whether a person was born poor or falls into poverty later in life.*

*Second, due to the association between race and poverty, SES-based discrimination reinforces and perpetuates racial inequality. A comprehensive strategy for addressing racial discrimination must also address SES-based discrimination.*

*The third argument is political: Many policies that have an adverse racial impact have an adverse impact on poor people of all races—e.g., voter ID laws or zoning laws restricting multi-unit housing. Framing disparate-impact claims in terms of SES would highlight the extent that lower-SES people of all races share common experiences*

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*of marginalization. This might be a step toward building a multiracial coalition focused on economic inequality—a longstanding goal of many progressives.*

*The fourth argument is legal: Some have argued that racial disparate-impact law should trigger scrutiny under the Fourteenth Amendment because it requires racially motivated decision making. Because poverty is not a suspect class under the Fourteenth Amendment, disparate-impact provisions targeting socioeconomic disparities would not raise the same constitutional concern.*

*I explain how protections against SES discrimination could be administered, as a practical matter. Prohibiting SES discrimination would not be as impractical as it might initially seem. Indeed, the practical questions associated with protecting SES are not really different from those associated with protecting race, disability, age, and other traits.*

*“Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. But . . . personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have.”<sup>1</sup>*

*“[S]ociety’s unexamined embrace of class discrimination reflects the irony that class is both the preferred method for and the hidden obstacle to racial justice.”<sup>2</sup>*

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<sup>1</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 121 (1973) (Marshall, J., dissenting).

<sup>2</sup> Audrey G. McFarlane, Operatively White?: Exploring the Significance of Race and Class Through the Paradox of Black Middle-Classness, 72 Law & Contemp. Probs. 163, 163 (2009).

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## I. INTRODUCTION

People who are poor, or who appear to be poor, are keenly aware of being stigmatized. A child whose family lives in a homeless shelter explains “[y]ou don’t want a lot of people to find out that you live here because people will make fun of it . . . you start to have no friends.”<sup>3</sup> A woman who has been rejected for many jobs because she cannot afford a car writes, “There is nothing quite like seeing an interviewer purse their lips and jot down a note down while their face screams ‘low-class, do not hire.’”<sup>4</sup> A woman who cannot afford to fix her missing teeth explains, “I would make a super legal secretary, but I’ve been turned

<sup>3</sup> PBS Frontline, *Poor Kids* (Nov. 20, 2012), <https://www.pbs.org/wgbh/frontline/film/poor-kids/transcript/> [https://perma.cc/LJ8E-6V73].

<sup>4</sup> Caitiín Eagen, *Do You Have Reliable Transportation?*, *The Billfold* (June 10, 2016), <https://www.thebillfold.com/2016/06/do-you-have-reliable-transportation/> [https://perma.cc/4PAB-CMNC].

down more than once because I ‘don’t fit the image of the firm,’ which is a nice way of saying ‘gtfo, pov.’”<sup>5</sup>

Discrimination based on socioeconomic status (SES) is routine. Employers screen applicants by residential address and weed out people who live in notoriously poor neighborhoods. Municipalities enact zoning rules for the purpose of excluding low income residents. Schools place wealthier students in more advanced classes with more experienced teachers. States require voters to show identification documents that poor people have more difficulty obtaining.

In the United States, discrimination statutes reflect a commitment to the ideals of social mobility and self-determination. Accordingly, they protect traits that are subject to *pervasive* and *illegitimate* social bias.<sup>6</sup> Race is the paradigmatic example of such a trait, but legislators have determined a number of other traits fit this description, including sex, national origin, age, disability, and religion.<sup>7</sup> This Article argues that the values animating these laws apply to SES to the same degree they do other protected traits. Accordingly, lawmakers should add SES to the list of traits protected by discrimination statutes.<sup>8</sup> For the specific purpose of discrimination law, I define SES simply as a person’s present, past, or perceived financial situation. Financial situation means a person’s financial resources measured in terms of income and wealth.<sup>9</sup>

I am not the first to suggest that the poor should be protected from discrimination. A number of scholars have argued that the poor should receive some measure of heightened protection under the Fourteenth

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<sup>5</sup> Linda Tirado, This is Why Poor People’s Bad Decisions Make Perfect Sense, Huffington Post (Dec. 6, 2017), [http://www.huffingtonpost.com/linda-tirado/why-poor-peoples-bad-decisions-make-perfect-sense\\_b\\_4326233.html](http://www.huffingtonpost.com/linda-tirado/why-poor-peoples-bad-decisions-make-perfect-sense_b_4326233.html) [<https://perma.cc/TEN4-X7WB>].

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See 42 U.S.C. § 2000e et seq. (2012) (Title VII); 15 U.S.C. § 1691 (2012) (Equal Credit Opportunity); 42 U.S.C. § 3604 (2012) (discriminatory housing practices); 42 U.S.C. § 12101 et seq. (2012) (ADA); 29 U.S.C. § 621 et seq. (2012) (ADEA).

<sup>8</sup> See, e.g., 42 U.S.C. § 2000a (2012) (public accommodations); 42 U.S.C. § 2000e-2(a) (2012) (employment); 42 U.S.C. § 2000d (2012) (programs receiving federal funds, including most state public school systems, transportation, and environmental protection agencies); 42 U.S.C. § 3604 (2012) (housing); 52 U.S.C. § 10301 (Supp. II 2015) (voting); 15 U.S.C. § 1691 (2012) (credit/lending).

<sup>9</sup> I explain the reasons for doing this, and elaborate on how this would work, in Section V.B (“Defining the Class”).

Amendment.<sup>10</sup> However, the Court has essentially rejected this idea,<sup>11</sup> and it seems unlikely to change course on this at any point in the foreseeable future.<sup>12</sup> This Article is the first sustained argument for protecting poverty under *discrimination statutes*, as opposed to the Constitution. To date, this possibility has received very little attention. The few scholars who have considered this idea have readily dismissed it.<sup>13</sup> I argue that the idea deserves more serious consideration.

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<sup>10</sup> The Court has long stated that heightened scrutiny under the Fourteenth Amendment is appropriate when legislation burdens a “suspect class,” or a group that is especially vulnerable to social prejudice and exclusion, and is therefore unable to advance its interests through the political process. See *infra* note 20. A number of scholars have argued that this rationale for heightened scrutiny applies to the poor. E.g., Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Class and Race in Constitutional Jurisprudence*, 72 *Law & Contemp. Probs.* 109, 110 (2009) (“[T]he Court should abandon its present bifurcated jurisprudence on race and class. . . .”); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 *U. Penn. L. Rev.* 1277, 1278 (1993) (arguing “that the political powerlessness of the poor requires some form of enhanced judicial protection”); Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, XXXV *Fordham Urb. L.J.* 629, 630 (2008) (critiquing the Court for “fail[ing] to enforce the Constitution’s existing protections when applied to poor people” in several ways, including “never directly or adequately determining . . . whether poverty meets the criteria for a suspect classification”); John A. Powell, *Constitutionalism and the Extreme Poor: Neo-Dred Scott and the Contemporary “Discrete and Insular Minorities,”* 60 *Drake L. Rev.* 1069, 1076 (2012) (“What I wish to suggest in this Essay is that the ‘discrete and insular minorit[ies]’ today are the poor or extreme poor.”); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 *Cal. L. Rev.* 323, 328–29 (2016) (demonstrating empirically that legislators are unresponsive to the preferences of the poor, and arguing that the poor should accordingly qualify for heightened protection); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 *N.Y.U. L. Rev.* 1527, 1527 (2015) (same). Others have argued that, while there may be good reasons for not recognizing poverty as a categorically suspect classification, the Fourteenth Amendment should be read to guarantee minimal entitlement to certain fundamental goods, such as education, housing, food, etc. See Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 *Hastings L.J.* 1, 3 (1987) (arguing for a constitutional right to a “survival” or “subsistence” income); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 *Harv. L. Rev.* 7, 9 (1969).

<sup>11</sup> See, e.g., *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[P]overty, standing alone, is not a suspect classification.”); see also *infra* note 22 (discussing the paucity of reasoning in decisions holding poverty is not a suspect class).

<sup>12</sup> See *infra* note 21 (discussing Court’s reluctance to recognize new suspect classes).

<sup>13</sup> Reasons are both theoretical and practical. Some argue that SES discrimination is fundamentally different from other protected traits, such as race or sex. See *infra* note 61, and accompanying text. Others dismiss the idea on the assumption that prohibiting SES

This Article proceeds in four parts:

In Part II, I discuss the values underlying statutory discrimination law and why they justify protecting various traits—including some that result from voluntary choices, and that sometimes relate to capability.

In Part III, I describe longstanding and pervasive social bias against the poor, how it intersects with racial bias, and leads to widespread SES-based discrimination. This Part aims to illustrate that the disadvantage poor people experience is not only an innocent byproduct of free market economic policies. Instead, it frequently results from social bias of a more invidious nature, akin to racial bias.

In Part IV, I advance four arguments for adding SES to the list of traits protected by discrimination statutes:

First and most straightforward, the values animating discrimination law apply to poverty. Existing discrimination laws protect not only immutable traits, but also traits that result from voluntary choices—e.g., certain disabilities and pregnancy. The rationales for protecting such traits also apply to poverty. Hence, regardless of why a person became poor—i.e., whether they were born that way or fell into poverty as a result of certain voluntary choices—poverty should be considered an illegitimate ground for discrimination.

The second reason for protecting SES is the intersection between racial bias and bias against the poor. Due to past and ongoing racial discrimination, poverty rates are higher among many minority racial groups. Hence, many policies and practices that discriminate based on poverty have a disparate racial impact. Examples include voter ID laws, using credit history to screen job applicants, and zoning rules restricting the development of affordable housing. Proponents of these policies sometimes attempt to defend them by saying they are based on SES, not race.<sup>14</sup> But SES-based discrimination is not really race-neutral: Poverty is caused by racial discrimination, and discrimination based on SES reinforces the racial discrimination that caused poverty. Comprehensively addressing racial discrimination requires addressing discrimination based on SES.

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discrimination would be impractical or infeasible. See *infra* notes 216, 237, 251 & 267, and accompanying text.

<sup>14</sup> See *infra* notes 235–239.

The third reason is political: Many policies (like those listed above) that have been the subject of race-based disparate-impact claims adversely impact lower-SES people of all races. When a court enjoins these policies, the remedy benefits lower-SES people generally—it is not race-specific.<sup>15</sup> Framing these claims in terms of racial disparities may obscure this fact. Framing these claims in terms of socioeconomic disparities would highlight the fact that lower-SES people of all races share common experiences of marginalization, and they all stand to benefit from legal intervention. This could be a step toward building a broader multiracial coalition focused on economic inequality—a longstanding goal of many progressives.<sup>16</sup>

The fourth reason is legal: At least two Supreme Court Justices have argued that racial disparate-impact law violates the Fourteenth Amendment because it requires racially motivated decision making.<sup>17</sup> Protecting SES would make it possible to address the many policies (like those listed above) that have both disparate socioeconomic and racial impacts, while avoiding this constitutional objection.<sup>18</sup>

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<sup>15</sup> See Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 Wash. U. L. Rev. 1429, 1489–90 (2014) (observing that the decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which invalidated an employer’s high school diploma requirement due to its disparate impact on black applicants, benefitted an even larger number of white applicants who also lacked high school diplomas.); Ian Ayres, *Statistical Methods Can Demonstrate Racial Disparity*, N.Y. Times (Apr. 27, 2015), <https://www.nytimes.com/roomfordebate/2015/04/27/can-discrimination-exist-without-clear-intent/statistical-methods-can-demonstrate-racial-disparity> [<https://perma.cc/H4K6PJB2>] (“Because disparate impact remedies apply to all consumers, striking down corporate policies that lack a business justification have in many cases also helped many white consumers.”).

<sup>16</sup> See, e.g., Peter Edelman, *Where Race Meets Class: The 21st Century Civil Rights Agenda*, XII Geo. J. on Poverty L. & Pol’y 1, 8 (2005) (“Our politics should be cross-cutting and inclusive. There is a racial agenda, but we should be trying to build as much as we possibly can along lines that are widely shared.”); Richard D. Kahlenberg, *Class-Based Affirmative Action*, 84 Cal. L. Rev. 1037, 1063 (1996) (“decreas[ing] public consciousness of race and increas[ing] public consciousness of class . . . has always been a political imperative [for progressives]”). See also *infra* notes 76–77 (discussing the post-Civil War populist agenda).

<sup>17</sup> See *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (stating that disparate-impact provisions should trigger scrutiny because they “place a racial thumb on the scales”); see also *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2530–31 (2015) (Thomas, J., dissenting) (making same argument).

<sup>18</sup> For similar reasons, some school systems have started considering SES rather than race as a criteria for drawing school districts, assigning students to schools, and public university

In Part V, after setting forth these arguments for protecting SES, I explain how such a law could be practically implemented. I show that protecting SES would not be as impractical or infeasible as it initially sounds. Indeed, the practical questions associated with protecting SES are not much different from those associated with protecting traits like age, race, sex, and disability. And, in terms of practical benefits, there are reasons to believe protecting SES would impact behavior and psychological wellbeing *even if* lawsuits were difficult to win.<sup>19</sup>

I conclude by discussing reasons to be optimistic about the political viability of this proposal.

## II. THE PRINCIPLES UNDERLYING DISCRIMINATION LAW

There are two major sources of discrimination law in the United States: the Fourteenth Amendment and discrimination statutes. Discrimination statutes provide broader protection than the Fourteenth Amendment in three important ways:

First, under the Fourteenth Amendment, only five ‘suspect classes’ receive heightened protection: race, national origin, citizenship, parents’ marital status, and sex.<sup>20</sup> The suspect class framework appears to be

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admissions. Mary Ann Zehr, Socioeconomics Replacing Race in School Assignments, *Education Week* (May 7, 2010), <https://www.edweek.org/ew/articles/2010/05/12/31poverty.h29.html> [<https://perma.cc/QP6C-3BV7>]; see also Kimberly Quick, How to Achieve Socioeconomic Integration in Schools, *The Century Foundation* (Oct. 14, 2016), <https://tcf.org/content/facts/achieve-socioeconomic-integration-schools/> [<https://perma.cc/7WQQ-63FD>]. There are issues with altogether replacing race-based affirmative action with SES-based affirmative action, as race is a distinct form of disadvantage from poverty. However, here I am not arguing for replacing prohibitions on racial discrimination with prohibitions on SES-based discrimination. I am arguing for prohibiting both types of discrimination simultaneously.

<sup>19</sup> See *infra* Section V.D.

<sup>20</sup> Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. Cal. L. Rev.* 481, 485 n.14 (2004). The suspect class framework is geared to protecting groups that are disadvantaged in the political process due to widespread social bias and exclusion. See generally *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities, and [so] may call for a correspondingly more searching judicial inquiry.”); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 153 (1980) (“[T]he doctrine of suspect classifications is a roundabout way of uncovering official attempts to . . . treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its



“closed,” since the Court has not recognized any new suspect classes since the 1970s.<sup>21</sup> In line with this, it denied suspect class status to poverty without seriously examining whether the values underlying the suspect class framework apply to poverty.<sup>22</sup> However, discrimination statutes protect a number of traits that are not protected under the Fourteenth Amendment, including age, disability, religion, and pregnancy.

Second, the Fourteenth Amendment applies only to government actors,<sup>23</sup> but statutes apply to a wide range of private actors, including employers, entities involved in the development, sale, and rental of housing, privately owned public accommodations (e.g., restaurants, shopping malls, hotels), public and private entities receiving federal funds (including most educational institutions).<sup>24</sup>

Third, Fourteenth Amendment liability requires proof that disparate treatment was motivated by the trait in question.<sup>25</sup> By contrast, most

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members.”). Discrimination based on other, non-suspect traits receives more deferential rational basis review. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (applying rational basis review to sexual orientation-based classifications).

<sup>21</sup> Goldberg, *supra* note 20, at 485 (describing the set of protected traits as having been “closed” since the 1970s); see also Kenji Yoshino, *The New Equal Protection*, 124 *Harv. L. Rev.* 747, 756–57 (2011) (stating the suspect class framework is “closed”); see *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (rejecting heightened review for classifications of people with mental retardation and applying rational basis review instead); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312–14 (1976) (declining to treat age as a suspect classification).

<sup>22</sup> Loffredo, *Poverty, Democracy and Constitutional Law*, *supra* note 10, at 1313 (“[The Court] has never adequately defended this position nor addressed the constitutional implications of a political system that functionally excludes a large segment of the nation’s citizenry on account of poverty.”); Nice, *No Scrutiny Whatsoever*, *supra* note 10, at 630 (“[T]he Court has . . . never directly or adequately determin[ed] whether poor people meet the criteria for a suspect class or whether poverty meets the criteria for a suspect classification.”); Ross & Li, *supra* note 10, at 343 (observing that the Court has denied suspect class status to poverty “by sleight of hand and without substantive analysis,” and it “has never squarely addressed the status of the poor under the suspect class standard”).

<sup>23</sup> See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

<sup>24</sup> See *supra* note 8 (listing these statutes).

<sup>25</sup> *Davis*, 426 U.S. at 239. This reading of the Fourteenth Amendment has been widely criticized as failing to address many policies that perpetuate racial inequality. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 322 (1987) (arguing that the intentional discrimination requirement fails to address unconscious racial motivation); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State*

discrimination statutes also allow liability for facially neutral policies that have an adverse impact on members of the protected group, even if they are not adopted for this purpose.<sup>26</sup> And in the case of disability, discrimination is defined even more broadly to include failure to reasonably accommodate the specialized needs of someone with a disability.<sup>27</sup>

In these three ways, discrimination statutes are broader and more comprehensive than constitutional protection.<sup>28</sup> Hence, discrimination statutes seem like a more promising alternative for addressing SES-based discrimination and the practices that unintentionally but unnecessarily reinforce it. For the remainder of this Article, I focus exclusively on the case for protecting SES under statutory discrimination law. Of course, many of my arguments for statutory protection translate to the case for Fourteenth Amendment protection.

Discrimination statutes advance the basic liberal ideals of social mobility and self-determination: People should not have fixed, predetermined social roles. Rather they should be at least “part authors”

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Action, 49 Stan. L. Rev. 1111, 1147 (1997) (maintaining that the intentional discrimination requirement “sanction[s] practices that perpetuate the race and gender stratification of American society”).

<sup>26</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (Under Title VII, “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”). See also 42 U.S.C. 2000e-2(a)(2) (2012); 52 U.S.C. § 10301 (Supp. II 2015); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2518 (2015) (Fair Housing Act authorizes disparate-impact claims); *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240 (2005) (ADEA authorizes disparate-impact claims); *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001) (Title VI does not provide a private cause of action for disparate impact. However federal regulations prohibit funding recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin” as a condition of funding (quoting 28 CFR § 42.104(b)(2) (2000)). It is unsettled whether laws governing public accommodations (Title II) prohibit disparate impacts. *Hardie v. Nat’l Collegiate Athletic Ass’n*, 876 F.3d 312, 315 (9th Cir. 2017).

<sup>27</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (“By definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, i.e., preferentially.”).

<sup>28</sup> Others have noted that Congress has been ahead of the Court when it comes to advancing protections from discrimination. Owen M. Fiss, *Another Equality*, 2 *Issues in Leg. Scholarship*, 2004, art. 20, at 14 (“Starting in the mid 1970s, roughly at the time of *Washington v. Davis* and continuing until the Newt Gingrich Congress of 1994, Congress maintained the civil rights agenda and in effect defended the antisubordination principle.”).

of their own lives.<sup>29</sup> Discrimination laws advance these ideals by restricting practices that create and perpetuate fixed social hierarchies.<sup>30</sup> In other words, they open up unnecessarily narrow “bottlenecks” in the

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<sup>29</sup> Social mobility and self-determination are the defining features of the liberal ideology that dominates western democracies. Liberal western democracies are based on the premise that all individuals are of equal worth (“created equal”) and therefore should have roughly equivalent opportunities to pursue careers, offices, and stations of their choosing. People should be at least “part authors” of their own lives. This idea of social mobility repudiated the preceding system of aristocracy—where people were born into a fixed social caste, their “station and its duties” predetermined by their status at birth. Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 *Stan. L. Rev.* 385, 392–93 (1996) (citing F.H. Bradley, *My Station and Its Duties*, in *Ethical Studies* 145 (1876)). See also Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity*, 120–21 (2014) (“[P]art of the distinctive appeal of equal opportunity is that it enables people to pursue goals in life that are to a greater degree their own, rather than being dictated by the limited opportunities that were available to them.”); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 *B.U. L. Rev.* 1357, 1359 (2017) (“By attacking status causation, employment discrimination law seeks to conform our workplaces to a simple liberal ideal: nobody should enjoy lesser freedom because she is black rather than white, a woman rather than a man, and so on.”).

<sup>30</sup> Owen Fiss has famously argued that discrimination law is motivated by a “group disadvantaging” or “anti-subordination” principle. This principle reflects “[a]n ethical view against caste”: that it is “undesirable for any social group to occupy a position of subordination for any extended period of time.” See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *Phil. & Pub. Aff.* 107, 108, 151 (1976); see also Fiss, *Another Equality*, supra note 28, at 1 (noting that what he initially called the group-disadvantaging principle, “has since been variously referred to as “the anticaste, antisubjugation, and, more generally, the antisubordination principle”). There is a clear connection between social mobility and anti-subordination: people who are systematically subordinated on account of their membership in a certain social group are denied social mobility and self-determination. The antisubordination theory has had a tremendous influence on thinking and writing about the objectives of discrimination law. See generally Symposium, *The Origins and Fate of Antisubordination Theory*, 2 *Issues in Leg. Scholarship* (2002) (collection of essays discussing the impact of the antisubordination principle); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 *U. Miami L. Rev.* 9, 10 (2003) (describing how the antisubordination principle underlies judgments about discrimination law, even when courts and lawmakers do not refer to it explicitly). An anti-bottleneck principle leads to the same results as an anti-subordination principle because practices that systematically subordinate certain groups are bottlenecks. Samuel R. Bagenstos, *Bottlenecks and Antidiscrimination Theory*, 93 *Tex. L. Rev.* 415, 432 (2014) (reviewing Fishkin, supra note 29) (“By the time a practice becomes a pervasive bottleneck, then, those who are disadvantaged by the practice might well think of themselves—and be understood by society—as an identifiable, disadvantaged group.”).

opportunity structure.<sup>31</sup> A trait like race or sex is an unnecessarily narrow bottleneck when it is subject to social bias that is both (1) pervasive and (2) illegitimate. If both conditions are met, the trait should be protected by discrimination law.<sup>32</sup>

*Pervasive social bias*: Social bias encompasses both interpersonal and structural bias. Interpersonal bias refers to human judgments based on social stereotypes—group-based generalizations that are potentially inaccurate in individual cases.<sup>33</sup> “Structural” or “institutional” bias refers to the way that ‘neutral’ policies, developed against a background of social inequality, have the unintended effect of reinforcing that inequality. For example, airplane cockpits were built with dimensions that required pilots to be taller than the average woman because historically most pilots were men (due to stereotype-based gender roles).<sup>34</sup> Though this policy may not be intentionally discriminatory, it has the impact of reinforcing stereotype-based gender roles. Discrimination laws address interpersonal and structural bias when it is

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<sup>31</sup> Fishkin, *supra* note 15, at 1477–78 (arguing that discrimination law furthers an “anti-bottleneck” principle by opening up narrow constraints in the opportunity structure through which people must pass in order to access opportunities that fan out on the other side, which are both severe (that is, pervasive and strict) and illegitimate (that is, not justified by any important interest)).

<sup>32</sup> *Id.* at 1477–79 (explaining that discrimination laws target bottlenecks that are both severe (pervasive and strict) and illegitimate (not justified by any important interest)).

