
THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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Stacy Hawkins, Special Issue Editor

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THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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JCUL Special Issue: What's Next? Diversity in Education After *SFFA v. Harvard/UNC*

An Introduction to the Special Issue

Stacy Hawkins

Affirmative Action After *SFFA*

Jonathan P. Feingold

In *SFFA v. Harvard (SFFA)*, the Supreme Court further restricted a university's right to consider the racial identity of individual applicants during admissions. The ruling has spawned considerable confusion regarding a university's ongoing ability to pursue racial diversity, racial inclusion, and other equality-oriented goals—whether through “race-conscious” or “race-neutral” means. To assist institutions attempting to navigate the ruling, this article outlines a set of key legal rights and responsibilities that universities continue to possess following SFFA.

New Avenues for Diversity After *Students for Fair Admissions*

Richard D. Kahlenberg

In *Students for Fair Admissions v. Harvard*, the U.S. Supreme Court upended decades of precedent, which had allowed universities to use race as one factor in student admissions in order to advance the compelling interest of providing the educational benefits of a racially diverse student environment. In earlier decisions, in 1978, 2003, and 2016, swing conservative justices had sided with liberal justices to permit the limited use of racial preferences. But in 2023, a decisive 6–2 majority in the Harvard case and a 6–3 majority in the companion *Students for Fair Admissions v. University of North Carolina* case, held that the universities' use of race could not survive strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment and a parallel requirement under Title VI of the 1964 Civil Rights Act. The Court raised a number of objections to the universities' use of racial preferences: (1) that the diversity interests advanced by the universities were “inescapably imponderable” and not “sufficiently measurable,” (2) that their racial preferences negatively affected nonbeneficiaries, (3) that the preferences had no logical ending point, and (4) that the preferences relied on impermissible stereotypes.

The Court did not, however, say that the pursuit of the educational benefits of racial diversity is itself impermissible. This article examines two possible avenues by which higher education institutions can continue to pursue racial and ethnic diversity: (1) by considering personal essays in which students discuss their experiences of how race shaped their lives; and (2) by employing nonracial factors, such as providing an admissions preference to socioeconomically disadvantaged students, or those from underrepresented geographic areas, which can have the effect of producing the educational benefits of racial diversity without the consideration of race.

I contend that while both options are legitimate if applied faithfully, there is a much bigger danger that admissions officers will improperly use the personal essay option than that they will misuse nonracial factors. Because admissions officials are accustomed to using race in admissions, instructing them on the critical difference between considering a student's experiences with race and considering race itself will be challenging. By contrast, the use of nonracial factors, such as socioeconomic disadvantage, is much less subject to abuse. Drawing upon simulations I helped conduct as an expert witness in the *Students for Fair Admissions* litigation, I contend that employing nonracial strategies, while more expensive than exploiting the personal essay "loophole," entails far fewer legal risks and can produce robust levels of racial diversity if implemented intelligently. Moreover, I argue, adopting these types of race-neutral alternatives can serve as a shield against future litigation.

Secret Admissions

Vinay Harpalani

This article examines secret admissions—an ironic term I use to refer to the mysterious nature of holistic review within universities' admissions policies. In particular, I examine legal controversies that have implicated race as part of holistic review. I consider the prospect for future controversies after the U.S. Supreme Court's recent ruling in *Students for Fair Admissions v. Harvard* (2023), which outlawed race-conscious admissions policies. Additionally, I review the history of holistic admissions, and I examine how the secrecy in holistic review has influenced and been influenced by the consideration of race in admissions. My article discusses the pros and cons of flexible, individualized consideration of race within holistic review—a policy that was previously endorsed by the Supreme Court in *Grutter v. Bollinger* (2003). I emphasize the fact that holistic review obscures both the impact of race on individual admissions decisions and the manner in which various admissions criteria are integrated to make such decisions. I argue that such obfuscation aided *Students for Fair Admissions* (SFFA) in advancing its case from the lower courts to the Supreme Court. I also consider the potential for surreptitious use of race in admissions in a post-SFFA admissions world, which could lead to more scrutiny of holistic review and consequent litigation. I do all of this by reviewing scholarly and judicial discourse on holistic admissions and by sharing various

personal anecdotes—from conversations about my research on race-conscious admissions policies to my experiences serving on admissions committees to stories from my students about their college and law school applications.

Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in *SFFA v. Harvard*

Mike Hoa Nguyen, Nicole Cruz Ngaosi, Douglas H. Lee, Liliana M. Garces, Janelle Wong, Oiyen A. Poon, Emelyn A Martinez Morales, Stephanie A. S. Dudowitz, and Daniel Woofter

Following the U.S. Supreme Court’s 2023 decision in *SFFA v. Harvard* to upend nearly fifty years of legal precedent for race-conscious admissions, this article summarizes arguments grounded in decades of social science research that sought to dispel the erroneous claims put forth by the plaintiffs. In critiquing the inaccuracies and contradictions embedded within the Court’s opinion, we argue that SFFA and the Court relied on inaccurate logics regarding race that were devoid of empirical research on the heterogeneity amongst Asian Americans as a racial category. We put forth evidence that contextualizes the racialized experiences of Asian Americans—influenced by historical immigration patterns of exclusion and hyperselectivity—and how they facilitate harmful stereotypes such as the model minority myth. Thus, it is incumbent upon social scientists to actively counteract misinformation and misrepresentation through the continued production and dissemination of empirical research. While race-conscious admissions may no longer be permissible, we contend that universities and colleges are uniquely positioned to reimagine new avenues for enhancing educational access that is rooted in racial equity.

The Elision of Causation in the 2023 Affirmative Action Case

Jonathan D. Glater

In the affirmative action cases decided in 2023, the conservative supermajority on the Supreme Court found unconstitutional the consideration of race in admissions at Harvard College and the University of North Carolina. In reaching this outcome, the Court did not grapple with a critical aspect of standing doctrine: whether the practice complained of was the cause of the harm alleged. This article explores the omission by the justices in the majority, situates it in a pattern of decisions favoring plaintiffs challenging affirmative action efforts, explains why the failure to establish causation is problematic, and identifies undesirable implications of the Court’s reasoning and analysis.

JCUL SPECIAL ISSUE: WHAT'S NEXT? DIVERSITY IN HIGHER EDUCATION AFTER *SFFA v. HARVARD/UNC*

An Introduction to the Special Issue

STACY HAWKINS*

The Supreme Court's decision this past June in the consolidated cases *Students for Fair Admission v. Harvard* and *Students for Fair Admission v. UNC*¹ (hereafter *SFFA v. Harvard*) was not entirely unexpected, but there were still lots of surprises to be found in the 237 pages comprising the majority (authored by Chief Justice Roberts), three concurring opinions (by Justices Thomas, Gorsuch, and Kavanaugh), and two dissents (authored by Justices Sotomayor and Jackson). In many ways, the Court's decision went far beyond what many predicted in altering the prevailing standards for the use of race in college and university admissions. For instance, for the first time in more than four decades the majority questioned colleges' and universities' ability to demonstrate an interest in student body diversity sufficient to satisfy the high standard of review applicable to all uses of race, even as the Court called the pursuit of diversity itself "commendable."² At the same time, Chief Justice Roberts displayed what might be characterized as restraint in both refusing to expressly overturn the Court's prior precedent on race-conscious admissions set out in *Grutter v. Bollinger*³ and in acknowledging that race remains a salient feature of students' identity and experience that need not be ignored in the admissions process. He explained, in what has become the most oft-quoted passage from the decision, "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."⁴ More surprises came in the dueling accounts found in the concurrences and the dissents of the treatment of Asian Americans in particular and of all students more generally in the process known as holistic review,⁵ as well

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1 600 U.S. 181 (2023).

2 *Id.* at 214.

3 539 U.S. 306 (2003). Justice Thomas was less sanguine about the effect of the Chief Justice's majority opinion. See *SFFA v. Harvard*, 600 U.S. at 287 (*Thomas, J., concurring*) ("The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.").

4 *Id.* at 230.

5 Compare 600 U.S. 181 at 302 (*Gorsuch, J., concurring*) (asserting that race-conscious admissions benefit only Black and Hispanic applicants and therefore harm White and Asian American applicants) with 600 U.S. 181 at 359 (*Sotomayor, J., dissenting*) (rejecting the majority's description of race-conscious admissions as a "zero-sum game" and, relying on the record evidence below, arguing instead "[t]hat is not the role race plays in holistic admissions.")

as of the history of racial inequality in the US and its redress under civil rights law.⁶ The concurring and dissenting opinions are a study in contrasts, offering wildly different views of the world that seem to echo the larger social and political divisions plaguing our country.⁷

All of these insights and more are contained in this Special Issue. The articles reflect a wide range of perspectives on and incisive analyses of the decision itself, while also offering readers an opportunity to consider the broader implications, including perhaps some unintended consequences, of the decision. We start with Jonathan Feingold's bold take on what it means for colleges and universities to pursue diversity and ensure equal opportunities for all students in the wake of this decision.⁸ Feingold acknowledges the race-neutral efforts that remain possible in pursuit of student body diversity, but he more provocatively argues that even race-conscious efforts continue to be permissible across a range of contexts. These permissible race-conscious efforts include two exceptions noted in the majority opinion itself, namely the aforementioned consideration of race through discussion in essays as well as a possible exemption for military academies.⁹ But Feingold suggests there are still more ways that colleges and universities might justify the continued consideration of race in admissions, including some long-forgotten arguments culled from Justice Powell's 1978 opinion in *Regents of the Univ. Calif. v. Bakke*.¹⁰ Rather than commiserate with those who claim affirmative action is dead, Feingold insists that not only is affirmative action still alive, but that now more than ever colleges and universities must vigorously pursue and defend it. In addition to imploring colleges and universities to use all available measures in pursuit of the interest in student body diversity, Feingold also reminds schools of their ongoing obligations under civil rights law to ensure equal educational opportunities for all students by preventing any disparate impact on and harassment of students of color, noting that the former will be in service to the latter.

While Feingold is imploring colleges and universities to continue engaging in robust and affirmative race-conscious efforts in pursuit of diversity and equal opportunity, Richard Kahlenberg is cautioning restraint.¹¹ Even before the

6 Compare 600 U.S. 181 at 232 (Thomas, J., *concurring*) ("offer[ing] an originalist defense of the colorblind Constitution.") with 600 U.S. 181 at 385 (Jackson, J., *dissenting*) ("Our country has never been colorblind.").

7 These contrasts can be seen in the arguments made by the amici in support of both SFFA, *see e.g.*, Briefs of Amici Curiae for United States Senators and Representatives Supporting Petitioner (arguing that race-consciousness is inherently suspect and divisive and cannot be tolerated under the Equal Protection Clause) and those in support of Harvard and UNC, *see e.g.* Brief for the United States as Amicus Curiae Supporting Respondents, Brief of Amici Curiae United States Senators and Former Senators Supporting Respondents (emphasizing the importance of ensuring opportunities for underrepresented minorities and the use of race-conscious admissions in pursuit of that end), available for download at <https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/>.

8 See Jonathan Feingold, *Affirmative Action After SFFA*, 48 J. COL. & UNIV. L. 239 (2023)

9 600 U.S. 181 at 213 n. 4.

10 438 U.S. 265.

11 See Richard Kahlenberg, *New Avenues for Diversity After Students for Fair Admissions*, 48 J. COL. & UNIV. L. 283 (2023).

litigation against UNC and Harvard (in which he served as an expert witness on behalf of SFFA), Kahlenberg was a proponent of replacing race-consciousness with socioeconomic (SES) preferences in admissions, arguing that class is a more morally and empirically compelling basis for “affirmative action” than race.¹² Following the Court’s decision in *SFFA v. Harvard*, Kahlenberg adds to this thesis by arguing that SES considerations should also be preferred because race has now become a dangerous criterion for colleges and universities to employ in the admissions process. While Feingold implores colleges and universities to consider “how race affected [an applicant’s] life, be it through discrimination, inspiration, or otherwise” as endorsed by Roberts in the majority opinion, Kahlenberg warns that pursuing this exception might be more fraught than expected.¹³

Kahlenberg reads the majority opinion much more narrowly than Feingold and warns colleges and universities that to use race in admissions to any productive end, even in the limited ways endorsed by the majority, will “place a litigation target on their backs.”¹⁴ Instead, he urges that the safest route for colleges and universities seeking student body diversity is to pursue SES preferences even if, and in some ways particularly if, those preferences are motivated by an interest in achieving racial diversity. Kahlenberg offers practical advice for how colleges and universities can effectively construct these SES preferences, relying in part on the experiences of states like California and Michigan, where the use of race has long been banned under state law.¹⁵ Kahlenberg is candid in acknowledging that using SES preferences to achieve diversity will be far more costly, even if much less risky, than the race-conscious alternatives. He argues that colleges and universities ought to be willing to invest in these important efforts to expand access to higher education, and proposes the costs of doing so can be offset by the significant fundraising potential of shifting from what he views as problematic racial preferences to more broadly appealing SES preferences.

But how do any of these considerations, whether race or SES, actually figure into the process of holistic review and how, if at all, will the process change in the wake of the decision in *SFFA v. Harvard*? That is the question taken up by Vinay Harpalani.¹⁶ According to Harpalani, holistic review has figured prominently in the admissions processes of selective colleges and universities for nearly a century, but its use only became well-known and closely scrutinized in the last half-century as part of the Supreme Court’s jurisprudence on race-conscious admissions. Harpalani’s detailed account of both the history and contemporary use of holistic review in admissions exposes what he describes as its most fundamental and yet troubling feature – secrecy. Troubling, in Harpalani’s view, because it has provided cover in

12 See RICHARD KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1997).

13 See Kahlenberg, *infra* at 294.

14 *Id.* at 288.

15 *Id.* at 310. Kahlenberg points in particular to the increases in overall student diversity at public schools in both California and Michigan. *Id.* Note, however, that both California and Michigan themselves filed amicus briefs in the Harvard case in support of race-conscious admissions, noting their own lack of progress in enrolling underrepresented minority students since their own state bans took effect. *Id.* at 307.

16 See Vinay Harpalani, *Secret Admissions*, 48 J. COL. & UNIV. L. 325 (2023).

the past for discrimination against Jewish students and may very well be doing the same for discrimination against Asian American students today. Troubling too because it has invited litigation in an attempt to ferret out its most pernicious effects. Still, Harpalani concludes that in the absence of a superior alternative, and he concedes colleges and universities have yet to identify one, holistic review remains the most effective means of selecting for diversity among students, which he acknowledges continues to be an interest worthy of pursuing.

The effect, if any, of considering race as a part of holistic review on the admissions prospects of Asian American students is the subject of an article by a group of preeminent Social Scientists.¹⁷ Having played a key role in developing the body of research about Asian Americans and stereotypes on which the arguments made in *SFFA v. Harvard* rely, these Social Scientists question the Court's reasoning and logic in arriving at the conclusion that the admissions processes at Harvard and UNC were unconstitutional at least in part due to their "negative discrimination" against Asian American students.¹⁸ The Social Scientists' claims are empirical rather than doctrinal; they rebuke the majority for eliding the record evidence in these cases in ways that are both staggering in their scope and troubling in their consequence. The Social Scientists marshal a significant body of research (much of which they have also produced) to argue that there is no evidence of "negative discrimination" against Asian Americans in the admissions processes of these two selective institutions. Instead, they say the consideration of race in admissions benefits many Asian American students and at the very least serves the important purpose of mitigating the harms of racial disparities that operate to the disadvantage of Black and Hispanic students throughout the educational system.

The Social Scientists have been researching and reporting on the effects, if any, of race-conscious admissions on Asian American students since the Supreme Court first considered a challenge against the University of Texas at Austin in 2013.¹⁹ They have filed amicus briefs in every Supreme Court case since then. Most recently, in *SFFA v. Harvard*, they were joined in that filing by over 1,200 other social scientists.²⁰ Many of the authors are not just researchers, but are themselves Asian American. In their article, they deftly unpack the arguments and evidence cited by the Supreme Court to strike down the admissions plans at both Harvard and UNC, calling the Court's reasoning grounded not in empirical reality but rather

17 See Mike Hoa Nguyen, *et al.*, *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in SFFA v. Harvard*, 48 J. COL. & UNIV. L. 369 (2023). This group includes Mike Hoa Nguyen, Nicole Cruz Ngaosi, Douglas H. Lee, Liliana M. Garces, Janelle Wong, OiYan A. Poon, Steph Dudowitz, Emelyn Martinez Morales, Daniel Woofter (collectively "The Social Scientists").

18 See *id.* at 374.

19 *Fisher v. Texas*, 570 U.S. 297 (2013).

20 See Brief of 1,241 Social Scientists and Scholars on College Access, Asian American Studies, and Race as Amici Curiae in Support of Respondent, available for download at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.supremecourt.gov/DocketPDF/20/20-1199/232212/20220729151949725_20-1199%20bsac%201241%20Social%20Scientists%20and%20Scholars.pdf](https://efaidnbmnnnibpcajpcglclefindmkaj/https://www.supremecourt.gov/DocketPDF/20/20-1199/232212/20220729151949725_20-1199%20bsac%201241%20Social%20Scientists%20and%20Scholars.pdf).

in “inaccuracies or myths.”²¹ They attempt to set the record straight by explaining why the Court misapprehended the relevance of race as a meaningful identity category for Asian Americans and why it is the majority and concurrence, rather than Harvard and UNC, who traffic in harmful racial stereotypes about Asian Americans.²² Finally, they describe how the majority ignored the evidence on behalf of countless Asian American students that the consideration of race helped rather than hurt their applications for admission.²³

Finally, Jonathan Glater takes the critique of the Court’s treatment of Asian American students’ interests in this litigation in a doctrinal direction.²⁴ Rather than dispute the Court’s conclusion that Asian American students suffered discrimination in the admissions processes at Harvard and UNC, Glater argues the Court failed to properly identify the source of any such discrimination, suggesting the harm to Asian American students came not from the consideration of race in admissions (as alleged by SFFA and accepted by the Court), but from other race-neutral aspects of the admissions process.²⁵ In particular, Glater couches his critique in an analysis of standing doctrine – the procedural burden a litigant must satisfy in order to have their case heard and resolved by the Court, which he says the Court takes for granted in *SFFA v. Harvard*.²⁶ The technicalities of standing doctrine aside, according to the Glater, this oversight has grave consequences both for the Asian American students on whose behalf this case was filed, who may continue to suffer discrimination in admissions in spite of their victory, and the universities who have been forced to adopt race-neutral admissions processes that may do nothing to immunize them from future litigation.

Whatever you thought about the Supreme Court’s decision in *SFFA v. Harvard*, this Special Issue is sure to offer novel perspectives and fresh insights for your consideration. The contributing authors have leveraged their diverse areas of scholarly expertise to interrogate the Court’s decision and underlying reasoning. They have directed their analyses to many underappreciated aspects of the decision and its consequences for ensuring equity and access in higher education, giving readers the opportunity to reconsider their initial impressions, question their settled assumptions, and revise their approaches to the new challenges that exist in the wake of this decision. As colleges and universities decide how to move forward, some may be inspired to pursue the bold “affirmative action” advocated by Jonathan Feingold, others will exercise more caution by adopting some of the SES alternatives sketched out by Richard Kahlenberg. In either case, all schools should be mindful that whatever they choose to do, they should take care to

21 See Nguyen, *et al.*, *infra* at 371.

22 600 U.S. 181 at 221 (accusing the universities of employing “stereotypes that treat individuals as the product of their race.”).

23 See Nguyen, *et al.*, *infra* at 380.

24 See Jonathan Glater, *The Elision of Causation in the 2023 Affirmative Action Cases*, 48 J. COL. & UNIV. L. 395 (2023).

25 *Id.* at 411.

26 *Id.* at 411-13. To be fair, Glater admits that the Court has consistently dismissed these standing concerns in prior cases involving challenges to race-conscious admissions. *Id.* at 405.

attend to the interests of all students. While these cases, and the Supreme Court's majority and concurring opinions, have tried to construct a narrative pitting Asian American students on one side of this issue and Black and Hispanic students on the other side, the Social Scientists, along with both Vinay Harpalani and Jonathan Glater, show us the reality is much more complicated. If Harpalani is right in his prediction that admissions processes will only become more secretive in the wake of this decision, or if Glater is right that adopting race-neutral admissions processes will do nothing to cure the discrimination against Asian American applicants, colleges and universities must ensure that they are taking seriously the interests of all students in the admissions process, being mindful of the wealth of social science research that exists to help guide their consideration, so long as they take care, as urged by the Social Scientists, to use it appropriately.

It is clear that SFFA has no intention of giving colleges and universities the benefit of the doubt about their compliance with the new limitations imposed on their admissions processes by the Supreme Court in *SFFA v. Harvard*.²⁷ So colleges and universities would do well to heed the advice in this Special Issue - to vigorously pursue those means that remain available for achieving student body diversity,²⁸ but to do so with an eye towards the risks that may lurk in any efforts designed to increase racial and ethnic diversity.²⁹ They should ensure that Asian American students are understood and evaluated in the context of their multiplicity of experiences.³⁰ Finally, colleges and universities must recognize that any attempts to further obscure the inner workings of holistic review may only serve to heighten suspicions that it is being used to harm the interests of some, thereby inviting further litigation.³¹

This new landscape is certain to bring new challenges, but it also offers new opportunities. For too long selective colleges and universities have relied too heavily on narrow measures of academic ability in selecting students for admission.³² Although the pandemic has wrought important changes in the use of standardized tests in the admissions process,³³ more changes will be necessary to ensure colleges and universities are able to continue enrolling diverse student

27 Immediately after the decision was announced, SFFA released a public letter to the presidents and general counsels of the top 150 colleges and universities demanding that they take specific steps to effect compliance with the decision in *SFFA v. Harvard*. Eric Hoover, *SFFA Urges Colleges to Shield 'Check Box' Data About Race from Admissions Officers* (July 12, 2023), CHRON. HIGHER EDUC., https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers?sra=true&cid=gen_sign_in.

28 See Feingold, *infra* at 241-42.

29 See Kahlenberg, *infra* at 298.

30 See Nguyen, *et al.*, *infra* at 374.

31 See Harpalani, *infra* at 357.

32 See Stacy Hawkins, *Mismatched or Counted Out? What's Missing from Mismatch Theory and Why It Matters*, 17 U. PA. J. CON'L L. 855 (2015).

33 According to FairTest.org, over 1,900 colleges and universities are now test optional or have eliminated the use of standardized tests in their admissions processes. See <https://fairtest.org/act-sat-optional-test-free-admissions-movement-expands-again-record-1900-schools-do-not-require-scores-for-fall-2024-entrance/>

bodies in this new admissions landscape. One additional development has been the commitment by a handful of colleges and universities to discontinue legacy admissions,³⁴ which according to the evidence adduced in the Harvard case contributed to the discrimination against all non-White applicants, including Asian Americans.³⁵ Yet, still more is needed.

The reality is, in spite of the widespread use of race and ethnicity in admissions processes by the most selective schools for more than four decades, most colleges and universities have not really done the kind of transformative work necessary not just to open their doors to a few minority students, but to become places of meaningful diversity, equity, and inclusion. Even before the decision in *SFFA v. Harvard*, there was room for improvement in how colleges and universities practice their commitment to student body diversity. One unlikely source of inspiration for how schools can improve in this regard should be historically black colleges and universities (HBCUs). Given their unique missions of access and opportunity for Black students, these schools have often been willing to admit students that others schools might overlook based on their credentials; many of them are also first-generation students or come from disadvantaged backgrounds.³⁶ Yet, HBCUs are able to support these students in obtaining bachelor's degrees at a rate that far exceeds their predominantly white peer institutions.³⁷ Their approach to selecting and supporting these students deserves to be studied and emulated.³⁸ The reason is not just that selective colleges and universities will be challenged to enroll Black and other underrepresented minority students in the wake of the *SFFA v. Harvard* decision, but because other demographic trends will also require institutions of higher education to understand how to better serve first-generation and disadvantaged students of all races and ethnicities, who will represent a growing share of new students.³⁹

The decision in *SFFA v. Harvard* has shifted the landscape for college and

34 See e.g. THE WASHINGTON POST, available at <https://www.washingtonpost.com/education/2023/09/29/colleges-keep-legacy-admissions/>. An effort to force schools to eliminate legacy admissions is also underway in Congress, where bi-partisan legislation has been proposed in the Senate to modify the accreditation standards under the Higher Education Admissions Act to prohibit schools from offering admissions preferences on the basis of legacy or donor status. See THE HILL, available at <https://thehill.com/homenews/senate/4297166-bipartisan-senate-bill-aims-end-legacy-admissions-college/>. Finally, Harvard's own legacy admissions preferences have been challenged by a civil rights organization who has filed a complaint with the Department of Education, Office of Civil Rights alleging that Harvard's legacy and donor preferences result in disparate racial impact on non-White students. See CNN, available at <https://www.cnn.com/2023/07/25/us/harvard-legacy-admissions-education-department-civil-rights-investigation/index.html>.

35 See *SFFA v. Harvard*, Civil Action No. 14-cv-14176-ADB (Sept. 30, 2019) at 34.

36 See Stacy Hawkins, *Reverse Integration: Centering HBCUs in the Fight for Educational Equality*, 24 U. PA. J. L. & SOC. CHANGE 351, 382 (2021).

37 The approximately 105 HBCUs operating today make up just 2 percent of degree-granting institutions in the United States, but they enroll approximately 11 percent of Black undergraduate students and confer approximately 20 percent of all Black bachelor's degrees. *Id.* at 358.

38 For a discussion of the HBCU pedagogical model, see *id.*, 372 – 384.

39 See The Boyer 2030 Commission Report, *The Equity Excellence Imperative* (2022), available for download at <https://ueru.org/boyer2030>.

university admissions, but this shift need not signal a downturn in student body diversity. Instead, relying on the guidance offered in this Special Issue, colleges and universities can adopt new strategies that align with their existing commitments to ensure that they are preparing students for work in a global economy and service in our pluralist democracy by offering students “exposure to widely diverse people, cultures, ideas, and viewpoints.”⁴⁰ In an increasingly competitive market for higher education, and in a context where there is declining value for post-secondary education,⁴¹ colleges and universities can distinguish themselves by ensuring that they remain places where diverse students of all types, including especially underrepresented minority students,⁴² understand they are welcome and will be well-prepared to thrive in the 21st century. The guidance offered in this Special Issue will provide colleges and universities the insight necessary to meet these challenges and to successfully navigate this new landscape without sacrificing the commitment to diversity.

40 Grutter v. Bollinger, 539 U.S. 306, 331.

41 See THE CHRONICLE OF HIGHER EDUCATION survey analysis, <https://www.chronicle.com/article/confidence-in-higher-ed-is-declining-but-most-people-still-think-college-is-worth-it>.

42 Racial and ethnic minorities represent a growing share of college-age students. See Richard Fry & Kim Parker, Early Benchmarks Show ‘Post-Millennials’ on Track to Be Most Diverse, Best-Educated Generation Yet, PEW RES. CTR. (Nov. 15, 2018), <https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet> [<https://perma.cc/XR38-WQG5>].

AFFIRMATIVE ACTION AFTER *SFFA*

JONATHAN P. FEINGOLD*

Abstract

In SFFA v. Harvard (SFFA), the Supreme Court further restricted a university's right to consider the racial identity of individual applicants during admissions. The ruling has spawned considerable confusion regarding a university's ongoing ability to pursue racial diversity, racial inclusion, and other equality-oriented goals—whether through “race-conscious” or “race-neutral” means. To assist institutions attempting to navigate the ruling, this article outlines a set of key legal rights and responsibilities that universities continue to possess following SFFA.

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INTRODUCTION

In *SFFA v. Harvard* (*SFFA*), the Supreme Court further restricted a university's ability to consider the racial identity of individual applicants during the admissions process.¹ The immediate consequences are clear. *SFFA* makes it more difficult for colleges and universities² to employ "racial classifications"³ to pursue equality-oriented goals like a racially diverse student body, a racially inclusive campus, and the "fair appraisal" of each applicant's academic talent and potential.⁴

But contrary to headlines, *SFFA* did not "end affirmative action."⁵ I do not mean to understate *SFFA*'s practical or doctrinal impact. Many universities have already jettisoned or modified a range of preexisting policies—including some untouched by the decision itself.⁶ Still, popular opinion has entrenched a narrative that overstates what is, as a formal matter, a surprisingly narrow opinion.

Universities possess a robust set of tools to create more racially diverse and inclusive campus communities. *SFFA* changed that, but less so than common headlines suggest.⁷ One danger is that if scholars, university counsel, and institutional leaders acquiesce to this dominant narrative, even well-meaning universities will eliminate or narrow still-lawful conduct.⁸ To guard against overcorrection and

1 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023) [hereinafter *SFFA v. Harvard*].

2 For brevity, I use the singular term "universities" to capture the broad and diverse set of educational entities that comprise higher education.

3 I employ the terms *race-conscious*, *race-based* and *racial classifications* interchangeably to describe admissions policies that permit decision-makers to differentiate between individual students based on their respective racial identities.

4 See generally Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference*, 53 U.C. DAVIS L. REV. 1117, 1146–69 (2019) (explaining why facially neutral criteria tend to understate the actual qualifications and potential of students from negatively stereotyped racial groups).

5 See, e.g., Jelani Cobb, *The End of Affirmative Action*, NEW YORKER (June 29, 2023), <https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action>.

6 This includes new institutional mandates that prohibit admissions officers from seeing each applicant's self-reported racial identity. See Anemona Hartcollis, *Colleges Will Be Able to Hide Student's Race on Admissions Applications*, NEW YORK TIMES (May 23, 2023), <https://www.nytimes.com/2023/05/26/us/college-admissions-race-common-app.html>. *SFFA* did not require this form of racial cloaking—which the plaintiff had requested in its Complaint against Harvard. See Complaint at 119, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-14176 (D. Mass. Nov. 14, 2014) (seeking a "permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions ... permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission").

7 See *infra* Part II.

8 See Jonathan Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 142 (2023) (describing similar phenomenon after California voters passed Proposition 209, which prohibits the state from "discriminating against" or "granting preferential treatment to" individuals based on several categories including race). On September 7, 2023, Yale University settled a lawsuit in which the same entity that had sued Harvard and

self-censorship, this article makes three discrete contributions.

Part I situates *SFFA* in a broader campaign to morally stigmatize and legally outlaw equality-oriented efforts in the United States. I start here because a purely legal analysis cannot capture the rising threat to racial equality in higher education and beyond. Moreover, the ideological alignment between rightwing litigants and the Supreme Court's conservative supermajority means that what is lawful today could be unlawful tomorrow.

Part II outlines a university's right to realize a more racially just admissions process and campus environment. For purposes of precision, I break this part into two subsections. The first focuses on policies that employ *racial classifications*⁹ to further equality-oriented objectives like racial diversity and racial inclusion. The second focuses on policies that employ *colorblind criteria*¹⁰ to promote those same equality-oriented ends. Whereas *SFFA* rendered racial classifications more difficult to defend, the decision fortified the legal case for colorblind criteria.¹¹

Part III identifies two legal obligations that universities must continue to satisfy after *SFFA*. Specifically, Title VI and its implementing regulations require covered universities to avoid practices that produce an unjustifiable disparate impact and to remedy racially hostile environments.¹² This part is meant to remind stakeholders that whatever *SFFA*'s reach, the opinion did not eliminate independent legal duties arising under federal civil rights law.

I. SITUATING *SFFA* IN THE FIGHT FOR RACIAL EQUALITY

Racial equality and multiracial democracy have always been contested propositions in America.¹³ *SFFA* is part of this story. The litigation targeted modest *affirmative action*¹⁴ policies at elite institutions with their own histories of racial

UNC challenged Yale's race-conscious admissions policy. Yale voluntarily agreed to cease engaging in equality-oriented practices that remain lawful after *SFFA*. Liam Knox, *Yale Reaches Agreement on Affirmative Action Case*, INSIDE HIGHER ED (Sept. 7, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/09/07/yale-affirmative-action-case-dropped-stipulations>.

9 Drawing on Supreme Court caselaw, I employ the term *racial classification* to describe policies that permit decision-makers to consider the racial identity of individual applicants in a competitive selection process. See *supra* note 3. The Supreme Court often employs terms like "race based," "racial preference," and "racial discrimination" to describe policies that employ "racial classifications." See e.g., *SFFA v. Harvard*, 600 U.S. 181, 208 (2023) ("Our acceptance of race-based state action has been rare for a reason. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'").

10 I employ the terms *colorblind*, *race-neutral* and *facially neutral* interchangeably to describe admissions policies that do not permit decision-makers to differentiate between individual students based on their respective racial identities. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

11 See *infra* Part II.

12 See *infra* Part III.

13 See Randall Kennedy, *The Truth Is, Many Americans Just Don't Want Black People to Get Ahead*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/07/opinion/resistance-black-advancement-affirmative-action.html>.

14 In this article, I use the term *affirmative action* to capture equality-oriented policies that employ racial classifications. See *supra* note 3 (defining "racial classifications").

exclusion.¹⁵ By ruling against Harvard University and the University of North Carolina (UNC), Chief Justice Roberts made it more difficult for the defendants—among other universities—to reckon with and remedy institutional legacies of racial exclusion.¹⁶ Aspects of Chief Justice Roberts’s opinion also legitimized the contemporary consequences of those legacies by treating the defendants’ race-conscious policies as the constitutional equivalent of Jim Crow segregation.¹⁷

A. *Looking Back: SFFA Advances a Decades-long Campaign to Limit Civil Rights Remedies*

In *SFFA*, the Supreme Court made it harder for universities to consider an applicant’s racial identity during admissions. The opinion was predictable in certain respects, surprising in others.¹⁸ One surprise was *SFFA*’s *formally* narrow scope. As I detail below, Chief Justice Roberts limited his holding to Harvard and UNC’s respective admissions policies and did not overturn established precedent.¹⁹

That said, many foresaw that colorblindness would animate a ruling that struck down equality-oriented policies.²⁰ The Chief Justice marshalled the rhetoric

15 See, e.g., David W. Bishop, *The Consent Decree Between the University of North Carolina System and the U.S. Department of Education, 1981–82*, 52 J. NEGRO EDUC. 350, 353 (1983) (“Toward the end of 1969, [the Department of Education’s Office of Civil Rights] decided that ten states [including North Carolina] were operating segregated systems of higher education in violation of Title VI.”); see also Letter from Patricia Parker and James Leloudis, Commission on History, Race, and a Way Forward, to Kevin Guskiewicz, Chancellor, Univ. of N.C. at Chapel Hill (June 29, 2021), <https://historyandrace.unc.edu/wp-content/uploads/sites/1091/2021/07/Second-name-removal-recommendation-package-5.pdf>.

16 This builds on prior Supreme Court precedent, including the holding that remedying “societal discrimination” does not constitute a compelling interest. See *SFFA v. Harvard*, 600 U.S. 181, 209 (2023) (“Justice Powell next observed that the goal of remedying the effects of societal discrimination was also insufficient because it was an amorphous concept of injury that may be ageless in its reach into the past.”) (internal quotation marks and ellipsis omitted).

17 See generally, Jonathan Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV 1 (2022).

18 Many predicted that the Supreme Court would rule against Harvard and UNC. See, e.g., Ian Millhiser, *The Supreme Court Case That Could End Affirmative Action*, VOX (Mar. 2, 2023), <https://www.vox.com/22301135/supreme-court-affirmative-action-harvard-college-race-students-for-fair-admission-ed-blum>. This tracked past predictions (then incorrect) that the Supreme Court would invalidate race-conscious admissions policies in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. Texas*, 136 S. Ct. 2198 (2016). See, e.g., Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 283–84 (2015) (“Based on the Court’s opinion in [Fisher I] . . . we may not have to wait until 2028 for a new determination on the efficacy of affirmative action.”); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CALIF. L. REV. 1055, 1120 (2001) (“[T]he diversity rationale for affirmative action may soon be rejected or curtailed by the Supreme Court.”).

19 See *infra* Part II; see also Reginald Oh, *What the Supreme Court Really Did to Affirmative Action*, WASH. MONTHLY (July 20, 2023) (highlighting that Chief Justice Roberts did not formally overturn *Grutter v. Bollinger* or the specific holding that racial diversity constitutes a compelling interest in university admissions).

20 See, e.g., Cara McClellan, *Evading a Race-Conscious Constitution*, 25 U. PA. J. CONST. L. ONLINE 1, 2 (2023) (“The idea of a ‘colorblind’ Constitution is front and center in cases before the Supreme Court this term.”); Vinay Harpalani, *“With All Deliberate Speed”*: The Ironic Demise of (and Hope for)

of “colorblindness” to refashion the Fourteenth Amendment and *Brown v. Board of Education*²¹—two of our nation’s most racially progressive precedents—as impediments to building more racially diverse and inclusive universities.²² At the same time, Chief Justice Roberts failed to engage the only actual evidence of discrimination presented in the litigation—evidence that Harvard’s admissions process harmed Asian Americans to the benefit of similarly situated White applicants.²³

At bottom, *SFFA* invalidated the modest consideration of race within two holistic admissions processes. Such limited interventions within elite university admissions have never been a panacea to racism—nor should we expect them to be. Still, the sorts of policies Harvard and UNC employed better position universities to advance a range of democratic and equality-oriented values—for example, desegregating historically White campuses²⁴; promoting a more individualized, equitable, and “meritocratic” selection process²⁵; and cultivating racially inclusive campuses where all students can enjoy the full benefits of university membership.²⁶

The ongoing need for race-conscious policies should be clear. Racism remains one of the most powerful forces in American society—a phenomenon that shapes all corners of our public and private lives.²⁷ Chief Justice Roberts’s opinion, in contrast, reads as if race is irrelevant to admissions until the moment affirmative action arrives.²⁸

Affirmative Action, 76 SMU L. REV. 91 (2023).

21 347 U.S. 483 (1954).

22 See, e.g., *SFFA v. Harvard*, 600 U.S. 181, 202 (2023) (“The Constitution, [the post-Civil War Congress] w[as] determined, ‘should not permit any distinctions of law based on race or color,’ because any ‘law which operates upon one man [should] operate equally upon all’ (quoting Supp. Brief for United States on Reargument in *Brown v. Board of Education*, O. T. 1953, No. 1 etc., p. 41 & CONG. GLOBE 2459 (statement of Rep. Stevens)). The decision and reasoning tracked a Supreme Court legacy of obstructing democratic efforts to deliver meaningful equality for Black Americans. See Kennedy, *supra* note 13.

23 See Jerry Kang, *Ending Affirmative Action Does Nothing to End Discrimination Against Asian Americans*, THE CONVERSATION (Aug. 3, 2023), <https://theconversation.com/ending-affirmative-action-does-nothing-to-end-discrimination-against-asian-americans-209647>; Jonathan Feingold & Vinay Harpalani, *Brief of Legal Scholars Defending Race-Conscious Admissions as Amici Curiae in Support of Respondents, SFFA v. Harvard (20-1199) and SFFA v. University of North Carolina at Chapel Hill (21-707) (2022)* [hereinafter Feingold & Harpalani, *Amicus Brief*].

24 See, e.g., Feingold, *Ambivalent Advocates*, *supra* note 8,.

25 See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1064 (2006).

26 See, e.g., Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, 60 (2019).

27 See, e.g., George Lipsitz, *The Racialization of Space and the Spatialization of Race*, 26 LANDSCAPE J. 10 (2007). Justice Kavanaugh appears to concede this point in his *SFFA* concurrence. SEE *SFFA v. Harvard*, 600 U.S. 181, 317 (Kavanaugh, J., concurring) (“To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist.”).

28 See, e.g., *SFFA v. Harvard*, 600 U.S. at 231 (“[U]niversities [that employ race-conscious admissions] have for too long done just the opposite. And in doing so, they have concluded, wrongly,

This narrative follows a centuries-long discourse that reframes civil rights remedies as a threat to civil rights.²⁹ The Supreme Court has condemned equality-oriented projects since the wake of the Civil War. In 1883, two decades after the Emancipation Proclamation, the Supreme Court struck down Congress's first attempt to prohibit racial discrimination in places of public accommodation.³⁰ Invoking a narrative that now shapes affirmative action debates, Justice Bradley characterized the nation's first federal antidiscrimination law as "preferential treatment" for Black Americans.³¹

This discursive and legal assault on civil rights remedies did not end in the nineteenth century. Over the past fifty years, the Supreme Court has erected an equal protection framework that deems remedial race-conscious policies no less suspect than the apartheid regime they are meant to remedy.³² This legal symmetry trades on rhetoric that discredits affirmative action as "preferential treatment" that harms "innocent victims."³³ As I and others have detailed, framing affirmative action as a "racial preference" relies on a highly contestable empirical claim; it is not a statement of objective fact.³⁴ Nonetheless, centuries of targeted rhetoric now shape (and, arguably, overdetermine) public perceptions of affirmative action and related race-conscious projects.³⁵

Even affirmative action advocates often defend such policies as a justifiable "preference"—that is, a defensible departure from a baseline of race neutrality.³⁶ This dynamic, which can transform affirmative action's formal champions into ambivalent advocates, defined *SFFA*.³⁷ As I previously observed, neither Harvard nor UNC zealously championed its own policy.³⁸ And by omitting key facts and theories, both fed the same narrative the Chief Justice offered: that race was irrelevant to their respective admissions processes until the moment affirmative

that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.").

29 See generally Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988).

30 See *The Civil Rights Cases*, 109 U.S. 3 (1883).

31 *Id.* at 25 ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.").

32 See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

33 See *SFFA v. Harvard*, 600 U.S. at 271–72 (Thomas, J., concurring).

34 See generally Carbado, *Footnote 43, supra* note 4.

35 This helps to explain why majorities of Americans recognize that racism is structural and yet remain ambivalent about "affirmative action." See, e.g., Pew Rsch. Ctr., *More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity in Admissions Decisions* (June 8, 2023), <https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions/>.

36 See Feingold, *Ambivalent Advocates, supra* note 8.

37 See *id.*

38 See *id.*

action arrived.³⁹

Among other omissions, neither defendant highlighted the myriad ways that race matters before, during, and after admissions.⁴⁰ The defendants said little about their own unremedied legacies of racial exclusion,⁴¹ the unearned racial preferences that colorblind criteria extend to White applicants,⁴² nor the relationship between racial demographics and racial harassment on campus.⁴³ Harvard and UNC know better than anyone that White racial advantages infiltrate their respective admissions practices. Even SFFA, the organization that sued Harvard, conceded this point when its expert highlighted that Harvard's personal rating and legacy preferences harm innocent Asian Americans (and other students of color) to the benefit of less qualified White applicants.⁴⁴ And yet, by eliminating Harvard's affirmative action program, the Supreme Court made it more difficult for the university to remedy the actual sources of anti-Asian bias.⁴⁵

B. Looking Ahead: SFFA Buttresses a Resurgent Campaign to Lock in Racial Inequality

In *SFFA*, rightwing think tanks and foundations targeted Harvard and UNC's race-conscious admissions policies.⁴⁶ The ruling is a victory for Edward Blum (a well-known affirmative action opponent who engineered *SFFA*) and his well-resourced benefactors.⁴⁷ But it does not end the assault on racial equality

39 *See id.*

40 *See* Jonathan Feingold & Arnie Arnesen, #RaceClass Affirmative Action Mini-Series, #RaceClass, [HTTPS://SOUNDCLOUD.COM/USER-808872105/SETS/RACECLASS-AFFIRMATIVE-ACTION?UTM_SOURCE=CLIPBOARD&UTM_MEDIUM=TEXT&UTM_CAMPAIGN=SOCIAL_SHARING](https://soundcloud.com/user-808872105/sets/raceclass-affirmative-action?utm_source=clipboard&utm_medium=text&utm_campaign=social_sharing) (last visited Nov. 15, 2023).

41 *See* Evan Mandery, *How White People Stole Affirmative Action and Ensured Its Demise*, POLITICO (June 16, 2023), <https://www.politico.com/news/magazine/2023/06/16/supreme-court-affirmative-action-college-00101963>.

42 *See* Carbado, *Footnote 43, supra* note 4.

43 *See* Feingold, *Hidden in Plain Sight, supra* note 26.

44 *See* Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. & ECON. 133, 147 (2020); *see also* Jonathan Feingold & Vinay Harpalani, *The Party Attacking Affirmative Action Just Made the Case for It*, BOS. GLOBE (Oct. 25, 2022), <https://www.bostonglobe.com/2022/10/25/opinion/party-attacking-affirmative-action-just-made-case-it/>; Uma Mazyck Jayakumar et al., *Race and Privilege Misunderstood: Athletics and Selective College Admissions in (and Beyond) the Supreme Court Affirmative Action Cases*, 70 UCLA L. REV. DISCOURSE 230, 234 (2023).

45 *See* Kang, *supra* note 23.

46 As one measure, the following nonexhaustive list of rightwing groups submitted amici briefs on behalf of SFFA: Pacific Legal Foundation, Speech First, Judicial Watch, Liberty Justice Center. *See* Students for Fair Admissions Inc. v. President & Fellows of Harvard College, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/> (last visited Nov. 06, 2023).

47 Jeannie Park and Kristin Penner have emphasized that Edward Blum's anti-affirmative action litigation is supported by an extensive network of rightwing donors and think tanks. *See* Jeannie Park & Kristin Penner, *The Absurd, Enduring Myth of the "Ont-Man" Campaign to Abolish Affirmative Action*, SLATE (Oct. 25, 2022), <https://slate.com/news-and-politics/2022/10/supreme-court-edward-blum-unc-harvard-myth.html>; *see also* M. Pollock, M. et al., *Supported, Silenced, Subdued, or Speaking Up? Educators' Experiences with the Conflict Campaign, 2021–2022*, 9 J. LEADERSHIP, EQUITY,

in higher education and beyond. It marks a new beginning. Much of the fight now shifts to *SFFA*'s fallout. Blum and his supporters have already turned their sights on equality-oriented efforts untouched by the decision itself.⁴⁸ This includes recruitment and retention practices, tracking and analyzing racial outcomes, and any program under the banner of "diversity, equity and inclusion" (DEI).⁴⁹ If these attacks succeed, they could usher in a new era of equal protection law that renders the very goal of racial diversity legally suspect.⁵⁰

This future could arrive sooner than many realize. In *SFFA*, affirmative action opponents argued that if Harvard and UNC wanted racial diversity, they should employ "race-neutral alternatives."⁵¹ Yet before *SFFA* had even concluded, Pacific Legal Foundation (which supported *SFFA*'s lawsuits against Harvard and UNC) sued several of the nation's most competitive public high schools for adopting facially neutral processes to increase racial diversity on campus.⁵² One prominent example includes Thomas Jefferson High School (TJ) in Fairfax, Virginia, which reduced reliance on standardized tests, dropped an application fee, and ensured

& RSCH. (July 16, 2023) ("These efforts are part of a nationally networked effort to restrict diversity- and inequality-related discussion, learning, and student support in educational settings—while inflaming Americans to battle public schools and one another.").

48 See, e.g., Tatyana Monnay, *The Lawyer Who Sued Harvard on Affirmative Action Is Going After Law Firms*, BNNBLOOMBERG (Aug. 22, 2023), <https://www.bnnbloomberg.ca/the-lawyer-who-sued-harvard-on-affirmative-action-is-going-after-law-firms-1.1962268>; see also Scott Jaschik, *The Demands of Students for Fair Admissions*, BLOOMBERG (Aug. 22, 2023), <https://www.bloomberg.com/news/articles/2023-08-22/affirmative-action-foe-sues-law-firms-over-dei-hiring-programs>; INSIDE HIGHER ED (July 13, 2023), <https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions>.

49 Recent legal and political attacks targeting equality-oriented practices extend beyond higher education. See, e.g., Taylor Telford, *They Invest in Black Women. A Lawsuit Claims It's Discrimination*, WASH. POST (Aug. 26, 2023), <https://www.washingtonpost.com/business/2023/08/26/dei-lawsuit-black-businesses-fearless-fund-edward-blum/>; Jessica Guynn, *Affirmative Action Wars Hit the Workplace: Conservatives Target "Woke" DEI Programs*, USA TODAY (Sept. 8, 2023), <https://www.usatoday.com/story/money/2023/09/08/affirmative-action-republicans-target-diversity-programs/70740724007/>.

50 See *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos.*, 996 F.3d 37, 48 (1st Cir. 2021) ("Under plaintiff's purported 'rule,' a selection process based solely on facially neutral criteria that results in an increase in the percentage representation of an underrepresented group is subject to strict scrutiny if those designing the program sought to achieve that result. Such a rule would pretty much mean that any attempt to use neutral criteria to enhance diversity—not just measures aimed at achieving a particular racial balance—would be subject to strict scrutiny. And that is just what plaintiff says.").

51 See Brief for Petitioner at 86, *SFFA v. Harvard*, 143 S. Ct. 2141 (2023) (No. 20-1199), 2022 WL 2918946 at *86 ("There is no reason why UNC cannot do the same [and remain diverse]. In fact, the myriad race-neutral alternatives available to universities led the United States to conclude in *Grutter* that racial preferences are never necessary."); see also *SFFA v. Harvard*, 600 U.S. 181, 317 (2023) (Kavanaugh, J., concurring) ("[G]overnments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.") (internal quotation marks omitted).

52 See Sonja Starr, *The Magnet School Wars*, STAN. L. REV. (forthcoming 2024); Janel George, *The Myth of Merit: The Fight of the Fairfax County School Board and the New Front of Massive Resistance*, 49 FORDHAM UR. L.J. 1091 (2022).

representation from each feeder school.⁵³

In a case that now appears destined for the Supreme Court,⁵⁴ Pacific Legal deems these practices a “new species of discrimination.”⁵⁵ As a legal matter, the organization argues that any effort to alter an institution’s racial composition violates the equal protection clause.⁵⁶ Law Professor Jonathan Glater has explained that were this theory accepted, it would render racial inequality “the [legally] relevant and normatively desirable baseline against which all changes to student selection must be measured.”⁵⁷

In line with the First Circuit (which rejected a related lawsuit targeting the Boston Exam Schools), the Fourth Circuit rejected Pacific Legal’s lawsuit against TJ.⁵⁸ This was an appropriate ruling consistent with decades of precedent that insulates facially neutral policies from legal scrutiny.⁵⁹ But as with *SFFA*, the challenges to race-neutral alternatives will reach a more sympathetic Supreme Court.⁶⁰

One cannot know how the *TJ* litigation will end. Prevailing doctrine is not on Pacific Legal’s side. But given this Supreme Court’s hostility to equality-oriented efforts, a ruling for Pacific Legal remains plausible—even though it would require the conservative Justices to abandon their own principles and precedents.⁶¹ Universities should be mindful of this possibility, which would severely curtail the availability of nearly any effort to promote racial diversity, racial inclusion, or other equality-oriented ends. But that is not the world we currently inhabit.

To clarify *SFFA*’s impact on admissions, I now identify several arguments universities can still employ to legally defend racial classifications.⁶² I then highlight how *SFFA* fortified the legal case for facially neutral practices—including those expressly adopted to promote racial diversity and other equality-oriented goals.

53 See George, *supra* note 52.

54 Pacific Legal filed a petition for Supreme Court review on August 21, 2023. See Pac. Legal Found., *Fighting Race-Based Discrimination at Nation’s Top-Ranked High Schools*, https://pacificlegal.org/case/coalition_for_tj/ (last visited Nov. 15, 2023).

55 Cert Brief, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 854 (4th Cir. 2023).

56 See Memorandum in Support of Motion for Preliminary Injunction at 3, 20, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685 (“[E]verybody knows [TJ’s admissions] policy is ... designed to affect the racial composition of the school ... [t]hat is all that is necessary to prove discriminatory intent.”).

57 Jonathan D. Glater, *Reflections on Selectivity*, 49 *FORDHAM URB. L.J.* 5 (2022).

58 See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 871 (4th Cir. 2023).

59 See Starr, *The Magnet School Wars*, *supra* note 52.

60 Every federal court that considered *SFFA*’s challenges against Harvard or UNC had ruled that the defendants’ respective policies satisfied existing precedent.