<sup>33</sup> A stereotype is a group-based generalization that has the risk of being overbroad and inaccurate with respect to any particular individual—for example, black people are lazy, women are bad at math and science. Stereotyping is harmful because it denies people the ability to establish individual reputations distinct from the group’s reputation. Cf. Fiss, *Groups and the Equal Protection Clause*, *supra* note 30, at 148 (arguing that an anti-subordination/group disadvantaging principle justifies protecting groups that are “interdependent,” meaning the reputation of any individual in the group is linked to the reputation of the group as a whole).

<sup>34</sup> *Boyd v. Ozark Air Lines, Inc.*, 568 F.2d 50, 52–53 n.1 (8th Cir. 1977). By recognizing disparate-impact liability, discrimination statutes address structural or institutional discrimination. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating an employer’s high school diploma requirement per its disparate impact on black employees); *id.* at 430 (“[P]ractices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”); see also Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 Cal. L. Rev. 1, 1–2 (2006) (recounting that “[m]any of the original drafters of the Civil Rights Act of 1964 expressed a desire to address what Senator Humphrey called the ‘many impersonal institutional processes which nevertheless determine the availability of jobs for nonwhite workers,’” and noting that the doctrine of disparate impact is a vestige of this).

pervasive throughout society, rather than a few isolated occurrences. Only *pervasive* bias is likely to constrain a person's overall social mobility—and this is what triggers the principles driving discrimination law.<sup>35</sup>

*Illegitimate social bias*: Traits subject to pervasive social bias do not automatically deserve protection from discrimination.<sup>36</sup> The trait must also be considered an illegitimate basis for judgment—meaning the trait in some ideal sense *should not* determine a person's opportunities.<sup>37</sup> This is a normative value judgment,<sup>38</sup> which begs the question of why certain traits are considered illegitimate bases for allocating opportunities.

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<sup>35</sup> Jessica A. Clarke, *Against Immutability*, 125 *Yale L.J.* 2, 93 (2015) (“Unlike isolated instances of workplace unfairness, pervasive biases substantially limit the opportunities of affected individuals. For example, victims of sex discrimination will encounter it in workplace after workplace,” but “a man who is fired because . . . he reminded the employer of the employer's hated stepfather is unlikely to ever encounter this same unreasonable prejudice again.”) (internal quotations omitted). Concerns about the pervasiveness of bias are evident in the statement of findings and purpose for the Americans with Disabilities Act, which explains that persons with disabilities “occupy an inferior status” and that discrimination is a “serious and pervasive social problem.” 42 U.S.C. § 12101(a) (2012). Likewise the statement of purpose for the Age Discrimination in Employment Act notes that many employers are “setting . . . arbitrary age limits regardless of potential for job performance,” and consequently “older workers find themselves disadvantaged in their efforts” to retain and secure employment. 29 U.S.C. § 621(a) (2012); see also Fishkin, *supra* note 15, at 1480 (“[T]he case for building modern antidiscrimination law in the first place, and overriding employer prerogatives over many employment decisions, turned on *the pervasiveness* of employment discrimination against African-Americans in particular, as well as the connections between that employment discrimination and broader dimensions of the opportunity structure (education, housing, etc.) that conspired to constrain black people's opportunities in ways that amounted to an extremely severe bottleneck.” (emphasis added)).

<sup>36</sup> C.f. Clarke, *supra* note 35, at 25–26 (“[I]n determining which traits to protect, constitutional law must distinguish between fair and unfair bases for discrimination: ‘After all, discrimination exists against some groups because the animus is warranted—no one could seriously argue that burglars form a suspect class.’” (quoting *Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989) (en banc) (Norris, J., concurring)). The same goes for statutory discrimination law.

<sup>37</sup> In other words, “society has decided, for reasons of public policy, to make [the criterion] illicit—whatever [its] performance-predictive power or lack thereof.” Fishkin, *supra* note 15, at 1465.

<sup>38</sup> *Id.*

One common answer is that the trait is irrelevant to capability; hence, discrimination on that basis is irrational from an economic perspective.<sup>39</sup> But this answer is not wholly satisfactory. Law prohibits discrimination based on traits like race, sex, and disability “even when it is rational statistical discrimination—that is, even when those characteristics have performance-predictive value.”<sup>40</sup>

Another common answer to why certain traits are illegitimate bases for discrimination is that they are immutable—meaning a “characteristic[] for which an individual is not responsible.”<sup>41</sup> Such traits

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<sup>39</sup> *Id.* at 1464 (explaining that one understanding of what makes certain traits an illegitimate basis for discrimination is that they do not accurately predict job performance); see also, Fiss, *Another Equality*, *supra* note 28, at 1 (explaining that one interpretation of discrimination law is advancing a principle of meritocracy or “transactional fairness”—treating a person differently because of an irrelevant factor is wrong because it is irrational).

<sup>40</sup> Fishkin, *supra* note 15, at 1465 (“The law reflects a public policy judgment that, absent a very strong justification, ‘such characteristics . . . are not ‘merit’ even when they do have performance-predictive value.’”). There are various scenarios in which discrimination law requires employers and other covered entities to do things that are not the most economically efficient alternative. For example, in a racist town, it might be economically rational for an employer to hire only white employees, as customers will be put off by black or Hispanic workers. However, this does not make race discrimination legal. Likewise, it may be economically rational for an employer to discriminate against a person with a disability or particular religious practice—they may require a specially modified tool or a special schedule that another worker would not require, and this makes hiring them slightly more expensive. Yet the cost of modification/accommodation does not make disability or religious discrimination legal *unless* the modification/accommodation would be unreasonably expensive. See generally Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 *Va. L. Rev.* 825, 849–51 (2003) (listing examples of how employment law prohibits rational, cost-effective discrimination); Christine Jolls, *Commentary, Antidiscrimination and Accommodation*, 115 *Harv. L. Rev.* 642, 645 (2001) (“[A]ntidiscrimination law fairly obviously operates to require employers to incur undeniable financial costs associated with employing the disfavored group of employees—and thus in a real sense to ‘accommodate’ these employees.”); Noah D. Zatz, *The Minimum Wage as Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 *U. Chi. Legal F.* 1, 24–25 (2009) (noting that “[i]n myriad ways, [discrimination law] forbids employers from adhering to practices of market rationality designed to maximize profits,” and giving examples along these lines).

<sup>41</sup> For example, a person may be incapable of changing a criminal record once they have one. But this is not considered an ‘immutable’ trait in the sense the concept is used in discrimination law, since the person was responsible for acquiring it. Clarke, *supra* note 35, at 13–14 & n.48; see also *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (discussing “the basic concept of our system that legal burdens should bear some relationship to individual responsibility” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))). Even though the term “immutability” emerges from Fourteenth Amendment jurisprudence, “courts have borrowed immutability concepts to answer definitional questions

should be protected because they are “morally arbitrary.”<sup>42</sup> To determine opportunities on the basis of traits people cannot control undermines the ideals of self-determination and social mobility.

Immutability may explain why traits like race and sex are considered illegitimate bases for discrimination. However, discrimination statutes also protect some traits that are (or once were) mutable. Some mutable traits, such as religious observance or pregnancy, may be protected because they are fundamental, respect-worthy aspects of personal identity—things people should not be required to change.<sup>43</sup> However, the law also protects some traits that result from voluntary choices and are not necessarily fundamental to a person’s identity. For instance, the Americans With Disabilities Act (ADA) protects a person with diabetes caused by their own unhealthy eating, or a person who is injured in a car accident caused by their own reckless driving.<sup>44</sup> Race-based disparate-

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about the scope of statutory prohibitions on discrimination.” Clarke, *supra* note 35, at 28–30 (citing sources illustrating this point).

<sup>42</sup> The focus on immutability stems from a prominent theory of distributive justice called “luck egalitarianism.” This holds that benefits and burdens should be based not on luck, but on things people can control. Hence, they should be “responsibility tracking.” Clarke, *supra* note 35, at 16–17; Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 *Theoretical Inquiries in L.* 271, 275–76 (2007); Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in *Reason and Value: Themes from the Work of Joseph Raz* 270, 273 (R. Jay Wallace et al., eds., 2004) (discussing egalitarian view that “resource outlays should not be influenced by morally arbitrary factors”).

<sup>43</sup> Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 *Yale L.J.* 485, 505 (1998) (“Jews generally can change or conceal their religion, while blacks generally cannot change or conceal their race. This surely does not make anti-Semitic legislation more legitimate than racist legislation.”); see Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 *Tex. L. Rev.* 343, 383 (1981) (reviewing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)) (Ely fails to consider that some traits “should be treated as immutable because of fundamental interests in not changing them”); see also *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, concurring) (suggesting that the law should protect “traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them”); cf. *Nyquist v. Mauclet*, 432 U.S. 1, 4–5, 7–8 n.10 (1977) (holding that alienage is a suspect classification where the plaintiffs were aliens by choice—i.e., they were eligible to apply for citizenship, but did not wish to do so). This has been described as the “new immutability,” “soft immutability,” or “personhood” theory of immutability. Clarke, *supra* note 35, at 24.

<sup>44</sup> *Cook v. R.I., Dep’t of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 24 (1st Cir. 1993) (“[The Americans With Disabilities Act] indisputably applies to numerous conditions that may be caused or exacerbated by voluntary conduct, such as alcoholism, AIDS,

impact law and state statutes restrict discrimination based on criminal and credit history.<sup>45</sup>

These traits do not seem to be protected because they are fundamental aspects of personal identity akin to religion and procreation. Rather, lawmakers may have determined that the voluntary conduct causing these traits is not sufficiently blameworthy or predictive of future conduct to justify ongoing exclusion from social and economic opportunities.<sup>46</sup> This can be true even if the trait is something like bad

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diabetes, cancer resulting from cigarette smoking, heart disease resulting from excesses of various types, and the like.”). The law is somewhat unsettled on where the boundaries of disability lie. *Cook* held that obesity is a disability because the Act applies to other conditions caused by voluntary conduct. *Id.* However other courts have held that obesity is not a disability unless it is caused by a physiological condition, i.e., immutable. See Clarke, *supra* note 35, at 56.

<sup>45</sup> See Fishkin, *supra* note 15, at 1439–44, 1455–70 (discussing these laws); see also *El v. Se. Pa. Transp. Auth.*, 418 F. Supp. 2d 659, 667 (E.D. Pa. 2005) (“[I]t has been recognized that a blanket policy of denying employment to any person having a criminal conviction violates Title VII”), *aff’d*, 479 F.3d 232 (3d Cir. 2007); *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1295 (8th Cir. 1975) (blanket policy prohibiting applicants with any non-traffic criminal conviction had racially disparate impact barred under Title VII).

<sup>46</sup> An Illinois legislator supporting a bill prohibiting credit history screening argued that “it’s just not relevant to the job. And people who are in a hole can’t get out because of it.” Fishkin, *supra* note 15, at 1447–48; *id.* at 1450 (a report on Washington’s bill stated that credit history screening “make[s] it more difficult for low-income workers to move into the middle class” and “unfairly penalize[s] lower class and middle class people who have had financial difficulties . . . [and] are often the people who need employment the most.”). Similarly, arguments for prohibiting criminal history screening relate to both its predictive power, and separately, the idea that people who make mistakes deserve second chances to rebound from their mistakes. *Id.* at 1456–57 (In the 2004 State of the Union, President George W. Bush stated that America is land of “second chance . . . and when the gates of the prison open, the path ahead should lead to a better life”). Courts and the EEOC have both rejected the idea that any criminal history is automatically predictive of job performance. Instead they require a more particularized assessment of the link between the specific type of criminal conviction and the job at issue, also taking into account the amount of time that has passed since the conviction. *El*, 479 F.3d at 244–45 (employers screening based on criminal history must demonstrate that they “accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not.”); see also EEOC, Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [<https://perma.cc/X6QX-5VYJ>]. Scholars have critiqued the theory of luck egalitarianism and the “responsibility tracking” principle underlying the immutability requirement as being unduly harsh and unforgiving. Clarke, *supra* note 35, at 19 (“The theory [of luck egalitarianism] distinguishes between ‘the deserving and the undeserving disadvantaged,’ and abandons the latter, even if her circumstances are catastrophic. It is not concerned with providing second chances, opportunities to correct



credit, caused by conduct that was voluntary and arguably irresponsible. In a society that values social mobility, even people who make mistakes should have an opportunity to turn their lives around.<sup>47</sup> Another reason for protecting these types of traits is that it may be impossible to objectively discern whether they are a product of voluntary choices as opposed to involuntary circumstances—since circumstances determine what choices are available and the reasonableness of those choices.<sup>48</sup>

There also may be macroeconomic justifications for protecting traits that meet the foregoing description, regardless of whether the trait is mutable, and even if discrimination is marginally efficient from an employer's perspective. Individuals who are systematically shut out of the economy due to overbroad group-based generalizations will be underemployed and dependent on welfare.<sup>49</sup> By requiring regulated parties to bear modest short-term costs associated with integrating these groups, discrimination law may enhance overall economic efficiency.<sup>50</sup>

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mistakes, or paths to redemption.”); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 *Ethics* 287, 295–96 (1999) (pointing out that under a strict interpretation of this theory, a motorist who is injured by their own negligent driving should not be entitled to any health coverage).

<sup>47</sup> Cf. Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* 23 (2014) (The anti-bottleneck principle underlying discrimination law calls for “open[ing] up a wider range of life paths and opportunities not only to those who demonstrate particular merit, desert, or promise, but to everyone—including those who have done poorly and those who did not manage to do as much as one would hope with the opportunities that were available to them.”).

<sup>48</sup> For example, a person who smokes might do so to mitigate the stress associated with circumstances beyond their control. Clarke, *supra* note 35, at 18 (“One need not believe free will is an illusion to agree that what may seem a free choice from a privileged perspective may seem predetermined by socioeconomic circumstances from a disadvantaged one.”). There is ample evidence that people tend to “ascribe volition and causation to individuals they have already implicitly judged as morally culpable.” *Id.*

<sup>49</sup> The statement of findings and purpose for the Americans with Disabilities Act notes that discrimination against persons with disabilities leads to unnecessary welfare dependency and unproductivity. 42 U.S.C. § 12101(a)(8) (2012). Likewise, the statement of purpose for the Age Discrimination in Employment Act observes that unemployment “is high among older workers; their numbers are great and growing, and their employment problems grave.” 29 U.S.C. § 621(a)(3) (2012); see also Fishkin, *supra* note 15, at 1461–62 (discussing how the main arguments for laws restricting criminal history screening focused on the general social and economic benefits of employing formerly incarcerated persons).

<sup>50</sup> For this reason, some argue that employment discrimination law is justified by economic efficiency. John Donohue III, *Is Title VII Efficient?* 134 *U. Pa. L. Rev.* 1411, 1429–30 (1986); see also David A. Strauss, *The Law and Economics of Racial*

In sum, there is no single, one-size-fits-all answer to why certain social biases are considered illegitimate. It is not that the protected traits are always irrelevant to capability, nor that they are immutable, nor that they are fundamental to personal identity. Some traits are protected even though they result from irresponsible choices. The common factor seems to be a value judgment that it is bad public policy or fundamentally inconsistent with the ideal of social mobility to treat people differently based on the trait in question.

With all protected traits, discrimination is sometimes justified in particular cases by important countervailing interests, such as economic productivity, profitability, or safety.<sup>51</sup> Hence, discrimination statutes recognize defenses for these scenarios: for all traits except race, disparate treatment is defensible if the trait is a “bona fide occupational qualification” (“BFOQ”), meaning only people with the trait are able to perform an “essential” job function.<sup>52</sup> For all protected traits, including race, a policy with a disparate impact is defensible if it is “job related for the position in question and consistent with business necessity.”<sup>53</sup> Further, failure to accommodate a disability is defensible if the cost of accommodation would create “undue hardship” for the business.<sup>54</sup>

The next two Parts will argue that the logic of discrimination law applies to poverty: first, in Part III, I review the long history of social bias against the poor. I explain how it is deeply intertwined with racial bias, and I describe widespread SES-based discrimination. Then, in Part IV, I argue that the justifications for protecting traits like race, religion, and disability all apply to poverty—this is true regardless of whether someone was born poor or became poor as a result of voluntary choices.

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Discrimination in Employment: The Case for Numerical Standards, 79 *Geo. L.J.* 1619, 1621–31 (1991) (explaining why racial discrimination may be rational from an employer’s perspective but also inefficient from a macroeconomic perspective). But see Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 *U. Pa. L. Rev.* 513, 518 (1987) (arguing that pre-Civil Rights Act of 1991 discrimination law might not be efficient once administrative costs are taken into account).

<sup>51</sup> Fishkin, *supra* note 15, at 1476–77 (noting that the goals of discrimination law must be balanced against competing considerations and whether a practice should be outlawed depends on where it falls on the spectrum between legitimate and arbitrary).

<sup>52</sup> 42 U.S.C. § 2000e-2(e) (2012).

<sup>53</sup> *Id.* § 2000e-2(k) (2012).

<sup>54</sup> *Id.* § 12112(b)(5)(A) (2012).

## III. PERVASIVE SES-BASED BIAS

Poverty is not typically considered the type of trait that should be protected from discrimination. This is evident from the fact that discrimination laws in the U.S. generally do not protect it.<sup>55</sup> Prominent scholars of discrimination law have also been skeptical about the idea of prohibiting discrimination based on poverty. They characterize the inequality poor people experience as being fundamentally different from social bias and stereotyping based on race, sex, and other protected traits. Roughly, this distinction maps onto one Professor Nancy Fraser draws between two different ways that political and social movements have framed issues of inequality: historically, complaints of injustice were mostly framed in terms of “maldistribution,” but in recent decades, the focus has shifted from maldistribution to misrecognition.<sup>56</sup> Claims of maldistribution portray injustice as rooted in economic structure, whereas claims of misrecognition portray injustice as rooted in “cultural depreciation” or “demeaning representations” of a particular group—not necessarily linked to economic status or disadvantage.<sup>57</sup>

The inequality experienced by poor people is typically characterized as maldistribution—an incidental byproduct of neutral economic forces—but not a problem of misrecognition.<sup>58</sup> Discrimination law is

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<sup>55</sup> Some state and local laws protect SES-linked traits, such as public assistance status and homelessness. See *infra* note 279, and accompanying text.

<sup>56</sup> Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, in *Redistribution or Recognition? A Political-Philosophical Exchange* (Nancy Fraser & Axel Honneth eds., 2003); Nancy Fraser, *Redistribution or Recognition? A Political-Philosophical Exchange* 7, 12 (Nancy Fraser & Axel Honneth eds., 2003); Nancy Fraser, *Rethinking Redistribution*, 3 *New Left Rev.* 107, 108–11 (May-June 2000).

<sup>57</sup> See Fraser, *Redistribution or Recognition?* *supra* note 56, at 34–35; see also Fraser, *Rethinking Redistributions*, *supra* note 56, at 110. Fraser gives the example of a white male factory worker who is laid off as someone who has social/cultural standing but suffers harm of distribution. She also gives the example of a well-to-do black banker, who cannot get a taxi to pick him up, as someone who has economic standing, but suffers a harm of recognition.

<sup>58</sup> *Id.* at 12–13 (noting that poverty is usually seen as an issue of maldistribution, but not one of misrecognition); Sandra Fredman, *Redistribution and Recognition: Reconciling Inequalities*, 23 *S. Afr. J. on Hum. Rts.* 214 (2007) (same). For instance, Owen Fiss stated that insofar as the Constitution, and discrimination law generally, are concerned primarily about individual justice, an anti-subordination principle should protect groups that have a

primarily structured around addressing misrecognition, and it is seen as an inept tool for addressing maldistribution.<sup>59</sup> To the extent the poor suffer primarily or exclusively from maldistribution, discrimination law is not an apt tool for addressing their harms.<sup>60</sup>

However, this dichotomy falls short in two respects. First, it does not appreciate the extent that poor people suffer misrecognition: people who appear to be poor are subject to demeaning representations and stereotyped as being inferior—no matter how capable and competent they are. Second, it overlooks the extent that these two types of harm overlap and propagate one another: Misrecognition—negative stereotypes about the poor—underlie policies that disadvantage poorer people

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quality called “interdependence”—meaning individual group members’ social reputations are intertwined with their group’s negative social reputation. This condition of interdependence makes harm to the group’s reputation effectively an individual harm. He maintains that this condition is not obtained in the case of the poor: They “are not disadvantaged because they are members of a group called ‘the poor,’[as] [t]heir status is not dependent on the status of the group in the way that the status of blacks is determined by their group status.” Fiss, *supra* note 28, at 20–21. Though he suggests that *if* discrimination law were driven by a concern for the structure and quality of community (rather than individual justice)—that is, not wanting to live in a community that is divided or “disfigured”—its logic would potentially justify protecting the poor. *Id.* at 21–22. Even Michelman, who is notorious for arguing that the Fourteenth Amendment should guarantee the poor minimal entitlements to basic goods, avoided arguing that all wealth discrimination should be suspect. Michelman, *supra* note 10, at 27–28 (“A de facto pecuniary classification . . . is usually nothing more or less than the making of a market (e.g., in trial transcripts) or the failure to relieve someone of the vicissitudes of market pricing (e.g., for appellate legal services),” and market pricing is “not normally deemed objectionable.”). In a similar vein, Ely argued that the poor should not be entitled to constitutional protection because “failures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures.” Ely, *supra* note 20, 162.

<sup>59</sup> While it can prohibit a shopkeeper from refusing to serve someone because of their race, it cannot force a factory to remain open in order to avoid laying off workers, force employers to pay all workers higher wages, or force shop keepers to lower their prices so food will be more affordable.

<sup>60</sup> Cf. Tarunabh Khaitan, *A Theory of Discrimination Law* 138 (2015) (reasoning that for certain characteristics, including poverty, lacking a university education, having a less-than-average IQ, “it may be that the connection between the characteristic and ability to perform a job makes it too expensive to protect certain groups, at least against discrimination in the employment sector,” though “this reasoning must be used with caution”).

and perpetuate maldistribution.<sup>61</sup> This Part surveys the well-documented history of social bias against the poor and its intersection with racial bias. I describe how this bias manifests in a broad range of policies that discriminate based on SES. Many of these policies are not merely incidental byproducts of a neutral free market. They are rooted in a more invidious form of social bias akin to racial bias. In Fraser's terms, the poor are widely misrepresented via demeaning stereotypes, and this drives and legitimates maldistribution.

#### *A. Social and Cultural Origins of SES-Based Bias*

This Section provides an abridged summary of how lower-SES people have been denigrated and mistreated at various periods throughout our history. These select historical examples are intended to illustrate the deep roots of social bias against the poor. I am not aiming to provide a comprehensive history of class dynamics in America, and I do not purport to contribute anything new to existing historical accounts.<sup>62</sup> This brief summary is intended to inform readers who are less familiar with the history, and anyone who is *skeptical* of the premise that discrimination against the poor reflects invidious bias akin to racial bias.

In recent years, as economic inequality has been rising, there has been a surge of writing about class and classism in American society.<sup>63</sup> There

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<sup>61</sup> Fraser questions this common characterization. See Fraser, *Redistribution or Recognition?*, supra note 56, at 23–24 (“Today, the misrecognition dimensions of class may be sufficiently autonomous . . . to require independent remedies of recognition.”); Fraser, *Rethinking Recognition*, supra note 59 at 110 (discussing the ways misrecognition—i.e., demeaning representations—perpetuate and legitimate maldistribution).

<sup>62</sup> This background may seem obvious to readers versed in this topic. See, e.g., Barnes & Chemerinsky, supra note 10, at 119 (stating it is an “obvious truth that poverty takes on the character of a stigmatizing identity category”); Ross & Li, supra note 10, at 343–344 (noting the “well-chronicled history” of “societal stigmatization of the poor”).