61 See Jonathan Feingold, *The Right to Inequality and Illusions of Colorblind Continuity* (manuscript on file with author).

62 See *infra* Part II.A.

II. LEGAL RIGHTS:WHAT UNIVERSITIES MAY DO TO PROMOTE RACIAL DIVERSITY AND INCLUSION

A. *Policies That Employ Racial Classifications*

One aim of this article is to trouble the narrative that *SFFA* ended affirmative action. Chief Justice Roberts narrowed a university's right to consider the racial identity of students during admissions.⁶³ But he did not rule that universities may never employ racial classifications to achieve racial diversity or other equality-oriented goals. When located within the Supreme Court's broader affirmative action jurisprudence, *SFFA* reveals multiple paths to legally defend race-based admissions.⁶⁴ I explore four below: (1) the "distinct interests" in diversity rationale, (2) the "remedial" rationale, (3) the "more quantifiable diversity" rationale, and (4) the "fair appraisal" rationale.

One preliminary note. It is possible that no set of facts could lead today's Supreme Court to uphold a race-conscious admissions policy. Even if one accepts that premise, it need not follow that universities should abandon all such practices. Before *SFFA* reached the Supreme Court, many commentators predicted that Harvard's and UNC's policies would not survive the litigation. That widespread (and accurate) sentiment did not spark a wholesale retreat from race-consciousness in admissions or beyond. For institutions electing now to retreat, they should at minimum consider the legal defenses that remain viable even after *SFFA*.

1. *The "Distinct Interests" in Diversity Rationale*

In footnote 4, Chief Justice Roberts explicitly exempted military academies from his holding because of their "potentially distinct interests" in racial diversity.⁶⁵ The Chief Justice explained that "[n]o military academy is party to these cases," and "none of the courts below addressed the propriety of race-based admissions systems in that context."⁶⁶

The relevant footnote offered little additional reasoning. Nor did the Chief Justice identify the precise contours of this "distinct interests" exemption.⁶⁷ This silence

63 See *SFFA v. Harvard*, 600 U.S. 181.

64 It is beyond the scope of this article to provide a comprehensive analysis of each rationale. My more modest goal is to clarify that even after *SFFA*, several arguments remain available to legally justify race-conscious admissions policies.

65 See *SFFA v. Harvard*, 600 U.S. at 213 n.4.

66 The full footnote follows:

The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

Id.

67 Less than two months after the Supreme Court decided *SFFA*, *SFFA* founder Edward Blum sued West Point for its ongoing race-conscious admissions practices. See Bianca Quilantan, *Anti-*

invites at least two interpretations. On the one hand, the express exemption for military academies could imply that the exemption applies *only* to military academies.⁶⁸ A separate interpretation would view military academies as one example of an educational institution with “potentially distinct interests” in diversity whose interests were not addressed in the litigation. Nothing in the opinion rules out this broader interpretation, which recognizes that other types of educational institutions might value racial diversity in ways meaningfully distinct from undergraduate research universities like Harvard and UNC.

For institutions of higher education, footnote 4 should invite the following question: *Do we possess potentially distinct interests in diversity that SFFA did not address?* If the answer is yes, that suggests a plausible path to defend a race-based admissions process. To survive legal attack, the institution would have to identify its distinct interests and persuade a court that those interests are constitutionally compelling. Among other possibilities, professional schools appear a natural fit to raise such an argument.⁶⁹

This includes medical schools and law schools, both of which belong to professional organizations with stated missions—and, many would argue, the moral obligation—to serve all communities in the United States.⁷⁰

To imagine what such an argument might entail for medical schools, the Association of American Medical Colleges’s (AAMC) SFFA amicus brief offers a

Affirmative Action Group Sues West Point over Race-conscious Admissions, POLITICO (Sept. 19, 2023), <https://www.politico.com/news/2023/09/19/anti-affirmative-action-west-point-lawsuit-race-admissions-00116791>. If both parties elect to litigate this case to a final decision on the merits, the Supreme Court should have an opportunity to elaborate on footnote 4. Until then, the “distinct interests” rationale remains highly indeterminate.

68 Justice Sotomayor’s reaction to footnote 4 reflects this narrow interpretation. See *SFFA v. Harvard*, 600 U.S. at 355 (Sotomayor, J., dissenting) (“In a footnote, the Court exempts military academies from its ruling in light of ‘the potentially distinct interests’ they may present. To the extent the Court suggests national security interests are ‘distinct,’ those interests cannot explain the Court’s narrow exemption, as national security interests are also implicated at civilian universities. The Court also attempts to justify its carveout based on the fact that ‘[n]o military academy is a party to these cases.’ Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion.”).

69 Other educational institutions that potentially possess distinct interests in racial diversity include religious institutions (as Justice Sotomayor referenced) and, *inter alia*, those that train police, first responders, and firefighters—among other entities that train individuals who interact with and safeguard various communities. See *id.* It is worth noting that absent a normative anchor that privileges inclusion over exclusion, a diversity rationale that trades on each institution’s specific mission could invite perverse outcomes—*e.g.*, were the Supreme Court to accept a “distinct interests” logic to justify institutional practices that exclude or discriminate against students of color or LGBTQ+ people. Cf. Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 770–71 (1997) (“[Grounding the diversity rationale in the First Amendment] constitutionalizes the power of a privileged educational establishment to determine what learning shall be valued and who shall be taught.”).

70 See ABA Statement on Diversity, Equity, and Inclusion Center, <https://www.americanbar.org/groups/diversity/> (last visited Nov. 3, 2023) (“Provides guidance, spearheads projects, and enhances collaboration and communication to advance ABA Goal III—to eliminate bias and enhance diversity in our Association, legal profession, and justice system. Goal III entities within the Center advance different but interrelated areas of diversity, equity, and inclusion.”).

starting point.⁷¹ That brief identified a diversity interest arguably distinct from those proffered by Harvard and UNC.⁷² The AAMC brief explains that “an overwhelming body of scientific research compiled over decades confirms, diversity literally saves lives by ensuring that the Nation’s increasingly diverse population will be served by healthcare professionals competent to meet its needs.”⁷³ To concretize this point, the AAMC cites now robust empirical evidence that, for example, Black patients receive better health outcomes when treated by Black physicians.⁷⁴ In short, the AAMC brief marshals a growing field of empirical scholarship that documents the need for medical schools to train a racially diverse medical workforce.⁷⁵

An array of data points ground this proposition.⁷⁶ One recent experimental study found that “black male patients who had the opportunity to meet with a (randomly assigned) black male doctor ha[d] a consistent, large, and robust positive effect on the demand for preventives.”⁷⁷ A separate 2023 study found that the increase of Black primary care physicians “was associated with higher life expectancy and was inversely associated with all-case Black mortality and mortality rate disparities between Black and White individuals.”⁷⁸

For present purposes, my goal is not to produce, in comprehensive and granular detail, the “*medical school* distinct interests” in diversity rationale. My more modest goal is to highlight that footnote 4 provides a potential defense for any institution that possesses distinct interests in racial diversity—whether it be a military academy, a medical school, or otherwise.⁷⁹

71 See AAMC Amicus Brief, *SFFA v. Harvard*, 2022 WL 3036400 (U.S.), 3–4.

72 See *id.*

73 See *id.*

74 See Dallon F. Flake, *Lifesaving Discrimination*, 72 AM. U.L. REV. 403, 409 (2022) (“It is becoming increasingly apparent that reducing racial disparities in healthcare not only requires improving minorities’ access to health services but also their access to physicians of their same race. Mounting empirical evidence indicates that for Black people in particular, patient-physician racial concordance can result in better medical care.”); Monica E. Peek, *Increasing Representation of Black Primary Physicians—A Critical Strategy to Advance Racial Health Equity*, JAMA NETWORK (Apr. 14, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803903>.

75 See Flake, *supra* note note 74 (reviewing studies).

76 See, e.g., *id.*

77 Marcella Alsan et al., *Does Diversity Matter for Health? Experimental Evidence from Oakland* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24787, 2018), https://www.nber.org/system/files/working_papers/w24787/w24787.pdf.

78 John E. Snyder et al., *Black Representation in the Primary Care Physician Workforce and Its Association with Population Life Expectancy and Mortality Rates in the US*, JAMA NETWORK (Apr. 14, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803898>.

79 In *Bakke*, the UC Davis Medical school defended its race-conscious admissions policy, in part, on the need to “improv[e] the delivery of health-care services to communities currently underserved.” *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 310 (1978). This argument tracks the diversity interests contained in the AAMC brief. Notably, Justice Powell rejected UC Davis’s argument because the defendant failed to ground its theory in evidence, not because the theory failed as a matter of law:

It may be assumed that in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner’s special

2. The “Remedial” Rationale

In *SFFA*, Justice Roberts expressly identified “two compelling interests [that] permit resort to race-based government action.”⁸⁰ The second interest, specific to prisons, is inapposite to university admissions.⁸¹ But the first offers universities another legal rationale for race-conscious admissions. The Chief Justice explained that “remediating specific, identified instances of past discrimination that violated the Constitution or a statute” constitutes a compelling interest.⁸² In plain language, universities can employ racial classifications when necessary to remedy their own past or present acts of racial discrimination.⁸³

This “remedial” rationale is admittedly limited.⁸⁴ As Chief Justice Roberts notes, the defense only applies to specific instances of legally cognizable discrimination attributable to the university itself.⁸⁵ One hurdle is that the Supreme Court has steadily narrowed what constitutes legally cognizable discrimination,⁸⁶ while

admissions program is either needed or geared to promote that goal.

Id. To summarize, Justice Powell found the argument theoretically plausible but lacking an evidentiary basis. *See id.* at n.46 (“The only evidence in the record with respect to such underservice is a newspaper article.”). To the extent evidence was lacking in 1978, it is considerable today.

80 *SFFA v. Harvard*, 600 U.S. 181, 207 (2023).

81 *See id.* (“The second [compelling interest] is avoiding imminent and serious risks to human safety in prisons, such as a race riot.”)

82 *See id.*

83 *See* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 323 n.221 (1999) (“[Crosby and Adarand] reaffirmed ... that ‘government bodies ... may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.’” (quoting *United States v. Paradise*, 480 U.S. 149, 166 (1987))).

84 As a doctrinal matter, the remedial rationale is legally relevant as a defense to satisfy strict scrutiny’s compelling interest requirement. Strict scrutiny, in turn, is only triggered when a university employs a race-conscious policy. If a university employed colorblind criteria to remedy past discrimination—or realize any other racial equality-oriented goal—that racial motive would not, in itself, trigger strict scrutiny. For example, a university might elect to view an applicant’s status as the descendant of an enslaved person as a positive factor in admissions. Because this criteria is facially neutral (it does not distinguish between applicants based on their respective racial identities), it would not trigger strict scrutiny—even if adopted for the express purpose of increasing the number of Black students on campus. Pacific Legal Foundation, which has sued multiple public high schools for adopting colorblind criteria to promote racial diversity, concedes this point. *See* Petitioner’s Reply in Support of Petition of Certiorari, *Coal. for TJ v. Fairfax* (No. 23-170) (Nov. 1, 2023) (“The Board says that the Coalition ‘reaffirmed’ at argument below ‘that an intent to increase Black and Hispanic representation would not itself render a race-neutral admissions policy unconstitutional.’ This is true, but it does not hurt the Coalition. The mere intent to increase black and Hispanic enrollment only violates the Equal Protection Clause if the means chosen are designed to treat applicants differently based on race.”).

85 *See SFFA v. Harvard*, 600 U.S. at 207 (“Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute.”).

86 In the university context, this often requires proof that the relevant university adopted policies or practices with the specific intent to exclude students of color. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

expanding the evidence required to prevail under such a defense.⁸⁷ The current contours of this rationale trace largely to *City of Richmond v. J.A. Croson Co.*, a 1989 case involving Richmond, Virginia's race-conscious set-aside.⁸⁸ In *Croson*, the Supreme Court held that a defendant asserting the remedial rationale must provide a "strong basis in evidence for its conclusion that remedial action was necessary."⁸⁹

This rule creates a substantial evidentiary hurdle for any institution raising the remedial rationale.⁹⁰

This burden need not, however, dissuade a university from pursuing this legal strategy.⁹¹ This is particularly true for universities with well-documented histories of unlawful discrimination—for example, universities that openly defied federal desegregation decrees following histories of de jure racial exclusion.⁹²

This includes institutions like UNC, one of the *SFFA* defendants.⁹³ UNC presents itself as the nation's "oldest public university."⁹⁴ This title obscures the fact that UNC formally excluded Black students for most of its history.⁹⁵ Even after

87 See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In affirmative lawsuits claiming unlawful discrimination, plaintiffs often fail to establish unlawful intent even in cases involving substantial evidence of animus or bias. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also Khiara Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 110 (2022) ("Differently stated, the Court has embraced an exceedingly narrow definition of racism. By its own constrained definition, the Court should have recognized the travel ban at issue in *Trump v. Hawaii* and the techniques of voter disenfranchisement that Shelby County permitted to develop as racism. Nevertheless, the Court refused to recognize as much.").

88 See *Croson*, 488 U.S. 469.

89 *Id.* at 500; see also *Fisher v. Univ. of Tex.*, 570 U.S. 297, 317 (2013) (Thomas, J., concurring in part and dissenting in part) (citation omitted) ("[T]he Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'").

90 Aside from introducing the "strong basis in evidence" standard to the equal protection context, the *Croson* court rejected the remedial rationale notwithstanding Richmond's existive history of overt racial discrimination. See *Croson*, 488 U.S. 469.

91 See generally Jonathan Feingold, *Colorblind Capture*, 102 BOSTON U. L. REV. 1949, 1983-93 (2022) (discussing how the remedial rationale offers legal and discursive benefits).

92 See *id.* (outlining how the University of North Carolina could build a remedial rationale to justify ongoing race-conscious admissions practices).

93 For records detailing UNC's desegregation resistance, see *Desegregation of the University of North Carolina at Chapel Hill: Archival Resources*, UNC UNIV. LIBRARIES, <https://guides.lib.unc.edu/desegregation-unc/archival> (last visited Nov. 20, 2023) (noting how in 1970, the federal government informed UNC that it was "in violation of the 1964 Civil Rights Act for maintaining a racially dual system of public higher education").

94 See UNC HISTORY AND TRADITION, <https://www.unc.edu/about/history-and-traditions/> (last visited Nov. 3, 2023) ("The University of North Carolina was the first public university in the nation. In 1789, William Richardson Davie wrote the act that established the University. In 1793, he and fellow trustees laid the cornerstone of the first building, Old East. Students arrived in 1795, and UNC became the only public university to award degrees in the 18th century.").

95 See GEETA N. KAPUR, *TO DRINK FROM THE WELL: THE STRUGGLE FOR RACIAL EQUALITY AT THE NATION'S OLDEST PUBLIC UNIVERSITY* (2020).

Brown v. Board of Education,⁹⁶ UNC continued to formally bar Black students until federal courts expressly prohibited the practice in 1955.⁹⁷ That ruling did not alter UNC's commitment to racial exclusion.⁹⁸ Rather than commit to desegregation, UNC fought federal integration orders for three decades.⁹⁹

That contest included a decade of litigation between UNC and the federal government—litigation that endured until President Reagan's Department of Education brokered a settlement to govern desegregation across the UNC system.¹⁰⁰ The consent decree terminated the litigation, but local civil rights leaders remained skeptical that UNC would desegregate its campuses.¹⁰¹ Elliott C. Lichtman, who had supported NAACP efforts to desegregate UNC over the preceding decade, termed the agreement "'a triple end run' around federal courts in Washington, civil rights laws and the Constitution."¹⁰²

In the decades' since, UNC has exhibited increasing commitment to remedy the vestiges of this legacy.¹⁰³ This includes the modest race-conscious policy that the Supreme Court overturned in *SFFA*. Yet even under that policy, students of color documented the hallmarks of a racially hostile environment.¹⁰⁴ Moreover,

96 347 U.S. 483 (1954).

97 *Frasier v. Bd. of Trs. of the Univ. of N.C.*, 134 F. Supp. 589, 592 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam).

98 See Feingold, *Ambivalent Advocates*, *supra* note 8.

99 See Feingold, *Colorblind Capture*, *supra* note 91.

100 See Bishop, *The Consent Decree*, *supra* note 15 at 353 ("Toward the end of 1969, [the Department of Education's Office of Civil Rights] decided that ten states were operating segregated systems of higher education in violation of Title VI. HEW finally sent letters to those ten states requesting that they devise statewide plans to desegregate and integrate their dual systems of higher education.").

101 David S. Tatel, then a senior official involved in the litigation with the Carter Administration, described the settlement as follows: "This settlement doesn't read like a desegregation plan. It reads like a joint U.S.–North Carolina defense of everything the system did." Charles R. Babcock, *U.S. Accepted Desegregation Plan Once Rejected for N.C. Colleges*, WASH. POST (July 11, 1981), <https://www.washingtonpost.com/archive/politics/1981/07/11/us-accepted-desegregation-plan-once-rejected-for-nc-colleges/3e4c542b-40b8-405f-8cc9-a46952035b0f/>.

102 See *id.*

103 Evidence present in the UNC litigation suggests that this work remains unfinished. See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 590 n.5 (M.D.N.C. 2021) ("[The intervenor's] expert report—which details UNC's reckoning with race over the full course of its history and illuminates the history of racial discrimination in North Carolina's K-12 public schools—is an important contribution to the Court's understanding of the context of this case. Dr. Cecelski provides considerable administrative and legislative findings that illuminate the extent of the educational disparities historically sanctioned by the State, and he concludes that, *though recently 'the University's faculty, administrators and trustees have made important strides to reform the institution's racial outlook and policies, ... those efforts have fallen short of repairing a deep-seated legacy of racial hostility and disrespect for people of color.'*") (emphasis added).

104 See Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-00954) ("[A] 'race-blind' ... admissions process would produce a range of harms. Such harms would include: ... lessening the diversity within each racial group, thereby entrenching racial stereotypes; exacerbating racial isolation among students who are already among the most marginalized on UNC's campus; and undermining their leadership and collective efforts to counter the lingering

Black students have never comprised more than 9.2% of the undergraduate campus population.¹⁰⁵ This figure marks a significant improvement from the total exclusion of Black students during UNC's apartheid era. Still, in a state that is over 20% Black, one could reasonably argue that this peak reflects UNC's failure to fully rectify its own legacy of racial exclusion.¹⁰⁶

The foregoing only begins to outline how UNC could proffer a "remedial" rationale.¹⁰⁷ We lack a more fulsome account, in part, because UNC expressly disclaimed this argument before the Supreme Court. It is possible that UNC would have lost even had it advanced a remedial rationale and marshaled a robust record to ground the defense. Given the conservative Justices' open hostility to racial classifications, arguments available in theory might be unavailable in practice.

But even if facts seem not to matter in the court of law, they remain critical in the court of public opinion.¹⁰⁸ The prospect of a hostile Supreme Court should not overdetermine the arguments universities raise when defending race-conscious practices. Few, if any, universities will be able to escape the fallout of a resurgent movement to ban equality-oriented principles and policies nationwide.¹⁰⁹ Against this backdrop, winning the legal battle matters. But so does winning the narrative battle.

On this point, I have elsewhere offered the following observation:

[B]ridging past to present enables universities to tell a fuller story about why race still matters. This act of truth-telling comprises an important intervention in itself—particularly against the backdrop of a growing campaign to erase the past through book bans and educational gag orders. When elite schools deny or diminish the past's imprint on the present they sacrifice more than an opportunity to defend affirmative action. Such narratives also feed regressive talking points that seek to legitimize existing inequality by

effects of racial discrimination on campus.").

105 See Nicholas Graham, *Historic African American Enrollment at UNC*, UNC UNIV. LIBRARIES (Apr. 21, 2016), <https://blogs.lib.unc.edu/hill/2016/04/21/historic-african-american-enrollment-at-unc/> ("African American students joined the undergraduate population in 1955.").

106 See Analytic Reports: Student Characteristics, UNIV. OF N.C. AT CHAPEL HILL OFF. OF INSTITUTIONAL RSCH. & ASSESSMENT, <https://oira.unc.edu/reports/> (last visited Nov. 20, 2023). UNC's Black student population declined to a recent low of 7.6% in 2018. *Id.* In 2014, the year SFFA sued UNC, that number was 7.9%. See *id.*

107 For a more comprehensive overview of this argument, see Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-00954) ("This [unfavorable] outcome could result if the Court does not consider or weigh . . . the history of discrimination at UNC-Chapel Hill, the inextricable link between that history and UNC's current compelling interest in student body diversity, and the adverse effect that elements of the current admissions process have on the diversity of the student population.").

108 Others have noted that Chief Justice Roberts dismissed or ignored significant portions of the evidence that anchored the lower court opinions in favor of Harvard and UNC. See Kang, *supra* note 23. This apparent disregard for two well-developed records supports the theory that no set of facts could have saved Harvard and UNC.

109 See Jack Stripling, *Behind the Lines of Texas A&M's Diversity War*, WASH. POST (Sept. 6, 2023), <https://www.washingtonpost.com/education/2023/09/05/texas-am-university-diversity-sb17/>.

locating racism in an ignoble past.¹¹⁰

3. *The “More Quantifiable Diversity” Rationale*

The “diversity” rationale refers to the proposition that universities “ha[ve] a compelling interest in a diverse student body” that can justify a narrowly tailored race-conscious admissions process.¹¹¹ A majority of the Supreme Court first embraced the diversity rationale in *Grutter v. Bollinger*, a 2003 case that upheld the University of Michigan Law School’s race-based admissions policy.¹¹² After *Grutter*, the diversity rationale became the primary—if not exclusive—legal argument universities employed to justify race-conscious admissions.

In *SFFA*, the plaintiff asked the Supreme Court to overturn *Grutter* and reject the diversity rationale. Chief Justice Roberts did neither—at least not formally.¹¹³ Rather than overturn *Grutter* or reject the diversity rationale, Roberts concluded that Harvard’s and UNC’s specific policies failed to satisfy existing precedent—including *Grutter*.¹¹⁴ According to the Chief Justice, the defendants’ proffered goals were “commendable” but insufficiently “coherent for purposes of strict scrutiny” and insufficiently measurable to “be subjected to meaningful judicial review.”¹¹⁵

110 See Feingold, *Colorblind Capture*, *supra* note 91, at 1985.

111 See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

112 *Id.*

113 Even though *SFFA* did not formally reject the diversity rationale, Chief Justice Roberts arguably narrowed the rationale’s scope by rejecting Harvard and UNC’s proffered interests—many of which tracked diversity-related interests the Supreme Court had accepted in *Grutter*. Compare *SFFA v. Harvard*, 600 U.S. 181, 214 (2023) (concluding that the following interests do not satisfy scrutiny’s compelling interest prong: “training future leaders in the public and private sectors”; preparing graduates to “adapt to an increasingly pluralistic society”; “better educating its students through diversity”; and “producing new knowledge stemming from diverse outlooks” ... “promoting the robust exchange of ideas”; “broadening and refining understanding”; fostering innovation and problem-solving”; “preparing engaged and productive citizens and leaders; enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”) with *Grutter*, 539 U.S. at 330 (“As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.”) (internal brackets omitted).

114 *SFFA v. Harvard*, 600 U.S. at 230 (“For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.”). Rather than overturn *Grutter*, Chief Justice Roberts suggested that his analysis applies *Grutter*. See *id.* (concluding that Harvard and UNC failed to comply with requirements *Grutter* imposed on racial classifications); see also *id.* at 316 (Kavanaugh, J., concurring) (“In light of the Constitution’s text, history, and precedent, the Court’s decision today appropriately respects and abides by *Grutter*’s explicit temporal limit on the use of race-based affirmative action in higher education.”).

115 *Id.* at 230 (“Both programs lack sufficiently focused and measurable objectives warranting the use of race ...”). Roberts added the following:

Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient “innovation and problem-solving,” or students who are appropriately “engaged and productive.” Finally, the question in this context is not one of no diversity or of some: it is a question of degree. How many fewer leaders Harvard would create without racial preferences,

He further condemned the defendants' policies for violating limits *Grutter* had allegedly placed on racial classifications—specifically, that universities may never “use race as a stereotype or negative, and—at some point—they must end.”¹¹⁶

Some have suggested that formalities aside, *SFFA* killed the diversity rationale and *Grutter*.¹¹⁷ As a practical matter, this might be true—that is, for this Supreme Court, no set of facts could save a race-based admissions policy designed to promote racial diversity. But if one takes Chief Justice Roberts at his word, a different conclusion is warranted: the diversity rationale remains available; Harvard and UNC just missed the mark.¹¹⁸

A key question, therefore, is how could a university employ racial classifications in pursuit of racial diversity without meeting the same fate? One can start with Chief Justice Roberts's claim that race-conscious policies may not operate as a “negative” or a “stereotype.”¹¹⁹

As for the “negative” limitation, Chief Justice Roberts concluded that Harvard's process operated as a “negative” because it “result[ed] in fewer Asian American

or how much poorer the education at Harvard would be, are inquiries no court could resolve.

Id.

116 *Id.* at 213. I employ the modifier “allegedly” because *Grutter* does not stand for the unqualified proposition that a racial classification may never operate as a “negative.” Even Chief Justice Roberts recognizes this when he invokes *Grutter* for the proposition that racial classifications should not “unduly harm[] nonminority applicants.” *See id.* at 212 (quoting *Grutter*, 539 U.S. at 341). But he then refashions this passage as a prohibition on any racial classification that functions as a “negative”—which lacks the “unduly” modifier he previously quoted. This subtle shift would appear to render unlawful any race-conscious policy that yields different racial outcomes than would arise under a facially neutral policy. If this is Chief Justice Roberts' intended rule, he cited *Grutter* for a proposition that conflicts with *Grutter* (and *Fisher v. Texas*); *Grutter* upheld a racial classification that, by design, altered the racial composition of the student body that would have existed *but for* the challenged policy.