<sup>63</sup> For a small sample of this writing see, for example, Nancy Isenberg, *White Trash: The 400-Year Untold History of Class in America* (2016); J.D. Vance, *Hillbilly Elegy: A Memoir of a Family and Culture in Crisis* (2016); Charles Murray, *Coming Apart: The State of White America 1960–2010* (2012); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012); Martin Gilens, *Why Americans Hate*

is a growing body of historical and sociological work documenting how poor people of all races have been “othered” throughout our social history.<sup>64</sup> As this part will describe in more detail, these stereotypes about the poor are influenced by racial bias, and they operate to perpetuate its effects.<sup>65</sup> But they also render poor whites in one sense “not quite white.”<sup>66</sup>

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Welfare: Race, Media, and the Politics of Antipoverty Policy (1999); Matt Wray, *Not Quite White: White Trash and the Boundaries of Whiteness* (2006); bell hooks, *Where We Stand: Class Matters* (2000). For an example of popular journalism on the topic, see Alec MacGillis & ProPublica, *The Original Underclass*, *The Atlantic* (Sept. 2016), <https://www.theatlantic.com/magazine/archive/2016/09/the-original-underclass/492731/> [<https://perma.cc/CBD3-WZ63>].

<sup>64</sup> See generally, Isenberg, *supra* note 63; Wray, *supra* note 63, at 3 (“[P]oor whites appear more like a caste than a class, and as such are thought to have no social worth and only regressive political tendencies.”); see also John Hartigan Jr., *Name Calling: Objectifying “Poor Whites” and “White Trash” in Detroit*, in *White Trash: Race and Class in America* 53 (Matt Wray & Annalee Newitz eds., 1997) [hereinafter Hartigan, *Name Calling*] (“Various names [exist] for “othered” whites, including: cracker, hillbilly, redneck. Each one “whites rely upon to distinguish between those who match class decorums of a certain racial identity (whiteness) and those who through physical, emotional, or economic markings, fail to measure up.”); Michelle M. Tokarczyk, *Promises to Keep: Working Class Students and Higher Education*, in *What’s Class Got To Do With It? American Society in the Twenty-First Century* 166 (Michael Zweig ed., 2004); Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 *S. Cal. Interdisc. L.J.* 289, 292 (2016) (“The use of the term [“white trash”] persists to this day to refer to unworthy whites, to those who defile the ideal of whiteness.” (citing John Hartigan, Jr., *Unpopular Culture: The Case of “White Trash,”* 11 *Cultural Stud.* 316, 322–25 (1997)); Camille Gear Rich, *Marginal Whiteness*, 98 *Calif. L. Rev.* 1497, 1518 (2010) (societal discrimination results in “low-status” whites “being treated like minorities”); Emma Eisenberg, *We Still Don’t Know How to Talk about Pennsatucky: The Reality of Rural Sexual Assault and How Class Plays Out in ‘Orange is the New Black,’* *Salon* (July 5, 2015), [http://www.salon.com/2015/07/05/we\\_still\\_dont\\_know\\_how\\_to\\_talk\\_about\\_pennsatucky\\_the\\_reality\\_of\\_rural\\_sexual\\_assault\\_and\\_how\\_class\\_plays\\_out\\_in\\_orange\\_is\\_the\\_new\\_black/](http://www.salon.com/2015/07/05/we_still_dont_know_how_to_talk_about_pennsatucky_the_reality_of_rural_sexual_assault_and_how_class_plays_out_in_orange_is_the_new_black/) [<https://perma.cc/387C-TFGH>].

<sup>65</sup> For a much more comprehensive account of this, see, for example, John A. Powell, *The Race and Class Nexus: An Intersectional Perspective*, 25 *Law & Ineq.* 355, 356–58 (2007) (“[R]ace and class are distinct and at the same time mutually constitutive...”); Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 *L. & Contemp. Probs.* 57, 63 n. 40 (2009) (posing question whether economic status can “so diminish the power of Whiteness” as to render poor whites “‘operatively’ or ‘functionally’ black”); McFarlane, *supra* note 2, at 163 (noting connections between race and class); and Barnes & Chemerinsky, *supra* note 10, at 119 n.55 (collecting sources).

<sup>66</sup> Wray, *supra* note 63, at 135 (“*[W]hite trash* and its linguistic kin have historically been used as boundary terms that have not only marked out a despised and stigmatized white other but enabled the articulation and rearticulation of white as a bounded cultural identity.”); see also Lani Guinier & Gerald Torres, *The Miner’s Canary: Enlisting Race, Resisting Power, Transforming Democracy* 94, 251 (2002) (observing that “rural white

Classism was built into our society from the Founding Era. Many of those sent to the Colonies by the British were poor people. Some became indentured servants.<sup>67</sup> Others squatted in undesirable lands, and this group of landless people lacked the ability to farm effectively, earn income, or acquire property.<sup>68</sup> Colonial officers described them as “slothful in everything but getting children,” “the meanest, most rustic and squalid part of the species”; “scum of nature,” “vermin,” “no better than savages,” “their children brought up in the woods like brutes.”<sup>69</sup> Many of the Founding Fathers bought into ideas of natural aristocracy—

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students had also effectively been raced black or brown”); Hartigan, *Name Calling*, *supra* note 64, at 52–53; Jones, *supra* note 65, at 63 (observing that the prototypical black person is poor, while the prototypical white person has economic power, and “insofar as many poor Whites lack access to education, health care, jobs, and home-ownership, the fact that they are White . . . loses much of its force”); Rich, *supra* note 64, at 1518 (“[L]ow-status or marginal whites may find that they are, for all practical purposes, being treated like minorities, as they are subject to defamatory statements and denial of privileges available to other white workers.”).

<sup>67</sup> Isenberg, *supra* note 63, at 27 (explaining that the leaders of Jamestown made debtors and, if these debtors perished before repaying their debts, their children into slaves). Debtors included those who sold their labor in exchange for passage to America. *Id.* at 30–34 (discussing indentured servitude in Puritan New England colonies); *id.* at 41–42 (“Slavery was . . . a logical outgrowth of the colonial class system . . . . It emerged from three interrelated phenomena: harsh labor conditions, the treatment of indentures as commodities, and, most of all, the deliberate choice to breed children so that they should become an exploitable pool of workers.”).

<sup>68</sup> See *id.* at 43–49 (discussing the Carolinas and noting that about 10% of the settlers owned almost 50% of the land); *id.* at 90 (describing how people squatting on unclaimed lands in Western Virginia and Kentucky were offered the opportunity to buy it, but instead became tenants because they lacked the cash to purchase them); *id.* at 71–72 (discussing how the Quakers and other wealthy proprietors controlled land in Pennsylvania, and discussing almshouses in New York, Philadelphia, and Boston); *id.* at 108–09 (describing how British military officers in the 1750s used the terms “scum of nature” and “vermin” to describe landless settlers in Pennsylvania, at the forks of the Ohio, Allegany, and Monongahela rivers); *id.* at 112 (noting that squatters were “ubiquit[ous]” and that by 1850, at least 35% of the population in southwestern states owned no real estate).

<sup>69</sup> *Id.* at 53–54 (discussing people squatting on lands in North Carolina); *id.* at 109 (discussing people squatting on lands in western Pennsylvania). Likewise military officers described people living on the frontiers of Virginia, Maryland, the Carolinas and Georgia as “idle strag[g]lers,” “vagabonds often worse than the Indians,” whose women were “sluttish.” *Id.* at 109–10.

believing that only members of certain classes were genetically fit to have political, economic, and social power.<sup>70</sup>

By the Civil War, the terms “squatter” and “cracker” became ubiquitous across the United States and a popular political trope, associated with crude habitations, licentiousness, degenerate patterns of breeding, distrust for civilization, and loud, boastful slang.<sup>71</sup> Leading up to the Civil War, both sides insulted the other for comprising low class people: Northerners argued that slavery had created a class of poor, idle, and disrespected “poor white trash” who were “sinking deeper and more hopelessly into barbarianism with every succeeding generation.”<sup>72</sup> Southern landowning elites criticized the North as being populated by rough laborers “hardly fit for association with a southern gentleman’s body servant.”<sup>73</sup> During Reconstruction, “Republicans designated white trash as a ‘dangerous class’ that was producing a flood of bastards, prostitutes, vagrants, and criminals,”<sup>74</sup> and some Northerners expressed anxiety about granting them voting rights.<sup>75</sup>

After the Civil War, the Populist Movement had some success uniting poor whites and emancipated blacks around shared experiences of economic and social marginalization.<sup>76</sup> But race was used as a wedge to

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<sup>70</sup> For instance, John Adams stated “passion for distinction” was a natural human force, and “there must be one, indeed who is the last and the lowest of the species.” *Id.* at 98. Thomas Jefferson argued that “[t]he circumstance of superior beauty is thought worthy of attention in the propagation of our horses, dogs, and other animals,” “why not in that of man?” *Id.* at 99. Both Adams and Jefferson used the term “wellborn” to describe what people should be looking for when selecting marital partners. *Id.* at 101. The term became synonymous with landed aristocracy. *Id.* Jefferson insulted Andrew Jackson (who was born in the Carolinas) for lacking the pedigree of a president. Jackson’s political opponents referred to his wife (who had divorced her first husband) as an “American Jezebel” and a “dirty black wench,” as she had tanned skin and “[w]hiteness was a badge of class privilege denied to poor cracker gals who worked under the sun.” *Id.* at 126–27.

<sup>71</sup> *Id.* at 112. See also Wray, *supra* note 63, at 46 (While initially a Southern term, by the end of the civil war, “poor white trash” became a “nonlocalized term for poor rural whites in every part of the nation.”).

<sup>72</sup> Isenberg, *supra* note 63, at 136 (quoting George Weston, *The Poor Whites of the South* 2 (1856)); *id.* at 135–40.

<sup>73</sup> *Id.* at 156 (“The prevailing class one meets with is that of mechanics struggling to be genteel, and small farmers who do their own drudgery”).

<sup>74</sup> *Id.* at 180. According to President Johnson, the Civil War emancipated not only black slaves, but also the “poor white man” who had been “looked down upon by the Negro and elite planter alike.” *Id.* at 177 (paraphrasing Johnson).

<sup>75</sup> Isenberg, *supra* note 63, at 180.

<sup>76</sup> Powell, *supra* note 65, at 375.



impede a cross-racial, class-based political coalition from gaining power.<sup>77</sup> Jim Crow laws enforcing racial segregation prevented lower-SES whites and nonwhites from developing social and political ties.<sup>78</sup> However, many of the mechanisms used to oppress nonwhites, such as poll taxes and literacy tests, also oppressed poor whites.<sup>79</sup>

Toward the end of the nineteenth century, as Southern Democrats regained power, theories of Social Darwinism and eugenics were gaining political traction. These theories—influenced by writings about poor Southern whites—“provided Americans with a convenient way to naturalize class and racial differences.”<sup>80</sup> In the 1920s, the term “aristogenic” was used to describe the emerging professional master class.<sup>81</sup> By 1931, twenty-seven states had laws requiring the sterilization or “segregation” (involuntary commitment) of people deemed “feeble-minded.”<sup>82</sup> These laws were part of a concerted campaign to prevent poorer women from “outbreeding” higher class women, or from

<sup>77</sup> Lawrence Goodwyn, *Democratic Promise, The Populist Movement in America* 276–306, 533–34 (1976); C. Vann Woodward, *The Strange Career of Jim Crow* 79 (1974); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 *Yale L.J.* 1287, 1297 n.28 (1982) (describing a “conscious, manipulated reversion to racism to incite the white masses and prevent a political coalition of Blacks and Whites from advancing to power”); powell, *supra* note 65, at 381 (“The Populist Party (the first political party to focus on the redistribution of wealth and emphasize racial tolerance) was defeated in the South by the use of race hatred, violence and fraud.”).

<sup>78</sup> See powell, *supra* note 65, at 378.

<sup>79</sup> *Id.*; Susan B. Glasser & Glenn Thrush, *What’s Going on With America’s White People?* *Politico Magazine* (Sept.–Oct. 2016), <https://www.politico.com/magazine/story/2016/09/problems-white-people-america-society-class-race-214227> [<https://perma.cc/KMC9-L7TD>] (interview with Nancy Isenberg) (“[O]ne thing we have to realize about white supremacy is that it leads to an advantage to the elite to pit these two groups against each other. And the poor whites don’t necessarily get all the benefits from their white skin.”).

<sup>80</sup> Isenberg, *supra* note 63, at 176.

<sup>81</sup> *Id.* at 202.

<sup>82</sup> Andrea DenHoed, *The Forgotten Lessons of the American Eugenics Movement*, *The New Yorker* (Apr. 27, 2016), <http://www.newyorker.com/books/page-turner/the-forgotten-lessons-of-the-american-eugenics-movement> [<https://perma.cc/SB3T-Y2L7>] (“Feeble-mindedness” was “a capaciously defined condition that was diagnosed . . . by identifying symptoms such as moral degeneracy, an overactive sex drive, and other traits liberally ascribed to poor people.”); see also Isenberg, *supra* note 63, at 195. In upholding the practice of forced sterilization, the Court reasoned “[i]t is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind.” *Buck v. Bell*, 274 U.S. 200, 207 (1927).

breeding with higher class men so as to create children of mixed class lineage.<sup>83</sup>

The Great Depression brought about a temporary shift in attitudes toward poverty. It illustrated that poverty could be caused by external circumstances, as opposed to genetics, and brought about New Deal programs to help those in poverty.<sup>84</sup> However, many of these programs were designed and administered in a manner that excluded poor blacks from benefits.<sup>85</sup> For example, federal programs underwriting home mortgages were administered in a way that encouraged white middle class people to move into exclusionary suburban developments.<sup>86</sup> This geographically segregated poor, and mostly black, people in inner cities.<sup>87</sup> Poorer whites were also segregated from the middle-upper class suburbs, but they were mostly in more rural areas and trailer parks, which “became the measure of white trash identity.”<sup>88</sup>

In the early ‘60s, the Civil Rights Movement marked another moment of sympathy for the poor. In 1962, Michael Harrington’s “The Other America” documented a “forgotten” population living in severe poverty despite the economic boom of the 1950s. This raised public awareness

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<sup>83</sup> This concern about breeding between classes is obviously reminiscent of a similar concern about interracial relationships. Using this type of language to refer to poor white women suggests they were likewise considered a distinct race. Isenberg, *supra* note 63, at 196–97.

<sup>84</sup> *Id.* at 210–16. The Director of the Subsistence Homesteads Division, Milburn Lincoln Wilson, instituted a program to give former landless tenants land, to educate them on how to make it productive, manage finances, etc. Secretary of Agriculture, Henry Wallace, argued that poverty was not genetic, and that if the children of poor families were raised in wealthy households, they would be indistinguishable from the wealthy. *Id.*

<sup>85</sup> See *powell*, *supra* note 65, at 382–92. For example, because the Social Security Act excluded agricultural, domestic, and other self-employed workers, 65% of blacks were excluded from its protections. *Id.* at 383. They were also excluded from GI Bill benefits due to various factors, including local control. *Id.* at 388.

<sup>86</sup> Isenberg, *supra* note 63, at 237–40 (explaining that suburban subdivisions were “class-conscious fortresses” that kept poorer people and non-whites out with policies like single-family zoning and racially restrictive covenants). The Federal Housing Administration considered blacks an “adverse influence” on property values, and refused to underwrite mortgages for homes in neighborhoods with many black residents. *powell*, *supra* note 65, at 391–92. This reinforced discrimination in the private sector. *Id.*

<sup>87</sup> *powell*, *supra* note 65, at 393 (“Black neighborhoods and eventually entire cities became and remain stigmatized.”).

<sup>88</sup> Isenberg, *supra* note 63, at 247; *id.* at 240–41 (These people were labeled as “trailer trash” that was “to be gotten rid of as soon as possible.”).

and reportedly influenced John F. Kennedy and Lyndon B. Johnson.<sup>89</sup> In 1964, Johnson campaigned on the promise of a “War on Poverty.” His advertisement declared that “poverty is not a trait of character. It is created anew in each generation. But not by heredity, by circumstances . . . .”<sup>90</sup> Johnson won by a landslide, and Congress enacted the Great Society programs, many of which have played an important role in abating poverty since the 1960s.<sup>91</sup> During this period leading up to the Great Society legislation, media stories about the poor tended to be sympathetic, and poverty was portrayed “overwhelmingly as a white problem.”<sup>92</sup>

However, the social and cultural revolutions during the 1960s provoked a conservative reaction: Goldwater’s 1964 campaign ad played up images of rebellious rioting, violence, crime, and nudity, and forewarned of imminent moral decline.<sup>93</sup> This spurred animosity toward inner city populations where these ‘vices’ were represented as being most prevalent—populations that were poor and mostly black. Starting in 1965, the media’s portrayal of poverty changed dramatically: “the face of poverty . . . became markedly darker.”<sup>94</sup> Since that time, a majority of stories about poverty featured black subjects, even though a

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<sup>89</sup> *Id.* at 265; see also Maurice Isserman, *Michael Harrington: Warrior on Poverty*, N.Y. Times (June 19, 2009), <https://www.nytimes.com/2009/06/21/books/review/Isserman-t.html> [<https://perma.cc/7XQG-VADH>] (noting that the book sold 70,000 copies its first year, and more than one million in successive editions).

<sup>90</sup> See Johnson Campaign Advertisement from the 1964 Presidential Election, <https://www.youtube.com/watch?v=gluX03psG5Y> (last visited Feb. 11, 2018).

<sup>91</sup> Christopher Wimer et al., Trends in Poverty with an Anchored Supplemental Poverty Measure 8 (Columbia Population Research Ctr. Dec. 5, 2013), <https://courseworks.columbia.edu/access/content/group/c5a1ef92-c03c-4d88-0018-ea43dd3cc5db/Working%20Papers%20for%20website/Anchored%20SPM.December7.pdf> [<https://perma.cc/V36K-C6SJ>].

<sup>92</sup> Martin Gilens, How the Poor Became Black: The Racialization of American Poverty in the Mass Media *in* *Race and the Politics of Welfare Reform* 101, 101–102 (Sanford F. Schram et al., eds., 2003).

<sup>93</sup> See Barry Goldwater Campaign Film from 1964, <https://www.youtube.com/watch?v=xniUoMiHm8g> [<https://perma.cc/H7SK-CSV7>]. Barry Goldwater’s 1964 campaign film depicted urban violence, rioting, nude parades, topless women, strip clubs, and described “two Americas”: One America is the dream. The other America “is no longer a dream, but a nightmare” where “our streets are no longer safe” and “immorality begins to flourish.”

<sup>94</sup> Gilens, *supra* note 92, at 101–102.

vast majority of poor people in America are white.<sup>95</sup> And simultaneously, stories about poverty became more blameful and moralizing.<sup>96</sup>

Politicians and media increasingly attributed poverty to “culture”—a set of behavioral “pathologies” that poor parents pass down to their children.<sup>97</sup> These pathologies include lack of self-discipline, aberrance of traditional moral and family values, laziness, and disinterest in education.<sup>98</sup> Perhaps the most famous example is Ronald Reagan’s trope of a lazy, dishonest “welfare queen,” who cheated the system in order to get benefits so she would not have to work.<sup>99</sup> The Welfare Queen “stigmatype”<sup>100</sup> and the generalizations it represents harm poorer people of all races.<sup>101</sup> But they especially harm black people, who are overrep-

<sup>95</sup> Id. at 109–111 (over 50% of stories about poverty included an image of a black person, even though blacks make up only about one-third of people in poverty).

<sup>96</sup> Id.

<sup>97</sup> Gregory Jordan, *The Causes of Poverty—Cultural vs. Structural: Can There Be a Synthesis?*, 1 Persp. in Pub. Aff. 18, 20 (2004); see also Heather E. Bullock et al., *Media Images of the Poor*, 57 J. Soc. Issues 229, 231 (2001) (“[T]he poor are either rendered invisible or portrayed in terms of characterological deficiencies and moral failings (e.g., substance abuse, crime, sexual availability, violence).”).

<sup>98</sup> Jordan, *supra* note 97, at 20. Daniel Patrick Moynihan’s report, *The Negro Family: The Case for National Action* (1965), argued that the matriarchal nature of black families was a cause of poverty, and this “somewhat unintentionally” contributed to the renewed relevance of cultural causes among conservative theorists and policymakers. Id.

<sup>99</sup> Josh Levin, *The Welfare Queen*, Slate (Dec. 19, 2013), [http://www.slate.com/articles/news\\_and\\_politics/history/2013/12/linda\\_taylor\\_welfare\\_queen\\_ronald\\_reagan\\_made\\_her\\_a\\_notorious\\_american\\_villain.html](http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html) [<https://perma.cc/Y3GV-G7QQ>]. In the 1980s, neo-conservative author Myron Magnet argued that poverty is caused by, in the words of H.R. Rodgers’ summary of Magnet’s work, “a destitution of the soul, a failure to develop the habits of education, reasoning, judgment, sacrifice, and hard work required to succeed in the world.” Jordan, *supra* note 97, at 20 (quoting H.R. Rodgers Jr., *American Poverty in a New Era of Reform* 69 (2000)). President George W. Bush later stated that Magnet influenced his thinking about poverty. Alison Mitchell, *Bush Draws Campaign Theme from More than ‘the Heart’*, N.Y. Times (June 12, 2000), <http://www.nytimes.com/2000/06/12/us/bush-draws-campaign-theme-from-more-than-the-heart.html>.

<sup>100</sup> Wray, *supra* note 63, at 23–24.

<sup>101</sup> See Scott Powell, *Overcoming Stereotypes About Poor Appalachian Single Mothers: Understanding Their Actual Lived Experiences* 31 (Aug. 2005) (unpublished M.A. thesis, College of Arts and Sciences of Ohio University) (available at [https://etd.ohiolink.edu/rws\\_etd/document/get/ohiou1128723036/inline](https://etd.ohiolink.edu/rws_etd/document/get/ohiou1128723036/inline) [<https://perma.cc/C7WF-EXXV>]) (“Today, Appalachians are deeply stereotyped by media programs like reruns of *The Beverly Hillbillies* and the film *Deliverance*. These stereotypes have enormous consequences on how we view and address the persistent poverty of Appalachia.”) (citation omitted).

resented in stories about the poor, and, as a consequence, tend to be stereotyped as being poor.<sup>102</sup>

Social bias against the poor remains pervasive. In 2000, the American Psychological Association (APA) adopted a “Resolution on Poverty and Socioeconomic Status,” calling for more research on the “prejudicial and negative attitudes toward the poor,” which “tend to . . . attribute poverty to personal failings . . . and [] ignore strengths and competencies in these groups.”<sup>103</sup> A 2015 summary of research stated that “[a]s a group, the poor . . . elicit[] negative reactions such as neglect and disgust,” and “stereotypes include character traits such as laziness, stupidity, and dishonesty, which presume that the poor are at least partially to blame for their disadvantage.”<sup>104</sup>

SES-based bias is so pervasive and deeply engrained that even children tend to “prefer those who have expensive-looking possessions, such as houses, cars, clothes, and toys, over those who have less costly belongings.”<sup>105</sup> While bias among adults may be more subtle, a number of studies indicate that adults harbor unconscious, automatic bias based on SES: For example, people have lower expectations for children they perceive as being lower SES, even if test scores are the same.<sup>106</sup> Participants in an experiment rated a candidate described as “middle class” as more suitable for a school leadership position than an identical

<sup>102</sup> Rachel D. Godsil, *Hey, Media: White People Are Poor, Too*, *The Root* (Dec. 2, 2013), <https://www.theroot.com/hey-media-white-people-are-poor-too-1790899158> [<https://perma.cc/M8QF-QSW6>] (“[I]nadvertently, the traditional media’s one-sided image of poverty has contributed to the misconception that most poor people are black and that most black people are poor—although more than 70 percent are not. This stereotype, like most stereotypes, harms black people in myriad ways, especially because the political right has linked poverty with moral failure . . . .”) (emphasis in original); see Gilens, *supra* note at 102 (“[T]he media’s tendency to associate African Americans with the undeserving poor reflects—and reinforces—the centuries-old stereotype of blacks as lazy.”).

<sup>103</sup> Am. Psychol. Ass’n, *Resolution on Poverty and Socioeconomic Status* (Aug. 6, 2000), <http://www.apa.org/about/policy/poverty-resolution.aspx> [<https://perma.cc/3BLT-PNGJ>].

<sup>104</sup> Courtney B. Tablante & Susan T. Fiske, *Teaching Social Class*, 42 *Teaching of Psychol.* 184, 185 (2015).

<sup>105</sup> Suzanne R. Horowitz & John F. Dovidio, *The Rich—Love Them or Hate Them? Divergent Implicit and Explicit Attitudes Toward the Wealthy*, 20 *Grp. Processes & Intergroup Rel.* 3, 7 (2017).

<sup>106</sup> See Tablante & Fiske, *supra* note 104, at 185.

candidate described as “working class.”<sup>107</sup> This bias is so common that that lower-SES students have come to expect others will stereotype them negatively, and experience “stereotype threat” during academic tests.<sup>108</sup> When asked to report their SES before taking an exam, they emit higher levels of stress-related hormones, and perform worse on the test, compared to higher-SES students.<sup>109</sup>

### *B. Widespread SES-Based Discrimination*

The biases described above give rise to a host of common policies that discriminate based on SES. Some of these policies involve disparate treatment—i.e., a decisionmaker is motivated (consciously or unconsciously) to treat someone differently because they are poor or appear that way. Others involve disparate impact—policies that are facially neutral and not necessarily intended to disadvantage the poor, but have a significant adverse impact on poorer people. Many of these policies arguably are not justified by legitimate interests. By this I mean that if the same policies were discriminating along the lines of race, sex, or

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<sup>107</sup> Id.; see also Adil H. Haider et al., Association of Unconscious Race and Social Class Bias with Vignette-Based Clinical Assessments by Medical Students, 306 *J. Am. Med. Ass’n* 942 (2011) (86% of tested first-year medical students displayed implicit association test scores consistent with implicit preferences toward members of the upper class.). There is bias against *relatively* lower-class people at all levels of the class structure. See, e.g., Lauren A. Rivera & András Tilcsik, Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market, 81 *Am. Soc. Rev.* 1097, 1097 (2016) (In a field experiment, law firms were significantly more likely to respond to male resumes with markers of “higher-class,” compared to otherwise identical male resumes with “lower-class” markers. However, this was not true for female applicants, as “higher-class” women may be stereotyped as being unwilling to work hard).

<sup>108</sup> “Stereotype threat” is an automatic, subconscious anxiety response triggered by the fear of fulfilling negative stereotypes. Bettina Spencer & Emanuele Castano, Social Class is Dead. Long Live Social Class! Stereotype Threat Among Low Socioeconomic Status Individuals, 20 *Soc. Just. Res.* 418, 418 (2007).

<sup>109</sup> Id. If SES is not made salient before the exam, this effect does not occur. This indicates that the threat may not be caused by exam itself but by consciousness of being stereotyped negatively due to SES. Id. at 427–28; see also Neha A. John-Henderson, et al., Performance and Inflammation Outcomes Are Predicted by Different Facets of SES Under Stereotype Threat, 5 *Soc. Psych. & Personality Sci.* 301, 301 (2014) (finding “low early life SES predicted heightened inflammation responses, while low current SES predicted impaired academic performance”).

another protected trait, there would be credible arguments that they do not satisfy the business necessity or BFOQ defenses.<sup>110</sup>

### *1. Education*

Various features of the educational system treat students differently because of their SES.

*Primary and Secondary Education:* Rather than creating equal opportunities, public education amplifies socioeconomic differences. In many states, school funding is tied to local taxes. This is a regressive system: Poorer districts must tax themselves at higher rates than wealthier ones to raise a comparable amount of school funding—and it may be impossible to make taxes high enough to raise comparable funding.<sup>111</sup> Hence, students in low income neighborhoods tend to have worse physical resources, including inadequate climate control systems, fewer books, fewer computers, crumbling infrastructure, and outdated techn-

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<sup>110</sup> I assume that these same defenses that are available under Title VII and other major laws covering race discrimination (and precedent interpreting these defenses) would apply if SES were added to the list of protected traits. I describe in more detail how these defenses would restrict claims of SES discrimination when I discuss practical implementation. See *infra* notes 237–241, 244–249, and accompanying text. A more radical version of this proposal would be to treat SES more like a disability and require “reasonable accommodation” for lower-SES people. This would mean that employers, landlords, educational institutions, etc., must restructure their practices and facilities to make them more accessible to lower-SES people, so long as doing this does not involve “undue hardship.”

<sup>111</sup> See, e.g., *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 12–13 (The plaintiff’s school district had the lowest average assessed property value per pupil in the San Antonio metropolitan area but had the highest tax rate in the metropolitan area.); Alana Semuels, *Good School, Rich School; Bad School, Poor School: The Inequality at the Heart of America’s Education System*, *The Atlantic* (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/> [<https://perma.cc/D564-T2N3>] (Greenwich, Conn., spends \$6,000 more per year per pupil than Bridgeport, Conn.); Emma Brown, *In 23 States, Richer School Districts Get More Local Funding Than Poorer Districts*, *The Washington Post* (Mar. 12, 2015), [https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/?utm\\_term=.263f9fee50da](https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/?utm_term=.263f9fee50da) [<https://perma.cc/AUY4-FMEP>]. Many states use federal funds to compensate for the difference, but this money is not intended to equalize funding for students in poor districts—it is intended to provide extra resources for poor students, English language learners, and those with special needs. Because it is being used for base funding, there is no money to address these children’s additional needs. *Id.*

ology.<sup>112</sup> They also tend to have less-qualified and less-experienced teachers and less-advanced curriculum.<sup>113</sup>

Lower-income students and their parents encounter interpersonal bias within the school environment “in the form of lowered teacher expectations, social distancing, or dismissive treatment.”<sup>114</sup> Administrators tend to channel high-aptitude, low-SES students into lower track courses instead of placing them in advanced or gifted classes for which they should qualify.<sup>115</sup> Lower-income students are suspended at higher rates than higher-income students for comparable behavioral infractions, and they generally receive harsher and more demeaning discipline for the same types of offenses.<sup>116</sup> Exclusionary disciplinary practices have been widely linked to withdrawal and disengagement from school, dropping out, and involvement in the criminal justice system.<sup>117</sup>

It is difficult to conceive of any neutral justification for these policies—one that does not assume the wealthy are more deserving of

<sup>112</sup> See, e.g., *Class Action Complaint, Gary B. v. Snyder*, 2018 WL 3609491 (E.D. Mich. Sept. 13, 2016) (No. 16-CV-13292), motion to dismiss granted in *Gary B. v. Snyder*, 2018 WL 3609491 (E.D. Mich. July 27, 2018) (No. 2:16-CV-13292) (alleging lower income schools in Detroit lack basic physical necessities, such as adequate climate control systems and clean drinking water, and they are infested by rodents); Am. Fed’n of Teachers, *The Facilities Gap: Cameras in Hand, Students Capture Photos of Schoolhouse Decay* 46–47 (Spring 2007).

<sup>113</sup> See, e.g., Chris Duncombe, *Unequal Opportunities: Fewer Resources, Worse Outcomes for Students in Schools with Concentrated Poverty* 1–2 (Oct. 2017), [http://www.thecommonwealthinstitute.org/wp-content/uploads/2017/10/unequal\\_opportunities.pdf](http://www.thecommonwealthinstitute.org/wp-content/uploads/2017/10/unequal_opportunities.pdf); Nat’l P’ship for Teaching in At-Risk Schools; Qualified Teachers for At-Risk Schools: A National Imperative (2005), <http://www.ecs.org/clearinghouse/57/96/5796.pdf> [<https://perma.cc/38LJ-55VB>].

<sup>114</sup> Am. Psychol. Ass’n, *Report of APA Task Force on Socioeconomic Status* 7 (Aug. 2006).

<sup>115</sup> David Card & Laura Giuliano, *Can Universal Screening Increase the Representation of Low Income and Minority Students in Gifted Education?* (Nat’l Bureau of Econ. Research, Working Paper No. 21519, 2015), <http://www.nber.org/papers/w21519> [<https://perma.cc/ZU52-FPBG>] (Low-SES students in a large, urban school district were less likely to be identified as gifted.); Joseph Neff et al., *5 Ways to Help Bright Low-Income Students to Excel*, *The Charlotte Observer*, <http://www.charlotteobserver.com/news/local/education/article150893387.html> [<https://perma.cc/6FH3-27TB>] (“An investigation . . . reveals that thousands of low-income children who score at the highest level in end-of-grade tests aren’t getting picked for advanced classes – and that they are excluded at a far higher rate than their more affluent classmates who earn the same scores.”).

<sup>116</sup> Russell J. Skiba & Kimberly Knesting, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, 2001 *Innovative Practices for Leadership Learning* 17, 30.

<sup>117</sup> *Id.* at 32–34.



advantages than the poor. Policies that link educational funding to local property taxes effectively require people in poorer districts to pay higher taxes than people in wealthier ones in order to have comparable educational resources.<sup>118</sup> The Department of Education has threatened to withdraw federal funds from school districts for providing students of one race or ethnicity inferior educational resources, assigning them to less advanced classes, or punishing them more severely.<sup>119</sup> These practices should be equally problematic if the disadvantaged class of students is defined by poverty.

*College Education:* The practices described above create real disparities in college preparedness between high- and low-SES students. But these differences do not fully account for differences in college attendance and graduation rates. Poor students who score in the highest bracket on standardized high school mathematics tests are 20% less likely to graduate from college than wealthy students *who score in a*

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<sup>118</sup> The complaint against policies that link educational funding to local property taxes is not based on the idea that the wealthy should be paying higher taxes. Cf., Ely, *supra* note 20, at 162 (arguing that “failures to provide the poor with one or another good or service” do not result from stereotype-based prejudice against the poor but “rather from a reluctance to raise the taxes needed to support such expenditures”). Equal treatment would not necessarily require the wealthy to be taxed more, but it would require that tax revenue be distributed equally across districts (that is, so that per-pupil spending is the same in all districts). Though the Supreme Court has declined to adopt this interpretation of the Fourteenth Amendment, many state courts have interpreted their constitutions to require education resources be distributed equally across all income-levels. *Abbott v. Burke*, 119 N.J. 287 (1990); *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 91–93 (Ark. 1983); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 315 (Wyo. 1980); *Horton v. Meskill*, 376 A.2d 359, 374–75 (Conn. 1977); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Serrano v. Priest*, 18 Cal. 3d 728, 765–66 (1976).

<sup>119</sup> See, e.g., Consent Order, *Barnhardt v. Meridian Mun. Separate Sch. Dist.*, No. 4:65-cv-01300-HTW-LRA (S.D. Miss., May 30, 2013) (consent decree requiring school district to correct patterns of disciplining black students at higher rates than white students); Resolution Agreement Between U.S. Department of Justice Civil Rights Division, U.S. Department of Education Office for Civil Rights and the Gallup-McKinley County School District (June 16, 2017), available at <https://www.justice.gov/crt/case-document/gallup-mckinley-county-school-district-resolution-agreement> [<https://perma.cc/9TL7-3LMY>] (agreeing to resolve complaints that the school district discriminated against Native American students by establishing policies and procedures limiting their access to “gifted” and advanced placement and honors courses).

*lower bracket*.<sup>120</sup> Various factors account for this,<sup>121</sup> but the admissions system is one important one. It privileges higher-SES students in various ways: Low-SES students are not able to participate in extracurricular activities and unpaid internships that enhance an applicant's resume; they do not have access to private test preparation and college admissions counseling; nor can they afford to take standardized tests multiple times.<sup>122</sup> Schools also oftentimes ask about disciplinary histories.<sup>123</sup> When SES influences who gets formally disciplined,<sup>124</sup> it is not safe to assume a lower-SES student with a disciplinary record is actually more prone to misconduct than a high-SES student without one. It is unclear whether any of these criteria accurately predict academic performance or longer-term goals of education, such as future leadership and contributions to the public interest.<sup>125</sup>

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<sup>120</sup> Nat'l Center for Educ. Stat., Postsecondary Attainment: Differences by Socioeconomic Status 6 (2015), [https://nces.ed.gov/programs/coe/pdf/coe\\_tva.pdf](https://nces.ed.gov/programs/coe/pdf/coe_tva.pdf) [<https://perma.cc/M498-YVQH>] [hereinafter NCES Report]; cf. The Exec. Office of the President, Increasing College Opportunity for Low-Income Students: Promising Models and a Call to Action (Jan. 2014) 12, [https://obamawhitehouse.archives.gov/sites/default/files/docs/increasing\\_college\\_opportunity\\_for\\_low-income\\_students\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/increasing_college_opportunity_for_low-income_students_report.pdf) [<https://perma.cc/L34K-JLWW>] [hereinafter Increasing College Opportunity] (“[L]ow-income students who performed in the top third of students in 8th grade math were just as likely to graduate college as their high-income peers who performed in the bottom third in math.”).

<sup>121</sup> See generally Increasing College Opportunity, *supra* note 120 (explaining factors for low enrollment of lower SES students in postsecondary education).

<sup>122</sup> *Id.* at 7–8; Harold O. Levy, Talented Low-Income Students Belong at Top Colleges. Why Aren't We Helping Them Get There?, Fox News (Feb. 5, 2016), <http://www.foxnews.com/opinion/2016/02/05/talented-low-income-students-belong-at-top-colleges-why-arent-helping-them-get-there.html> [<https://perma.cc/39KB-PZBG>].

<sup>123</sup> U.S. Dep't. of Educ., Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals (May 9, 2016), <https://www2.ed.gov/documents/beyond-the-box/guidance.pdf> [<https://perma.cc/8QFL-SS2T>].

<sup>124</sup> Skiba & Knesting, *supra* note 116, at 30.

<sup>125</sup> In this vein, law schools have begun to reconsider the LSAT requirement. Cf. Jim Saksa, Law Schools Don't Need the LSAT: But They Need the GRE Even Less, Slate (Mar. 21, 2017), [http://www.slate.com/articles/business/education/2017/03/harvard\\_law\\_is\\_right\\_to\\_stop\\_requiring\\_the\\_lsat\\_wrong\\_to\\_take\\_the\\_gre.html](http://www.slate.com/articles/business/education/2017/03/harvard_law_is_right_to_stop_requiring_the_lsat_wrong_to_take_the_gre.html) [<https://perma.cc/JY2D-QS5P>] (noting research suggests LSAT scores predict neither law school GPAs nor bar results); see generally Lani Guinier, The Miner's Canary: Enlisting Race, Resisting Power, & Transforming Democracy, 91 *Liberal Educ.* 26, 29 (Spring 2005), available at <https://files.eric.ed.gov/fulltext/EJ697351.pdf> [<https://perma.cc/R7S7-Z3KQ>] (discussing a study of University of Michigan Law School students, which found that incoming credentials, such as LSAT score, did not predict financial success or career satisfaction and

## 2. *Housing*

From the perspective of discrimination law, it is important to distinguish between two different ways that the poor are excluded from housing opportunities. One way is when a person simply cannot afford the rent or purchase price of a property that is set at “fair market rate.”<sup>126</sup> For the purpose of this Article, I take for granted that charging the “fair market rate” for a property would serve as a legitimate business justification under existing housing discrimination law.<sup>127</sup>

However, there are also many instances where the poor are excluded from housing as a result of policies that are motivated by stereotypes, and arguably lack a strong business justification. Two specific examples are: (1) landlords refusing to rent to tenants who *are able to pay* the listed price with subsidized housing vouchers; and (2) local government obstructing private developers seeking to build affordable housing.

*“Source of Income” Discrimination:* The federal Housing Choice Voucher Program provides a limited number of “vouchers” to assist with the cost of renting housing on the private market.<sup>128</sup> These Section 8 vouchers are touted as an alternative to public housing because they theoretically avoid concentrating all low-income people in one area—lower-income families can choose to live in neighborhoods with higher property values and better schools.<sup>129</sup> However, landlords in higher-income neighborhoods frequently refuse to rent to Section 8 tenants,

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were inversely related to becoming community leaders, mentoring younger people, or doing public service and pro bono).

<sup>126</sup> By “fair market rate” I mean a price that is in accordance with comparable properties in the local market. The Department of Housing and Urban Development calculates “fair market rents” to determine how much to pay for subsidized housing vouchers in various regions. See Dep’t. of Hous. and Urb. Dev., Fair Market Rents, <https://www.huduser.gov/portal/datasets/fmr.html> [<https://perma.cc/8U92-BSBP>].

<sup>127</sup> In interpreting the Fair Housing Act, the Court has explained that “market factors” are a legitimate interest that may count as a defense to housing policies with a disparate impact. *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015). Of course, it is always debatable whether market factors are neutral, since zoning and land allocation decisions influence market pricing, and these decisions might reflect bias.

<sup>128</sup> Alana Semuels, *How Housing Policy is Failing America’s Poor*, *The Atlantic* (June 24, 2015) (hereinafter *Housing Policy*), <https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650/> [<https://perma.cc/G4W8-VTXJ>].

<sup>129</sup> *Id.*

even though they can afford the listed rent with the subsidy—in fact, they tend to pay rent more reliably and stay in apartments longer than nonsubsidized tenants.<sup>130</sup>

Reluctance is purportedly due to terms of the program, which include periodic inspections, and constraints on the landlord's discretion to evict the tenant during the course of the lease.<sup>131</sup> However, given that tenants tend to pay rent more reliably, it is questionable whether the terms compromise the landlord's business interests in a significant way. A number of local jurisdictions have determined these justifications are inadequate and therefore prohibit discrimination against renters receiving public assistance.<sup>132</sup>

*Restrictive Zoning:* Another important federal housing program offers tax credits to developers who build affordable housing, with the goal of reducing racial segregation (and coincidentally socioeconomic segregation).<sup>133</sup> However, many higher-income communities have blocked the development of affordable housing for stereotype-based reasons.<sup>134</sup> For instance, in one Texas municipality, a council representative explained that the decision to veto affordable housing was not motivated by race (the mayor is black and there is a sizable nonwhite population), but because people “have different values based on their

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<sup>130</sup> Id.; see also The Law. Comm. for Better Hous., *Locked Out: Barriers to Choice for Housing Voucher Holders: Report on Section 8 Housing Choice Voucher Discrimination 10–11* (June 2002), [http://www.prrac.org/projects/fair\\_housing\\_commission/chicago/C-2\\_LCBH\\_-\\_Locked\\_Out.pdf](http://www.prrac.org/projects/fair_housing_commission/chicago/C-2_LCBH_-_Locked_Out.pdf) [<https://perma.cc/9V7D-7N3M>] (finding Chicago voucher holders were locked out of approximately 70% of the market rate units supposedly available to them due to illegal discrimination).

<sup>131</sup> Semuels, *Housing Policy*, supra note 128.

<sup>132</sup> See, e.g., Eric Hauge & Lael Robertson, *It's Time to Stop Discrimination Against Section 8 Renters*, *MinnPost* (Mar. 21, 2017), <https://www.minnpost.com/community-voices/2017/03/it-s-time-stop-discrimination-against-section-8-renters> [<https://perma.cc/9JLV-HS7Z>] (noting that fifty-eight jurisdictions prohibit landlords from discriminating based on “source of income”).

<sup>133</sup> John Eligon et al., *Program to Spur Low-Income Housing is Keeping Cities Segregated*, *N.Y. Times* (July 2, 2017), <https://www.nytimes.com/2017/07/02/us/federal-housing-assistance-urban-racial-divides.html> [<https://perma.cc/E4F3-9EC9>].

<sup>134</sup> See, e.g., id; see also Douglas S. Massey et al., *The Changing Bases of Segregation in the United States*, 626 *Annals of the Am. Acad. of Pol. & Soc. Sci.* 74, 89 (2009) (“In an era where naked prejudice and overt discrimination are receding, exclusionary zoning has become a core institutional mechanism limiting opportunities for the poor and minorities to live in better neighborhoods and enjoy better access to public and private goods.”).

socioeconomic status.”<sup>135</sup> One resident argued it would bring “unwelcome resident[s] who, due to poverty and lack of education, will bring the threat of crime, drugs and prostitution to the neighborhood.”<sup>136</sup>

A community is certainly entitled to enact rules to keep the neighborhood quiet, safe, clean, and even to preserve historic character.<sup>137</sup> However, it seems these objectives could be accomplished with more narrowly tailored rules, such as noise ordinances, criminal laws prohibiting drug transactions and property crime, restrictions on dumping and littering, and even building codes that stipulate specific building styles (without outright prohibiting multi-unit housing). This would open opportunities for the many low-SES people who desperately do want to live in quiet, safe, and clean communities and would be happy to conform to these norms.<sup>138</sup>

### 3. *Voting*

Many of the policies that have been utilized to exclude black voters and candidates (e.g., poll taxes and ballot fees) discriminate against all poor people. This is also true of many policies that have been the subject of recent race-based disparate-impact claims, such as voter ID laws and limits on early voting. For example, in holding that Texas’s voter ID law had an unjustified disparate impact on minority voters, a Texas district court cited evidence that eligible voters making under \$20,000 per year were eight times likelier than voters making over \$100,000 per year to lack the requisite ID.<sup>139</sup> The court explained that the racial impact of voter ID laws is due to the persistent association between race and

<sup>135</sup> Eligon et al., *supra* note 133.

<sup>136</sup> *Id.*; see also Laura Sullivan & Meg Anderson, Section 8 Vouchers Help the Poor—But Only if Housing is Available, NPR (May 10, 2017), <https://www.npr.org/2017/05/10/527660512/section-8-vouchers-help-the-poor-but-only-if-housing-is-available> [<https://perma.cc/3JY6-83T9>] (quoting a resident explaining she opposes the development of affordable housing because “[i]t’s just not people who are the same class as us”).

<sup>137</sup> *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015).

<sup>138</sup> Sullivan & Anderson, *supra* note 136.

<sup>139</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627, 664 (S.D. Tex. 2014). Eligible black and Hispanic voters were 1.78 and 2.42 times likelier, respectively, than white voters to lack the required ID. *Id.* at 662–63.

poverty, which is in turn attributable to racial discrimination.<sup>140</sup> Several courts have found voter ID laws insufficiently tailored to serve the state's purported interest in preventing election fraud.<sup>141</sup> The justification for such laws is equally spurious regardless of whether the disadvantaged class is framed in terms of race or poverty.

#### 4. Customer Discrimination

Just as with housing discrimination, there are two different ways that poorer people are disadvantaged as customers. One is where poor people are excluded because they cannot afford to pay the market price for a product or service. Just as with housing, inability to pay would likely be considered a legitimate business justification for denying service. However, customers who seem to be poor are also charged higher prices or denied service in scenarios where there appears to be *no legitimate business justification*.

Studies find that lower-income customers are frequently quoted higher prices for things like cars, car insurance, home insurance, and mortgages, and the price is inflated more than what would be justified by increased risks to the seller/lender.<sup>142</sup> There are numerous reports of businesses declining to serve customers who offer to pay but appear to be homeless.<sup>143</sup> These policies also seem to lack legitimate business

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<sup>140</sup> Id at 664–65.

<sup>141</sup> N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 235 (4th Cir. 2016) (inferring racial motives in part because “[t]he photo ID requirement here is both too restrictive and not restrictive enough to effectively prevent voter fraud”); *Veasey*, 71 F. Supp. 3d at 702.

<sup>142</sup> The Brookings Inst., *The High Price of Being Poor in Kentucky: How to Put the Market to Work for Kentucky's Lower-Income Families* 24–25, 29 (2007); Katie Lobosco, *Geico Accused of Discriminating Against Low Income Drivers*, CNN Money (Feb. 13, 2015), <http://money.cnn.com/2015/02/13/pf/insurance/geico-discriminating/index.html> [<https://perma.cc/L4NM-AY5W>]. Federal credit and lending laws already prohibit mortgage lenders from discriminating against potential borrowers “because all or part of the applicant’s income derives from any public assistance program.” 15 U.S.C. § 1691(a)(2). It seems the same reasoning should also apply to discrimination against lower-income borrowers, insofar as it is not justified by additional risk to the lender.