117 *See SFFA v. Harvard*, 600 U.S. at 287 (Thomas, J., concurring) (“The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”); *id.* at 342 (Sotomayor, J., dissenting) (“As Justice Thomas puts it, ‘*Grutter* is, for all intents and purposes, overruled.’ It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.”) (internal citations omitted).

118 *See Oh, What the Supreme Court Really Did to Affirmative Action*, *supra* note 19 (“A better reading leads to the conclusion that *Grutter v. Bollinger*, a 2003 case upholding race in admissions, is still good law, diversity remains a compelling interest, and the narrow use of race, albeit in limited circumstances, continues to be permissible. Undoubtedly, universities must rethink and change their admissions policies after Harvard. But affirmative action is not dead.”).

119 *SFFA v. Harvard*, 600 U.S. at 218. (“The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”)

and white students being admitted.”¹²⁰ On its face, the pronouncement that racial classifications may not operate as a “negative” is indeterminate. One could read it as a requirement that racial classifications not yield a racial composition different than what would have arisen absent the racial classification. Alternatively, one could read the requirement to prohibit only those racial classifications that reduce the absolute number of any racial group.¹²¹ Note that the above interpretations implicitly presume that the racial composition that would arise absent the race-based policy is legitimate—morally and legally. If one questions this presumption, it invites a third interpretation: A race-based admissions policy operates as a “negative” only if the racial group that experiences less absolute or relative representation (under that policy) enjoys a legal entitlement to the racial demographics that would arise absent the policy.

At first glance, Chief Justice Roberts appears to be embracing the first reading; his reference to Asian Americans referenced the group’s relative representation—not absolute numbers. By extension, one might ask whether this effectively outlaws all racial classifications—which, often, are designed to produce a racial composition different than what would arise under colorblind conditions.

But if one parses *SFFA*, it becomes difficult to sustain this rigid negative requirement. To begin, the Chief Justice notes that his opinion does not extend to military academies—because those institutions have “potentially distinct interests” in diversity.¹²² If a rigid negative requirement outlawed all racial classifications, an institution’s potentially “distinct interests” in diversity would be legally irrelevant. The Chief Justice also notes that a university can employ affirmative action to remedy its own discrimination.¹²³ As with the diversity rationale, the

120 *Id.* Chief Justice Roberts bases this empirical claim on a footnote from the First Circuit’s opinion, which upheld Harvard’s admissions process. I reproduce that footnote below because it reflects how Chief Justice Roberts cites *Grutter* for a proposition that actually departs from *Grutter*. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 191 n.29 (1st Cir. 2020), rev’d, 600 U.S. 181 (2023) (“The United States attempts to make the impact of Harvard’s use of race appear more significant than it is. It argues that Harvard ‘inflicts an 11.1% penalty’ on Asian Americans because, absent the consideration of race, their representation would increase from 24% to 27%. It then claims that Harvard provides a 133% bonus to African Americans because their representation increases from 6% to 14%. While these calculations are correct, similar calculations show that race was used about as extensively in the program approved in *Grutter*. That program, using the government’s language and calculations, inflicted a penalty of 10.9% on applicants who were not underrepresented minorities (because their representation would increase from 85.5% to 96% absent the consideration of race) while simultaneously giving a 263% bonus to underrepresented minority applicants (because their representation increased from 4% to 14.5% with the consideration of race).”).

121 To the extent one presumes that admissions processes are inevitably zero-sum, these first two readings might diverge in form but converge in practice. But as Reginald Oh has noted, not all aspects of an admissions process are necessarily zero-sum. See Oh, *What the Supreme Court Really Did to Affirmative Action*, *supra* note 19 (“One way for schools to avoid a negative impact is to expand the size of their admitting class to ensure that students are not negatively affected by the use of race. Towards the end of the admissions cycle, Harvard could assess the incoming class’s racial composition. If it appears that the use of race for underrepresented students resulted in fewer white students being admitted, then Harvard could simply eliminate the adverse racial impact by admitting more students.”).

122 *SFFA v. Harvard*, 600 U.S. at 213 n.4.

123 See *id.* at 207.

remedial rationale contemplates racial classifications that, by design, reduce the representation certain racial groups would enjoy absent affirmative action.

One might argue that the remedial rationale is materially distinct (from the diversity rationale) because it treats the pre-existing racial baseline as constitutionally suspect—that is, the student body’s racial composition would be different but for prior discrimination. This logic folds the third interpretation into the “negative” analysis—if even implicit.

Even if one accepts this argument, it is unclear why similar logic could not extend to a racial distribution that is morally suspect—even if lawful. Consider Harvard’s use of legacy preferences, which shaped the racial composition of Harvard’s student body by heavily favoring less qualified White applicants.¹²⁴ Under prevailing equal protection doctrine, legacy preferences raise no independent legal concern because they are facially neutral.¹²⁵ But as a normative matter, the racial preference they extend to White applicants renders the resulting racial composition suspect. Put differently, the question is whether the “negative” analysis leaves space to consider whether the racial composition that flows from colorblind criteria is itself legitimate. Assuming it does, a race-based policy that reduces one group’s (illegitimate) overrepresentation would not operate as a “negative” even though it reduces that group’s racial representation (relative to a process that lacked the racial classification).

There is one final reason to question whether Chief Justice Roberts introduced a rigid “negative” requirement. If Chief Justice Roberts is saying that no racial classification can reduce a group’s representation (relative to what it would have enjoyed under colorblind conditions), one would have to ask whether any racial classification could ever survive. Such a rule would render the compelling interest requirement superfluous and would appear to preclude all race-based practices—even if the asserted goal implicated interests that the Supreme Court tends to privilege such as national security.¹²⁶

124 See Feingold, *Colorblind Capture*, *supra* note 91 (“[W]ere Harvard to eliminate all Legacy+ preferences, “[t]he admit rate for all white ALDC applicants would fall from 43.6% to 11.4%, a drop of more than thirty percentage points.”) (quoting Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. & ECON. 133, 147 (2020)).

125 See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). One could argue that Harvard’s legacy preferences violate the disparate impact provision in Title VI’s implementing regulations. See *infra* Part III.A.

126 The Supreme Court often privileges perceived national security interests over the civil rights of communities of color. See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1, 35 (2010) (“The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”); Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J. F. 688, 701 (2019) (“The courts, too, entered the fray [following 9/11]—at times fully deferring to the executive branch and its largely unsubstantiated claims of national security, and at other times citing *Korematsu* as a reason for more closely reviewing the government’s factual claims.”). Were it true that racial classifications may never operate as a “stereotype” or “negative,” it is difficult to see how the government could ever justify a policy that targets a racial, ethnic, or religious group—even in the heat of wartime. Cf. Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678, 1686 (2022) (“At its core, racial profiling is pernicious precisely because it legitimizes the idea that one racial group’s privacy, dignity, and security may be

The requirement that racial classifications not operate as a stereotype appears more easily addressed.¹²⁷ According to the Chief Justice, Harvard and UNC traded on the forbidden “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”¹²⁸ Chief Justice Roberts further admonished the defendants for considering “race *qua* race”—that is, “race for race’s sake.”¹²⁹

This characterization appears to rest on Chief Justice Roberts’s view that Harvard and UNC valued diversity for its “discourse benefits”—that is, to foster a robust marketplace of ideas. Under this conception of diversity, racial categories can function as proxies for information about an applicant’s personal experiences and perspective.¹³⁰ According to Chief Justice Roberts, when racial identity functions as a proxy for perspective, that constitutes “illegitimate stereotyping.”¹³¹

This stereotyping concern should disappear if the racial category is important in itself—not as a proxy to discern something else about a student. In separate work, I invite universities to embrace an equality-centered conception of racial diversity that invites this shift.¹³² Specifically, I highlight the relationship between racial demographics and each student’s right to enjoy the full benefits of university membership.¹³³ Extensive empirical research reveals that when students from negatively stereotyped groups are severely underrepresented, they are likely to confront unique identity-contingent burdens.¹³⁴ These burdens, in turn, can compromise a student’s ability to learn, engage, and perform—all essential

sacrificed for the “greater good”—a sacrifice that others are never asked, nor expected, to bear. That sacrifice can only be considered the “greater” good if you do not account for those experiencing the harm.”).

127 To be fair, there is little evidence that Harvard and UNC were relying on or reproducing stereotypical views about students of color. This did not stop the Supreme Court from declaring otherwise. See *SFFA v. Harvard*, 600 U.S. 220 (“Respondents admit as much. Harvard’s admissions process rests on the pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer.’”).

128 *Id.* at 219 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

129 *Id.* at 220.

130 *Id.* at 212 (“The first is the risk that the use of race will devolve into ‘illegitimate ... stereotyp[ing].’ Universities were thus not permitted to operate their admissions programs on the “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”). Charles Lawrence III foreshadowed how a First Amendment-centric diversity rationale would invite such arguments. See Lawrence, *Each Other’s Harvest*, *supra* note 68, at 774 (“[W]hen the First Amendment justification for diversity—academic conversation—is separated from the substantive content of that conversation—learning about the social reality of racism—it is not apparent why race should be a factor in deciding who should participate in that conversation. ‘What does the color of an individual’s skin matter in a discussion of quantum physics?’ is the paradigm rhetorical question posed by affirmative action’s opponents.”).

131 *SFFA v. Harvard*, 600 U.S. at 212.

132 See generally Feingold, *Hidden in Plain Sight*, *supra* note 26.

133 See *id.*

134 See *id.* (summarizing empirical scholarship on social identity threat and implicit biases).

components of university membership.¹³⁵ This scholarship situates racial diversity as a prerequisite to racial equality—or more precisely, the present and personal equality interests of actual university students.¹³⁶

This equality-centered diversity rationale also avoids concerns about stereotyping. In fact, the social science on which it rests identifies affirmative action as a tool to reduce the racial stereotypes students of color often confront when numerically isolated in predominately White spaces.¹³⁷ The same research on stereotype threat and social identity threat helps to concretize and quantify the harm students from negatively stereotyped racial groups experience when severely underrepresented on campus.¹³⁸ This evidence responds to Chief Justice Roberts's concern that Harvard and UNC's respective policies "lack[ed] sufficiently focused and measurable objectives."¹³⁹

As with the other rationales I identify, I am not claiming that a more quantifiable diversity rationale—that avoids the "negative" and "stereotyping" limitations—would survive before the present Supreme Court. Even if one doubts that a fortified diversity rationale would have saved Harvard and UNC's respective policies, defending racial diversity as a key to racial equality performs an important discursive intervention. Specifically, it positions universities to intervene in public debates about the relationship between institutional environments, individual opportunity, and structural racism. Universities enjoy significant platforms to uplift the contested reality that race matters, in part, because racial demographics shape a university's ability to ensure that every student, regardless of their racial identity, can enjoy the full benefits of university membership.

135 See *id.*

136 Beyond its empirical foundation, this vision of diversity should appeal to conservative Justices because it is animated by a vision of constitutional equality that confers upon every individual an equal "right to compete" irrespective of their racial identity. See *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville (Northeastern Florida)*, 508 U.S. 656, 666 (1993) (holding that in the presence of a racial classification, a cognizable claim exists even if the plaintiff would not have received the benefit absent the racial classification).

137 See, e.g., Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of A Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198 (2010).

138 See generally Thomas Dee & Joshua Aronson, *Stereotype Threat in the Real World*, in STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION (Michael Inzlicht and Toni Schmader eds., 2011).

139 *SFFA v. Harvard*, 600 U.S. 181, 230 (2023). A different question concerns the amount of diversity necessary to buffer students against these equality harms. The Supreme Court has previously employed the term "critical mass" to identify the general threshold at which racial diversity yields its various benefits. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Neither Harvard nor UNC defended their respective policy as necessary to enroll a critical mass of students from otherwise underrepresented racial groups. See *SFFA v. Harvard*, 600 U.S. at 228 ("The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a 'sui generis' race-based admissions program used by the University of Texas, whose 'goal' it was to enroll a 'critical mass' of certain minority students. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means."). Chief Justice Roberts seemed to suggest that *SFFA* was not intended to upset precedent that condoned "critical mass" as an legitimate objective. Specifically, he framed his opinion as consistent with *Fisher II*, in which a 4-3 plurality reaffirmed *Grutter* and upheld a race-based admissions policy designed to "enroll a 'critical mass' of certain minority students." *Id.*

4. *The “Fair Appraisal” Rationale*

I now identify one final rationale that a university could employ to justify a race-conscious admissions policy. This “fair appraisal” approach is straightforward: unless a university considers applicant race, it will systematically undervalue the existing academic talent and potential of students of color—and thereby inflate the relative academic credentials of White applicants.¹⁴⁰ This rationale trades on decades of empirical scholarship that show how standard measures of merit often understate the academic abilities of students from negatively stereotyped groups.¹⁴¹ Accordingly, considering applicant race positions universities to realize a more “meritocratic,” equitable, and individualized process that reduces the degree to which race shapes admissions outcomes.¹⁴²

The fair appraisal rationale can be conceived at various levels of abstraction. A “broad” conception might account for the ways that an applicant’s racial identity shaped their access to resources necessary to develop the skills and competencies standard metrics measure.¹⁴³ This version assumes that even if a portion of group-based performance gaps reflect real differences in existing abilities, those differences should not dictate admissions outcomes because they (1) reflect access to training, not innate academic talent or potential and (2) internalize unearned racial advantage and disadvantage (themselves the vestiges of a formerly apartheid society).¹⁴⁴

140 I use the terms “measures of merit” and “standard metrics” interchangeably to capture metrics that universities tend to privilege in admissions processes—for example, standardized test scores, grade point average, letters of recommendation.

141 See generally Kang & Banaji, *Fair Measures*, *supra* note 25 (reviewing scholarship on implicit biases and stereotype threat).

142 See Devon Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 180–81 (2016) (“We identify a number of obstacles African American students across class likely encounter—up to and including the moment of admission—that potentially negatively impact their formal academic performance and the overall competitiveness of their admissions files. These obstacles create what we call an ‘admissions imbalance’ that affirmative action helps to offset.”).

143 One danger with this “broad” theory is that it often assumes that racial performance gaps (in, e.g., test performance or admissions) accurately reflect real differences in ability and preparation across groups. See, e.g., CHARLES FRIED, ORDER AND LAW 100 (1991) (“It seemed that we were ready to cheat on standards of excellence or even competence in order to avoid facing the fact that centuries of deprivation had left many blacks less qualified than whites.”). See also Carbado et al., *Privileged or Mismatched*, *supra* note 142 at 179 (“The failure of proponents of affirmative action to robustly defend the policy for middle-class African Americans strengthens the perception of affirmative action as a racial preference. Put another way, the perception of affirmative action as a racial preference has particular traction when its beneficiaries are black but not class-disadvantaged.”).

144 Some might argue that if the policy is designed to provide a more individualized review by accounting for a student’s relative advantage or disadvantage, the policy should focus on a student’s socioeconomic status (or familial wealth), not their racial identity. The underlying logic is that wealth is a better proxy for advantage/disadvantage than racial identity. This logic is not without some merit. If the goal is only to identify and account for each student’s relative financial resources, familial wealth could be a better (that is, less under- and overinclusive) proxy than racial identity. But as I and others have detailed, policies that attend to wealth but not race have at least three significant shortcomings: (1) they obscure the degree to which race matters (and racism operates) irrespective of an individual’s class status; (2) they deprive class-advantaged but racially disadvantaged students an individualized review; and (3) they function as a racial preference for students with the most inherited racial advantage. See Jonathan P. Feingold, “All (Poor) Lives Matter”: *How Class-Not-Race*

A “narrower” version might instead account for the common failure of standard metrics to accurately capture the existing talent and competencies of students from negatively stereotyped groups.¹⁴⁵ This “fair appraisals” story attends specifically to illusory portions of group-based performance gaps—portions that reflect measurement errors, not real differences in individual or group-based qualifications.¹⁴⁶ If left unaddressed, these “racial mismeasures” operate as a racial preference for White applicants.¹⁴⁷

For present purposes, I focus on this narrower “fair appraisals” rationale because it enjoys the most direct doctrinal support. I refer specifically to Justice Powell’s opinion in *Regents of the Univ. of Calif. v. Bakke*.¹⁴⁸ Many know *Bakke* as the case in which Powell introduced the diversity rationale. Far fewer are familiar with a separate piece of Powell’s opinion—his observation that affirmative action could produce a more objective and meritocratic admissions process:

[The] *fair appraisal* of each individual’s academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be

Logic Reinscribes Race and Class Privilege, U. CHI. L. REV. ONLINE 47 (2020); Cheryl I. Harris, *Fisher’s Foibles: From Race and Class to Class Not Race*, UCLA L. REV. DISCOURSE (2017) (“In casting race-conscious affirmative action as a fight for access to privilege, the class over race discourse erases the history of working class struggle for such programs, the ameliorative effect of race conscious affirmative action in alleviating inequality, and racism’s ongoing negative impact on middle class Blacks.”).

145 See generally Feingold, *Colorblind Capture*, *supra* note 91 at 1994–95 (“This is not a ‘pipeline story that attributes the underrepresentation of Black and Latinx students to past discrimination (e.g., racially disparate access to well-resourced K-12 schools). Rather, this is a story about universities privileging fraught measures of ‘merit’ that, in practice, subject students of color to unequal treatment by understating their true academic qualifications. When universities fail to correct for fraught metrics, they confer racial advantages to wealthy white students. Affirmative action, by countering those racial advantages, promotes a more objective, individualized, and race-neutral process.”).

146 The “fair appraisal” rationale I identify herein is distinct from arguments that challenge the notion of merit itself; contend that standard metrics do not measure the traits that universities should care about; or challenge standard metrics’ lack of predictive validity. See Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1455 (1997) (arguing that “merit” in the law school admissions context was, as initially constructed, tied “to the profession’s desire to bar entry to immigrants and people of color”); See Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1270, 1314 (1995) (“In the best scenario, employment tests provide only limited predictive information so that it is difficult to make confident distinctions among individuals based solely on their test scores” and that “[t]est scores, at best, are imprecise measures of ability, however if used properly they can provide some information to employers”); Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1241 (2011) (“Research demonstrates that the predictive inadequacies of, and scientifically unjustified racial differences in, scores on conventional factorist tests like the SAT may be legally cognizable ‘test deficiencies.’”).

147 Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 529 (2019) (“[D]ecades of research on implicit bias and stereotype threat reveals that common measures of merit, although facially neutral, fail to produce racially neutral results. Rather, they produce what I term ‘racial mismeasures,’ a concept I use to describe facially neutral tools that predictably and systematically mismeasure merit because of an individual’s race.”).

148 438 U.S. 265 (1978).

argued that there is *no* “preference” at all.¹⁴⁹

Justice Powell recognized that standard metrics might understate the academic promise and potential of students from negatively stereotyped groups. In a detailed analysis of the above passage, Professor Devon Carbado has outlined how Powell’s “fair appraisal” framing alters standard conceptualizations of affirmative action:

[Affirmative action] counteract[s] race-based disadvantages that students of color face as they prepare for college, as they put together their admissions file, and as that file is reviewed by admissions officers. At each of these steps, systematic biases introduce inaccuracies that understate the academic accomplishments and promise of those students. Affirmative action helps offset the disadvantages those biases create.¹⁵⁰

Carbado surfaces how the fair appraisal rationale—and its substantial empirical support—troubles the near ubiquitous assumption that race-conscious admissions policies constitute “preferential treatment” that harm “innocent” third parties. This matters, in part, because the presumption that affirmative action comprises a “racial preference” anchors the Supreme Court’s longstanding hostility to such practices.¹⁵¹ Yet even Justice Powell recognized that this characterization relies on the assumption that standard metrics accurately capture the existing abilities of all students.¹⁵²

Chief Justice Roberts employs this common conflation. On at least eighteen separate occasions in *SFFA*, the Chief Justice uses the term “preference” to characterize and de-legitimize the defendants’ race-based admissions practices.¹⁵³ This framing internalizes the assumption that racial advantages and disadvantages do not infiltrate admissions processes until the moment affirmative action arrives. But as Carbado highlights, this assumption comprises a “highly contestable claim, not an empirical fact.”¹⁵⁴ And as I have previously detailed, “a substantial portion of ‘achievement gaps’ reflect measurement errors that artificially inflate the relative merit of white students—not actual differences in preparation, ability, or motivation.”¹⁵⁵ To borrow Justice Powell’s words, an affirmative action policy that counters these unearned white racial advantages should constitute “no ‘preference’ at all.”¹⁵⁶

Harvard and UNC could have employed a “fair appraisal” rationale.¹⁵⁷ Neither

149 *Id.* at 306 n.43.

150 See Carbado, *Footnote 43, supra* note 4 (“Instead of the misleading conceptualization of the policy as a preference, footnote forty-three provides a more appropriate understanding of affirmative action as a countermeasure.”)

151 See *supra* Part I.A.

152 See *Bakke*, 438 U.S. at 306 n.43.

153 See *SFFA v. Harvard*, 600 U.S. 181, 212-229 (2023).

154 Carbado, *Footnote 43, supra* note 4, at 1132.

155 Feingold, *Colorblind Capture, supra* note 91, at 1994.

156 *Bakke*, 438 U.S. at 306 n.43.

157 See Feingold & Harpalani, *Amicus Brief, supra* note 23 at 15–16 (“By considering race, Respondents counter unearned racial advantages that benefit (predominately wealthy) white applicants. Respondents’ RCAPs, in turn, constitute modest antidiscrimination measures that reduce race’s impact on admissions,

did. This was disappointing, in part, because the limited evidence SFFA presented could have anchored this precise argument.¹⁵⁸ Recall that SFFA alleged that Harvard intentionally discriminated against Asian Americans.¹⁵⁹ To support this claim, SFFA presented evidence that anti-Asian bias (1) came from colorblind components of Harvard's admissions process and (2) principally benefited wealthy White applicants.¹⁶⁰

More specifically, SFFA targeted Harvard's personal rating, which "summarizes an applicant's personal qualities based on an 'applicant's essays, their responses to short-answer questions, teachers' and guidance counselors' qualitative observations about applicants, alumni interviewers' comments, and much other information."¹⁶¹ According to SFFA, Asian Americans received lower scores on that metric relative to similarly situated White applicants.¹⁶² Multiple theories could explain this disparity. One is that implicit biases caused evaluators—such as guidance counselors or alumni interviewers—to rate Asian Americans lower than White applicants for materially identical performance.¹⁶³ A separate theory is that White applicants were more likely to attend private high schools with low student-to-guidance counselor ratios.¹⁶⁴ Regardless of the theory, one thing is clear: Harvard's formal race-based policy did not cause this alleged race-based harm.

Harvard could have argued that SFFA's evidence of anti-Asian bias rendered affirmative action even more important—specifically, as a tool to counter "racial

promote a more objective process, and protect students' of color right to compete on their individual "merit," irrespective of their race.").

158 See generally Jonathan Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

159 See *id.*

160 SFFA argued, for example, that "even taking 'Harvard's scoring of applicants at face value, Harvard imposes a penalty against Asian Americans as compared to whites' that 'has a significant effect on an Asian-American applicant's probability of admission.'" Plaintiffs Memorandum of Reasons in Support of Its Motion for Summary Judgment at 10, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard Coll.*, No. 1:14-cv-14176-ADB (D. Mass. June 15, 2018); see also *id.* ("An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white - even including the biased personal rating.").

161 *Students for Fair Admission, Inc., v. President and Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 183 (D. Mass. 2018). Admission officers further assign the personal rating based on their assessment of a variety of other factors, including the applicant's "humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities." *Id.*

162 See *id.*

163 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 203 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023) ("Finally, SFFA argues that 'the district court recognized that one likely explanation for why Asian Americans are penalized in the admissions process is Harvard's 'implicit bias' and that calling the bias 'implicit' does not make it legal.") (internal quotation marks omitted).

164 See Julie Park & Sooji Kim, *Harvard's Personal Rating: The Impact of Private High School Attendance*, 30 ASIAN AM. POL'Y REV. 2020 ("White Harvard applicants are considerably more likely to experience the advantages associated with private school college counseling, and that's a real advantage in the hypercompetitive world of elite college admissions. Asian Americans are not less personable, but even well-meaning public school counselors generally cannot dedicate the individualized time to their students like private school counselors."). See Mike Hoa Nguyen, et al., *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in SFFA v. Harvard*, 48 J. COL. & UNIV. L. 369, 384 (2023).

mismeasures” that inflated the qualifications of White students relative to their Asian American counterparts. Harvard never raised this argument. And in an ironic twist, by striking down Harvard’s existing affirmative action policy, Chief Justice Roberts hindered Harvard’s ability to mitigate the barriers Asian American students face while leaving untouched the practices that create those precise barriers.

B. Policies That Employ Colorblind Criteria

Above, I identified four rationales that remain available to defend race-conscious admissions policies. I also acknowledged that when it comes to race-conscious policies, even a robust factual record and sound theoretical argument might be insufficient before this Supreme Court.

A different story concerns policies that employ colorblind criteria—that is, policies that *do not* distinguish between individual applicants on the basis of their respective racial identities. Whereas racial classifications are legally suspect, facially neutral conduct is presumptively constitutional—even if the policy is adopted to promote equality-oriented goals like racial diversity or racial inclusion on campus.¹⁶⁵ Unfortunately, substantial commentary post-*SFFA* has generated confusion about the legality of such practices. This confusion heightens the risk well-meaning universities will jettison or otherwise avoid lawful conduct.¹⁶⁶ Doing so might reduce legal and political attacks in the short term. But it comes at great expense and forfeits tools that remain legally secure—even after *SFFA*. To aide against unnecessary overcorrection, I now highlight five facially neutral practices that present no constitutional concern.

1. Universities May Consider a Student’s Personal Experiences with Race and Racism

In *SFFA*, Chief Justice Roberts emphasized that universities remain free to consider each student’s personal experiences with race and racism:

[A]s all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.¹⁶⁷

This passage should reassure universities that they may formally consider how race and racism affects, or has affected, their applicants—or what I term *personal race/ism* information.¹⁶⁸ In many respects, this reassurance should not have been

¹⁶⁵ See generally Starr, *The Magnet School Wars*, *supra* note 52; Feingold, *The Right to Inequality*, *supra* note 61.