<sup>143</sup> In a survey of 142 homeless people in Washington, D.C., more than 70% reported having been discriminated against by a private business. Nat’l Coal. for the Homeless, *Discrimination and Economic Profiling Among the Homeless of Washington, DC* 5 (Apr. 2014), <http://nationalhomeless.org/wp-content/uploads/2014/04/DiscriminationReport20141.pdf> [<https://perma.cc/9VK3-9ZEB>].

justification: insofar as they are intended to keep dangerous and disruptive individuals away, they are overbroad. Not all homeless are dangerous or disruptive, and the business could always banish specific individuals who behave in that manner. Insofar as policies against serving the homeless are designed to cater to customers' distaste for associating with homeless people, it is questionable whether this is a legitimate justification.<sup>144</sup>

### 5. *Employment*

Employers commonly screen based on traits and credentials that are closely linked with SES. There are certainly instances when these criteria are job-related—for example, a medical degree is indisputably a legitimate credential for practicing medicine.<sup>145</sup> However, it is also common for employers to select applicants based on SES-linked traits and credentials for jobs where those credentials bear very little, if any, relation to the skills required for the job.

*SES-Linked Physical Traits:* The Equal Employment Opportunity Commission (EEOC) Compliance Manual on racial discrimination does not define race. Instead, it lists a series of grounds for decisions that could constitute racial discrimination, including physical or cultural characteristics that are associated with race.<sup>146</sup> This reflects the reality that employers frequently base their decisions on characteristics that are not explicitly racial but are closely associated with race, such as the applicant's manner of speaking, hairstyle, or way of dressing. But when

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<sup>144</sup> Cf. *Crandall v. Starbucks Corp.*, 249 F. Supp.3d 1087, 1113 (N.D. Cal. 2017) (noting that customers' discriminatory preferences are not a defense for refusal to accommodate customers with disabilities). In line with this, a few localities have adopted ordinances prohibiting private businesses from discriminating against the homeless; see Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 *Seton Hall L. Rev.* 383, 404–06 (2015) (discussing Rhode Island's homeless bill of rights, the first of which acknowledges and enables judicial enforcement of the right to “use and move freely in public spaces”).

<sup>145</sup> Equal Emp. Opportunity Comm'n, Section 15-VI(B)(2): Race and Color Discrimination *in* EEOC Compliance Manual, § 15-VI.B.2 (Apr. 19, 2006) [hereinafter EEOCCM] (giving this as an example of a practice that may have a racial disparate impact, but satisfies the business necessity/job relatedness standard).

<sup>146</sup> *Id.* § 15-II (“For example, an employment decision based on a person having a so-called ‘Black accent,’ or ‘sounding White,’ violates Title VII if the accent or manner of speech does not materially interfere with the ability to perform job duties.”).

these traits are strongly associated with race, disdain for them nonetheless reflects racial bias.

In a similar way, discrimination based on SES is often subtler than explicitly refusing to hire someone because he or she is poor. Oftentimes the decision is not explicitly based on the applicant's poverty but on physical or cultural characteristics that are strongly associated with poverty. Perhaps the most obvious example is missing, stained, or broken teeth.<sup>147</sup> As one sociologist puts it, "[m]ore than any other marker in America, teeth indicate class status . . . . [B]eing too poor to have respectable teeth is like wearing an 'L' for loser on your face."<sup>148</sup> Employers commonly reject applicants for customer service, receptionist, and other positions because of their teeth.<sup>149</sup> This is so pervasive that women who grew up in communities without fluoridated water have significantly lower earnings as adults.<sup>150</sup> But just as with

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<sup>147</sup> See, e.g., Susan Sered, *What Pennsatucky's Teeth Tell Us About Class in America*, Bitch Media (July 1, 2014), <https://www.bitchmedia.org/post/what-pennsatucky%E2%80%99s-teeth-tell-us-about-class-in-america> [<https://perma.cc/L9FV-GCG5>]; Sarah Smarsh, *Poor Teeth*, *aeon* (Oct. 23, 2014), <https://aeon.co/essays/there-is-no-shame-worse-than-poor-teeth-in-a-rich-world> [<https://perma.cc/8WTX-KL85>].

<sup>148</sup> Sered, *supra* note 147; cf. *infra* notes 149–151 (discussing discrimination against the homeless based on appearance).

<sup>149</sup> See JoNel Aleccia, *Bad Teeth, Broken Dreams: Lack of Dental Care Keeps Many Out of Jobs*, *The Daily Beast* (June 13, 2013), <https://www.thedailybeast.com/bad-teeth-broken-dreams-lack-of-dental-care-keeps-many-out-of-jobs> [<https://perma.cc/JM23-8F7S>] ("Customer service jobs, good entry-level jobs, they're not available to people who lack the basic ability to smile, to function, to chew properly."); David K. Shipler, *A Poor Cousin of the Middle Class*, *N.Y. Times Magazine* (Jan. 18, 2004), <http://www.nytimes.com/2004/01/18/magazine/a-poor-cousin-of-the-middle-class.html> [<https://perma.cc/KMG6-FKJA>] ("The people who received promotions tended to have something that Caroline did not. They had teeth. Caroline's teeth had succumbed to poverty, to the years when she could not afford a dentist."); Tirado, *supra* note 5; Erik Eckholm, *America's 'Near Poor' are Increasingly at Economic Risk, Experts Say*, *N.Y. Times* (May 8, 2006), <http://www.nytimes.com/2006/05/08/us/08poverty.html> [<https://perma.cc/3QEC-LBLR>] ("Ms. Abbott, a diabetic who is now 51, lost all her teeth and could not afford to replace them. 'Since I didn't have a smile,' she recalled, 'I couldn't even work at a checkout counter.'").

<sup>150</sup> Sherry Glied & Matthew Neidell, *The Economic Value of Teeth* (Nat'l Bureau of Econ. Research, Working Paper No. 13879, March 2008), <http://www.nber.org/papers/w13879.pdf> [<https://perma.cc/QW55-MHAT>]. The report concludes "consumer and employer discrimination are the likely driving factors through which oral health affects earnings." *Id.* at 3. After low-income people received dental services to correct their missing and broken teeth, they were twice as likely to find a job or move off welfare compared to a similar cohort who did not receive such care. Aleccia, *supra* note 149.



race: when these characteristics are strongly associated with poverty, disdain for them reflects SES-based bias.

As I explain in more detail later, where there is a relationship between teeth and the business's product (e.g., a dental hygienist) straight, white teeth may be a bona fide occupational qualification (or a "BFOQ").<sup>151</sup> But when the business's product has nothing to do with teeth (e.g., a convenience store), the relationship between the appearance of an employee's teeth and job performance is at least questionable. Any such relationship seems to rely on an assumption that customers prefer employees with straight, white teeth.<sup>152</sup> Customers' biased preferences do not make race or sex a BFOQ.<sup>153</sup> Why should they make a "classy appearance" one?

*Residency and Transportation Requirements:* Other common proxies for poverty are residential neighborhood and mode of transportation.<sup>154</sup> Employers commonly screen applicants based on residential address. Some require applicants to live nearby, which effectively weeds out people living in poorer, more remote areas, while others screen out people who list addresses in poor neighborhoods.<sup>155</sup> Many refuse to hire

<sup>151</sup> See discussion on bona fide occupational qualifications, *infra* notes 246–249.

<sup>152</sup> Glied & Neidell, *supra* note 150, at 3 (concluding that discrimination based on teeth is likely driven by consumer and employer discrimination, not any relationship to capability or job performance).

<sup>153</sup> See *infra* notes 246–249 (discussing when customer preferences can establish a BFOQ).

<sup>154</sup> See Max Besbris et al., *Effect of Neighborhood Stigma on Economic Transactions*, 112 *Proc. Nat'l. Acad. of Sci.* 4994, 4996 (2015) (audit study finding that sellers offering an item for sale in an online marketplace receive significantly fewer inquiries if they list their address in a poor neighborhood); see also Ross & Li, *supra* note 10, at 343 ("We can generally determine that people are poor on the basis of where they live, what they possess, and their demonstrated levels of education.").

<sup>155</sup> See, e.g., David C. Phillips, *Living Closer to Jobs May Improve Prospects for Low-wage Workers*, Policy Brief (U.C. Davis Ctr. for Poverty Research), Vol. 4, No. 9, [https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-phillips\\_distance\\_discrimination\\_brief.pdf](https://poverty.ucdavis.edu/sites/main/files/file-attachments/cpr-phillips_distance_discrimination_brief.pdf) [<https://perma.cc/9SF5-S4DM>] (empirical study finding "[f]ictional résumés randomly assigned addresses far from the job location receive 14% fewer callbacks from employers than nearby addresses) ("Résumés listing residential addresses far from the job location receive 14 percent fewer callbacks than résumés listing addresses in nearby neighborhoods with similar levels of affluence (i.e. income, education, and fraction white). For addresses on average only 2.6 miles further from the job location, this difference represents an economically large effect . . . Most narrowly, these results provide evidence that employers discriminate against applicants from poor neighborhoods, not necessarily

any person who resides in a homeless shelter.<sup>156</sup> In areas where most people rely on cars to get around, the poor are also distinguishable by the fact that they rely on public transportation.<sup>157</sup> Businesses sometimes refuse to hire people who do not own a vehicle.<sup>158</sup>

Employers may justify these policies on the grounds that they are designed to ensure employees will show up to work reliably and promptly. Undoubtedly, this is a legitimate interest. However, it is questionable whether living in a homeless shelter or poor/remote neighborhood, or lacking personal transportation, accurately predicts reliability. Unless there is evidence to back this up, it seems to be a stereotype-based assumption about people who have attributes associated with poverty. To the contrary, someone who really needs the job and is willing to leave two hours early to make the commute may be more dedicated and hardworking than someone who lives an easy five-minute drive away.<sup>159</sup> In cases where residency requirements have an adverse racial impact, courts have found they do not satisfy the business necessity

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because of the neighborhood's poverty, but because poor neighborhoods tend to be far from the job."); see also Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 *Am. Econ. Rev.* 991, 1003 (2004) (finding that otherwise-comparable resumes listing addresses in wealthier, more educated, or "whiter" neighborhoods receive higher callback rates); Jay Romano, *Challenging Residency as a Job Requirement*, *N.Y. Times* (Aug. 25, 1991), <https://www.nytimes.com/1991/08/25/nyregion/challenging-residency-as-job-requirement.html> [<https://perma.cc/Q4PF-4P7E>] (discussing controversy over municipal employers requiring that employees live within the municipality); *Nolo Legal Encyclopedia: Can an employer hire only applicants who live in the same neighborhood as the business?*, <https://www.nolo.com/legal-encyclopedia/can-employer-hire-only-applicants-live-the-same-neighborhood-the-business.html> [<https://perma.cc/ZT5U-ZWPV>] (user asking for legal advice on whether it was legal for the manager of a bar to refuse to hire people who do not live in same zip code).

<sup>156</sup> Sarah Golabek-Goldman, *Homeless Shouldn't Face Job Discrimination Just Because They Lack an Address*, *L.A. Times* (Oct. 10, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-golabek-goldman-homeless-address-job-application-20161010-snap-story.html> [<https://perma.cc/H2JN-AUS3>] [hereinafter Golabek-Goldman, *Job Discrimination*]; see also Sarah Golabek-Goldman, Note, *Ban the Address: Combatting Employment Discrimination Against the Homeless*, 126 *Yale L.J.* 1788, 1804–07 (2017) (interviewing employers who state that they will not hire homeless people for low-wage service jobs).

<sup>157</sup> See Eagen, *supra* note 4.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* ("I've been working for years without a car. And I have very rarely been late to work. . . . [H]ard workers like myself know to leave early as possible to prevent being late.").

defense.<sup>160</sup> The justification is likewise spurious when the excluded group is defined by poverty.

*Financial History Screening:* In recent decades, it has become common for employers to screen applicants based on factors like credit and unemployment history.<sup>161</sup> These practices have drawn criticism from both state lawmakers and the EEOC, since there is little evidence that credit or unemployment history predict job performance.<sup>162</sup> In several states, legislators have restricted preliminary screening based on unemployment and credit history.<sup>163</sup> This suggests that these policies would be of at least questionable validity under the business necessity defense.

*Education Requirements:* Education is undeniably relevant for various professional, specialized, and technical positions.<sup>164</sup> However, employers increasingly require college degrees for entry-level jobs that have not historically required one and where there is no obvious relationship between a college degree and job skills (such as a file clerk, a receptionist, a courier, and a cargo agent).<sup>165</sup> In a market where there is a surplus of job seekers, employers may use degrees as an overly blunt

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<sup>160</sup> E.g., *NAACP v. N. Hudson Reg'l Fire & Rescue*, 665 F.3d 464, 481–82 (3d. Cir. 2011) (holding a residency requirement for firefighter positions that caused a disparate impact by excluding well-qualified African Americans who would otherwise be eligible was not justified by any business necessity).

<sup>161</sup> Fishkin, *supra* note 15, at 1444–55.

<sup>162</sup> *Id.* at 1446–48 (quoting legislators and advocates questioning whether credit history predicts job performance); see *id.* at 1453–54 (explaining that screening based on unemployment may be slightly more efficient than picking applicants randomly, as a small subset of unemployed applicants likely lost their jobs for cause); see also Equal Emp. Opportunity Comm'n, EEOC Public Meeting Explores the Use of Credit Histories as Employee Selection Criteria (Oct. 20, 2010), <https://www.eeoc.gov/eeoc/newsroom/release/10-20-10b.cfm> [<https://perma.cc/Q4LB-X7E6>]; Equal Emp. Opportunity Comm'n, Meeting of the Equal Employment Opportunity Commission (Feb. 16, 2011), transcript available at <http://www.eeoc.gov/eeoc/meetings/2-16-11/transcript.cfm#work> [<https://perma.cc/98KJ-WRPN>].

<sup>163</sup> Fishkin, *supra* note 15, at 1439–52 (describing legislative history).

<sup>164</sup> EEOCCM, *supra* 145, at § 15-VI(B)(2).

<sup>165</sup> Catherine Rampell, *It Takes a B.A. to Find a Job as a File Clerk*, N.Y. Times (Feb. 19, 2013), [http://www.nytimes.com/2013/02/20/business/college-degree-required-by-increasing-number-of-companies.html?\\_r=1](http://www.nytimes.com/2013/02/20/business/college-degree-required-by-increasing-number-of-companies.html?_r=1).

but cheap screening mechanism.<sup>166</sup> Employers assume that people with degrees are generally better workers than people without them. For example, a managing partner at a law firm stated that his firm requires their receptionist and in-house courier to have a college degree because “[c]ollege graduates are just more career-oriented.”<sup>167</sup> But it is not clear why a college degree is related to skills one needs as a courier—indeed, it might be a waste of resources for someone who wants a successful career as a courier to pursue a college degree.<sup>168</sup> In sex-based disparate-impact claims, courts have held that employers cannot require greater skills than needed to perform the job based on the general assumption that “more is better.”<sup>169</sup>

These common examples show that employment discrimination based on SES-linked traits is common, and in many instances, arguably does not satisfy the BFOQ or business necessity defenses that are available under existing discrimination law. The policies described above are particularly problematic because they cause self-fulfilling cycles of poverty: People need to work in order to get out of poverty, but poverty prevents them from obtaining work.<sup>170</sup> Being rejected repeatedly because of poverty understandably causes feelings of hopelessness and humiliation, discouraging people from continuing to search for work.<sup>171</sup>

In sum, throughout American history, the poor have been stigmatized by popular narratives that attribute poverty to hereditary or behavioral deficiencies. Accordingly, SES-based discrimination is pervasive. Many policies that disadvantage the poor are not justified by legitimate neutral interests. Rather, they rest on more invidious social stereotypes and

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<sup>166</sup> One recruiter explained, “[w]hen you get 800 résumés for every job ad, you need to weed them out somehow.” *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> If someone wishes to be a very good courier, he or she might be better off spending the four years gaining work experience, rather than paying to attend college.

<sup>169</sup> *Lanning v. Se. Penn. Transp. Auth. (SEPTA)*, 181 F.3d 478, 493 (3d Cir. 1999) (reversing a district court’s conclusion that an employer could require employees to meet a higher fitness standard that was necessary for the job).

<sup>170</sup> Eagen, *supra* note 4 (“Our classist society continues obscene practices which work only to keep the poor the way they are. . . . The lower your income is the more you get screwed in job hunting, the less likely you are to move up in your socio-economic class.”)

<sup>171</sup> Golabek-Goldman, *Job Discrimination*, *supra* note 156 (quoting a homeless veteran explaining that “[a] lot of people look down at people like myself. So I gave up hope”). Tirado, *supra* note 5 (“Beauty is a thing you get when you can afford it, and that’s how you get the job that you need in order to be beautiful. There isn’t much point trying.”).

demeaning misrepresentations. This is the same type of status harm—i.e., misrecognition—that disadvantages racial minorities and other protected groups.<sup>172</sup> In light of this background, the following Part advances the moral, political, and legal arguments for protecting SES.

#### IV. THE MORAL, POLITICAL, AND LEGAL ARGUMENTS FOR PROTECTING SES

In this Part, I offer four arguments for protecting SES. The first two are moral: First and most straightforward, the reasons for prohibiting discrimination based on traits like race, religion, and disability, also apply to poverty. The second moral argument is that, due to the association between race and poverty, comprehensively addressing racial discrimination requires addressing SES-based discrimination. The third argument is political: Protecting SES would highlight the fact that lower-SES people of all races share common experiences of marginalization, and all stand to benefit from legal intervention. This is potentially a step toward building a broader cross-racial coalition focused on economic inequality. The fourth reason is legal: Some judges have suggested that race-based disparate-impact law should trigger scrutiny under the Fourteenth Amendment. Protecting SES would make it possible to challenge the types of policies listed above, which have adverse impacts on both poorer people and racial groups with higher poverty rates, while avoiding this constitutional objection.

##### *A. Poverty Should be an Illegitimate Basis for Discrimination*

The most straightforward moral argument for protecting SES is that it shares all the relevant features of other protected traits. In Part I, I explained that discrimination law is driven by a moral and political commitment to the ideals of social mobility and self-determination. Accordingly, discrimination laws protect traits that are subject to pervasive and illegitimate social bias. The preceding Part illustrated that

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<sup>172</sup> In other words, the poor are disadvantaged precisely “because they are members of a group called ‘the poor.’” Fiss, *Another Equality*, supra note 28, at 21 (suggesting the poor lack the characteristic of interdependence, which is essential for protecting a group under a theory of discrimination based on individual fairness).

the poor are subject to pervasive social bias. Here I argue that this bias should be considered illegitimate as a normative matter.

The rationales for considering various other traits illegitimate grounds for discrimination each apply to poverty: In some cases, poverty is, like race or sex, effectively immutable (something a person is not responsible for) and therefore “morally arbitrary”; sometimes poverty is, like religion or pregnancy, a result of choices that are fundamental to personal identity; and in other cases, poverty is, like diabetes caused by unhealthy eating, a result of choices that are irresponsible but not sufficiently blameworthy or predictive of future conduct to justify exclusion from opportunities. I will elaborate on how each of these three rationales applies to poverty.

*1. Effectively immutable and morally arbitrary*

The widespread belief that our system is a meritocracy blinds us to how poverty is in many cases effectively immutable—i.e., a trait that someone is not responsible for. Under a well-documented phenomenon called “system justification,” people are psychologically motivated to perceive the status quo as fair and just—that people get what they deserve.<sup>173</sup> This motive drives the widespread perception that our society is meritocratic: people who are wealthy deserve more based on their hard work and effort, and those who are poor deserve less by virtue of some personal shortcoming. This belief obscures the reality that people’s economic outcomes are largely determined by circumstances beyond their control.

Wealth and poverty are transmitted between generations: Approximately 65% of people whose fathers were in the lowest income quintile wind up in the lowest two income quintiles as adults, while 65% of people whose fathers were in the top income quintile wind up in the highest two income quintiles as adults.<sup>174</sup> People who make very

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<sup>173</sup> See Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 *Calif. L. Rev.* 1119, 1123 (2006). The need to see the world as just likely stems from the universal psychological need for control. *Id.* at 1138.

<sup>174</sup> Richard V. Reeves & Joanna Venator, *The Inheritance of Education*, Brookings Inst. (Oct. 27, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/10/27/the-inheritance-of-education/> [<https://perma.cc/FT6L-M7JX>] (noting similar patterns with education).

condemnable choices may remain wealthy because they were born to wealthy parents.<sup>175</sup> By the same token, people who were born into poverty can easily remain there despite having great potential. Being born into conditions associated with poverty has a tremendous impact on early cognitive and emotional development.<sup>176</sup> These effects may be

<sup>175</sup> The most extreme example of this is wealthy heirs who are charged with irresponsible criminal behavior, such as drunk driving and sexual assault, and get off without significant personal sacrifice. E.g., Dan Alexander, *Billionaire Bailouts: American Heirs Who Got Off Easy*, *Forbes* (July 10, 2014), <https://www.forbes.com/sites/danalexander/2014/07/10/billionaire-bailouts-american-heirs-who-got-off-easy/#7bd361361cf9> [<https://perma.cc/8UTY-WDMF>]; Associated Press, *Wal-Mart Billionaire Alice Walton Gets Arrest for Suspected Drunk Driving Removed From Record*, *Business Insider* (Dec. 5, 2013), <https://www.businessinsider.com/wal-mart-billionaire-alice-walton-gets-dwi-arrest-expunged-2013-12> [<https://perma.cc/PJE7-J2SF>]; Kevin Conlon & Stephanie Gallman, *Du Pont Heir Convicted of Raping Daughter Spared Prison*, *CNN* (Apr. 2, 2014), <https://www.cnn.com/2014/04/02/justice/delaware-du-pont-rape-case/> [<https://perma.cc/9LNK-K9K6>]; Manny Fernandez & John Schwartz, *Teenager's Sentence in Fatal Drunken-Driving Case Stirs 'Affluenza' Debate*, *N.Y. Times* (Dec. 13, 2013), <https://www.nytimes.com/2013/12/14/us/teenagers-sentence-in-fatal-drunken-driving-case-stirs-affluenza-debate.html> [<https://perma.cc/TCP2-7ZKN>] (A wealthy heir convicted of killing four people in a drunk driving accident was sentenced to probation, rather than the recommended 20 year prison sentence, after a psychologist testified he should not be sent to prison because he suffered from "affluenza"); Rob Wile, *A Billionaire 22-Year-Old Was Fined \$30,000 For Drunk Driving*, *Time* (Nov. 17, 2017), <http://time.com/money/5029095/a-billionaire-22-year-old-was-fined-30000-for-drunken-driving/> [<https://perma.cc/E2A6-UN9A>]; These people will likely remain wealthy for life, regardless of personal shortcomings.