¹⁶⁶ Liam Knox, *An Overabundance of Caution*, INSIDE HIGHER ED (Aug. 9, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/08/09/are-colleges-overcorrecting-affirmative-action>.

¹⁶⁷ *SFFA v. Harvard*, 600 U.S. 181, 231 (2023).

¹⁶⁸ See also U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT’S DECISION IN STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIV. OF N.C. (2023) https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf [hereinafter DOJ/DOE Guidance] (“[I]nstitutions of higher education remain free to consider any quality or characteristic of a student that bears on the institution’s admission decision, such as courage, motivation, or determination, even if the student’s application ties that characteristic to their lived experience with

necessary; it reflects basic elements of the Supreme Court's well-established equal protection jurisprudence.

Existing doctrine draws a rigid distinction between policies that employ racial classifications and policies that employ colorblind (or facially neutral) criteria. Racial classifications are presumptively unconstitutional and must satisfy strict scrutiny.¹⁶⁹ Facially neutral policies are presumptively lawful and need only satisfy rational basis review.¹⁷⁰ The Supreme Court has justified this rigid dichotomy by arguing that racial classifications pose special concerns that do not implicate facially neutral conduct.¹⁷¹

SFFA challenged Harvard and UNC's use of racial classifications—that is, the component of their admissions processes that permitted reviewers to consider the racial identity of individual applicants.¹⁷² This explains why the defendants bore the near-insurmountable burden of satisfying strict scrutiny. Had Harvard and UNC possessed the same underlying goals but considered each student's personal race/ism information (a facially neutral criteria), strict scrutiny would not have applied. Instead, SFFA would have had to prove that the defendants adopted that specific policy with "an impermissible racial purpose." This is a near-insurmountable burden for the plaintiff, in part, because facially neutral policies enjoy substantial deference.¹⁷³

To appreciate the distinction between racial classifications and facially neutral criteria, consider the following hypothetical. Imagine two applicants with materially identical paper records. They grew up in the same affluent neighborhood, attended the same high school, received the same GPA and SAT scores, and engaged in the

race—provided that any benefit is tied to 'that student's' characteristics, and that the student is 'treated based on his or her experiences as an individual[,] and 'not on the basis of race.'").

169 See *SFFA v. Harvard*, 600 U.S. at 207.

170 See *Washington v. Davis*, 426 U.S. 229, 247 (1976). To invalidate a facially neutral policy, the plaintiff must provide evidence that the defendant adopted the challenged policy with an "impermissible racial purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). If the plaintiff makes this prima facie showing, the burden shifts to the defendant to prove that it would have adopted the policy "even had the impermissible purpose not been considered." *Id.* at 270 n.21.

171 See *SFFA v. Harvard*, 600 U.S. 212 ("[The *Grutter* court] observed that all racial classifications, however compelling their goals, were dangerous. And it cautioned that all race-based governmental action should remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.") (internal quotation marks and brackets omitted). See also *id.* at 208 ("Our acceptance of race-based state action has been rare for a reason. Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

172 The target of SFFA's legal challenges, coupled with the conservative Justices' embrace of "race-neutral alternatives," helps to clarify that when Roberts employs (with derision) terms like "racial discrimination," "race-based," or "race-qua-race," he is referencing the piece of Harvard and UNC's respective policies that permitted admissions officers to consider the racial identity of individual applicants. He is not referencing the defendants' racial diversity-related goals.

173 See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) ("[B]ecause an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."). Cf. Peter Salib and Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 1 (2023).

same extracurricular activity: the school newspaper. The students differ in two relevant respects.¹⁷⁴ First, they possess distinct racial identities. The first student, Brett, identifies as White; the second, Neal, identifies as Asian American. The students self-report this racial identity information on their application forms. Second, the students have different experiences with race and racism. The students describe those experiences in their admission essays.

Brett describes his high school experience as relatively uneventful. He notes that his high school is overwhelmingly White but that he rarely thinks about his own racial identity or broader racial dynamics. The one exception came from his time on the school newspaper. He notes that unlike the school as a whole, the newspaper's student staff is predominately Asian American. The teacher who oversees the newspaper is also Asian American. Brett shares that prior to joining the newspaper, he had never felt self-conscious about his racial identity. But he admits that in the newspaper's office, he cannot help but feel vigilant about his racial identity—at times concerned about how the other members of the newspaper will perceive him and his actions. He recalls times when he felt anxious that if he revealed ignorance about Asian American history, he might confirm stereotypes his classmates hold about people racialized as White.¹⁷⁵ He also reflects that his experience on the newspaper has heightened his appreciation for why racial representation can matter—and even affect how students feel inside the classroom.

Neal describes a different high school experience. Like Brett, Neal's parents were high-earning professionals. But unlike Brett, Neal describes a childhood in which he was constantly thinking about his racial identity. He describes navigating predominately White environments where he routinely encountered subtle and more overt cues that he and his family were not welcome. He describes the exhaustion, stress, and fear that he regularly carries with him—experiences that are most acute when he is the only Asian American person in the room. In contrast to Brett, Neal describes the newspaper as a site of temporary relief—a place where he can let down his guard and “just be himself.” He longs for a university where he can avoid the toll of severe underrepresentation—both in student groups and in the classes he must take for his planned English/ Art History double major.

To recap. The students provide two types of information: (1) their racial identity information and (2) their personal race/ism information. Nothing prohibits a university from obtaining, knowing, or otherwise learning about either type of

174 This is a stylized example that flattens the complexities of identity, race, and racism. I nonetheless employ it to help concretize the difference between a presumptively unlawful *race-based* policy that considers “race-qua-race” and a presumptively lawful *colorblind* policy that considers personal race/ism experience.

175 The fear that negative performance on a particular task could confirm a stereotype about a group to which a person belongs is known as *stereotype threat*. See Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CALIF. L. REV. 307, 330–39 (2015). Decades of empirical scholarship suggest that stereotype threat is responsible for a considerable portion of racial and gender-based achievement gaps. See *id.* at 327 (reviewing two “meta-analyses [that] provide evidence that stereotype threat accounts for a quarter of the white-black SAT gap and a third of the white-Latino SAT gap”).

information.¹⁷⁶ The key doctrinal question is whether a university may consider either type of information when making an admissions decision. If Harvard considers Brett's or Neal's racial identity as a positive factor, that would constitute a presumptively unlawful racial classification.¹⁷⁷ Harvard would have to satisfy strict scrutiny to save the policy. In contrast, if Harvard considers either applicant's personal race/ism information, that would constitute a presumptively lawful facially neutral policy.¹⁷⁸ The plaintiff would carry the burden of proving that Harvard adopted the policy with an "impermissible racial purpose."

Two related points deserve note. First, the fact that universities can consider personal race/ism information dictates neither *what* constitutes personal race/ism information nor *why* universities should consider it.

As to the *what*, this underdefined category of information could entail, *inter alia*,¹⁷⁹ (1) whether a student attended a racially diverse high school; (2) whether the student was part of a severely underrepresented racial group in high school; (3) whether a student grew up in a formerly redlined neighborhood; (4) whether a student has relatives who physically fled racialized violence in the United States or abroad; (5) whether a student has relatives who lost property or personal liberty from racialized campaigns in the United States or abroad; (6) whether a student encounters forms of racial bias on a daily basis; (7) whether a student has formally studied race and racism; (8) whether a student has previously engaged in academic, professional, or other work that supports antiracist efforts.

As to the *why*, there are at least three obvious reasons why a university might positively weigh an applicant's personal race/ism information: (1) it is part of academic "merit"¹⁸⁰; (2) it promotes a more *holistic and individualized* review; (3) it yields *discourse and equality* benefits.¹⁸¹

176 See *infra* Part II.B.3.

177 This reflects the component of Harvard's and UNC's respective admissions processes that SFFA challenged and the Supreme Court invalidated.

178 This is the scenario Chief Justice Roberts invokes when he states that nothing in *SFFA* should be construed as "prohibiting universities from considering an applicant's discussion of how race affected his or her life." *SFFA v. Harvard*, 600 U.S. 181, 230 (2023).

179 This list is nonexhaustive. I include it to highlight the broad swath of information that could constitute personal race/ism information.

180 More precisely, a university may conceptualize merit to include a student's racial literacy—that is, their ability to talk and think about race and racism with a heightened level of sophistication. A student's personal race/ism information—either through their own experiences or formal study—might provide this sort of literacy. See Jonathan Feingold & Arnie Arnesen, *Why Ask Students About Race, #RaceClass*, <https://soundcloud.com/user-808872105/ep-21-why-ask-students-about-race?> (last visited Nov. 15, 2023).

181 As to discourse benefits, universities are better situated to promote a robust marketplace of ideas if their leaders, faculty and students bring a diverse set of experiences with race/ism. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'). As to equality benefits, a student body that better appreciates the tax that comes from racial underrepresentation and racial stereotyping will be better positioned to promote a racially inclusive learning environment. See generally Feingold, *Hidden in Plain Sight supra* note 26 (explaining how racial diversity furthers the

Second, the source of the information does not affect the doctrinal analysis. If a university formally considers racial identity as a plus factor, that is presumptively unconstitutional—whether the university obtains the information through a self-reported check box or infers it through an admissions essay. The same applies to personal race/ism information. Whether the information comes from an admissions essay or elsewhere, use of that information raises no independent legal concerns.¹⁸² For various reasons, it might behoove a university to obtain such information through channels other than the admissions essay.¹⁸³ Some personal race/ism information could be gleaned through surveys that ask students to answer specific questions. Other types of information could be available through indirect means.

For present purposes, my goal is not to identify precisely what constitutes personal race/ism information, why a university would consider it, or how a university would acquire it. Those are questions each university should consider in light of their specific mission and local context. My primary goal is to (1) invite universities to think critically about the foregoing and (2) reiterate that reliance on personal race/ism information, regardless of the source, presents no independent constitutional concern.

2. *University's May Employ Colorblind Criteria to Promote Racial Diversity*

One can generalize the preceding section into the broader proposition that *SFFA* did nothing to limit a university's ability to utilize colorblind criteria to realize equality-oriented goals.¹⁸⁴ Federal guidance from the Departments of Justice and Education (DOJ/DOE Guidance) puts this plainly: “[N]othing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions.” The DOJ/DOE Guidance appropriately distinguishes between facially neutral admissions policies (no constitutional concern) and policies that distinguish between individual students based on their racial identity (presumptively suspect).¹⁸⁵

goal of an equal learning environment).

182 Notwithstanding the recent emphasis on admissions essays, there is no obvious doctrinal reason why a university could not rely on information about a student's personal race/ism experience obtained through other sources.

183 There are multiple reasons why a university might want to avoid overrelying on the personal essay for personal race/ism information. One reason is that doing so could unfairly advantage students with the most access to coaching and resources. A second reason is that forcing students to produce this information can be traumatizing—another tax that will likely fall unevenly on students of color. See Vinay Harpalani, *Secret Admissions*, 48 J. COL. & UNIV. L. 325, 368 (2023). See also Atinuke Adediran, *The United States Supreme Court Puts an End to Consideration of Race in University Admissions and Potentially Increases Racial Trauma for Applicants*, OXFORD HUMAN RIGHTS HUB (July 4, 2023), <https://ohrh.law.ox.ac.uk/the-united-states-supreme-court-puts-an-end-to-the-consideration-of-race-in-university-admissions-and-potentially-increases-racial-trauma-for-applicants/>.

184 See DOJ/DOE Guidance, *supra* note 168.

185 One way to understand this distinction is to divide a policy into its means and its motive. The means determine whether or not strict scrutiny applies. Only policies that employ racial classifications (the means) trigger strict scrutiny. See *SFFA v. Harvard*, 600 U.S. 181, 214 (2023) (“Because “[r]acial discrimination [is] invidious in all contexts ... we have required that universities operate their race-based

In *SFFA*, Chief Justice Roberts reinforced this distinction. To begin, the Chief Justice reiterated that racial classifications pose special concerns that demand heightened scrutiny.¹⁸⁶ According to the Supreme Court, those concerns are specific to racial classifications; they do not extend to facially neutral conduct.¹⁸⁷

One sees this within strict scrutiny itself. Narrow tailoring, for example, requires universities to avoid race-conscious policies if “race-neutral alternatives” could achieve the desired end.¹⁸⁸ This requirement reinforces two key points. First, race-based affirmative action is constitutionally suspect because of the racial means, not the racial motive. Were it otherwise, a “race-neutral alternative” should not save the policy.¹⁸⁹ Second, all racial classifications are suspect, but only some racial motives are impermissible.¹⁹⁰ And, critically, permissible racial motives include equality-oriented goals like racial diversity and racial inclusion.¹⁹¹

admissions programs in a manner that is sufficiently measurable to permit judicial [review] under the rubric of strict scrutiny.”). Facially neutral policies, even if they are designed to promote certain racial motives like racial diversity (the motive), need only satisfy rational basis review. *See Washington v. Davis*, 426 U.S. 229, 246 (1976) (“As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.”).

186 *See SFFA v. Harvard*, 600 U.S. at 208 (Our acceptance of race-based state action has been rare for a reason. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. That principle cannot be overridden except in the most extraordinary case.”) (internal citations and quotation marks omitted); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm.”).

187 *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in judgment) (“The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.”). One point of potential confusion is Kennedy’s use of the term “race-conscious.” That term is often used to describe admissions policies that employ racial classifications. In this passage, Justice Kennedy is using the term to describe facially neutral admissions policies designed to achieve racial results.

188 *See Grutter*, 539 U.S. at 339 (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

189 *See Parents Involved*, 551 U.S. at 735 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989)). (Kennedy, J., concurring in part and concurring in judgment) (racial classifications permitted only “as a last resort”); (“This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past.”).

190 *See Ian Ayres, Narrow Tailoring*, 43 UCLA L. REV. 1781, 1792–93 (1996) (“The *Adarand* / *Croson* preference for ‘race-neutral means to increase minority participation’ clearly contemplates legislative action ‘because of’ its effects on minority entrepreneurs. And while it is difficult to clearly specify the minimum requirement for establishing a ‘predominant’ motivating factor, it should not be difficult to conclude that subsidies fashioned to increase minority participation are predominantly motivated by race.”).

191 *See Richard A. Primus, Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV.

Imagine if *SFFA* had challenged UNC's former policy of de jure segregation (as opposed to its recent affirmative action policy).¹⁹² UNC could not save this exclusionary and animus-laden policy by proving that race-neutral alternatives were unavailable. Nor could UNC constitutionally pursue the same ends through facially neutral means. No court would suggest as much. The reason is that in the context of de jure segregation, the constitutional infirmity lies in the racial means *and* the racial motive.

Juxtapose this with what actually transpired in *SFFA*.¹⁹³ Every conservative Justice condemned the challenged policies and racial classifications more broadly.¹⁹⁴ Many of those same opinions admonished Harvard and UNC for failing to adopt (or even invited the defendants to adopt) "race-neutral alternatives" to achieve a racially diverse student body.¹⁹⁵ This highlights that Harvard and UNC's policies were suspect because they employed racial classifications, not because they aimed to promote racial diversity or related goals.¹⁹⁶

493, 541 (2003) ("Instead of setting aside a certain percentage of contracting business for minority-owned contractors, the *Croson* Court wrote, the city of Richmond could have modified its municipal contracting practices in other ways that, without making race itself a factor in awarding individual contracts, would have increased contracting opportunities for minority contractors otherwise likely to be excluded. ... *Adarand* repeated this idea that "race-neutral means to increase minority business participation" can be a constitutionally appropriate substitute when race-specific affirmative action programs would violate equal protection."); Ayres, *supra* note 191, at 1791 ("The key phrase from *Croson*, which is quoted again in *Adarand*, is the admonition that policymakers must consider 'the use of race-neutral means to increase minority business participation.' The Court is still counseling legislatures to engage in race-conscious decisionmaking—to enact certain subsidies because of the race of the beneficiaries. And, of course, the Court cannot avoid this causal connection: Any race-neutral program attempting to remedy past racial discrimination would necessarily have a motive to benefit the victimized race.").

192 See Feingold, *Ambivalent Advocates*, *supra* note 8 (discussing UNC's history of formal racial exclusion).

193 Prior to *SFFA*, conservative Justices hostile to affirmative action invited defendants to employ colorblind policies to achieve racially motivated results. Justice Scalia's opinion in *Richmond v. Croson* is illustrative. Concurring in a judgment that struck down Richmond, Virginia's set-aside for minority contractors, Justice Scalia denied any legal distinction between Jim Crow and affirmative action; he claimed both violated the Fourteenth Amendment's colorblindness mandate. *City of Richmond*, 488 U.S. at 520 (Scalia, J., concurring) ("I do not agree ... with Justice O'Connor's dictum suggesting that ... state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.'"). And yet, Scalia invited Richmond to employ facially neutral policies to achieve the same racially motivated ends. *See id.* at 526 ("A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.").

194 See, e.g., *SFFA v. Harvard*, 600 U.S. 181, 284 (2023) (Thomas, J., concurring) ("To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means.").

195 See, e.g., *id.* at 317 (Kavanaugh, J., concurring) ("[G]overnments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'" (quoting *City of Richmond*, 488 U.S. at 526, 109 S. Ct. 706 (Scalia, J., concurring in judgment) (internal quotation marks omitted))).

196 Chief Justice Roberts articulated a similar position in *Parents Involved*, which invalidated

Justice Kavanaugh makes this point explicit.¹⁹⁷ In his concurrence, Kavanaugh quotes *Grutter* for the proposition that narrow tailoring “requires courts to examine ... whether a racial classification is ‘necessary’—in other words, whether race-neutral alternatives could adequately achieve the government interest.”¹⁹⁸ Kavanaugh must know that in *Grutter*, the Law School argued that racial classifications were necessary to realize a racially diverse student body.¹⁹⁹ Were there any confusion, Kavanaugh concludes with the following passage (which itself cites prior opinions from Justices O’Connor and Scalia):

[A]lthough progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. ... [G]overnments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.²⁰⁰

Justice Gorsuch also invokes “race-neutral alternatives” to discredit the defendants’ use of racial classifications.²⁰¹ The relevant passage appears to condone “universities across the country” that have sought racial diversity through facially neutral means like “reducing legacy preferences, increasing financial aid, and the like.”²⁰² Gorsuch extends this argument by noting that SFFA “submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices.”²⁰³

Even Justice Thomas, the Court’s most vocal affirmative action opponent, offered a similar take.²⁰⁴ Also citing Scalia’s concurrence in *Croson v. Richmond*, Thomas remarked that nineteenth century laws designed to remedy racial inequality were permissible because they avoided racial classifications: “[E]ven if targeting race

voluntary race-conscious K-12 desegregation policies but invited race-neutral alternatives. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (“The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications.”).

197 *See SFFA v. Harvard*, 600 U.S. at 311 (Kavanaugh, J., concurring).

198 *See id.*

199 *See id.* at 313–14.

200 *Id.* at 317 (citing *City of Richmond*, 488 U.S. at 526 (Scalia, J., concurring in judgment) (internal quotation marks omitted); *see id.*, at 509 (plurality opinion of O’Connor, J.)).

201 *See id.* at 299 (Gorsuch, J., concurring) (“Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like.”).

202 *See id.*

203 *Id.* at 300.

204 *See id.* at 249–50 (Thomas, J., concurring).

as such—[these laws] likely were also constitutionally permissible examples of Government action ‘undoing the effects of past discrimination in a way that does not involve classification by race,’ even though they had ‘a racially disproportionate impact.’²⁰⁵ Thomas included the 1865 and 1866 Freedmen’s Bureau Acts, both of which directed assistance to “freedmen.”²⁰⁶ Thomas reasoned that neither Act contravened the Constitution’s equality guarantees because “freedman” is a “formally race-neutral category, not blacks writ large.”²⁰⁷

The upshot is that under prevailing doctrine, facially neutral efforts to achieve racial diversity raise no constitutional concern.²⁰⁸ Chief Justice Roberts’s majority opinion is in accord. The Chief Justice condemned Harvard and UNC’s means while condoning their motives. The Chief Justice concluded that neither defendant proffered a viable *compelling* interest. But he did not disparage the defendants’ diversity-related motives. To the contrary, Chief Justice Roberts deemed them “commendable.”²⁰⁹

Also, as noted, *SFFA* formally left *Grutter* and the diversity rationale in tact. This means that racial diversity remains a constitutionally compelling interest—at least as a formal matter. Were the Supreme Court to invalidate a facially neutral policy designed to promote racial diversity, it would effectively enshrine a constitutional framework at war with itself—one in which racial diversity is both compelling and impermissible.

3. *Universities May Know and Learn the Racial Identity of Individual Applicants and May Model and Analyze Their Practices’ Racial Impact*

SFFA does not prohibit universities from knowing or learning their applicants’ individual racial identities or collecting and analyzing that information in the aggregate.²¹⁰ *SFFA* requested that the Supreme Court prohibit Harvard and UNC from knowing or becoming aware of each applicant’s racial identity.²¹¹ It is not surprising that the Supreme Court never seriously considered this request, which

205 *Id.* at 249 (internal brackets omitted) (citing *City of Richmond*, Scalia, J., concurring in judgment).

206 *See id.* at 247–51.

207 *Id.* at 247.

208 As referenced herein, pending litigation from the Pacific Legal Foundation seeks to upend this aspect of prevailing doctrine. *See Glater, Reflections on Selectivity*, *supra* note 57.

209 *SFFA v. Harvard*, 600 U.S. at 214. This is consistent with *Parents Involved*, in which Chief Justice Roberts condemned the use of racial classifications, but characterized the defendants’ racial motives as a “worthy goal.” *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (“Our established strict scrutiny test for racial classifications, however, insists on ‘detailed examination, both as to ends and as to means.’ Simply because the school districts may seek a *worthy goal* does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.”) (emphasis added).

210 *See DOJ/DOE Guidance*, *supra* note 168 (“As stated above in Question 2, admissions officers need not be prevented from learning an individual applicant’s race if, for example, the applicant discussed in an application essay how race affected their life.”).

211 *See Complaint* at 119, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-14176 (D. Mass. Nov. 14, 2014), *supra* note 6.

SFFA effectively abandoned during the litigation. Beyond the request's impracticability,²¹² universities need to obtain and analyze racial demographic information to identify and avoid policies and practices that disparately impact certain groups.²¹³

Chief Justice Roberts made clear that admissions officers may know the racial identity of individual applicants when he identified race/ism information as a permissible consideration.²¹⁴ In the same passage, Chief Justice Roberts emphasized that Harvard and UNC could not use that information to covertly reestablish "the regime we hold unlawful today."²¹⁵ As discussed above, the unlawful "regime" refers to the defendants' use of racial classifications, not their knowledge of individual racial identities nor their diversity-related goals.²¹⁶

If confusion persists, consider any other context in which an entity is permitted to know individuals' racial identities but prohibited from treating those individuals differently based on that information. Racial profiling is a useful analogy. If the police choose to stop person A because person A is (or is perceived to be) Asian American, that race-based disparate treatment would raise serious Fourteenth Amendment concerns.²¹⁷ At the same time, nothing prohibits the police from learning the racial identity (or perceived racial identity) of the individuals they encounter on the street. If anything, collecting and analyzing demographic information about police encounters better positions law enforcement to avoid or minimize practices that disparately harm certain racial groups.

Translated to the admissions context, nothing prohibits Harvard from preemptively modeling, contemporaneously tracking, or subsequently analyzing the racial impact of its admissions process.²¹⁸ Nor does *SFFA* prohibit Harvard from adjusting its process based on analysis that reveals a colorblind criterion is disparately harming an identifiable racial group. Imagine if halfway through an admissions cycle, Harvard discovers that Asian American admits are conspicuously underrepresented. That triggers concern and a corresponding internal analysis that identifies two likely culprits: (a) Harvard's overreliance on guidance counselor

212 See Feingold, *SFFA v. Harvard*, *supra* note 158.

213 See DOJ/DOE Guidance, *supra* note 168 ("Data containing demographic information about an institution's student applicant pool, student admissions outcomes, and student enrollment and retention provide institutions with critical information related to their programs and objectives."). See also *infra* Part III.A.

214 *SFFA v. Harvard*, 600 U.S. at 230.

215 *Id.*

216 See *supra* Part II.B.1.

217 See *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

218 DOJ/DOE Guidance, *supra* note 168 ("Similarly, institutions may investigate whether the mechanics of their admissions processes are inadvertently screening out students who would thrive and contribute greatly on campus. ... The Court's decision likewise does not prohibit admissions models and strategies that do not consider an individual's race, such as those that offer admission to students based on attendance at certain secondary or post-secondary institutions or based on other race-neutral criteria.").

letters of recommendation and (b) Harvard's legacy preferences.²¹⁹ Both criteria systematically advantage White applicants, who gain admission over their equally qualified, if not more qualified, Asian American counterparts.²²⁰

As noted, Harvard has only filled half its admit class. The question, therefore, is what can Harvard do (practically and legally) to correct or mitigate a process defect that favors White applicants over equally (or more) qualified Asian American applicants. Per *SFFA*, a concern would arise if Harvard rectified the problem by treating Asian American identity as a plus factor in the admissions process.²²¹ That would be "reestablish[ing]" the "regime" *SFFA* deemed "unlawful." In contrast, it should raise no legal concern if Harvard ceased considering both criteria for the remainder of its admissions cycle.²²² Even if done for a racial purpose, this mid-cycle shift reflects the type of "race-neutral alternative" conservative Justices have endorsed for decades.²²³

4. Universities May Proudly Proclaim Their Equality-oriented Values

Nothing in *SFFA* limits a university's expansive right to openly and unapologetically express its commitment to equality-oriented goals like racial justice, antiracism, racial diversity, and racial inclusion.²²⁴ Such public proclamations are lawful and often key to fostering a welcoming campus environment.

There is a common narrative that universities—and the government more broadly—should be neutral. The basic claim is that the government should not pick sides, particularly on controversial topics.²²⁵ In certain respects, this is true. When a

219 This fact pattern reflects the evidence of anti-Asian bias *SFFA* presented in *SFFA v. Harvard*. See Feingold, *SFFA v. Harvard*, *supra* note 158.

220 See *id.*

221 Although this race-conscious response would trigger strict scrutiny, Harvard could defend the specific policy under remedial or fair appraisal rationales (especially if Harvard continued to rely on the colorblind criteria that functioned as an unfair racial preference for White applicants). See *supra* Parts II.A.2, II.A.4.

222 This mid-cycle shift, which would alter the admissions process for a yet-to-be-admitted cohort, distinguishes the hypothetical from *Ricci v. DeStefano*, 129 S. Ct. 9658 (2009). In *Ricci*, the Supreme Court invalidated New Haven, CT's decision to revise a promotional procedure after discovering that a component of the initial evaluation process had a severe adverse impact on African American firefighters. See *id.* Identifiable White firefighters who would have been promoted under the initial process sued. See *id.* Richard Primus has argued that the existence of these identifiable "visible victims" rendered the racially motivated decision suspect—whereas similar decisionmaking that lacks visible victims would not. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1369–75 (2010).

223 See *supra* Part II.B.2.

224 In pending litigation, affirmative action opponents have invoked equality-oriented statements to challenge the legality of facially neutral efforts to promote racial diversity. See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023). In a separate piece, I explain why the legal theory underlying those challenges lacks a coherent doctrinal anchor but could nonetheless find a sympathetic Supreme Court. See Feingold, *The Right to Inequality*, *supra* note 61.

225 Widespread criticism targeting university statements concerning the conflict in Israel and Gaza belies this neutrality narrative. See Emma Hurt & Eleanor Hawkins, *Universities Struggle with Responses as Israel–Hamas War reverberates*, AXIOS (Oct. 18, 2023), <https://www.axios.com/2023/10/18/israel-hamas-palestine-gaza-college-universities-statement>. Rather than demand neutrality, much of the criticism aimed at universities faults institutional statements for being *too* neutral and for not staking out a more partial position. See *id.*

public university regulates the speech of others, the First Amendment and related laws and values often demand some degree of neutrality.²²⁶ But in other contexts, neither law nor values demand neutrality. This is especially true when the government is acting as a *speaker* (as opposed to when the government acts as a *regulator*).²²⁷

Education law scholar Kristine Bowman has explained that “[p]ublic universities have broad leeway under the government speech doctrine to advance their views while excluding others’ view-points.”²²⁸ Bowman observes that the Supreme Court has “made clear that the government may freely express viewpoints and that it does not have (or need) First Amendment protections when doing so.”²²⁹ Free speech scholar Catherine Ross has similarly noted that “[n]o constitutional hurdle restrains administrators ... from promoting chosen messages, including exhortations that encourage empathy, sensitivity, tolerance of difference, and civil norms.”²³⁰

We might not see it, but universities choose sides all the time. This includes decisions over institutional policies, values, and curriculum. Bowman highlights this reality: “When university presidents speak at convocation and graduation, and when they communicate regularly with their campuses, they often are opining and seeking to persuade rather than demanding compliance.”²³¹ In each instance, the university is not being neutral. It is taking sides and expressing values.

First Amendment scholar Steven Calabresi has likewise observed that a neutrality requirement would conflict with the university’s core mission to pursue truth and knowledge: “I would add that public colleges, universities, and secondary schools could not even function if they did not choose to praise some viewpoints and criticize others. The praising of some things and the disapproving of others is basically at the core of what education itself is all about.”²³²

A university’s right to speak is not diminished when a topic is controversial or divisive. In fact, such topics might increase the need for a university to share its viewpoint through intentional counterspeech. This includes situations that, if left unaddressed, could create a hostile environment for students of color. To illustrate how a university can use counterspeech to promote a racially inclusive climate, Bowman recounts how University of Florida’s President Kent Fuchs used his platform to condemn the ideas espoused by rightwing ideologue Richard Spencer.²³³

When Spencer came to the University of Florida in the fall of 2018, Fuchs was outspoken in his opposition to Spencer’s message. Fuchs conveyed messages to the university community via email, video, and social media; the campus

226 See Kristine Bowman, *Universities’ Speech and the First Amendment*, 99 NEBRASKA L. REV. 896 (2020).

227 *Id.*

228 *Id.*

229 *Id.* at 912.

230 Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 768 (2017).

231 Bowman, *Universities’ Speech and the First Amendment*, *supra* note 227 at 932–33.

232 Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV. 1005, 1013 (2014).

233 Bowman, *Universities’ Speech and the First Amendment*, *supra* note 227 at 933.

newspaper; and in public settings. Bowman notes that Fuchs spoke persuasively, seeking to convince those in the university community and beyond that Spencer's views were wrong. Fuchs avoided coercive speech; he neither punished Spencer nor threatened to punish those who supported him.²³⁴

5. *SFFA Applies to Admissions Decisions Only*

In the months since *SFFA*, many universities have questioned their ability to consider race in aspects of institutional governance that transcend admissions. Common examples include financial aid and other recruitment and retention strategies.²³⁵ It is understandable that university officials view such policies as under threat.²³⁶ But it is a mistake to conclude that *SFFA* directly governs these other institutional practices.

To start, Chief Justice Roberts explicitly limited his opinion to the challenged conduct: Harvard and UNC's race-conscious admissions practices. Beyond tying his analysis to the defendants' respective policies, the Chief Justice underscored that these "cases involve whether a university may make *admissions decisions* that turn on an applicant's race."²³⁷ This language supports the position that *SFFA* does not determine the legality of other institutional policies that might also consider a student's racial identity.

Beyond Chief Justice Roberts's limiting language, factual distinctions between admissions processes and other equality-oriented practices highlight why *SFFA* does not necessarily translate. To begin, affirmative action opponents tend to frame admissions as a "zero-sum" context whereby admission for one student means rejection for another.²³⁸ This framing does not naturally extend to recruitment and retention practices—often designed to remove barriers that exclude or undermine the educational experience of students from historically excluded groups (but have no obvious "negative" effect on other groups).²³⁹

The DOJ/DOE Guidance makes a similar point:

SFFA does not require institutions to ignore race when identifying prospective students for outreach and recruitment, provided that their outreach and recruitment programs do not provide targeted groups of prospective students

234 Bowman also notes that Fuchs openly spoke in his official capacity, thus making clear that he was speaking on behalf of the university. *See id.*

235 *See* Devika Rao, *Is the End of Affirmative Action Also the End of Race-based Scholarships*, *THE WEEK* (July 8, 2023), <https://theweek.com/supreme-court/1024862/is-the-end-of-affirmative-action-also-the-end-of-race-based-scholarships>.

236 *See* Joseph Ax, *Anti-affirmative Action Group, Emboldened by US Supreme Court, Targets Scholarships*, *REUTERS* (Sept. 22, 2023), <https://www.reuters.com/world/us/anti-affirmative-action-group-emboldened-by-us-supreme-court-targets-2023-09-22/>.

237 *SFFA v. Harvard*, 600 U.S. 181, 208 (2023) (emphasis added).

238 *See id.* at 219 ("College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.").

239 *See* DOJ/DOE Guidance, *supra* note 166 ("In addition to outreach and recruitment programs, institutions may offer pathway programs that focus on increasing the pool of particular groups of college-ready applicants in high school and career and technical education programs.").

preference in the admissions process, and provided that all students—whether part of a specifically targeted group or not—enjoy the same opportunity to apply and compete for admission. Such outreach and recruitment efforts can remove barriers and promote opportunity for all, and institutions remain able to permissibly consider students’ race when engaged in those efforts.²⁴⁰

It is possible that this Supreme Court would deny any legal distinction between admissions practices and other institutional efforts to create racially diverse and inclusive campuses. But that does not mean universities should prematurely cede still-lawful conduct. It would be as if abortion providers closed shop when *Dobbs* was still pending because many predicted the Supreme Court would overturn *Roe v. Wade*. It is, of course, prudent for institutions to plan for possible future rulings. My more modest hope is that universities not unthinkingly extend *SFFA* beyond its formal holding by eliminating beneficial policies or practices that remain legally defensible.

III. LEGAL OBLIGATIONS: WHAT UNIVERSITIES MUST DO TO PROMOTE RACIAL DIVERSITY AND INCLUSION

SFFA does not relieve universities of two important legal obligations. First, federal law mandates that universities avoid unjustifiable racial disparities.²⁴¹ Second, universities have a legal duty to create and maintain equal learning environments.²⁴² Both legal obligations require regular vigilance and attention to racial outcomes and racial dynamics on campus.

A. Title VI’s Implementing Regulations Prohibit Disparate Impacts

The United States Department of Education (DOE) issues regulations to effectuate Title VI’s various mandates. These “implementing regulations” include a provision that prohibits universities from employing admissions criteria that disproportionately and unjustifiably exclude students of color.²⁴³ This disparate impact provision furthers one of Title VI’s core aims: to remove barriers that deny certain groups equal access to sites of educational opportunity.²⁴⁴ The United States Department of Justice (DOJ) has explained that the “disparate impact regulations seek to ensure that programs accepting federal money are not administered in a way that perpetuates

240 *Id.* (“In identifying prospective students through outreach and recruitment, institutions may, as many currently do, consider race and other factors that include, but are not limited to, geographic residency, financial means and socioeconomic status, family background, and parental education level.”).

241 *See infra* Part III.A.

242 *See infra* Part III.B.

243 For an extended analysis of Title VI’s implementing regulations, see Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PENN. L. REV. 1075, 1145–55 (2009); *see also* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590 (2017).

244 *See* U.S. Dep’t of Justice Civil Rights Division, *Title VI Legal Manual, Section VII: Proving Discrimination—Disparate Impact* <https://www.justice.gov/crt/fcs/T6Manual7> (last visited Nov. 21, 2023).

the repercussions of past discrimination.”²⁴⁵

Under disparate impact theories of discrimination, the analysis focuses on the consequences of a university’s actions, not the university’s motive or intent. The basic requirement is that a university must avoid policies or practices that unjustifiably harm an identifiable racial group. When a policy is shown to have a negative disparate impact on an identifiable racial group, the university must offer a “substantial legitimate justification” to support the policy.²⁴⁶ Even if the university offers an otherwise valid justification, the policy still violates Title VI’s implementing regulations if there was an available alternative that could have achieved the same result with a less discriminatory impact.²⁴⁷

Title VI’s disparate impact provision implicates university policies that disparately disadvantage students of color during the admissions process and on campus. This could include a university’s overreliance on facially neutral admissions criteria like standardized tests, guidance counselor letters of recommendation, or legacy preferences. A Boston-based civil rights organization invoked these regulations in a recent complaint submitted to the Office of Civil Rights (OCR).²⁴⁸ The complaint alleges that Harvard’s legacy admissions preferences, which overwhelmingly favor wealthy White applicants, violate Title VI and its implementing regulations.²⁴⁹

B. Title VI Mandates Equal Learning Environments

SFFA did not diminish universities’ ongoing obligation to create equal learning environments for all students. Specifically, Title VI of the Civil Rights Act of 1964 mandates that universities take affirmative steps to remedy racially hostile environments.²⁵⁰ Title IX creates parallel institutional obligations that protect students on the basis of sex.²⁵¹

Congress passed Title VI as part of a sweeping federal civil rights law known as the Civil Rights Act of 1964.²⁵² Among other benefits, Title VI enabled Congress to use its Spending Power to enforce the Supreme Court’s desegregation mandate contained in *Brown v. Board of Education*.²⁵³ Title VI was also designed to ensure that

245 *Id.*

246 *Id.*

247 *See id.*

248 Complaint Under Title VI of the Civil Rights Act of 1964 at 3, Chica Project, African Cmty Econ. Dev. of New England and Greater Bos. Latino Network v. President and Fellows of Harvard College (Harvard Corporation), U.S. Dep’t of Educ. Office for Civil Rights (July 3, 2023).

249 *Id.*

250 *See* 42 U.S.C.A. § 2000d; *see also* Cara McClellan, *Discrimination as Disruption: Addressing Hostile Environments Without Violating the Constitution*, 34 YALE L. & POL’Y REV. 1 (2015).

251 *See* 20 U.S.C. § 1681; *see also* Brian Soucek, *Speech First, Equality Last*, 55 ARIZ. ST. L. REV. 683 (2023).

252 *See* Charles Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 GEO. L.J. 1, 3 (1981).

253 *See id.* at 22-23.

federal tax dollars would not subsidize entities that engaged in racial discrimination.²⁵⁴ Prior to its passage, President John F. Kennedy outlined Title VI's purpose:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.²⁵⁵

Congress subsequently passed Title VI, which states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."²⁵⁶ Along with other federal agencies, the OCR within the United States DOE enforces Title VI and its implementing regulations.²⁵⁷

OCR has explained that "the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient" with actual or constructive knowledge violates Title VI.²⁵⁸ To constitute a racially hostile environment, the underlying conduct (e.g., physical, verbal, graphic, or written) must be "sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient."²⁵⁹ OCR further explains that "an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment."²⁶⁰

254 See Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 137 (2014).

255 See H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).

256 42 U.S.C. § 2000d.

257 U.S. Dep't of Educ. Office for Civil Rights, *Education and Title VI* (Apr 23, 2003) <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>.

258 See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 47 (Mar. 10, 1994).

259 *Id.*

260 *Id.*

If OCR determines that a racially hostile environment exists, it will evaluate whether the university has taken sufficient and effective remedial action. To satisfy Title VI, a university's response "to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment ... the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment."²⁶¹

In short, Title VI mandates that covered universities take affirmative measures to prevent racially hostile environments. Failure to do so violates students' civil rights and exposes the university to legal liability and the potential loss of federal funding.²⁶²

These obligations implicate the many sites of institutional governance that shape a university's campus climate. That includes the university's admissions process and retention practices. When universities fail to recruit, admit, and retain critical masses of students from negatively stereotype groups, the result can amplify effects like tokenization, stigma, and isolation—thereby compromising enrolled students' right to a learning environment free from racial harassment.²⁶³

IV. CONCLUSION

SFFA made it more difficult for universities to realize a host of equality-oriented goals. Looking ahead, danger lies in both understating and overstating *SFFA*'s significance. To guard against either outcome, I have offered a roadmap to help institutional leaders navigate the post-*SFFA* legal and political landscape. This case is over. But the next fight for racial justice—with legal, political, and narrative fronts—has already begun.

261 *Id.*

262 As a strategic matter, Title VI's concern with equal learning environments is attractive because it reflects the theory of constitutional equality that animates prevailing equal protection doctrine. Specifically, the Supreme Court views the equal protection clause as a constitutional mandate that safeguards personal rights. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Because the Fourteenth Amendment 'protect[s] persons, not groups,' all 'governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.' It follows from that principle that 'government may treat people differently because of their race only for the most compelling reasons.'"). Racially hostile environments undermine such rights because they deny actual students, because of their race, an equal opportunity to enjoy the full benefits of university membership. See Feingold, *Hidden in Plain Sight*, *supra* note 26.

263 See Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 EDUC. RESEARCHER 3, 115-24 (2014); Bowen, *Brilliant Disguise*, *supra* note 137.

NEW AVENUES FOR DIVERSITY AFTER STUDENTS FOR FAIR ADMISSIONS

RICHARD D. KAHLENBERG*

Abstract

In Students for Fair Admissions v. Harvard, the U.S. Supreme Court upended decades of precedent, which had allowed universities to use race as one factor in student admissions in order to advance the compelling interest of providing the educational benefits of a racially diverse student environment. In earlier decisions, in 1978, 2003, and 2016, swing conservative justices had sided with liberal justices to permit the limited use of racial preferences. But in 2023, a decisive 6–2 majority in the Harvard case and a 6–3 majority in the companion Students for Fair Admissions v. University of North Carolina case, held that the universities’ use of race could not survive strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment and a parallel requirement under Title VI of the 1964 Civil Rights Act. The Court raised a number of objections to the universities’ use of racial preferences: (1) that the diversity interests advanced by the universities were “inescapably imponderable” and not “sufficiently measurable,” (2) that their racial preferences negatively affected nonbeneficiaries, (3) that the preferences had no logical ending point, and (4) that the preferences relied on impermissible stereotypes.

The Court did not, however, say that the pursuit of the educational benefits of racial diversity is itself impermissible. This article examines two possible avenues by which higher education institutions can continue to pursue racial and ethnic diversity: (1) by considering personal essays in which students discuss their experiences of how race shaped their lives; and (2) by employing nonracial factors, such as providing an admissions preference to socioeconomically disadvantaged students, or those from underrepresented geographic areas, which can have the effect of producing the educational benefits of racial diversity without the consideration of race.

I contend that while both options are legitimate if applied faithfully, there is a much bigger danger that admissions officers will improperly use the personal essay option than that they will misuse nonracial factors. Because admissions officials are accustomed to using race in admissions, instructing them on the critical difference between considering a student’s experiences with race and considering race itself will be challenging. By contrast, the use of nonracial factors, such as socioeconomic disadvantage, is much less subject to abuse. Drawing upon simulations I helped conduct as an expert witness in the Students for Fair Admissions litigation, I contend that employing nonracial strategies, while more expensive than exploiting the personal essay “loophole,” entails far fewer legal risks and can produce robust levels of racial diversity if implemented intelligently. Moreover, I argue, adopting these types of race-neutral alternatives can serve as a shield against future litigation.

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INTRODUCTION

In February 2016, I spoke at Harvard University to a conference of first-generation college students from several Ivy League schools. The audience was made up of an inspiring array of Black, Hispanic, Asian, and White students, all of whom were bound together by the fact that, unlike the vast majority of students at selective colleges, they had overcome the odds associated with having parents who had not received a bachelor's degree. These students were fighting, among other things, for greater representation.¹

At Harvard, at the time, first-generation students accounted for about 10% of the student population. The number of students whose parents had gone to Harvard outnumbered first-generation students in the undergraduate student body, even though there were 382 times as many American adults age 25 and older without a college degree (143 million) as adults in the world with a Harvard degree (375,000).² If African American students had been as underrepresented in Harvard's population as first-generation college students were, Black students would have constituted just 2.25% of the undergraduate student body.³

The first-generation students said they felt isolated, which was understandable. Research has found that Harvard has fifteen times as many high-income students as low-income students.⁴ Among the Black, Hispanic, and Native American students, 71.8% hailed from the most advantaged one-fifth of the Black, Hispanic, and Native American populations nationally—and the White and Asian students were even more advantaged.⁵

1 See Richard D. Kahlenberg, *How Low-Income Students Are Fitting in at Elite Colleges*, THE ATLANTIC (Feb. 24, 2016), <https://www.theatlantic.com/education/archive/2016/02/the-rise-of-first-generation-college-students/470664/>.

2 See Camille L. Ryan & Kurt Bauman, *Educational Attainment in the United States: 2015*, U.S. CENSUS BUREAU 2, tbl. 1 (Mar. 29, 2016), <https://www.census.gov/library/publications/2016/demo/p20-578.html>; Christina Pazzanese, *Harvard's Alumni Impact*, HARVARD GAZETTE, Dec. 8, 2015; and RICHARD D. KAHLBERG, EXPERT REPORT OF RICHARD D. KAHLBERG, *STUDENTS FOR FAIR ADMISSIONS V. HARVARD* 22 (Oct. 16, 2017), <https://studentsfor.wpenginepowered.com/wp-content/uploads/2018/06/Doc-416-1-Kahlenberg-Expert-Report.pdf> [hereinafter KAHLBERG, EXPERT REPORT].

3 See Ryan & Bauman, *Educational Attainment in the United States: 2015*, *supra* note 2 (68% of adults age forty-five to sixty-four lacked a bachelor's degree, compared with 10% of Harvard undergraduates who were first-generation college students. This 15% representation rate, if applied to African Americans (who made up 15% of the population) would yield a student body that is 2.25% Black.); and KAHLBERG, EXPERT REPORT, *supra* note 2, at 22.

4 See *Economic Diversity and Student Outcomes at Harvard University*, N.Y. TIMES, (Jan. 18, 2017), <https://www.nytimes.com/interactive/projects/college-mobility/harvard-university> (citing research by Raj Chetty finding that 67% of students came from the highest 20% by income and 4.5% from the bottom 20% by income).

5 See KAHLBERG, EXPERT REPORT, *supra* note 2, Appendix, Simulation 4, <https://studentsfor.wpenginepowered.com/wp-content/uploads/2018/06/Doc-416-1-Kahlenberg-Expert-Report.pdf> (showing that under the status quo, for the class of 2019, 133 underrepresented minority students were tagged as "disadvantaged" and 338 underrepresented minority students were nondisadvantaged, and that among all students, 17.4% were tagged "disadvantaged" and 82.6% were nondisadvantaged.) A student is tagged "disadvantaged" by Harvard for one of three reasons:

Two years later, in October 2018, I testified in federal district court in Boston as an expert witness for the plaintiffs in *Students for Fair Admissions v. Harvard*.⁶ I testified that racial diversity has compelling educational benefits, and that simulations I conducted in conjunction with Duke Economist Peter Arcidiacono found that Harvard could create about as much racial diversity as produced under a system of racial preferences, if Harvard eliminated some of its preferences that tended to benefit wealthy White students (such as legacy preferences) while also giving a boost to socioeconomically disadvantaged students of all races. This use of “race-neutral” alternatives would not only work about as well at producing racial diversity, it would also allow Harvard to maintain high academic standards and to increase socioeconomic diversity. It would, however, require that Harvard devote greater resources to financial aid, which it was not eager to do.⁷

The U.S. district court sided with Harvard, as did the First Circuit Court of Appeals, but in June 2023, almost five years after the trial, the U.S. Supreme Court ruled in *Students for Fair Admissions v. Harvard* that the use of racial preferences by Harvard and the University of North Carolina (or UNC), violated the Equal Protection Clause of the Constitution’s Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.⁸

the student’s parents lack a bachelor’s degree; the family income is \$80,000 or less or one lives in a neighborhood with concentrated poverty. Roughly two-thirds of Americans would be considered “disadvantaged” under Harvard’s definition, and about four-fifths of Black, Hispanic, and Native American students nationally would be considered “disadvantaged.” See Andrew Howard Nichols & J. Oliver Schak, *Degree Attainment for Black Adults: National and State Trends*, EDUCATION TRUST (2017), https://edtrust.org/wp-content/uploads/2014/09/Black-Degree-Attainment_FINAL.pdf. See also RICHARD D. KAHLBERG, SUPPLEMENTAL EXPERT REPORT REGARDING THE FINAL REPORT OF THE COMMITTEE TO STUDY RACE-NEUTRAL ALTERNATIVES, *STUDENTS FOR FAIR ADMISSIONS V. HARVARD* 4–5 (Apr. 26, 2018), <https://studentsfor.wpenginepowered.com/wp-content/uploads/2018/06/Doc-416-3-Kahlenberg-Errata.pdf> [hereinafter KAHLBERG, SUPPLEMENTAL EXPERT REPORT] (“Harvard admissions officers tag as ‘disadvantaged’ students who come from families with annual incomes below \$80,000 or whose parents lack a four-year college degree. In other words, this group includes not only students who might conventionally be thought of as disadvantaged but also many students from middle-class families. Roughly speaking, about two-thirds of all Americans would be characterized by Harvard as ‘disadvantaged.’ Because African-American and Hispanic students are more likely to be disadvantaged than the average American, substantially more than two-thirds are likely to be so categorized by Harvard. Indeed, according to the Committee, fully 70% of African Americans and 60% of Hispanics nationally are disadvantaged enough to be eligible for zero parental contribution under Harvard’s financial aid program (earning less than \$65,000 annually). An even higher percentage of these students, therefore, would qualify for the disadvantaged tag (which has an \$80,000 cut off and also includes families making more than \$80,000 where the parents lack a four-year college degree). While the vast majority of African-American and Hispanic students nationally would be considered disadvantaged by Harvard’s reckoning, in the current admitted class of 2019, only 29% of underrepresented minorities were tagged as disadvantaged. This number would rise to approach the national averages under the race-neutral alternatives I outlined in my report.”)

6 Testimony of Richard D. Kahlenberg, *Students for Fair Admissions v. Harvard*, U.S. District Court, Boston, MA, Oct. 22, 2018.

7 KAHLBERG, EXPERT REPORT, *supra* note 2; RICHARD D. KAHLBERG, REBUTTAL EXPERT REPORT OF RICHARD D. KAHLBERG, *STUDENTS FOR FAIR ADMISSIONS V. HARVARD* (Jan. 28, 2018), <https://studentsfor.wpenginepowered.com/wp-content/uploads/2018/06/Doc-416-2-Kahlenberg-Rebuttal-Report.pdf>; and KAHLBERG, SUPPLEMENTAL EXPERT REPORT, *supra* note 5.

8 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), [hereinafter *SFAA v. Harvard*].

Importantly, the Court did not say that the pursuit of the educational benefits of racial diversity was impermissible. But henceforth, universities that were seeking to create the educational benefits of a racially diverse environment would have to find new paths. Many universities say they remain committed to achieving racial diversity—and will do what it takes, within the confines of the law, to forge new avenues to do so. Among the most promising paths is to provide socioeconomically disadvantaged students of all races a leg up in the admissions process. In a very real sense, then, the array of disadvantaged students participating in the 2016 first-generation conference at Harvard may well represent the future of affirmative action.

This article proceeds in four parts.

Part I assesses the meaning of the *Students for Fair Admissions* (or *SFFA*) decision. It outlines the ways in which *SFFA* substantially departs from precedent, effectively overturning the 2003 *Grutter v. Bollinger*⁹ precedent allowing the use of race as a factor in admissions, despite the fact that *SFFA* did not expressly do so.¹⁰ This part of the article also briefly discusses the two central paths the Supreme Court leaves open for universities seeking the educational benefits of racial, ethnic, socioeconomic, and geographic diversity: (1) the use of student essays and (2) the use of other race-neutral alternatives.

Part II discusses the limited possibilities and significant limitations of using information from personal essays to replicate prior levels of racial and ethnic diversity. While the Supreme Court did allow for a narrow consideration of ways in which universities can consider a student's discussion of race—a concession to the reality that it would be unrealistic to ban students from doing so—I outline the several reasons universities would be unwise to make too much of this provision in the *SFFA* decision.