<sup>176</sup> There is a vast and growing literature on this. See generally Anne Fernald, et al., *SES Differences in Language Processing Skill and Vocabulary are Evident at 18 Months*, 16 *Dev. Sci.* 234, 240 (2013); Joan Luby et al., *The Effects of Poverty on Childhood Brain Development: The Mediating Effect of Caregiving and Stressful Life Events*, 167 *J. Am. Med. Ass'n Pediatrics* 1135, 1135 (2013) (finding exposure to poverty in early childhood materially impacts brain development at school age, and this effect is mediated by caregiver support/hostility and stressful life events); Betty Hart & Todd R. Risley, *The 30 Million Word Gap by Age 3*, *Am. Fed'n of Teachers* (Spring 2003), [http://www.aft.org/ae/spring2003/hart\\_risley](http://www.aft.org/ae/spring2003/hart_risley) [<https://perma.cc/Y4ME-VJNT>] (finding that, by 48 months, a child of professional parents has heard an average of 45 million words, while a child of low income parents has heard an average of 13 million words, and this difference predicted IQ and standardized test scores at ages 3 and 9); Darshak Sanghavi, *How to Make Toddlers Smarter: Talk to Them*, *Brookings Inst. Soc. Mobility Memos*, (Oct. 25, 2013), <https://www.brookings.edu/blog/social-mobility-memos/2013/10/25/how-to-make-toddlers-smarter-talk-to-them/> [<https://perma.cc/4PPC-5EPQ>] (explaining that neural connections are developed by stimulation, and hence, the more words children hear during their earliest years, the more proficient they become at processing). Recent research suggests that growing up in an unpredictable environment (as is more common in poor households) encourages children to pursue immediate (rather than delayed) gratification. When one's experience

overcome, but they are only exacerbated by the way lower-SES students are treated within the educational system.<sup>177</sup> Because the college admissions system is biased in favor of wealthier students,<sup>178</sup> even lower-SES students who score in the highest test score bracket despite these disadvantages are much less likely to complete college than wealthy students with lower test scores.<sup>179</sup> If these talented students do not graduate from college, they have a much lower chance of getting out of poverty.<sup>180</sup>

It might be easier to conceive of poverty as an immutable, morally arbitrary characteristic when it comes to people who are born to poor parents and remain poor. However, poverty might seem more like a result of voluntary conduct, and therefore a legitimate ground for judgment, when it comes to people who fall into poverty later in life. But in a society with a thin safety net, reasonably responsible middle class people can easily fall into poverty as a result of various factors beyond their control, including physical injuries, family illness, layoffs, or changes in the economy.<sup>181</sup> For many Americans in the middle class, a small emergency can be financially destabilizing.<sup>182</sup> When someone

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teaches that the future is unreliable, it is not safe to delay gratification on the assumption that a promised future payoff will actually materialize, and it is rational to pursue immediate payoffs. Celeste Kidd et al., *Rational Snacking: Young Children's Decision-Making on the Marshmallow Task is Moderated by Beliefs About Environmental Reliability*, 126 *Cognition* 109, 113 (2014).

<sup>177</sup> By relegating these students to inferior schools, tracking them into less-stimulating courses, subjecting them to more punitive discipline, the educational system enhances these gaps, rather than remedies them. See *supra* notes 114–115, and accompanying text.

<sup>178</sup> See *supra* notes 121–125, and accompanying text.

<sup>179</sup> NCEES Report, *supra* note 120, at 6.

<sup>180</sup> Michael Greenstone et al., *Thirteen Economic Facts About Social Mobility and the Role of Education*, Brookings Inst. (June 26, 2013), <https://www.brookings.edu/research/thirteen-economic-facts-about-social-mobility-and-the-role-of-education/> [<https://perma.cc/V8KN-73JN>].

<sup>181</sup> E.g., Nick Wing & Carly Schwartz, *Here's the Painful Truth About What It Means to Be 'Working Poor' in America*, Huffington Post (updated Dec. 6, 2017), [https://www.huffingtonpost.com/2014/05/19/working-poor-stories\\_n\\_5297694.html](https://www.huffingtonpost.com/2014/05/19/working-poor-stories_n_5297694.html) [<https://perma.cc/WV49-A8KB>].

<sup>182</sup> Neal Gabler, *The Secret Shame of Middle Class Americans*, *The Atlantic* (May 2016), <https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/> [<https://perma.cc/V3NZ-6WLV>]. According to the Census Bureau, about one-third of all U.S. residents slipped below the poverty line for at least two months in the period from 2009–2011. Ashley N. Edwards, *Dynamics of Economic Well-Being: Poverty 2009-2011*,



falls into poverty later in life due to these types of uncontrollable circumstances, it is involuntary in the same way as being born poor.

Regardless of how a person becomes poor, once they are below a certain threshold of poverty, it may be impossible to change.<sup>183</sup> For someone who earns barely enough to cover living expenses, it is impossible to pay the bills and also save as needed to improve one's financial position. Without savings, they will need to borrow at high interest rates to cover inevitable emergency expenses (like a doctor's visit, car repair, or prescription). The current minimum wage does not supply enough income to keep many people above this threshold.<sup>184</sup> Hence, for someone with a dependent, who earns around minimum wage and has no savings, it is very difficult if not impossible to break

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U.S. Census Bureau 3 (Jan. 2014), <https://www.census.gov/library/publications/2014/demo/p70-137.html> [<https://perma.cc/W6PS-QMYQ>].

<sup>183</sup> Economists use the term "Micawber threshold" to refer to point below which it is difficult for agents ever to accumulate assets. "The image echoes the travails of Wilkins Micawber, the perpetually insolvent debtor in Dickens' *David Copperfield*." Christopher Barrett, et al., Poverty Traps and Social Protection, The World Bank Soc. Protection & Lab. Discussion Paper No. 0804 2-3 n.5 (Feb. 2008); Michael R. Carter & Christopher B. Barrett, The Economics of Poverty Traps and Persistent Poverty: An Asset-Based Approach, 42 J. of Dev. Stud. 178, 179 (2006).

<sup>184</sup> A person employed full time at the current federal minimum wage (\$7.25 an hour, which provides a full-time worker an annual income of about \$15,000) cannot keep a household of two people above the poverty threshold. What Are the Annual Earnings of a Minimum Wage Worker?, Univ. of Cal., Davis Ctr. For Poverty Res., <https://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker> [<https://perma.cc/5CTN-VAGZ>] (last updated Jan. 12, 2018). Millions of people who are considered poor do work full time, and many have more than one job. Bureau of Lab. Stat., A Profile of the Working Poor, 2014 (Apr. 2016); see also Paul Davidson, The Job Juggle is Real. Many Americans are Balancing Two, Even Three Gigs, U.S.A. Today (Oct. 17, 2016), <https://www.usatoday.com/story/money/2016/10/17/job-juggle-real-many-americans-balancing-two-even-three-gigs/92072068/> [<https://perma.cc/2VPR-XP8>]; Tami Luhby, The Poor Do Have Jobs, CNN Money (Sept. 21, 2012), <http://money.cnn.com/2012/09/21/news/economy/poor-jobs/index.html> [<https://perma.cc/7DWE-962N>]; Dorothy Rosenbaum, The Relationship Between SNAP and Work Among Low-Income Households, Ctr. on Budget and Pol'y Priorities, 5 (Jan. 30, 2013), [https://www.cbpp.org/research/the-relationship-between-snap-and-work-among-low-income-households?fa=view&id=3894#\\_ftn3](https://www.cbpp.org/research/the-relationship-between-snap-and-work-among-low-income-households?fa=view&id=3894#_ftn3) [<https://perma.cc/42Y6-RCUN>] (finding that in 2012, over 80% of households receiving supplemental nutrition assistance had at least one adult who worked full time in the previous year or in the year following assistance); Wing & Schwartz, *supra* note 181.

the cycle of living paycheck-to-paycheck. They are likely to sink deeper into debt every time an emergency comes up.<sup>185</sup>

For the foregoing reasons, once someone is in poverty, it may be so difficult to get out that it is effectively immutable. This is true regardless of whether a person was born into poverty or slipped into it later in life as a result of a layoff, an injury, or changes in the economy. In these instances, poverty is arguably akin to race or sex: It is a trait for which a person is not responsible, and which they are effectively powerless to change.<sup>186</sup>

## 2. *Mutable but respect-worthy*

In some cases, poverty may be similar to religion or pregnancy. These traits are attributable to voluntary choices. But they are considered

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<sup>185</sup> Furthermore, people living paycheck to paycheck without any savings oftentimes wind up paying more for things. For example, someone in this income category might be unable to afford the security deposit for an apartment or to pay a full month's rent upfront. Instead many resort to staying in motels on a daily or weekly basis, which is ultimately more expensive than renting an apartment. See, e.g., Carolyn Bick, *America's Hidden Homeless: Life in the Starlight Motel*, Al Jazeera (July 30 2016), <https://www.aljazeera.com/indepth/features/2016/07/america-hidden-homeless-life-starlight-motel-160728034318034.html> [<https://perma.cc/3337-7MTE>]; Leighton Akio Woodhouse, *These Motel Rooms are the Last Resort for Families Without Homes*, The Nation (Feb. 11, 2015), <https://www.thenation.com/article/these-motel-rooms-are-last-resort-families-without-homes/> [<https://perma.cc/P4X8-25KV>]. Someone living paycheck-to-paycheck might also be unable to maintain a bank account because they are unable to maintain the minimum balance required to open and keep an account. Without a checking account, they must pay higher fees to cash paychecks and purchase money orders in order to pay bills. And if they do need to borrow, they must rely on high-interest pay-day loans. Mehra Baradaran, *How the Poor Got Cut Out of Banking*, 62 Emory L.J. 483, 485–86 (2013) (“[A]pproximately one-in-four households in the United States (28.3%) are “unbanked”—meaning they have no formal relationship with a bank—or “underbanked”—meaning they do not have access to incremental credit. Thus, they must rely on payday lenders, check cashers, or other fringe banking institutions to meet their short-term credit needs.”). Basic goods oftentimes wind up being more expensive for someone living paycheck-to-paycheck. They are unable to take advantage of the savings of buying in bulk. Without a car, one cannot commute to a large supermarket, and instead must shop at a local corner store where items are much more expensive. See DeNeen L. Brown, *The High Cost of Poverty: Why the Poor Pay More*, Wash. Post (May 18, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/17/AR2009051702053.html?sid=ST2009051801162&noredirect=on> [<https://perma.cc/C3EQ-6FGQ>].

<sup>186</sup> Barnes & Chemerinsky, *supra* note 10, at 122 (observing “[t]he perception . . . is that, unlike race and gender, poverty is not immutable,” but arguing that statistics on social mobility undermine this perception).

illegitimate bases for discrimination because they are fundamental, respect-worthy aspects of personal identity—things people should not be required to change.<sup>187</sup> In some scenarios, this logic might apply to poverty. Poverty may result from fundamental, respect-worthy personal choices. For example, a person might wind up being poor because they left school early in order to work in order to help support their family or to provide care for a sibling, child, or ailing parent or relative.<sup>188</sup> These are choices about how to structure family relationships and how to fulfill familial obligations seem just as fundamental as choices about whether to have a child. They should not be legitimate grounds for discrimination, any more than a person's choice of religion or choice to have a family.<sup>189</sup>

### *3. Choices not sufficiently blameworthy to justify ongoing exclusion*

In some cases, poverty may be analogous to traits such as diabetes caused by unhealthy eating or a disability caused by negligent driving: a result of choices that are arguably irresponsible, and not necessarily fundamental to identity. The reasons for protecting disability in such cases also apply to poverty: If the aim is to advance the ideals of social mobility and self-determination, people should have opportunities to turn their lives around after making mistakes, at least to the extent that past mistakes are not strong predictors of future performance. In most cases, the behaviors causing poverty are not sufficiently blameworthy or predictive of future conduct to justify ongoing exclusion. Lawmakers

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<sup>187</sup> See sources cited supra note 46, and accompanying text.

<sup>188</sup> Jeff Guo, *Why Poor Kids Don't Stay in College*, Wash. Post (Oct 20, 2014), [https://www.washingtonpost.com/news/storyline/wp/2014/10/20/why-poor-kids-dont-stay-in-college/?utm\\_term=.56c1b9501364](https://www.washingtonpost.com/news/storyline/wp/2014/10/20/why-poor-kids-dont-stay-in-college/?utm_term=.56c1b9501364) [<https://perma.cc/SEM5-M6TX>]; Molly M. Scott et al., *Dropping Out and Clocking In: A Portrait of Teens Who Leave School Early and Work* 6, 8, The Urb. Inst. (2015), <https://www.urban.org/sites/default/files/publication/49216/2000189-Dropping-Out-and-Clocking-In.pdf> [<https://perma.cc/ZG5Q-6Z9Q>] (finding that about 30% of students who leave high school early are working, that this is especially common among Hispanic males who are supporting dependents, and that over one-third of working dropouts contribute more than 20% of family income).

<sup>189</sup> I am not arguing that people are entitled to welfare payments to support them in making personal choices that result in lower earnings. I am arguing that people who are poor or have been poor as a result of these choices should not be discriminated against when they seek employment, housing, etc.

have recognized this to some extent with laws prohibiting screening based on credit and unemployment history.<sup>190</sup> An additional reason is that it may be impossible to objectively evaluate whether poverty is caused by choice or circumstance.<sup>191</sup> This is because involuntary circumstances (e.g., living with an abusive parent) influence choices (e.g., to drop out of high school in order to work full time in order to live independently).

Each of these three rationales for protecting currently-protected traits also applies to SES. The economic rationales for discrimination law also apply to protecting SES: If lower-SES people are systematically denied employment opportunities as a result of social bias, this causes unnecessary unemployment and welfare dependency.

### *B. Intersection Between Race and SES Discrimination*

A second moral argument for protecting SES is that SES discrimination oftentimes operates to reinforce or perpetuate racial discrimination. In considering bias against the poor, it is important to keep in mind the racialization of poverty. Because of the way poverty has been racialized in the media and other public images, stereotypes about poverty have been incorporated into racial stereotypes: Black people especially, but also other minority racial groups, tend to be stereotyped as being poor and thereby having the character failings associated with poverty.<sup>192</sup> And poor whites, by virtue of also presumably having these character failings, are seen as “not quite white.”<sup>193</sup> Due to this association, discrimination against the poor may

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<sup>190</sup> See sources cited *supra* note 45.

<sup>191</sup> See Clarke, *supra* note 35, at 18 (discussing how a choice might seem irresponsible or unreasonable from the perspective of an outsider who has never experienced the situation that the person was in).

<sup>192</sup> Gilens, *How the Poor became Black*, *supra* note 92, at 102; Godsil, *supra* note 102.

<sup>193</sup> See generally Guinier & Torres, *supra* note 66, at 94 (2002) (observing that poor white students “had also effectively been raced black or brown”); Hartigan, *Name Calling*, *supra* note 64, at 45–47 (“[B]y behaving in a manner considered indecorous by [white residents of a working class suburb], these recent arrivals (white trash) are disrupting implicit understandings of what it means to be white.”); Jones, *supra* note 65, at 63 n.40 (2009) (observing that the “prototypical” black person is poor, while the “prototypical” white person has economic power, and “insofar as these poor Whites lack access to education, health care, jobs, and home-ownership, the fact that they are White . . . loses much of its force”); Rich, *supra* note 64, at 1518 (“[L]ow-status or marginal whites may find that they

reflect racial bias (even if it also harms lower-SES people with white skin).<sup>194</sup>

Because of this, it is difficult if not impossible to disentangle bias against the poor from racial bias. Policies that discriminate based on SES tend to have adverse racial impacts, since poverty rates are higher among nonwhites. Sometimes these policies are defended on the grounds that they are motivated by a desire not to affiliate with poor people, and any racial impact is incidental.<sup>195</sup> Consider the aforementioned Texas municipality that vetoed the development of low-income housing. A councilmember denied that this decision was race motivated, pointing out that the mayor is black, and about 35% of residents are nonwhite.<sup>196</sup> However, he explained that the decision was based on a desire not to mix with lower income people, who have “different values.”<sup>197</sup>

This is an example of how poverty serves as an ostensibly race-neutral justification for policies that harm minority racial groups with higher poverty rates: This Texas town is comfortable with people who are not white, but only higher-SES ones. But accepting only wealthier people is not really a race-neutral policy: Higher poverty rates among black, Hispanic, and other minority racial groups are due to racial

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are, for all practical purposes, being treated like minorities, as they are subject to defamatory statements and denial of privileges available to other white workers.”)

<sup>194</sup> A substantial body of research has shown that opposition to certain means-tested welfare programs is linked to racism and the mistaken perception that non-whites are the primary beneficiaries of the programs. See Christopher M. Federico, *When Do Welfare Attitudes Become Racialized? The Paradoxical Effects of Education*, 48 *Am. J. Pol. Sci.* 374, 374 (2004); Martin Gilens, “Race Coding” and White Opposition to Welfare, 90 *Am. Pol. Sci. Rev.* 593, 601 (1996); Powell, *supra* note 10, at 1072–73 (citing Alberto Alesina & Edward L. Glaeser, *Fighting Poverty in the United States and Europe: A World of Difference* 133–81 (2004)); cf. Rich, *supra* note 64, at 1503 (“[H]igh-status whites may attempt to cover their racially discriminatory actions by imposing colorblind rules that also victimize low-status white persons.”).

<sup>195</sup> Barnes & Chemerinsky, *supra* note 10, at 129 (“[A]ctions producing disparate racial outcomes are explainable not as a function of race discrimination, but as matters simply (and inadvertently) disadvantaging the poor, more generally.”).

<sup>196</sup> Eligon et al., *supra* note 133.

<sup>197</sup> *Id.*

discrimination. Treating poverty as a neutral grounds for discrimination reinforces the racial discrimination that caused the poverty.<sup>198</sup>

According to the EEOC Compliance Manual, employment discrimination statutes prohibit employers from discriminating against people at the intersection of two protected traits: For example, an employer may not refuse to hire black women, even if they hire a large number of black men and a large number of white women.<sup>199</sup> Because SES is not a protected class, nothing prohibits an employer, landlord, town, etc., from discriminating based on the intersection of race and SES—i.e., by accepting higher-SES black or Hispanic people but discriminating specifically against lower-SES black or Hispanic people.<sup>200</sup> Protecting SES would capture this intersection between race and SES: It would render this “class-not-race” defense suspect. Because SES-based discrimination is so intertwined with racial bias, addressing SES discrimination is part of a comprehensive strategy for addressing racial discrimination.

### *C. Building a Cross-Racial, SES-Based Coalition*

The third argument for protecting SES is political: Throughout history, race has been used as a wedge to split low-SES blacks from low-SES whites, to prevent the groups from uniting to advance their shared economic interests.<sup>201</sup> In cases involving policies like voter ID

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<sup>198</sup> Cf. McFarlane, *supra* note 2, at 163 (“[S]ociety’s unexamined embrace of class discrimination reflects the irony that class is both the preferred method for and the hidden obstacle to racial justice.”).

<sup>199</sup> EEOCCM, *supra* note 145, at § 15-(IV)(C).

<sup>200</sup> There is some evidence that people discriminate more severely against people who are both black and poor. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 *Ann. Rev. Sociol.* 181, 189 (2008) (noting that research using telephone audits for the sale or lease of housing finds that “blacks who speak in a manner associated with a lower-class upbringing suffer greater discrimination than black men and/or those signaling a middle-class upbringing”). Bias against lower-SES non-whites may not be exclusive to higher-SES whites. Higher-SES non-whites might also distance themselves from lower-SES people of the same racial group. Cf. Henry Louis Gates, Jr., *Black America and the Class Divide*, *N.Y. Times* (Feb. 1, 2016), <http://www.nytimes.com/2016/02/07/education/edlife/black-america-and-the-class-divide.html> [<https://perma.cc/393Q-927G>] (discussing the growing class divide within the black population and William Julius Wilson’s concern with the problem of income inequality between wealthier and poorer black people).

<sup>201</sup> See generally Part III.A.

laws, restrictive zoning, and credit history screening, which have both a racial disparate impact and a disparate impact on lower-SES people, a disparate-impact claim could theoretically be presented both in terms of disparities between higher- and lower-SES people or disparities between black, white, and Hispanic people. Framing the claim in terms of racial disparities makes it seem as though one racial group benefits from the remedy. In fact, the remedy benefits lower-SES people of all races.<sup>202</sup> Giving litigants the option of framing disparate-impact claims in terms of SES would draw attention to the ways that lower-SES people of all races share common experiences of exclusion and marginalization. This could be an incremental step toward building a cross-racial coalition focused on economic inequality—something the Progressive movement has been trying to accomplish for a long time.<sup>203</sup>

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<sup>202</sup> Recall that in the Texas voter ID case, 21.4% of eligible poor voters lacked the required ID, compared to 2.6% of higher income voters. *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016); see also Fishkin, *supra* note 15, at 1489–90 (pointing out that the ruling in *Griggs*, which invalidated an employer’s high school diploma requirement, benefitted many white applicants without a high school diploma); Ayres, *supra* note 15 (making a similar observation with respect to race-based disparate-impact challenges to credit/lending policies).

<sup>203</sup> For this same reason, advocates have argued for replacing race-based affirmative action with SES-based affirmative action. See, e.g., Kahlenberg, *Class-Based Affirmative Action*, *supra* note 16, at 1063 (“[R]eplacing race preferences with class preferences will decrease public consciousness of race and increase public consciousness of class. For progressives, this shift has always been a political imperative.”). These arguments have been controversial, since racial disadvantage is distinct from socioeconomic disadvantage, and replacing race-based admissions with SES-based admissions might not produce the same levels of racial diversity. See, e.g., Sean Reardon, et al., *What Levels of Racial Diversity Can be Achieved with Socioeconomic-Based Affirmative Action?* 23–24 (Ctr. for Educ. Pol. Analysis, Working Paper No.15-04, 2017), <https://cepa.stanford.edu/sites/default/files/wp15-04-v201712.pdf> [<https://perma.cc/D3KP-MCRZ>] (finding neither SES-based affirmative action nor race-based recruitment alone produce the rates of black and Hispanic enrollment from race-based affirmative action policies, but used together at their strongest levels, these two tools can achieve the enrollment levels of race-based affirmative action). My argument avoids this problem because I am not arguing for replacing race discrimination laws with laws prohibiting SES discrimination; rather, I am arguing for enforcing both prohibitions simultaneously. This means an employer could not adopt a policy that disadvantages black applicants in the name of complying with prohibitions on SES-based discrimination. Discrimination law differs from affirmative action in that it is a negative prohibition on certain criteria for allocating opportunities. But the law says nothing positive about what selection criteria must be used, or which individual should be preferred for any given opportunity. In other words, an employer, landlord, or private school could simultaneously

#### D. Avoiding Constitutional Scrutiny

The fourth argument for protecting SES is legal: Some argue that race-based disparate-impact law should trigger Fourteenth Amendment scrutiny because it requires employers to engage in race-conscious decision making.<sup>204</sup> A majority of the Court has declined to embrace this view, but a future Court could conceivably do so. Even if the Court does not go down this road, judges concerned about the “balkanizing” effects of race-conscious decision making may be somewhat hesitant about race-based disparate-impact claims.<sup>205</sup> The fact that SES is not a protected class under the Fourteenth Amendment works to its advantage when it comes to statutory protection. It means that requiring employers and other regulated entities to consider the socioeconomic impact of their actions would not trigger the same constitutional objections.<sup>206</sup> Therefore, protecting SES would make it possible to challenge the many policies with both adverse racial and socioeconomic effects, without

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adhere to prohibitions on SES-based discrimination and pursue voluntary race-based affirmative action.

<sup>204</sup> Justices Scalia and Thomas have suggested it should trigger heightened scrutiny because it “place[s] a racial thumb on the scales.” *Ricci v. DeStefano*, 557 U.S. 557, 594 (2008) (Scalia, J., concurring); see also *Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2531 (2015) (Thomas, J., dissenting); Roger Clegg, *The Bad Law of “Disparate Impact”*, *The Pub. Int.* 79, 87–88 (Winter 2000); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 *Harv. L. Rev.* 494, 518–19 (2003) (discussing whether equal protection affirmatively forbids the use of statutory disparate-impact standards).

<sup>205</sup> Judges might be inclined to deny remedies in these claims out of concern that any form of race-conscious intervention is balkanizing. Cf. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *Yale L.J.* 1278, 1281, 1283 (2011) (arguing that concerns about balkanization underlie Fourteenth Amendment jurisprudence pertaining to race-based disparate-impact law).

<sup>206</sup> Justices Scalia and Thomas have both voiced support for SES-based affirmative action. Richard D. Kahlenberg, *Where Sotomayor and Thomas Agree on Affirmative Action*, *Chron. of Higher Educ.* (June 17, 2013), <http://www.chronicle.com/blogs/conversation/2013/01/17/where-sotomayor-and-thomas-agree-on-affirmative-action/> [<https://perma.cc/72MG-L7SB>]; Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 *Wash. U. L. Rev.* 147, 156 (“I strongly favor . . . what might be called . . . ‘affirmative action programs’ of many types of help for the poor and disadvantaged. It may well be that many, or even most, of those benefited by such programs would be members of minority races . . . I would not care if *all* of them were. The unacceptable vice is simply selecting or rejecting them *on the basis of their race.*”) (emphasis in original).



triggering the constitutional objections to race-based disparate-impact liability.