Part III—the bulk of the article—discusses the evidence around the feasibility and legality of using alternative race-neutral strategies for producing racial, ethnic, economic, and geographic diversity. The part begins by discussing the promising language in *SFFA*, which suggests that the use of race-neutral alternatives can survive legal attacks from those alleging these strategies are a form of “proxy discrimination.” I next outline the leading race-neutral strategies available to universities and assess the evidence that race-neutral alternatives can produce racial diversity. I do so by examining experiences of states where race has long been banned in admissions decisions (usually because of a voter referendum), simulations by leading economists using national data, and simulations developed in the Harvard and UNC litigation.

I then discuss the important question of how universities can pay for new race-neutral strategies, which will generally require a greater commitment of resources to financial aid than racial affirmative action programs did. Finally, I discuss the importance of universities publicly announcing their use of new race-neutral strategies as a way to shield against possible allegations that universities are

9 539 U.S. 306 (2003).

10 600 U.S. 181, 311 (Kavanaugh, J., concurring).

“cheating” by improperly using race in the personal essay, or in other impermissible ways, in order to sustain racial diversity. I argue that universities that do manage to achieve considerable racial diversity, in the absence of employing new race-neutral strategies, are likely to place a litigation target on their backs.

Part IV briefly concludes by revisiting some of the earlier thinking around affirmative action among leading liberal leaders in the 1960s and considers the ways in which race-neutral alternatives effectively pick up an important thread that had been lost during the several decades in which race-conscious affirmative action programs flourished.

I. THE MEANING OF THE *STUDENTS FOR FAIR ADMISSIONS* DECISION

A. *Gutting the Grutter Precedent*

When the U.S. Supreme Court granted certiorari in the Harvard and UNC affirmative action cases, it had four major options of how to rule in the cases, ranging from the most liberal outcome to the most conservative.

The first option was to sustain the basic logic in the 2003 *Grutter v. Bollinger* case, which held that race could be used as one factor in admissions to achieve the compelling interest in the educational benefits of student body diversity.¹¹ While this option seemed unlikely given the Court’s conservative tilt, it was not out of the question. The history of Supreme Court rulings on affirmative action was one in which conservative justices would go up to the precipice of ending racial preferences, but a swing conservative would pull back at the last minute and side with liberal justices. In *Regents of the University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003) and *Fisher v. Texas II* (2016), the Supreme Court consistently surprised observers when a series of conservative justices—first Lewis Powell, Jr., then Sandra Day O’Connor, and finally Anthony Kennedy—joined liberal justices in supporting the ability of universities to use race as one factor in admissions.¹²

The second option was to enhance enforcement of *Grutter* and *Fisher II*’s requirements that universities could not use racial preferences if race-neutral alternatives could work about as well at achieving the educational benefits that derive from student body diversity. This was the middle-ground position I advocated in my testimony in federal district court: that diversity is a compelling justification, but Harvard and UNC could use race-neutral means to achieve that diversity.¹³ This would have had the effect of striking down racial preferences at

11 539 U.S. 306.

12 See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (4–1–4 decision, striking down racial quotas by 5–4 but supporting the use of race as one factor in admissions by 5–4); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (5–4 in support of using race as a factor); and *Fisher v. Univ. of Tex. (II)*, 579 U.S. 365 (2016) (4–3 decision in support of the use of race as a factor)

13 Testimony of Richard D. Kahlenberg, *Students for Fair Admissions v. Harvard*, U.S. District Court, Boston, MA, Oct. 22, 2018; and Testimony of Richard D. Kahlenberg, *Students for Fair Admissions v. University of North Carolina*, Winston-Salem, NC, November 12, 2020.

these institutions but sustaining the principle that diversity is a compelling state interest and leaving the door open that under certain (probably rare) circumstances, universities that could not find adequate race-neutral alternatives could use race as a last resort.

The third option was to overturn *Grutter's* holding that diversity provides a compelling justification for the use of race but suggest that seeking the educational benefits of diversity was nevertheless a permissible goal that could be achieved through race-neutral alternatives. This option was in keeping with the position enunciated in the past by several of the conservative U.S. Supreme Court justices hearing the *SFFA* cases.¹⁴

The fourth, most conservative, option was to overturn *Grutter's* support of racial diversity as a compelling justification, and go further still. Under this option, the Court would not only strike down racial preferences as a *means*, it would also suggest that the *goal* of racial diversity itself was impermissible. Under this scenario, a college that employed a race-neutral alternative, such as socioeconomic preferences, would be acting illegally if even part of its motive was that, because Black and Hispanic students are disproportionately poor, they would disproportionately benefit from socioeconomic preferences.

This fourth position, while extreme, was consistent with the thinking of some very conservative legal theorists who have argued that if even some *part* of a university's goal in using strategies such as socioeconomic preferences is to achieve racial diversity, then this practice would constitute a form of "proxy discrimination."¹⁵ And, as discussed below, one conservative federal district court judge in Virginia has taken that position.¹⁶

As detailed further below, when the decision in *SFFA* was handed down, it essentially took option 3: gutting *Grutter*.

Unlike earlier courts, the justices avoided option 1. Whereas individual swing conservatives refused to pull the trigger on racial preferences in 1978, 2003, and 2016, in *SFFA*, the conservative decision striking down the use of race was decisive: a 6–3 ruling in the UNC case and 6–2 in the Harvard case.¹⁷

Nor did any of the justices take the narrower path offer by option 2, to strike down the use of race at Harvard and UNC on the basis that race-neutral alternatives were available.

14 See Richard D. Kahlenberg, *A Middle Ground on Race and College*, NAT'L AFFAIRS (Spring 2023), <https://www.nationalaffairs.com/publications/detail/a-middle-ground-on-race-and-college>.

15 See, e.g., Brian Fitzpatrick, *Racial Preferences Won't Go Easily*, WALL ST. J. (May 31, 2023), <https://www.wsj.com/articles/racial-preferences-wont-go-easily-thomas-jefferson-harvard-unc-court-bfa302b3>.

16 See *infra* Section III.A; Kahlenberg, *A Middle Ground on Race and College*, *supra* note 14 (discussing litigation challenging race-neutral alternatives employed by Thomas Jefferson High School in Virginia and rejecting the view that race-neutral alternatives are illegal).

17 The votes were 6–3 in the UNC case and 6–2 in the Harvard case because Justice Ketanji Brown Jackson participated in the UNC case but was recused in the Harvard case.

Instead, as discussed further below, the Supreme Court took the more dramatic step (option 3) of essentially overturning *Grutter* and effectively making it impossible for universities to justify the use of race to achieve what had been the compelling interest of creating the educational benefits that flow from a diverse student body.

Finally, the Court also passed on option 4, which would have suggested that racial diversity is an impermissible goal. Under this scenario, the Court would have flipped from one extreme (seeking the educational benefits of diversity is a compelling justification) to the other extreme (seeking the educational benefits of diversity is impermissible). As discussed further below, the Court appeared to land on a middle ground. While going forward it would be very unlikely that universities could demonstrate that the educational benefits of diversity are compelling, it was at the same time true that the educational benefits that may flow from a racially diverse environment are in fact “commendable,” thus leaving the door open to race-neutral alternatives that promote racial diversity.

In the decision, the Court struck down the use of race at both UNC and Harvard. It ruled that UNC, as a public institution, violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution, and that Harvard, as a private institution receiving federal funds, violated Title VI of the 1964 Civil Rights Act. In keeping with precedent, the Court held that the Fourteenth Amendment and the Civil Rights Act should be read to apply precisely the same standard.¹⁸

In critiquing Harvard and UNC’s rationale for using race as a factor in student admissions, the six-member majority opinion, authored by Chief Justice Roberts, cited four fundamental flaws.

First, the universities’ justifications for using race, such as “training future leaders,” “better educating its students through diversity,” and promoting “cross racial understanding,” while “commendable” were not “sufficiently measurable” to allow courts to scrutinize them in a way that could justify treating students differently based on race.¹⁹ Because the interests advanced were “inescapably imponderable,” courts could not validate them under the strict scrutiny standard.²⁰ Technically, the Court did not come out and say that diversity is no longer a compelling interest; but for all intents and purposes, that is the effect of its new standard. While a college could theoretically come up with a new measurable standard that is better than the ones Harvard and UNC posited, in practice, this hope is almost surely illusory because the more precise a standard is, the closer it comes to creating an unconstitutional quota.²¹

18 *SFFA v. Harvard*, 600 U.S. 181 at 197.

19 *Id.* at 214-215.

20 *Id.* at 215.

21 Some have argued that a college could theoretically devise “measurable” standards. *See, e.g.*, Reginald C. Oh, *What the Supreme Court Really Did to Affirmative Action*, WASH. MONTHLY (July 20, 2023), <https://washingtonmonthly.com/2023/07/20/what-the-supreme-court-really-did-to-affirmative-action/> (“Roberts leaves the door ajar for universities to devise measurable, quantifiable educational benefits of diversity to justify the use of race.”). *See also* Jonathan Feingold, *Affirmative Action After SFFA*, 48 J. COL. & UNIV. L. 239, 256 (2023).

But the Supreme Court appears to have come up with an impossible standard to meet in *SFFA*. As the dissent notes, the Court’s majority “announces a requirement designed to ensure all race-conscious

Second, the justices in the majority said, in the college admissions context, the positive use of race for some students necessarily means a “negative” use of race for others (nonbeneficiaries). “College admissions are zero-sum,” the majority opinion observed. “A benefit provided to some applicants but not others necessarily advantages the former group at the expense of the latter.”²² As Vinay Harpalani of the University of New Mexico Law School notes, whereas *Grutter* said that nonbeneficiaries of affirmative action could not bear an “undue burden,” that standard appeared to shift in *SFFA* to say that nonbeneficiaries could bear no burden whatsoever.²³ Once again, this objection seems almost impossible for a university to overcome.

Third, the majority suggested, there was no “logical end point” to Harvard and UNC’s use of race in admissions, in violation of the Equal Protection Clause and Title VI of the Civil Rights Act.²⁴ The majority rejected the dissent’s contention that racial preferences should remain until racial inequality has been abolished.²⁵

Fourth, the majority said Harvard and UNC’s programs engaged in impermissible stereotyping about the meaning of a student’s race. The Court said that “Harvard’s admissions process rests on the pernicious stereotype that ‘a black student can usually bring something that a white student cannot offer.’” UNC, the Court said, improperly “argues that race itself ‘says [something] about who you are.’”²⁶

By leveling these four objections, the Court gutted the *Grutter* ruling which had held that the educational benefits of diversity provide a compelling rationale for using race. Although *Grutter* was not expressly overruled, several justices acknowledged that “*Grutter* is, for all intents and purposes, overruled.”²⁷ As the

plans fail. Any increased level of precision runs the risk of violating the Court’s admonition that colleges and universities operate their race-conscious admissions policies with no “specified percentage[s]” and no “specific number[s] firmly in mind.” *Grutter v. Bollinger*, 539 U.S. 306, 324, 335 (2003) Thus, the majority’s holding puts schools in an untenable position. It creates a legal framework where race-conscious plans must be measured with precision but also must not be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny “fatal in fact.” *SFFA v. Harvard*, 600 U.S. 181 at 366-367. (Sotomayor, J., dissenting). See also Ethan Blevins, *The Peculiar Silence in the Students for Fair Admissions Decision*, QUILLETTE (Aug. 16, 2023), <https://quillette.com/2023/08/16/the-silence-in-students-for-fair-admissions/> (“Consider, for example, how a university might make its interests more concrete and measurable, as the Chief Justice demands. A university could say, for instance, that cross-racial understanding will be achieved once our student body is 30 percent black and Hispanic. More specific? Yes. But the university will have only veered away from Scylla (overly vague interests) to run into the domain of Charybdis (unlawful quotas). While the Supreme Court gave its blessing to racial preferences, it has always made one thing clear: racial quotas or their functional equivalents are off-limits.”).

22 *SFFA v. Harvard*, 600 U.S. 181 at 218-219.

23 Vinay Harpalani, *Secret Admissions*, 48 J. COL. & UNIV. L. 325, 327 (2023). See also Feingold, *supra*, note 21 at 257, n. 116.

24 *SFFA v. Harvard*, 600 U.S. 181 at 221-225.

25 *Id.* at 227-228 (rejecting idea that racial preferences should remain “indefinitely, until ‘racial inequality will end’”).

26 *Id.* at 220.

27 *Id.* at 287 (Thomas, J., concurring); *id.* at 342 (Sotomayor, J. dissenting). Sotomayor’s dissent was joined by Justices Kagan and Jackson. See also *id.* at 307 (Gorsuch, J., concurring) (“If the Courts

dissenting justices noted, “Overruling decades of precedent,” the *SFFA* decision “strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an ‘inescapably imponderable’ goal and ‘overrides its longstanding holding that diversity in higher education is a compelling value.’”²⁸ The fact that Harvard’s diversity program, which was lauded by Justice Powell in the 1978 *Bakke* decision as a national model, was struck down in the 2023 *SFFA* case underlines the dramatic change in the law.²⁹

In short, while under several previous Supreme Court rulings over a period of four decades, it had been permissible to use race as one of several factors in admissions, under *SFFA*, the use of race, even in that limited fashion, was declared unlawful.

B. Two Paths Forward: The Student Essay Loophole and Race-Neutral Alternatives

Although the Supreme Court struck down the use of race in the admissions process as employed by Harvard and UNC, the Court also provided two potential paths forward: the student essay “loophole” and the possibility of employing other race-neutral alternatives. In this section, I briefly describe what the Court said about each of these options. In Parts II and III, I delve much more deeply into the promises and pitfalls of each.

The first path involves what some institutions are seeing as a legal loophole: students may discuss how race has shaped their lives in personal essays, and universities may consider those essays (in limited ways) as they decide whom to admit.

The majority opinion provided, “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”³⁰

The Court then provided two examples: “a benefit to a student who overcame racial discrimination” that showed “courage or determination” or “a benefit to a student whose heritage or culture motivated him to assume a leadership role or attain a particular goal” that showed a “unique ability to contribute to the university.”³¹

post-Bakke higher-education precedents ever made sense, they are now incoherent. Recognizing as much, the Court today cuts through the kudzu. It ends university exceptionalism.”); and Education Counsel, *Preliminary Guidance Regarding the U.S. Supreme Court’s Decision in SFFA v. Harvard and SFFA v. UNC*, 1–2 (July 6, 2023) (that while the Court “did not expressly overrule past decisions,” it “significantly undercut that precedent to a point of eviscerating its continued vitality” and established “a fundamentally new legal landscape”) <https://educationcounsel.com/storage/seLGkbGgqeKNZ56fYVH9I4AT5U0cw88M2YwTomUc.pdf>.

28 *SFFA v. Harvard*, 600 U.S. at 357 (Sotomayor, J., dissenting).

29 *Id.* at 210 (noting that Justice Powell pointed to Harvard as an “illuminating example” of how diversity policies should operate).

30 *Id.* at 230.

31 *Id.* at 230-231.

Because a student of any race could conceivably make these arguments, this consideration can in a sense be considered “race-neutral.”³² As discussed in much greater detail below in Part II, however, the Supreme Court quickly put sharp parameters around the essay loophole and both the majority and the dissent warned universities not to make too much of this provision.

The second path is to employ other race-neutral strategies such as providing socioeconomic preferences. The *SFFA* decision appears to have left the door wide open for this approach. On the one hand, the Court, as a practical matter, made it virtually impossible for a university to show that achieving the educational benefits of diversity is a compelling interest, and it raised a number of other objections that effectively bars the consideration of race at universities. At the same time, it did nothing to say that the goal of achieving the educational benefits of racial diversity is impermissible or that universities could not seek to achieve greater racial diversity through race-neutral means.

In addition, six individual justices explicitly endorsed race-neutral alternatives in the *SFFA* opinion, and additional sitting members of the Supreme Court have done so in the past. In short, while racial preferences were struck down for a variety of reasons by the Court, race-neutral alternatives were given a green light. I discuss the legality and efficacy of these alternatives in much further detail in Part III.

It is important to note that highly formalistic arguments are being advanced on both the left and right that envision diametrically opposed interpretations of the *SFFA* decision. I will argue below that neither of these arguments will in the end prevail with five members of the U.S. Supreme Court.

The formalistic argument on the right starts out with the valid premise that *SFFA* essentially eliminated racial diversity as a *compelling* justification for using race. But it then takes a leap and posits that if a goal is no longer compelling, then the Supreme Court will have no choice but to flip a switch that automatically renders student body diversity an impermissible goal. In this view, there is no possible middle ground that the Court will find between compelling and forbidden; that is, if a goal is not so powerful as to be compelling, it necessarily becomes an unlawful and discriminatory goal to pursue, even by race-neutral means. Under this formalistic theory, if even part of the motive for using a race-neutral strategy, such as socioeconomic preferences, is achieving the educational benefits of racial diversity, the whole enterprise is unlawful.

The formalist argument on the left also starts out correctly before going off the rails. It begins by properly noting that *SFFA* did nothing to suggest that the goal of achieving the educational benefits of diversity is forbidden. It then goes on to suggest that the portion of the opinion that permits consideration of essays discussing a student’s experience with race renders the *SFFA* decision largely meaningless in the real world. If it is still permissible to have a *goal* of racial diversity, the argument runs, and if considering a student’s *experience* with race is “race-neutral,” then there is nothing to stop a university from giving greater

32 Education Counsel, *Preliminary Guidance*, *supra* note 25, at 3 n. 4.

value to the racial experiences of students based on the fact that they are part of an *underrepresented group* and will therefore contribute more to student body diversity.

In this way of thinking, *SFFA* is analogous to *Bakke*;³³ it looked very bad for universities seeking to pursue diversity at first glance (because U.C. Davis Medical School's quota was struck down), but over time it became clear that universities could easily work around the obstacle. In this line of reasoning, just as *Bakke* required universities to make a fairly cosmetic shift – to drop formal quotas even as they continued to weight race as a factor to achieve a critical mass of underrepresented students—so *SFFA* merely requires universities to be a bit more nuanced in their implementation of racial preferences. Instead of assuming that *all* underrepresented students will bring the educational benefits of diversity, under *SFFA*, underrepresented students will simply write an essay discussing how they will contribute to diversity. When considering the essays of underrepresented students, universities are perfectly justified, the argument runs, in using those essays to give a plus to underrepresented minority students and not to other students. The essay magically transforms the special consideration of underrepresentation from race-conscious to race-neutral under this theory.

As discussed further below, I do not believe either of these formalistic positions will prevail with the U.S. Supreme Court. The bottom line, I will argue, is that pushing the envelope on the essay loophole is legally risky but relatively cheap, because it essentially maintains the status quo. The second path, employing other race-neutral strategies, such as socioeconomic preferences, is more expensive (because disadvantaged students require more financial aid) but is much more legally sustainable.

II. POSSIBILITIES AND RISKS OF USING THE STUDENT ESSAY LOOPHOLE

Some scholars have argued that universities should simply defy the U.S. Supreme Court's ruling in *Students for Fair Admissions v. Harvard*.³⁴ Historian Richard Rothstein, for example, writing in *The Atlantic*, flatly declared that in the face of a negative ruling, universities "should continue to implement race-specific affirmative action, in defiance of the Supreme Court."³⁵

Although university leaders have not publicly taken this stance, some admissions officers, who are deeply committed to racial diversity may, in their enthusiasm for the cause, be tempted to either defy the Supreme Court, or exploit the personal essay loophole in a way not intended by the Supreme Court. Cornell Law professor William A. Jacobson raises a concern that universities, such as Harvard, will take the loophole and "drive an affirmative action truck right through it."³⁶

33 438 US 265 (1978).

34 600 U.S. 181 (2023).

35 Richard Rothstein, *The Problem with Wealth Based Affirmative Action*, THE ATLANTIC (June 1, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/affirmative-action-race-socioeconomic-supreme-court/674251/>.

36 William A. Jacobson, *SCOTUS "Gave Universities a Narrow Opening, and Harvard Just Announced It's Going to Drive an Affirmative Action Truck Right Through It,"* LEGAL INSURRECTION (June 29, 2023),

The Supreme Court had little choice but to allow students to discuss their race in essays and to allow admissions officers to read them. It would have been untenable to require that if a student wrote about how she had overcome racial discrimination, for example, that essay would have to be “heavily redacted because the college must censor all references to an applicant’s race.”³⁷ Even the plaintiffs, Students for Fair Admissions, did not call for this type of censorship in their arguments before the U.S. Supreme Court.³⁸

But all nine justices who signed on to the majority and dissenting opinions cautioned that universities should not make too much of the essay loophole. Immediately after noting the ability to consider essays, the majority said, “universities may not simply establish through application essays or other means the regime we hold unlawful today ... What cannot be done directly cannot be done indirectly.” The majority opinion made clear that educational institutions should focus on “challenges bested, skills built, or lessons learned” by students and not “the color of their skin.”³⁹

The dissent, likewise, made clear that it thought the use of essays, as cabined by the majority opinion, was an ineffectual means for achieving adequate student body diversity. The three dissenting justices said that the Court’s decision “rolls back decades of precedent and momentous progress,” and said the allowance for universities to consider student essays that discuss race is “an attempt to put lipstick on a pig.” The dissent suggested that the essay exception is “a false promise” used by the majority to “save face and appear attuned to reality. No one is fooled.”⁴⁰ The dissent concluded—the Court’s essay “loophole” notwithstanding—“The devastating impact of this decision cannot be overstated.”⁴¹ Justice Ketanji Brown Jackson charged the majority with employing “let-them-eat-cake obliviousness” and said that the decision’s use of the Equal Protection Clause to “obstruct our collective progress ... is truly a tragedy for all of us.”⁴² These are not the words of justices who think that universities can easily exploit the use of essays to accomplish significant levels of racial diversity.

This presents universities with a dilemma. On the one hand, the Court said there are clearly legitimate ways to employ the student essays in examining an applicant’s experience with race. On the other hand, “universities may not simply establish through application essays or other means the regime we hold unlawful today ... What cannot be done directly cannot be done indirectly.” Where does the

<https://legalinsurrection.com/2023/06/scotus-gave-universities-a-narrow-opening-and-harvard-just-announced-its-going-to-drive-an-affirmative-action-truck-right-through-it/>.

37 See Elise C. Boddie, *A Damaging Bid to Censor Applications at Harvard: If a Lawsuit over Affirmative Action Is Successful, Would-be College Students May Gave to Hide Their Race*, N.Y. TIMES (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/opinion/harvard-affirmative-action-lawsuit.html>.

38 *SFFA v. Harvard*, 600 U.S. 181 at 230 (noting that “all parties agree” that universities should not be barred from considering discussions of race in an essay).

39 *Id.* at 231.

40 *Id.* at 318, 363 (Sotomayor, J., dissenting).

41 *Id.* at 383 (Sotomayor, J., dissenting).

42 *Id.* at 407, 411 (Jackson, J., dissenting). Justice Jackson’s dissent is targeted to *SFFA v. UNC* because she was recused in the Harvard case.

line fall separating legitimate from illegitimate uses of student experiences with race in the personal essay?

To explore that issue further, it is worth considering in detail examples of the two distinct types of student essays cited by the majority opinion: (1) describing how a student overcame adversity in the face of racial discrimination, and (2) describing more generally how race shaped a student's life and ability to contribute to the university.

Of the two different examples the Court provided of how a university could legally consider an individual student's experience with race in a student essay, the type of essay that describes "overcoming discrimination" appears to be on more clearly solid footing because it could show "courage and determination," an element of individual merit. The *SFFA* decision effectively gutted the principle that diversity provides a compelling state interest, but as Thomas Kane of Harvard University notes, "it simultaneously handed Harvard a mandate with even greater moral force: recognizing the obstacles that students have overcome, whether they be physical, economic, social, gender OR race-based."⁴³ Stories of overcoming adversity—including racial discrimination—are almost universally lauded and considered inspiring in American culture.

The U.S. Department of Education and the U.S. Department of Justice's "Dear Colleague" letter to universities leaned heavily on the adversity example. The Question and Answer appended to the letter noted, "a university could consider an applicant's explanation of what it meant to him to be the first Black violinist in the city's youth orchestra or an applicant's account of overcoming prejudice when she transferred to a rural high school where she was the only student of South Asian descent. An institution could likewise consider a guidance counselor or other recommender's description of how an applicant conquered her feelings of isolation as a Latina student at an overwhelmingly white high school to join the debate team."⁴⁴

By contrast, the second example—a student essay that describes how "heritage or culture motivated him or her to assume a leadership role or attain a particular goal" that showed that student's "unique ability to contribute to the university"—appears to be much more challenging for a university to employ at scale. It is legitimate, as the Court notes, for a university to consider a student's experience with race as a source of inspiration because to do so is individualized and race-neutral. An experience with race could be invoked by a student of any race—Black, Hispanic, Asian, or White. The danger, as outlined below, is that admissions officers may *selectively* consider the personal essay's discussion of race and weight it differently based on whether the applicant comes from a underrepresented racial group.

43 Zing Gee, *A "Huge Blow": Harvard Faculty Dismayed with Affirmative Action Ruling*, *HARVARD CRIMSON* (June 30, 2023), <https://www.thecrimson.com/article/2023/6/30/faculty-react-affirmative-action/>.

44 U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDUC., *QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN STUDENTS FOR FAIR ADMISSIONS INC. v. HARVARD COLLEGE AND THE UNIVERSITY OF NORTH CAROLINA*, 2 (Aug. 14, 2023), https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf.

The Dear Colleague Letter provides a telling example. “An institution could consider an applicant’s discussion of how learning to cook traditional Hmong dishes from her grandmother sparked her passion for food and nurtured her sense of self by connecting her to past generations of her family.”⁴⁵ A university seems very safe in considering the fact that a student was passionate about food, and that passion is connected to her race. So far so good.

Admitting that student because she is Hmong and passionate about Hmong food is fine, if a university values a passion for cooking that is rooted in racial experience. But what if an admissions officer does not accord similar value to a Chinese American student who has a passion for Chinese food or a Greek American student who has a passion for Greek food? If the admissions officer’s answer is that a passion for Hmong food adds something that is missing from the university—and that there are already plenty of students on campus who have a passion for Chinese or Greek food—the admissions officer is not looking just at an individual student’s experience with race but with whether her racial group is underrepresented. That consideration crosses over into territory the Court now forbids: that some students will “contribute” more to the university by virtue of the racial group of which they are a part.