For all these reasons, protecting SES would advance the values and purposes of discrimination law. Next, I will turn to questions about the practical viability of this proposal.

## V. PRACTICAL IMPLEMENTATION

The foregoing arguments for protecting SES are of little value if doing so would be impractical or ineffective. This Part aims to show how protecting SES would be practically feasible and have positive benefits. I address five concerns along these lines: (1) Congress's power; (2) defining the class; (3) opening the floodgates to too many claims; (4) efficacy of discrimination law; and (5) the risk of reification.

### *A. Congress's Power*

The fact that SES is not protected under the Fourteenth Amendment is advantageous when it comes to disparate-impact law, but it might also raise questions about whether Congress has power to protect SES under discrimination legislation. Congress's ability to legislatively enforce the Fourteenth Amendment is limited to the Court's interpretation of that amendment.<sup>207</sup> However, Congress is able to reach conduct not covered by the Fourteenth Amendment under its Commerce Clause,<sup>208</sup> Spending Clause,<sup>209</sup> and Thirteenth Amendment enforcement powers.<sup>210</sup> These powers have allowed Congress to protect other traits, such as disability and age, even though the Court has declined to protect them under the Fourteenth Amendment.

Congress could rely on the same sources of power to protect SES in the various domains covered by discrimination law: Specifically, Congress should be able to rely on Commerce Clause power to prohibit SES discrimination in private employment, public accommodations, and

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<sup>207</sup> *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

<sup>208</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>209</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>210</sup> U.S. Const. amend. XIII, § 2.

credit/lending.<sup>211</sup> Pursuant to Spending Clause power, it should be able to prohibit SES discrimination in programs receiving federal funds.<sup>212</sup> Laws prohibiting racial discrimination in private housing transactions are an exercise of Thirteenth Amendment enforcement power, and Congress could arguably rely on the same power to prohibit SES-based housing discrimination.<sup>213</sup> And lastly, when it comes specifically to voting, the Court has held that poverty is an impermissible classification under the Fourteenth Amendment;<sup>214</sup> therefore, Congress should have Fourteenth Amendment enforcement power to prohibit SES-based discrimination in voting.

While I am mostly discussing federal legislation, my arguments are also intended for state and local lawmakers. They have plenary power to protect whatever traits they wish, and many do protect more traits than are covered by federal discrimination statutes—even some SES-linked traits, such as public assistance status.<sup>215</sup> Indeed, states and localities may be the most promising ground for starting this type of reform.

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<sup>211</sup> See *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding the Americans With Disabilities Act is not a valid exercise of Congress's Fourteenth Amendment enforcement power but acknowledging it is a valid exercise of Commerce Clause power); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding the same with respect to the Age Discrimination in Employment Act); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (holding Congress acted within its Commerce Clause power in prohibiting discrimination in private businesses open to the public). Because these laws are not valid exercises of Fourteenth Amendment enforcement power, they cannot be applied to state governments, even where Congress could otherwise regulate under its Article I powers. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (holding Congress cannot abrogate states' sovereign immunity pursuant to its Article I power).

<sup>212</sup> See *Barnes v. Gorman*, 536 U.S. 181, 185–86 (2002) (noting that “Title VI invokes Congress’s power under the Spending Clause . . . to place conditions on the grant of federal funds.”).

<sup>213</sup> See *Jones v. Mayer Co.*, 392 U.S. 409, 441 (1968). If race-based housing discrimination is a badge or incident of slavery, the same arguably goes for SES-based housing discrimination—especially given the overlap between racial discrimination and SES-based discrimination, and given that the prohibition on slavery is not race-specific. See, e.g., *United States v. Nelson*, 277 F.3d 164, 169 (2d Cir. 2002) (statute prohibiting religiously or racially motivated interference with enjoyment of public facility was constitutional exercise of Congress's Thirteenth Amendment power); see also Jamal Greene, *Thirteenth Amendment Optimism*, 112 *Colum. L. Rev.* 1733, 1734–35 (2012).

<sup>214</sup> *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (“[A]s a condition of obtaining a ballot—the requirement of fee paying causes an ‘invidious’ discrimination that runs afoul of the Equal Protection Clause.”) (citation omitted).

<sup>215</sup> See *infra* notes 279–280, and accompanying text (discussing state laws addressing forms of SES discrimination).

*B. Defining the Class*

Courts and scholars discussing the prospects of protecting the poor under the Fourteenth Amendment, as well as SES-based affirmative action, have grappled with how to define the group of beneficiaries.<sup>216</sup> Sometimes the terms SES and class are used interchangeably. I have avoided using the term class, and have instead been using SES to refer to a concept simpler than social class. Class is a complex function of various factors, including wealth, education, occupation, the social status of one's parents, and potentially many others.<sup>217</sup> It may well be impossible for the legal system to define and measure the complexities of class.<sup>218</sup> I do not attempt to do so here. Instead, my simpler objective is to define the protected group in a way that captures policies that reinforce cycles of poverty by excluding people who are financially disadvantaged. Individuals burdened by these policies can be identified by their present, past, or perceived financial situation. It is unnecessary to classify them by a more abstract definition of social class.

A measure of current financial situation, i.e., SES, is adequate for my purpose for two reasons. First, because financial resources are highly correlated with other components of class, protecting people who lack financial resources (or who are perceived as lacking them) will protect, by and large, people who lack education, have low-status occupations, or who were raised by poor parents.<sup>219</sup> Yet it avoids the complexity of

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<sup>216</sup> See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25–26 (1973) (stating that the class could not be defined in “traditional” Equal Protection terms because there was no set of people who fell below some specific threshold of poverty); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982) (“[T]he alleged ‘class’ of low-income persons constitutes an incredibly amorphous group, a group which changes over time and by context...”); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 *Tex. L. Rev.* 1847, 1863–65 (1996) (describing different ways of understanding class and arguing that any system of class-based affirmative action will have difficulty capturing the nuance of class).

<sup>217</sup> Report of the APA Task Force on SES, *supra* note 114, at 9 (noting that SES is typically measured in terms of income, occupation, and education); Kahlenberg, *Class-Based Affirmative Action*, *supra* note 16, at 1073–83 (discussing various definitions of class and the various components that would go into a more sophisticated definition of class).

<sup>218</sup> See Malamud, *supra* note 216, at 1863–65.

<sup>219</sup> Kahlenberg, *supra* note 16, at 1074 (discussing family income would as the simplest way of measuring SES and noting that it serves as a good proxy for other variables, such as education and occupation).

attempting to quantify other components of class, such as education, occupation, and parents' social status.

Second and more importantly, for reasons elaborated in Section IV.A, it is my position that the law should protect anyone who is currently poor, regardless of whether they were born upper-middle class, have a graduate degree, or were at one point wealthy. Many policies listed in Section III.B (e.g., rejecting job applicants living in homeless shelters or with bad credit and refusing Section 8 tenants) impact everyone *currently* in poverty, even if they were born to wealthy parents and have a graduate degree (i.e., are in many senses higher class), and then fell into poverty later in life. For the reasons I have already explained, discrimination based on poverty should be illegitimate even if a person became poor later in life, and regardless of whether poverty was a result of personal choices, involuntary circumstances, or some combination.<sup>220</sup> Hence, for this limited purpose of discrimination legislation, I would define SES simply as current financial resources, past financial resources, or perceived financial resources.<sup>221</sup>

Stipulating that SES is measured in terms of current, past, or perceived financial resources still leaves a question of where to draw the cutoff between people who are considered high-SES and those

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<sup>220</sup> Because there is no universal threshold between people considered wealthy and poor, the Court has stated that discrimination based on poverty is only constitutionally cognizable in cases involving a specific fine or fee. In those cases, the fine or fee at issue defines the class of people who are considered poor—i.e., everyone too poor to be able to afford the fee in question. *Rodriguez*, 411 U.S. at 25 & n.60 (holding that Texas's policy of financing education through local property taxes did not trigger heightened scrutiny despite making educational resources a function of district wealth) (“If elementary and secondary education were made available by the State only to those able to pay a tuition . . . there would be a clearly defined class of ‘poor’ people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.”); see also Pierre Bourdieu, *What Makes a Social Class? On the Theoretical and Practical Existence of Groups*, 32 *Berkeley J. Sociol.* 1, 2 (1987) (“[I]ncome, like most properties attached to individuals, shows a continuous distribution such that any discrete category one might construct on its basis appears as a mere statistical artefact.”).

<sup>221</sup> By including past and perceived financial resources, I am following the model of the Americans with Disabilities Act. See 42 U.S.C. § 12102(1) (2012) (defining disability to encompass persons with an “impairment that substantially limits one or more [of the individual’s] major life activities,” with a record of one, or who are “regarded as” having one).

considered low-SES.<sup>222</sup> However, this question of where to draw the threshold is largely a red herring. None of the traits protected by discrimination law are amenable to this sort of clear-cut categorical definition. Even with respect to traits like race or sex, which are oftentimes mischaracterized as having natural categorical boundaries, people fall along a continuous spectrum from more masculine to more feminine, from appearing more- or less- white (where whiteness is demarcated by a number of attributes including skin color, hair style, dress, accent, etc.).<sup>223</sup> Discrimination cases do not always require proof that a person of one race or sex was treated differently than someone of *a categorically different* race or sex. All discrimination is relative—a male can be a victim of sex discrimination if he is treated worse than other men due to his relatively effeminate nature. What matters is that the adverse action was driven by stereotypes about race or sex.<sup>224</sup>

Age is the most obvious example of a protected trait that is measured along a continuum, rather than in categories. Hence, the law of age discrimination offers the clearest blueprint for how the law could evaluate SES discrimination without defining a fixed, universal cutoff between high- and low-SES people. The ADEA does not define a fixed cutoff point between young and elderly people, such as everyone under

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<sup>222</sup> For instance, the Court held that a class of children living in poorer school districts could not be defined in “traditional” Equal Protection terms because the plaintiffs did not all fall below some defined threshold of poverty. *Rodriguez*, 411 U.S. at 25–26.

<sup>223</sup> A person of African American descent might have light skin, speak and style their hair in a way that is associated with white culture; a person who is biologically male might dress and talk in a manner associated with femininity. See Bourdieu, *supra* note 220, at 2.

<sup>224</sup> See generally *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78–79 (1998) (male employee could bring Title VII sex discrimination claim for sex-related humiliating actions by his male supervisor and male coworkers); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (holding that firing a women because she has a female partner—and therefore defies stereotypes of femininity—is a form of sex discrimination actionable under Title VII) (“Viewed through the lens of the gender non-conformity line of cases, *Hively* represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.”). Likewise, if a white employer rejects a white applicant because he has a black-sounding name, then he has still been discriminated against because of negative stereotypes about black people. See Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being Regarded as Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 *Wis. L. Rev.* 1283, 1300–01.

sixty vs. everyone over sixty. The law only applies to people over forty. But anyone at least forty can bring a claim if he or she was treated worse than a relatively younger person—even if the younger person is also at least forty.<sup>225</sup> This means “elderly” is defined within the context of any particular case: In one case, someone who is forty-three years old could claim they were discriminated against in favor of a thirty-year-old. In another case, someone who is fifty-five might claim they were discriminated against in favor of a forty-three-year-old.<sup>226</sup>

Laws protecting SES could work in the same way: If lawmakers chose to protect only those below a certain threshold of economic disadvantage, they could make the law applicable to people below a certain level of wealth (e.g., below the median wealth), just as the ADEA only protects people who are at least forty.<sup>227</sup> But anyone within the SES-range covered by the law could bring a claim, so long as they were discriminated against in favor of a relatively higher-SES person, or if there is other evidence that the employer’s decision was motivated by SES or an SES-linked trait (e.g., statements suggesting the applicant is undesirable because they live in a homeless shelter, have missing teeth, etc.).<sup>228</sup>

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<sup>225</sup> While it only covers people at least age forty, this does not mean that claims of discrimination must be framed as comparisons between people at least forty and people under forty. *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (“The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.*”) (emphasis in original).

<sup>226</sup> *Id.*

<sup>227</sup> Whether to do this depends on whether lawmakers elect for prohibitions on SES discrimination to be symmetrical (like prohibitions on race and sex discrimination) or asymmetrical (like prohibitions on age and disability discrimination). Symmetrical protection for SES would prohibit discrimination against wealthy people in favor of the poor as well as discrimination against poor people in favor of the wealthy. If symmetrical, protection should not be limited to people under the median income. Asymmetric protection for SES would only prohibit discrimination against poorer people in favor of wealthier people, as age discrimination law only protects the elderly against discrimination in favor of younger people; it does not protect younger people against discrimination in favor of the elderly. For more on this design choice, see generally Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. Rev. 1085 (2017).

<sup>228</sup> This means that someone with an income of \$50,000 per year could be the victim of SES discrimination in one context (e.g., if his or her children are disadvantaged by certain aspects of the college admissions process, such as valuing unpaid internships or expensive extracurricular activities), but he or she could be the beneficiary of SES discrimination in a different context (e.g., if he or she is selected for a job above someone who has been unemployed and therefore has no income).

This continuous approach also works for using statistical evidence to prove either disparate-treatment or disparate-impact discrimination.<sup>229</sup> Showing a statistically significant disparity does not require defining and comparing categories of low- and high-SES people. Linear modeling would use a continuous measure of income—i.e., taking account of all data points along the income distribution—to calculate the correlation between income and the outcome in question. The resulting coefficient estimates how much one additional increment of SES impacts the outcome (e.g., the likelihood of satisfying a hiring requirement, having a voter ID, or receiving a call-back on a job application). If the correlation is statistically significant, there is a significant disparity between people one standard deviation below and above the mean income. Statistical experts have recommended this approach for cases of age discrimination.<sup>230</sup>

Alternatively, if courts preferred to use categorical comparisons in statistical cases, the relevant population could be divided at objective cut-off points, such as those above and below the mean SES, or quartiles, for the sake of comparison.<sup>231</sup> Throughout this article I have referenced analyses that do exactly this to show statistical disparities in outcomes, such as college graduation or possessing a voter ID, for

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<sup>229</sup> Both types of cases frequently rely on statistical evidence. See, e.g., *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1280–84 (11th Cir. 2000) (holding that a disparity in hire rates between men and women might support a finding of disparate treatment, but not disparate impact, since the disparity was not attributable to any facially neutral policy of the employer); *MacNamara v. Korean Air Lines*, 863 F.2d 1135, 1148 (3d Cir. 1988) (“[T]he statistical evidence supporting a claim of disparate impact often resembles that used to help establish disparate treatment.”).

<sup>230</sup> *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61, 76 (3d Cir. 2017) (“Some scholars have proposed the use of statistical models that treat age as a continuous variable and thus avoid the need to draw ‘arbitrary’ age groups. Options discussed in the literature include proportional hazards models and logistic regression.”).

<sup>231</sup> *Id.* at 68–69, 77 (“The continuous nature of the age variable need not be a statistical problem under disparate-impact analysis” since “[p]laintiffs can demonstrate such impact with various forms of evidence, including forty-and-older comparisons, subgroup comparisons, or more sophisticated statistical modeling, so long as that evidence meets the usual standards for admissibility.”); *id.* at 77 (“The claim can be analyzed, of course, to determine if the result is robust across various age breaks and whether the age breaks can be justified independently of the data.”).

different SES brackets.<sup>232</sup> These same analyses could be used to show SES-based disparate impact.

### C. Floodgates

A third practical concern is that because so many policies have a disparate impact on the poor, prohibiting SES discrimination would open the floodgates to an overwhelming number of lawsuits.<sup>233</sup> As a matter of principle, this argument is not compelling: The fact that injustice is pervasive should not be a reason for allowing it to continue.<sup>234</sup> On a more practical note, the same thing could be said about other traits protected by discrimination law. Indeed, by prohibiting policies with an adverse racial impact, the law already *does* implicate most policies with an adverse impact on the poor.

As described in Section IV.B, because poverty rates are higher among nonwhites, most policies with a disparate impact on the poor have an adverse racial impact. In *Washington v. Davis*, holding an adverse racial impact does not establish liability under the Fourteenth Amendment, the Court reasoned that recognizing such liability “would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be *more burdensome to the poor* and to the average black than to the more affluent white.”<sup>235</sup> Nonetheless, Congress chose to authorize race-based, disparate-impact claims in the specific areas where discrimination statutes apply. These provisions already implicate many policies with a

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<sup>232</sup> See, e.g., *Veasey v. Perry*, 71 F. Supp. 3d 627, 664 (S.D. Tex. 2014) (subsequent history omitted) (comparing rates of voter ID possession for people in lowest income bracket to people in higher income bracket); NCES Report, *supra* note 120, at 2 (comparing rates of college graduation for people in different SES brackets).

<sup>233</sup> Fishkin, *supra* note 15, at 1508 (rejecting the idea of “an antidiscrimination law based on class” because “a body of disparate impact law focused on class would be tantamount to a legal rule that nearly all employment practices must meet the business necessity/job relatedness test”) (citing Kasper Lippert-Rasmussen, *Discrimination: What Is It and What Makes It Morally Wrong?*, in *New Waves in Applied Ethics* 51, 60 (Jesper Ryberg et al. eds., 2007)).

<sup>234</sup> This sounds like a “fear of too much justice.” *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (critiquing the Court’s refusal to consider evidence of racial disparities in application of the death penalty because doing so would open the door to widespread challenges in all aspects of criminal sentencing).

<sup>235</sup> *Washington v. Davis*, 426 U.S. 229, 248 (1976) (emphasis added).



disparate impact on the poor, including voter ID laws, zoning restricting the development of low-income housing, and employment policies such as credit-history and unemployment-history screening. Protecting SES would not allow many claims that could not have already been brought under existing race-based disparate-impact law.

The history of race-based disparate-impact suits further demonstrates why we should not be concerned about opening the “floodgates” to overwhelming volumes of disparate-impact litigation. Despite the fact that race-based disparate-impact provisions implicate most policies that discriminate based on SES, race-based disparate-impact claims “appear to have had only an extremely modest influence on the volume of litigation.”<sup>236</sup> There are at least two reasons for this.

First, a policy with a disparate impact is not automatically invalid. It is defensible if it is necessary to serve a legitimate interest of the business or institution, such as profitability or safety.<sup>237</sup> There is precedent establishing that certain types of policies satisfy this defense and are therefore permissible despite their adverse racial impact. For instance, courts have long deferred to employers’ judgments about the necessity of education and various other requirements for highly skilled, specialized, or technical positions.<sup>238</sup> Hence, even though requiring a

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<sup>236</sup> John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan. L. Rev.* 983, 998 (1991).

<sup>237</sup> *Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (listing interests that might justify a policy with a housing policy with a disparate impact); *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (strength of law’s rationale is one factor to be considered in claims of voting discrimination or dilution); U.S. Dep’t of Justice Title VI Legal Manual § VII.C (Apr. 13, 2017) (explaining that a policy with a disparate impact may be defensible if the justification is “legitimate, integral to the recipient’s institutional mission, and important”); *Interagency Policy Statement on Discrimination in Lending*, 59 *Fed. Reg.* 73,18266, 73,18267, 73,18269 (Apr. 15, 1994) (explaining that under the Equal Credit Opportunity Act, policies with a racial disparate impact are defensible if the lender establishes the practice is justified by “business necessity,” which takes into account cost and profitability).

<sup>238</sup> *Chrisner v. Complete Auto Transit*, 645 F.2d 1251, 1262 (6th Cir. 1981) (“An industry with the primary function of managing the safety of large numbers of passengers must be allowed more latitude in structuring the requirements which could effect the performance of a primary business objective.”); see also, e.g., *Davis v. City of Dallas*, 777 F.2d 205, 207–08 (5th Cir. 1985) (upholding a requirement that police officers have 45 hours of college credit); *Spurlock v. United Airlines*, 475 F.2d 216, 219 (10th Cir. 1972) (“[W]hen the job clearly requires a high degree of skill and the economic and human risks involved in hiring

medical degree has an adverse racial impact, EEOC Guidance instructs this is a legitimate job-related credential for practicing medicine,<sup>239</sup> and people rarely, if ever, bring disparate-impact challenges to this commonplace hiring policy. However, courts have been more willing to scrutinize hiring requirements for unskilled or entry-level positions, where hiring a less-qualified or specialized applicant poses less risk to safety or profitability.<sup>240</sup> This established precedent forecloses race-based disparate-impact challenges to many education-related hiring criteria that correlate with SES, unless the job is a lower-skilled or entry-level position, where the relationship to job performance is particularly tenuous.<sup>241</sup>

The second reason disparate-impact provisions have not generated volumes of litigation is that they offer little financial incentive to bring lawsuits. There are no damages available, only injunctive relief.<sup>242</sup> Because there is no monetary payoff, all plaintiffs can hope to gain from these claims is the opportunity to compete on more narrowly tailored, job-related criteria. They have no incentive to take the time and effort to bring suit unless there is a substantial likelihood that (1) a court would find the defendant's practice is not defensible and (2) they will actually fare better if the defendant were required to adopt a less-restrictive

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an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job related."); *Scott v. Univ. of Del.*, 455 F. Supp. 1102, 1126 (D. Del. 1978) (holding that a Ph.D is a valid hiring requirement for a professor).

<sup>239</sup> EEOCCM, *supra* note 145, § 15-(VI)(B)(2) ("Educational requirements obviously may be important for certain jobs. For example, graduation from medical school is required to practice medicine.").

<sup>240</sup> *Spurlock*, 475 F.2d at 219 ("When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant . . . the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job related."); see also *Kinsey v. First Reg'l. Sec.*, 557 F.2d 830, 836-38 (D.C. Cir. 1977) (holding requirements of "sales experience" and "sales motivation" for an entry-level sales representative training program are not justified by business necessity); *Payne v. Travenol Labs., Inc.*, 416 F. Supp. 248, 259-61 (N.D. Miss. 1976) (A college degree was not a valid hiring requirement for the positions of "scheduling analyst, traffic analyst, or systems analyst" in a manufacturing plant.).

<sup>241</sup> Oftentimes in these scenarios disparate-impact claims serve to smoke out otherwise-unprovable illegitimate purpose. *Inclusive Cmty. Project, Inc.*, 135 S. Ct. at 2511-12 (noting that disparate-impact claims "permit[] plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment").

<sup>242</sup> See 42 U.S.C. § 1981a(a)(1) (2012).

alternative.<sup>243</sup> SES-based claims would be constrained by these same factors. Therefore, protecting SES is unlikely to generate many more disparate-impact suits than race-based disparate-impact law.

While I do not expect protecting SES to generate many novel disparate-impact claims, it might generate some novel disparate-treatment claims. Employers commonly screen based on physical traits associated with poverty—e.g., missing or stained teeth.<sup>244</sup> These practices could give rise to SES-based disparate-treatment claims.<sup>245</sup> Some might argue that employers should be allowed to screen on the basis of traits that are associated with “classy” appearance, at least for certain jobs. For this reason, disparate-treatment provisions generally allow employers to discriminate based on a protected trait if it is a BFOQ, meaning that it is “reasonably necessary to the normal operation of that particular business.”<sup>246</sup> I presume that this BFOQ defense would also be available for SES discrimination.

Cases involving sex as a BFOQ provide some guidance on when SES-linked traits, like straight, white teeth, might be a BFOQ. Courts have held that sex is not a BFOQ simply because customers prefer it.<sup>247</sup> Sex may be a BFOQ if sex or sexual entertainment is the business’s product—e.g., a cabaret show—but this usually does not apply if the business sells another product, like food or air travel, but markets it with

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<sup>243</sup> For these reasons, disparate impact has been described as an “underutilized” theory of discrimination. Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 *Yale L. & Pol’y Rev.* 95, 99 n.21 (2006) (citation omitted).

<sup>244</sup> See *supra* notes 149–150.

<sup>245</sup> I am assuming that missing or broken teeth is a SES-linked trait and that disparate treatment based on SES-linked traits is effectively disparate treatment based on SES. See *infra* note 146 and accompanying text (discussing how EEOC guidance defines racial discrimination to encompass discrimination based on race-linked traits).

<sup>246</sup> 42 U.S.C. § 2000e-2(e) (2012); *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414–17 (1985). Alternatively, employers can show that it would be impossible to evaluate candidates on an individual basis. *Western Air Lines*, 472 U.S. at 414.

<sup>247</sup> *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981) (citing *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971)) (“[T]he fact that customers prefer [females] cannot justify sex discrimination.”); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (Hasidic parents’ strong preference for male bus drivers to drive their male children did not make sex a BFOQ).

sex.<sup>248</sup> By analogy, an SES-linked trait, such as straight, white teeth, may be a BFOQ if the business is selling something related to dental hygiene. In this scenario, there is a strong argument that teeth are the business's product in the way sex is the product in a cabaret show.<sup>249</sup> However, this argument seems weaker when it comes to positions like a server in a fast food restaurant or a cashier in a general store, where there is no inherent connection between teeth or classy appearance and the product. Even if courts were inclined to allow physical traits associated with "looking classy" as a BFOQ for many customer-service positions, allowing litigants to challenge these practices would at least open up a discussion about their legitimacy.

In sum, in both disparate-treatment and disparate-impact cases, courts have erred on the side of deferring to defendants' justifications.<sup>250</sup> This

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<sup>248</sup> Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 Calif. L. Rev. 147, 152 (2004) ("[W]ithin the realm of sexual-titillation cases, courts distinguish sharply between businesses selling virtually nothing but sexual titillation . . . and ["plus-sex"] businesses offering or selling sexual titillation along with some other good or service."); Rachel L. Cantor, Comment, *Consumer Preferences for Sex and Title VII: Employing Market Definition Analysis for Evaluating BFOQ Defenses*, 1999 U. Chi. Legal F. 493, 508–17 (discussing how courts permit businesses to discriminate on the basis of sex when "sex defines the market in which the business participates"); Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 U. Mich. J.L. Reform 551, 559 (1998) (noting that "sex does not become a BFOQ merely in order to enhance a marketing strategy and considering whether sex is a BFOQ for working in a restaurant called "Hooters"). EEOC Guidance provides that sex may be a BFOQ if it "is necessary for the purpose of authenticity or genuineness, e.g., an actor or an actress." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Ch. XIV § 1604.2(a)(2) (2002).

<sup>249</sup> Businesses like high-end fashion boutiques could conceivably argue that classy image is what they are selling, and hence, a classy appearance "is necessary for the purpose of authenticity or genuineness." See EEOC Guidelines on Discrimination Because of Sex, *supra* note 248, § 1604.2(a)(2).

<sup>250</sup> See generally Jillian B. Berman, Comment, *Defining the "Essence of the Business": An Analysis of Title VII's Privacy BFOQ After Johnson Controls*, 67 U. Chi. L. Rev. 749, 749–53 (2000) (criticizing courts' permissiveness toward sex discrimination in privacy-based BFOQ cases); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 Minn. L. Rev. 1275, 1282–85 (2012) ("Discrimination plaintiffs fare far worse than virtually every other category of federal litigants, including even many categories of plaintiffs who face notoriously difficult legal standards (such as ERISA plaintiffs and habeas corpus litigants)."); see also Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. Rev. 701, 738–40 (2006) (noting that the success rate for employment discrimination plaintiffs is about 35%, compared to a 50% success rate for civil litigants; and the success rate for disparate-impact plaintiffs in district court is approximately 25%).

track record suggests courts are unlikely to interpret prohibitions on SES discrimination in a way that invalidates a broad array of commonplace hiring policies.<sup>251</sup>

#### *D. Practical Value*

The conclusion of the previous paragraph—that courts are inclined to defer to defendants in discrimination cases—leads to a practical consideration of the opposite nature: If plaintiffs rarely win discrimination claims, what is the practical value of protecting SES? I submit that protecting SES would influence behavior in important ways, even if lawsuits were difficult to win. Discrimination law influences behavior in ways not measured by the success rate for discrimination lawsuits. The success rate does not account for the extent that law prompts people to preemptively modify their behavior before any lawsuit is filed. Nor does it account for the intangible social-psychological benefits for those protected by the law.

Research suggests that people tend to preemptively conform their behavior to discrimination laws, regardless of the probability of enforcement action.<sup>252</sup> The authors of one study explain, “if legislation only impacted behavior to the extent that punishment were expected, antidiscrimination laws would likely have little effect.”<sup>253</sup> However, they argue, “[t]he symbolic effects of legislation are such that, even absent any possibility of tangible punishment, legislation may reduce a given

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<sup>251</sup> While I do not explore it here, one interesting possibility for addressing the risk that discrimination law opens the floodgates to too many lawsuits, as well as the problem of courts being overly-deferential to defendants, is to give administrative agencies like the EEOC the power to cite violators directly, rather than having to sue them in court—just as federal agencies enforce rules prohibiting discrimination in programs receiving federal funds. See Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. Ill. L. Rev. 405, 405–07 (2006).

<sup>252</sup> A field study found that in localities where discrimination laws protect sexual orientation, LGBT applicants were treated significantly better compared to otherwise-comparable localities without such laws. Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 *Psychol. Pub. Pol’y & L.* 191, 197–200 (2013). The same effect occurred in a randomized lab experiment comparing people who were told about legislation protecting LGBT people to a control group that was not told of such laws. *Id.* at 199–200.

<sup>253</sup> *Id.* at 194.

act (discrimination) simply by designating it as illegal, criminal, or deviant.”<sup>254</sup> Other research suggests that human resources officers tend to overstate the threat of liability under employment laws.<sup>255</sup> To the extent this is true, employers might take preemptive measures to comply with discrimination law because they overestimate the risk of being held liable. For both these reasons, laws prohibiting discrimination are likely to influence behavior—at least conscious, explicit stereotyping and discrimination—even if lawsuits are difficult to win.<sup>256</sup>

There is a second benefit of discrimination law that is not captured by the success rate for discrimination suits: the psychological benefits for people protected by it. By publicly condemning stereotypes, discrimination law may improve the psychological resilience of people who experience discrimination. In one recent study, overweight people who were simply told that one state has a law prohibiting weight discrimination were less likely to internalize negative stereotypes about overweight people, and less likely to evaluate themselves negatively due to their weight, compared to those who were not told about such legislation.<sup>257</sup> They also reported higher feelings of determination, strength, inspiration, pride, boldness, and confidence, all of which are associated with empowerment.<sup>258</sup>

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<sup>254</sup> *Id.*

<sup>255</sup> See Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *Law & Soc’y Rev.* 47, 63–65 (1992) (finding that during a period in the 1980s, after a few courts recognized a cause of action for “wrongful discharge,” business and personnel journal articles advised human resources personnel to take far more significant precautions than would be justified by the remote probability of being held liable). This may stem from a drive to aggrandize their role in the company or simply from risk aversion. *Id.* at 74–78.

<sup>256</sup> Most scholars accept that discrimination laws have at least been effective at reducing overt, explicit stereotyping and discrimination—what Susan Sturm calls “first generation” discrimination. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *Colum. L. Rev.* 458, 460 (2001).

<sup>257</sup> Rebecca L. Pearl et al., *Can Legislation Prohibiting Weight Discrimination Improve Psychological Well-Being? A Preliminary Investigation*, 17 *Analyses of Soc. Issues & Pub. Pol’y* 84, 88, 96 (2017).

<sup>258</sup> *Id.* at 96–97. This effect obtained even though subjects were merely told about the existence of discrimination law. They did not tangibly benefit from any enforcement action. *Id.*

Protecting SES could have similar benefits. Lower-SES people are conscious of being regarded negatively based on their SES.<sup>259</sup> This can lead to self-stereotyping, low self-esteem, and depression.<sup>260</sup> The study on weight discrimination law suggests that laws condemning SES discrimination might likewise reduce the tendency to internalize negative stereotypes surrounding poverty. Prohibiting SES discrimination would not eliminate poverty, but by publicly denouncing stereotypes about the poor, it could reduce the prevalence of explicit SES-based discrimination and make people more psychologically resilient when they do experience it.<sup>261</sup>

### *E. Reification*

Another practical consideration is what Nancy Fraser calls “the problem of reification”: discrimination laws may raise the social salience of the protected trait, and enhance social divisions along these lines, rather than eliminating them.<sup>262</sup> If this is true, it does not automatically follow that this undermines the purpose of the law or that ignoring the trait is a more productive alternative. Addressing systemic

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<sup>259</sup> See Hazel Rose Markus & Susan T. Fiske, Introduction: A Wide-Angle Lens on the Psychology of Social Class, in *Facing Social Class: How Societal Rank Influences Interaction* 1, 2 (Susan T. Fiske & Hazel Rose Markus, eds., 2012) (“[P]eople are constantly and keenly aware of their [class] ranking and that those at the top of the social ladder think, feel, and act differently from those on the lower rungs.”); see also *supra* notes 3–5 and accompanying text (explaining how poor people are acutely aware of how they will be judged based on their appearances or their neighborhoods).

<sup>260</sup> See, e.g., Ben Fell & Miles Hewstone, *Psychological Perspectives on Poverty* 16–18 (June 2015), <https://www.jrf.org.uk/report/psychological-perspectives-poverty> [<https://perma.cc/FJP9-SBGW>] (discussing research on self-stereotyping and concluding that “if the content of stereotypes regarding those in poverty emphasizes their lack of efficacy (e.g. through lack of intelligence or laziness), it is entirely possible that self-stereotyping will further undermine their self-image, and actual ability to effectively improve their own situation”).

<sup>261</sup> Of course, the same can be said about laws prohibiting discrimination based on race, sex, etc.

<sup>262</sup> Fraser, *Redistribution or Recognition?*, *supra* note 56, at 91–92. A similar concern underlies arguments for interpreting the Fourteenth Amendment in a way that prohibits all race-consciousness. For instance, see Chief Justice Roberts’s argument that “[t]he way to stop discrimination 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) (plurality opinion).

bias requires “speak[ing] openly and candidly” about that bias.<sup>263</sup> This predictably threatens members of dominant groups who benefit from the status quo, and in turn, provokes some resentment and backlash. But this type of conflict does not necessarily mean the law is failing to accomplish its purpose. It may be an inevitable side effect of any law designed to transform the status quo.

While reification may not be ideal, it may be better than ignoring pervasive and illegitimate inequality. In an ideal world, traits like race and SES would not determine how a person is treated. In reality, race and SES have a large impact on how people perceive and interact with one another.<sup>264</sup> Ignoring these disparities allows them to persist and tacitly endorses the status quo.<sup>265</sup> Perhaps protecting SES would lead people to identify more strongly in terms of their SES and spark some conflict between lower- and higher-SES people. However, this may be a necessary step in challenging policies that perpetuate and reinforce socioeconomic inequality.<sup>266</sup>

## VI. CONCLUSION

Discrimination statutes represent a moral and political commitment to the ideals of social mobility and self-determination. Accordingly, they protect traits that are subject to pervasive and illegitimate social bias. The legitimacy of bias is a value judgment, but lawmakers have determined several different types of traits are illegitimate bases for

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<sup>263</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (“The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race.”).

<sup>264</sup> *Id.* (Sotomayor, J., dissenting) (describing the way race makes a difference in daily interactions and how racial discrimination causes and perpetuates socioeconomic inequality); see also, e.g., Pager & Shepherd, *supra* note 200, at 182 (detailing evidence of racial discrimination); Markus & Fiske, *supra* note 259, at 2–3 (stating people are “keenly aware” of their SES and how it influences their daily interactions; detailing evidence of discrimination based on SES).

<sup>265</sup> *Schuette*, 134 S. Ct. at 1676 (Sotomayor, J., dissenting) (“It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.”).

<sup>266</sup> This strikes me as consistent with Fraser’s proposed response to the reification of traits like race: “conceptualizing struggles for recognition so that they can be integrated with struggles for redistribution, rather than displacing and undermining them.” Fraser, *Rethinking Recognition*, *supra* note 56, at 109.



judgment: Some traits are immutable/beyond individual control, and therefore morally arbitrary; others are fundamental, respect-worthy aspects of personal identity; and others result from choices that are irresponsible but not sufficiently blameworthy or predictive of future conduct to justify ongoing exclusion. Each of these lines of reasoning can apply to SES. But put more simply: In a country that values social mobility, it should be a priority to address practices that unjustifiably perpetuate cycles of poverty.

It is reasonable to be skeptical about the political viability of this proposal.<sup>267</sup> Lawmakers are notoriously beholden to the interests of wealthy constituents, and unresponsive to the preferences of lower income constituents.<sup>268</sup>

Yet there is some cause for optimism. Other groups protected by discrimination law also lack political power, yet lawmakers were ideologically motivated to protect them.<sup>269</sup> In the 1960s, when Lyndon B. Johnson campaigned on the promise of a “War on Poverty,”

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<sup>267</sup> Fishkin, *supra* note 15, at 1515–16 (suggesting discrimination law protecting class would be “too sweeping to be an attractive legislative response”).

<sup>268</sup> See Martin Gilens, *Affluence And Influence: Economic Inequality and Political Power in America* 81 (2012) (concluding “government policy bears absolutely no relationship to the degree of support or opposition among the poor,” though it is related to support among the wealthy). Ross & Li found that a 10% increase in the percentage of poor people in a congressional district is associated with an 11% decrease in the likelihood that the representative would vote for legislation benefitting the poor. Ross & Li, *supra* note 10, at 368–69. However, legislators’ votes were positively related to the preferences of other interest groups, such as farmers and union members. *Id.* at 364–68; see also Barnes & Chemerinsky, *supra* note 10, at 121–22 (“In a society where elected officials respond to those who spend money on their campaigns, the poor are uniquely ill-equipped to exercise influence.”). Antipathy toward the poor may be partly due to the fact that few legislators come from a lower income background. Only 6% of federal legislators in recent decades have spent any time in a working class job, and even fewer have spent a large proportion of their career in one. Nicholas Carnes, *White-Collar Government: The Hidden Role of Class in Economic Policy Making* 20 (2013). Legislators who have worked in blue-collar occupations tend to vote more liberally on economic issues. *Id.* at 32–41.

<sup>269</sup> As Ross and Li note, most groups that are underrepresented in lawmaking bodies have legislation benefitting their interests. Ross & Li, *supra* note 10, at 335–36. The poor have benefitted from favorable legislation, but this is not a result of their direct political influence. Instead “they are bystanders benefiting from an ideological moment and what remains of its legacy.” *Id.* at 349.

he won by a landslide,<sup>270</sup> and Congress took significant measures to protect the poor—measures that are still working to keep people out of poverty.<sup>271</sup>

The 2016 presidential election showed that socioeconomic inequality is again an issue of serious national concern. Many feel undervalued and unfairly excluded by elites in government and corporate America.<sup>272</sup> In both parties, a considerable proportion of voters gravitated toward candidates who criticized the establishment for overlooking the working class and poor.<sup>273</sup> In the run up to the 2018 midterms, “populist” candidates are gaining notable victories within both parties.<sup>274</sup> This indicates that socioeconomic inequality remains a prominent issue on the political agenda, and there could be bipartisan support for candidates

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<sup>270</sup> Tom Wicker, *Johnson Swamps Goldwater*, N.Y. Times (Nov. 4, 1964), <https://archive.nytimes.com/www.nytimes.com/books/98/04/12/specials/johnson-goldwater.html> [<https://perma.cc/DF2P-FA7V>].

<sup>271</sup> Wimer et al., *supra* note 92, at 2.

<sup>272</sup> See, e.g., Michael Lerner, *Stop Shaming Trump Supporters*, N.Y. Times (Nov. 9, 2016), <https://www.nytimes.com/interactive/projects/cp/opinion/election-night-2016/stop-shaming-trump-supporters> [<https://perma.cc/32M5-E6PN>] (“Many Trump supporters very legitimately feel that it is they who have been facing an unfair reality. The upper 20 percent of income earners . . . are blind to their own class privilege and to the hidden injuries of class that are internalized by much of the country as self-blame.”). Charles Murray, a scholar at the libertarian American Enterprise Institute and a staunch opponent of race-based affirmative action, has argued the college degree “has become a driver of class divisions at the same moment in history when it has become educationally meaningless,” and “the Supreme Court long ago ruled that employers could not use scores on standardized tests to choose among job applicants without demonstrating a tight link between the test and actual job requirements.” Charles A. Murray, *Narrowing the New Class Divide*, N.Y. Times (Mar. 7, 2012), <http://www.nytimes.com/2012/03/08/opinion/reforms-for-the-new-upper-class.html> [<https://perma.cc/9TWF-FERP>].

<sup>273</sup> See, e.g., Richard Reeves, *Inequality Built the Trump Coalition, Even if He Won’t Solve It*, Las Vegas Sun (Sept. 19, 2016), <https://lasvegassun.com/news/2016/sep/19/inequality-built-the-trump-coalition-even-if-he-wo/> [<https://perma.cc/67VN-4M6N>]; James Surowiecki, *Economic Populism at the Primaries*, The New Yorker (Feb. 22, 2016), <https://www.newyorker.com/magazine/2016/02/22/trump-sanders-and-the-american-worker> [<https://perma.cc/6UUE-V2W6>].

<sup>274</sup> *Midterms: Democratic Women and Republican Populists Surge in Primaries*, The Guardian (June 17, 2018), <https://www.theguardian.com/us-news/2018/jun/17/us-primaries-democratic-women-republican-populists> [<https://perma.cc/DVN5-W6W5>]; see also Karine Jean-Pierre, *Opinion: A Year for the Most Progressive and Populist Democrats to Shine*, CNN (Sept. 7, 2018), <https://www.cnn.com/2018/09/07/opinions/progressive-democrats-shine-pressley-gillum-karine-jean-pierre/index.html> [<https://perma.cc/ZHF8-F7VP>].

who put poverty at the forefront of their campaign in the way Johnson did in 1964.

Another reason for optimism is that poverty is like age and disability, in that it is a “permeable” group: People of any racial, ethnic, cultural background can become poor at any point in life.<sup>275</sup> As Fiss notes, “[t]he Americans with Disabilities Act sailed through Congress, with little or no resistance, perhaps because the disadvantaged group is, unlike blacks or women, one of which anyone might become a member.”<sup>276</sup> This reasoning also applies to poverty, as most who are not currently poor can imagine themselves or their kin becoming poor.<sup>277</sup> The more people see a law as potentially benefitting them or their kin, the more people are likely to support it.<sup>278</sup>

A third reason for optimism is that there are already promising steps toward this type of reform at the state and local level. Some state and local discrimination laws already do protect SES-linked traits like public

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<sup>275</sup> Jon Valant & Daniel A. Newark, *The Politics of Achievement Gaps: U.S. Public Opinion on Race-Based and Wealth-Based Differences in Test Scores*, 45 *Educ. Researcher* 331, 332 (2016).

<sup>276</sup> Fiss, *supra* note 28, at 14.

<sup>277</sup> See, e.g., Arlie Russell Hochschild, *I Spent 5 Years with Some of Trump’s Biggest Fans. Here’s What They Won’t Tell You*, *Mother Jones* (Sept. –Oct. 2016), <https://www.motherjones.com/politics/2016/08/trump-white-blue-collar-supporters/> [<https://perma.cc/U4CZ-V3W9>] (“Being middle class didn’t mean you felt secure, because that class was thinning out as a tiny elite shot up to great wealth and more people fell into a life of broken teeth, unpaid rent, and shame.”).

<sup>278</sup> Perhaps for this reason, several studies find that people are significantly more supportive of measures addressing socioeconomic disparities, compared to ones addressing racial disparities. Valant & Newark, *supra* note 275, at 331–32 (within a nationally representative survey sample, respondents were significantly more concerned about eliminating the achievement gap between wealthy and poor than about eliminating the racial achievement gap); see also Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, *Gallup* (July 8, 2016), <http://www.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx> [<https://perma.cc/ZE3R-SSFP>] (61% of respondents believed “family’s economic circumstances” should be considered, while 36% believed that race should be considered); Jill Darling Richardson, *Poll Analysis: U.S. Nowhere Near Eliminating Racism, but Race-Based Affirmative Action Not the Answer*, *L.A. Times* (Feb. 6, 2003), <http://www.latimes.com/la-na-poll6feb06-481pa3an-story.html> [<https://perma.cc/46HC-J569>] (68% of minorities and 56% of whites (overall 60%) support programs that grant SES-based preferences in education and employment).

assistance status and homelessness.<sup>279</sup> Many localities have enacted laws limiting screening based on credit, criminal, and unemployment history.<sup>280</sup> Courts in at least six states have held that inequitable education funding between wealthy and poor school districts triggers scrutiny under their constitutions.<sup>281</sup> Over thirty states have interpreted their constitutions to require that the state provide a minimally “adequate education”—which oftentimes entails measures to equalize resources available to lower income students.<sup>282</sup> All of this indicates that there is already some energy behind a movement for protecting the poor.

I do not expect these reforms to take place overnight. But I believe they could come about incrementally, over the course of a generation. History teaches us that legal claims move from off-the-wall to on-the-wall.<sup>283</sup> The most recent example is how, in a few short decades, the LGBT rights movement went from a Supreme Court decision upholding laws criminalizing sodomy to one recognizing same-sex marriage as a constitutional right.<sup>284</sup> This was accomplished via a series of incremental

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<sup>279</sup> See Rankin, *supra* note 144, at 405; see also, e.g., Mass. Gen. Laws ch. 151B, § 4(10) (2016) (barring discrimination to recipients of federal, state, or local public assistance in furnishing credit, services, or rental accommodations); Minn. Stat. Ann. § 363A.08 (2016); N.D. Cent. Code Ann. § 14-02.4-03 (2017); 34 R.I. Gen. L. Ann. § 34-37.1-3 (2011).

<sup>280</sup> Fishkin, *supra* note 15, at 1439–41 (describing these laws).

<sup>281</sup> *DuPree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 91–93 (Ark. 1983); *Serrano v. Priest*, 18 Cal.3d 728, 765–66 (1976); *Horton v. Meskill*, 376 A.2d 359, 374–75 (Conn. 1977); *Abbott v. Burke*, 119 N.J. 287 (1990); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979); *Washakie Cty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 315 (Wyo. 1980). And Montana’s Constitution more broadly prohibits discrimination in “the exercise of . . . civil or political rights” based on “social origin or condition.” Mont. Const., art. II, § 4.

<sup>282</sup> Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 *Geo. Wash. L. Rev.* 92, 129–30 n.227 (2013) (collecting state court decisions to this effect); *id.* at 130–32 (describing how these decisions resulted in the state channeling more resources to lower-income schools).

<sup>283</sup> See, e.g., Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, *The Atlantic* (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/> [<https://perma.cc/8EYX-JQP9>].

<sup>284</sup> Compare *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding a Georgia law criminalizing sodomy), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (recognizing same-sex marriage as a Constitutional right).

legislative and judicial victories, mostly at the state and local level.<sup>285</sup> A dedicated coalition could adopt a similar approach to advance legal protection for the poor.

The first step toward this is organizing and mobilizing people based on SES. Advocates must speak about poverty the way Johnson did in 1964: as a product of circumstances beyond individual control that can afflict hardworking and responsible people of all racial and cultural backgrounds. Furthermore, advocates must begin to speak about poverty as a social identity; to acknowledge that the poor are and have long been subject to cultural depreciation and demeaning representations. This means talking openly and candidly about how socioeconomic status influences a person's daily interactions, experiences, and opportunities. It means encouraging people to embrace their SES as a part of who they are that is entitled to respect, just like their race, sex, and sexual orientation. Poverty or economic hardship should not be a source of individual shame—a personal blemish to be hidden or masked whenever possible. It should be a reality that people can openly acknowledge, a ground for identification and affiliation.

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<sup>285</sup> Molly Ball, *How Gay Marriage Became a Constitutional Right*, *The Atlantic* (July 1, 2015), <https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/> [<https://perma.cc/ZA66-WN52>].