The Department of Education’s choice of highlighting a “Hmong” student in the example is telling because the Hmong population is disproportionately poor in America and often underrepresented at selective colleges. But the notion of treating a student’s essay about their experience with race differently depending upon whether that student’s *racial group* is underrepresented on campus bleeds into precisely the type of thinking that Harvard and UNC invoked and that the majority of justices rejected. The Court made clear, “In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.”⁴⁶

The challenge boils down to this: if part of what makes evaluation of racial experiences “race-neutral” is that an individual of any race can benefit from an essay discussing their experiences with race, and if admissions officers then turn around and use the essay almost exclusively to favor applicants who are from underrepresented minority groups, the concept of race-neutrality has been sapped of its very meaning.

Indeed, after providing the example of the Hmong students devoted to Hmong food, the Dear Colleague Letter quickly reverts to the much more morally resonant rationale about a student overcoming adversity: “In short, institutions of higher education remain free to consider any quality or characteristic of a student that bears on the institutions’ admission decision, such as courage, motivation or determination, even if the student’s application ties that characteristic to their lived experience with race.”⁴⁷

45 *Id.*

46 *SFFA v. Harvard*, at 231.

47 U.S. DEP’T OF JUSTICE AND U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS, *supra* note 44, at 3.

While the first example (overcoming racial discrimination) is linked to surmounting *adversity* and therefore being a particularly meritorious *individual*, the second example (race has shaped me to be who I am) lends itself much more easily to misapplication in which the student's experience with race is valued only to the extent that his or her *racial group* is underrepresented. Once that consideration is invoked—and a student's experience with race is less valued and makes less of a “contribution” because his or her *racial group* is already well represented—the practice no longer appears authentically race-neutral.

And yet the emphasis in the Departments of Education and Justice's Dear Colleague letter on adversity notwithstanding, some institutions of higher education appear to be leaning into the second model—linked to racial group underrepresentation—more than the first.⁴⁸ Harvard, for example, is for the first time requiring all applicants to answer the following prompt: “Harvard has long recognized the importance of enrolling a diverse student body. How will the life experiences that shape who you are today enable you to contribute to Harvard?”⁴⁹

As the Supreme Court warned, it would be very dangerous for universities to simply adapt wholesale the idea that large numbers of underrepresented minority students—each on an individual basis—will contribute more because of their experiences with race. Indeed, in the oral argument in the UNC case, Chief Justice Roberts raised that very question: what “if all of a sudden the number of essays that talk about the experience of being an African American in society rises dramatically...?”⁵⁰ In the end, of course, Roberts included the essay provision in the final opinion, so employing it in an authentically individualized manner is clearly legal. But Roberts's question in the oral argument—and the language in the majority opinion warning universities not to achieve indirectly what they cannot do directly—serves as a powerful warning that universities should not simply use discussions of race in an essay to code students by race and value their experiences with race differently depending on whether their racial group is underrepresented.

The Court will likely see through that ruse. After all, institutions, such as Harvard, claimed the holistic, *individualized* consideration of students was precisely what they had been engaged in *all along*. Yet Harvard's program was struck down by the U.S. Supreme Court on a vote of 6–2.

While the “diversity” prompts related to personal essays are especially problematic, universities also need to be cautious about considering “adversity” selectively in a way that applies mostly to students who come from underrepresented groups. It is completely legitimate, in evaluating a candidate, to consider the fact that a Black student performed well despite having to overcome instances of racial discrimination. But if a university is going to count overcoming adversity as a plus factor, it would be very risky to be racially selective in doing so—applying the benefit to Black and

48 See Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your “Identity,”* N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html>.

49 Steven McGuire, *Can Harvard Discriminate with Essays?* WALL ST. J. Aug. 12, 2023, at A 13.

50 SFFA v. UNC, oral argument transcript, at 42 (Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_bb7j.pdf.

Hispanic students who overcame racial discrimination but not to Asian students who overcame discrimination—because it no longer looks like a race-neutral evaluation of experiences and more like a covert racial preference. To avoid risk, a university should consistently apply the standard and also provide a plus to the Asian American student who has overcome adversity in the face of discrimination.

Likewise, if overcoming adversity is the value universities are using to provide favorable consideration to students who overcome racial discrimination, it would be unwise to fail to provide favorable consideration for students who overcome obstacles based on their socioeconomic status. If the reason a university values the experience of overcoming racial adversity is that it says something powerful about the student's individual character and determination—as opposed to valuing the experience as a clever way to implement a covert group racial preference—then universities should take care to value the quality of determination *in nonracial contexts* as well.

Statistical analysis conducted in the Harvard and UNC cases showed that admissions officers had counted race about twice as heavily as socioeconomic disadvantage.⁵¹ If overcoming adversity is a key rationale advanced by universities for considering individual students' experiences overcoming racial discrimination, and they want to fend off the accusation that they are sneaking racial preferences in through the back door—universities will want to demonstrate that they *also* give at least as much consideration to overcoming socioeconomic obstacles, given research suggesting that today, class barriers impose costs seven times as high as strictly racial barriers as measured by predicted SAT scores.⁵²

The point is not that universities have to value overcoming adversity. When they provide a preference to legacy applicants, for example, they are doing precisely the opposite. It is that if universities are justifying consideration of overcoming racial discrimination as a *race-neutral* strategy because they value someone of any race who overcomes odds, they will want to apply that principle in a way that does not appear racially selective by ignoring other students who have overcome socioeconomic adversity merely because their *racial group* is overrepresented.

51 KAHLENBERG, EXPERT REPORT, *supra* note 2, at 26 (Harvard found that the size of the logit coefficient/preference for African American students was 2.37 compared with 0.98 for students with family incomes below \$60,000) and 27 (Professor Arcidiacono found that logit coefficient/preference for African American students was 2.659 compared with 1.083 for socioeconomically disadvantaged students); and RICHARD D. KAHLENBERG, EXPERT REPORT OF RICHARD D. KAHLENBERG, STUDENTS FOR FAIR ADMISSIONS V. UNIVERSITY OF NORTH CAROLINA, 33, <https://affirmativeactiondebate.files.wordpress.com/2021/06/kahlenberg-report-jan-2018.pdf>. (Professor Arcidiacono found that logit coefficient/preference for in-state African American students was 4.687 compared with 1.251 for in-state first-generation college students.)

52 See, e.g., Anthony P. Carnevale & Jeff Strohl, *How Increasing College Access Is Increasing Inequality, and What to Do About It*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 170, tbl. 3.7 (Richard D. Kahlenberg ed., 2010 (estimating the SAT scores socioeconomically disadvantaged students on average are 399 points below socioeconomically advantaged students, while for African American students, controlling for economic status, the expected score is 56 points lower)).

The danger of selectively considering overcoming obstacles arises within racial and ethnic groups as well as between them. The Dear Colleague Letter cites the adversity faced by “a Latina student at an overwhelmingly white high school,” which fits the profile of many underrepresented minority students at selective colleges today. The case presents a legitimate obstacle associated with ethnicity. But if a college consistently chooses that student, and not the Latina student in a high-poverty segregated school, whose parents did not attend college and would require more financial aid, then the school might rightly be accused of being inconsistent about the types of adversity to which it pays attention in order to reengineer the status quo.

In sum, the key to the proper use of the personal essay’s discussion of race—either the adversity example or the inspiration example—is to apply principles *consistently* across students of different racial and ethnic groups.

Apart from the student essay discussion, some universities may think they can ignore the Supreme Court’s limitations on using race altogether by downplaying or eliminating quantitative measures like the SAT in their system of admissions. How will anyone know what they are up to when “hard” measures become much less important in admissions decisions? But plaintiffs, through the legal discovery process, will be able to run statistical analyses, as *SFFA* did in the Harvard and UNC litigation, that will ascertain whether colleges are skirting the law by directly invoking race as a plus factor.

Even if colleges abandon the SAT, as some already have, it will still be possible to detect whether they are employing direct racial preferences. Institutions that consider thousands of applicants need to quantify and standardize the process. They will likely continue to rely on AP exam scores, SAT subject-matter score, and high-school GPAs. And in evaluating large numbers of students, universities often apply quantitative ratings to even softer criteria such as essays and recommendations.⁵³ In short, universities will not be able to hide behind opaque admissions processes, whether or not they abandon the SAT.

III. THE IMPORTANCE OF AUTHENTIC RACE-NEUTRAL ALTERNATIVES

If the essay loophole is of relatively limited utility for institutions seeking racial diversity, the other race-neutral alternatives option is much more potent. In this part, I begin by outlining *SFFA*’s discussion of the legality of race-neutral alternatives. I then discuss the leading alternative race-neutral strategies colleges could adopt, their efficacy in promoting racial and economic diversity, the pressing issue of how colleges can pay for these alternative race-neutral strategies, and I conclude this part with a discussion of how employing these alternative race-neutral strategies can serve as a shield against future litigation.

53 This discussion draws upon Kahlenberg, *A Middle Ground on Race and College*, *supra* note 14. Compare Harpalani, *Secret Admissions*, *supra* note 23 at 349.

A. *The Legality of Race-neutral Alternatives After Students for Fair Admissions*

As noted in Part I.A, it was conceivable (if never likely) that the conservative justices in *SFFA* would not only strike down racial preferences as a form of discriminatory means in admissions but go further and suggest that even having the goal of racial diversity was itself impermissible (option 4). Under this logic, a college that adopted a race-neutral alternative, such as providing a break to students from economically disadvantaged backgrounds or ending legacy preferences, would be engaging in illegal “proxy discrimination,” if part of the intent, and the effect, of the policy was to increase the representation of Black and Hispanic students.⁵⁴

This argument was advanced in a case known as *Coalition for TJ vs. Fairfax County School Board* (2023), challenging the use of geographic and socioeconomic considerations (but not race) in admissions to a selective magnet school, Thomas Jefferson High School, in Northern Virginia. While a conservative federal district court judge in Virginia struck down the plan as discriminatory, the Fourth Circuit reversed, noting that for years, conservative justices have been advocating that educational institutions should employ precisely the type of race-neutral factors that Thomas Jefferson High School applied, rather than race.⁵⁵

Some had been worried that in the *SFFA* cases, the Supreme Court would begin down the path advocated by the plaintiffs in the *TJ* case. Although the issue of the legality of race-neutral alternatives was not squarely raised in *SFFA*, the question had come up during oral arguments, and so observers were looking for signals from the Supreme Court.

A few weeks before the U.S. Supreme Court decision in *SFFA* was handed down, Harvard Law professor Randall Kennedy warned against those who

“declare confidently that race-neutral strategies for facilitating racial diversity will be in the clear. They insist that wealth-based, or income-based, or ZIP-code-based affirmative action will be immune to judicial attack because such markers are not expressly racial, though if tweaked carefully they can dependably yield substantial numbers of Black beneficiaries. That view is naïve.”⁵⁶

But when *SFFA* was handed down, there was nothing in the opinion to hint that the Supreme Court was willing to go down the path of outlawing race-neutral strategies. To the contrary, the Supreme Court appeared to leave the door wide

54 See, e.g., Brian Fitzpatrick, *Racial Preferences Won't Go Easily*, WALL ST. J., May 31, 2023, <https://www.wsj.com/articles/racial-preferences-wont-go-easily-thomas-jefferson-harvard-unc-court-bfa302b3>. Jonathan Feingold of Boston University Law School raised the point that ending legacy preferences would be illegal under the Pacific Legal Foundation's theory if part of the motivation was to increase racial diversity. See Feingold, *Affirmative Action After SFFA*, *supra* note 21 at 247.

55 See *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, 68 F. 4th 864 (4th Cir. 2023); and Kahlenberg, *A Middle Ground on Race and College*, *supra* note 14.

56 Randall Kennedy, *The Truth Is, Many Americans Just Don't Want Black People to Get Ahead*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/07/opinion/resistance-black-advancement-affirmative-action.html>.

open to universities employing a variety of “race-neutral” alternatives, such as those Professor Kennedy described, to promote the goal of racial diversity in admissions.

While the Supreme Court appeared, for all intents and purposes, to reject the idea that diversity provides a *compelling* justification for using race in admissions, it also said nothing to suggest that pursuing the educational benefit of racial diversity through race-neutral means was an *impermissible* goal. To the contrary, the majority opinion called the larger goals Harvard and UNC sought to achieve, such as promoting cross racial understanding, “commendable” and “worthy.”⁵⁷

The majority opinion did not spend much time discussing the issue of race-neutral alternatives beyond the discussion of using the personal essay to describe experiences with race. The closest it came to doing so was to note that considering geography is perfectly legal. The majority noted, “The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.”⁵⁸

Moreover, six members of the court—Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh in concurring opinions, and Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson in the dissent—discussed and endorsed race-neutral admissions policies.

Justice Thomas, for example, wrote that “if an applicant has less financial means,” then “surely a university may take that into account.”⁵⁹ Likewise, Thomas wrote, a university could consider a student’s “status as a first-generation college applicant” as a factor “to contextualize his application.”⁶⁰ Thomas explained, “universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities may not, however, assume that all members of certain racial minorities are disadvantaged.”⁶¹

Justice Thomas further lauded universities that had been banned from using race by state law for nevertheless achieving racial diversity by employing “race-neutral means.” He noted that the University of California had “recently admitted its ‘most diverse undergraduate class ever,’ despite California’s ban on racial preferences” and that “the University of Michigan’s 2021 incoming class was ‘among the university’s most racially and ethnically diverse classes with 37% of first-year students identifying as persons of color.’” Thomas wrote, “Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.”⁶²

57 *SFFA v. Harvard*, 600 U.S. 181 at 358.

58 *Id.* at 220.

59 *Id.* at 280 (Thomas, J., concurring).

60 *Id.* at 281 (Thomas, J., concurring).

61 *Id.* at 282 n. 11 (Thomas, J., concurring).

62 *Id.* at 284–56 (Thomas, J., concurring).

Justice Gorsuch, likewise, appeared to endorse race-neutral alternatives when he cited my expert testimony that “Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just *half* of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni and faculty.”⁶³ Justice Gorsuch also excoriated Harvard for its claim that it believes in all types of diversity given its lack of heterogeneity by economic status. Gorsuch wrote, “While Harvard professes interest in socioeconomic diversity,” testimony showed that there are “23 times as many rich kids on campus as poor kids.”⁶⁴

Justice Kavanaugh, as well, noted that race-neutral strategies could be used as a tool to “undo the effects of past discrimination.” He quoted an earlier decision pointing to “an array of race-neutral devices to increase accessibility.”⁶⁵

Justice Sotomayor, writing for dissenting Justices Kagan and Jackson, noted that “Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages.” Sotomayor observed, “At SFFA’s own urging, those efforts remain constitutionally permissible” as do policies that emphasize “geographic diversity, percentage plans, plans to increase community college transfers, and plans that develop partnerships with disadvantaged high schools.”⁶⁶

Although Justice Samuel Alito did not write a concurring opinion in *SFFA*, in the past, he has strongly supported race-neutral alternatives even where achieving racial student body diversity was part of the goal. In *Fisher II*, Justice Alito endorsed the Texas Top 10% plan, noting that if the University of Texas at Austin admitted students in the top share of every high school class, along with other race-neutral strategies, it could achieve racial diversity “without injecting race into the process.”⁶⁷

The Biden Administration’s “Dear Colleague” letter from the Departments of Justice and Education interpreting *SFFA v. Harvard* also read the opinion to permit a variety of race-neutral alternatives. The Administration’s Question and Answer sheet attached to the Dear Colleague letter included the following passage:

“The Court’s decision likewise does not prohibit admissions models and strategies that do not consider an individual’s race, such as those that offer admission to students based on attendance at certain secondary or post-secondary institutions or based on other race-neutral criteria. For instance, institutions may admit all students who complete degree programs at certain types of post-secondary institutions (e.g., community colleges and other institutions that are more likely to enroll students from economically or educationally disadvantaged backgrounds) and meet certain criteria (e.g., minimum GPA). Where feasible, institutions may also admit all students

63 *Id.* at 300 (Gorsuch, J., concurring).

64 *Id.* at 299 (Gorsuch, J., concurring).

65 *Id.* at 317 (Kavanaugh, J., concurring).

66 *Id.* at 365 (Sotomayor, J., dissenting).

67 *Fisher v. Univ. of Tex. (II)*, 579 U.S. 365, 426–27 (2016) (Alito, J., dissenting).

who graduate in the top portion of their high school class. These sorts of admission programs that do not consider an applicant's race in and of itself can help ensure that opportunities are distributed broadly and that classes are made up of students from a wide range of backgrounds and experiences."⁶⁸

The Q&A went on to say,

"As part of their holistic review, institutions may also continue to consider a wide range of factors that shape an applicant's lived experiences. These factors include but are not limited to: financial means and broader socioeconomic status; whether the applicant lives in a city, suburb, or rural area; information about the applicant's neighborhood and high school; whether the applicant is a citizen or member of a Tribal Nation; family background; parental education level; experiences of adversity, including discrimination; participation in service or community organizations; and whether the applicant speaks more than one language."⁶⁹

Other experts agree. The College Board posted on its website the opinion of Education Counsel, which also emphasized, "The Court's ruling elevates the importance of comprehensively considering all viable race-neutral strategies that may advance institutional diversity and equity goals."⁷⁰ Education Counsel noted that authentic "race-neutral" admissions factors such as "socioeconomic status, wealth, geography, first generation status, and more are permissible."

Finally, recruitment and outreach efforts are held to a different standard than admissions. Education counsel noted, "race-related recruitment and outreach policies are not subject to strict scrutiny standards, and nothing in the Court's opinion has changed that precedent."⁷¹

In August 2023, the plaintiffs in the *TJ* case appealed the unfavorable ruling from the Fourth Circuit Court of Appeals to the U.S. Supreme Court,⁷² so the justices may decide to weigh in directly on the issue.⁷³ Given the discussion above, it seems very unlikely that the Supreme Court will strike down race-neutral strategies.

To reduce the risks that universities will be challenged for using race-neutral strategies, it is important that school officials document the independent justifications for such policies, irrespective of their impact on racial diversity. During the Supreme Court oral arguments in *SFFA v. University of North Carolina*,

68 U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS, *supra* note 44, at 6.

69 *Id.*

70 Education Counsel, *Preliminary Guidance*, *supra* note 27, at 8.

71 *Id.* at 8–9.

72 Cert. Pet. in Coal. for TJ v. Fairfax Cnty. Sch. Bd, <https://pacificlegal.org/wp-content/uploads/2023/08/2023-08-21-Coalition-for-TJ-Cert-Petition.pdf>

73 See Karina Elwood, *Supreme Court Asked to Hear Thomas Jefferson High School Admissions Case*, WASH. POST (Aug. 23, 2023), <https://www.washingtonpost.com/education/2023/08/23/thomas-jefferson-high-school-supreme-court-admissions/>.

the justices raised the question of whether, if the Court were to strike down racial preferences, conservatives would turn around and challenge race-neutral alternatives that were motivated in part by a desire to produce racial diversity. SFFA's attorney, Patrick Strawbridge, answered that SFFA would likely oppose "a pure proxy for race" such as a preference for the descendants of enslaved people. But he acknowledged that other approaches, such as socioeconomic or geographic preferences, would be both desirable and entirely legal because there is a "race-neutral justification" for adopting them. The key for Strawbridge is that the plan proposed be justified in part by factors other than race.⁷⁴

In the case of socioeconomic preferences, for example, a university could say that it desires socioeconomic diversity for its own sake because it enriches classroom discussions and because a student who overcame socioeconomic obstacles shows more promise than his or her raw academic record might indicate. Indeed, some have criticized direct racial preferences precisely because they were a poor proxy for class: not all Black and Hispanic people are economically disadvantaged, and not all economically disadvantaged people are Black and Hispanic.⁷⁵

To make clear that these factors are not being used *solely* as a pretext for achieving greater racial diversity, Education Counsel suggested that institutions document their interests in these forms of diversity as a way of demonstrating "that they would pursue the interest" independently and "not based on interests in racial diversity alone."⁷⁶

B. Leading Race-neutral Strategies

Universities have available to them numerous race-neutral strategies. In an article in the *Chronicle of Higher Education*, civil rights attorney John Brittain and I outlined ten research-backed ideas for universities to consider.⁷⁷ Each has an independent justification and is also likely to disproportionately benefit Black and Hispanic students.

1. Jettison legacy preferences.
2. End preferences for faculty children.
3. Eliminate early admissions.

74 SFFAv.UNC, oral argument transcript, at 16, 44–45 (Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-707_m64n.pdf; and Kahlenberg, *A Middle Ground on Race and College*, *supra* note 14.

75 See, e.g., Bertrand Cooper, *The Failure of Affirmative Action: For the Black Poor, a World Without Affirmative Action Is Just the World as It Is—No Different than Before*, THE ATLANTIC (June 19, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/failure-affirmative-action/674439/> (criticizing Justice Sotomayor for calling socioeconomic preferences a "subterfuge" because the socioeconomic status of beneficiaries would be very different from the current beneficiaries of racial preferences).

76 Education Counsel, *Preliminary Guidance*, *supra* note 27, at 9.

77 Richard D. Kahlenberg & John C. Brittain, *10 Ways Colleges Can Diversify After Affirmative Action: There Are Many Options Beyond Racial Preferences*, CHRONICLE OF HIGHER EDUCATION (Nov. 9, 2022), <https://www-chronicle-com.proxygw.wrlc.org/article/10-ways-colleges-can-diversify-after-affirmative-action>.

4. Give a significant boost in admissions to low-income and first-generation students.
5. Give a further boost to students who grew up in disadvantaged neighborhoods.
6. Give a further preference to students with low family wealth.
7. Seek geographic diversity.
8. Increase community-college transfers.
9. Expand recruitment.
10. Increase financial aid.

The article provides detailed information about the rationale for each of these policies. There are other alternatives, such as forming partnerships with K–12 institutions. These policies work best in tandem with one another, rather than in isolation. Individual institutions will want to experiment to see which provide the best fit for their particular situations.

C. The Effectiveness of Race-neutral Alternatives in Producing Racial Diversity

Race-neutral alternatives have never been the preferred path to racial diversity for universities, in part because some university officials have thought it was important to employ race-specific preferences as a public acknowledgment that they recognize the importance of race in American society and in part because race-neutral alternatives are generally more expensive to implement than racial preferences.⁷⁸ To the extent that race could be used to recruit upper-middle class Black and Hispanic students, race-based affirmative action required a smaller allocation of resources than socioeconomic affirmative action programs, which entail investing greater amounts in student financial aid and support for economically disadvantaged students of all races.⁷⁹

In part, for that reason, universities had strong incentive to highlight—and in some cases exaggerate—potential drawbacks to race-neutral strategies. The effort to denigrate race-neutral alternatives may have reached its apex in a widely cited set of amicus briefs submitted in *SFFA* by the University of California and the

78 See, e.g., Brief of Amherst et al., Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard*, at 3 (Aug. 1, 2022), https://www.supremecourt.gov/DocketPDF/20/20-1199/232512/20220801174102841_20-1199%20and%2021-707_Brief%20of%20Amici%20Curiae%20Amherst%20et%20al%20Colleges%20and%20Bucknell%20et%20al%20Universities.pdf (Affirmative action is necessary “in a society in which race still matters.”); SAN DIEGO CMTY. COLL. DIST., STATEMENT ON THE SUPREME COURT AFFIRMATIVE ACTION RULING (June 30, 2023), <https://www.sdccd.edu/about/departments-and-offices/communications-and-public-relations/newscenter/articles/2023/statement-supreme-court-affirmative-action-ruling.aspx> (“The court’s decision ignores the ongoing realities of racism in our country and higher education systems.”); and Brief for the President and Chancellors of the University of California as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard*, at 15 (Aug. 1, 2022), https://www.supremecourt.gov/DocketPDF/20/20-1199/232355/20220801134931730_20-1199%20bsac%20University%20of%20California.pdf (noting that outreach programs are “extremely costly: UC has spent over a half-billion dollars implementing them”).

79 See KAHLBERG, EXPERT REPORT, *supra* note 2, Appendix, Simulation 4.

University of Michigan, which claimed that bans on racial preferences in those states had led to disastrous results.⁸⁰ The critique was further entrenched in the public consciousness when the *New York Times* ran a major article that essentially took the evidence cited in the amicus briefs at face value. The article said that despite the investment of “hundreds of million dollars,” race-neutral strategies to produce racial diversity “have fallen abysmally short.”⁸¹ But as the evidence presented below suggests, while universities facing bans on racial preferences did often see short-term drops in racial diversity, once universities were able to install and implement race-neutral strategies they were often able to restore robust levels of racial diversity.⁸²

The other common complaint lodged against a leading race-neutral alternative—providing a preference for socioeconomically disadvantaged students—is that it will mostly benefit White students as a matter of simple math. White people in 2021 constituted 43% of poor Americans. Twenty percent of poor people were Black, 28% were Hispanic, and 5% were Asian.⁸³ Moreover, some of the early research on using economic disadvantage in admissions suggested that looking at family income would not produce much racial diversity.⁸⁴

This line of reasoning, however, fails to appreciate two points.

First, only if universities envision affirmative action for socioeconomically disadvantaged students as occupying roughly the same number of seats as affirmative action by race, will economically disadvantaged White students necessarily “crowd out” Black and Hispanic students. By allocating a greater *share of* seats that can be occupied in the admission process by economically disadvantaged students than those informally allocated in the past for racial minorities, socioeconomic

80 See Brief for the President and Chancellors of the University of California as Amici Curiae Supporting Respondents, *Students for Fair Admissions v. Harvard* (Aug. 1, 2022), https://www.supremecourt.gov/DocketPDF/20/20-1199/232355/20220801134931730_20-1199%20bsac%20University%20of%20California.pdf; and Brief for the University of Michigan as Amicus Curiae in Support of Respondents, *Students for Fair Admissions v. Harvard* (Aug. 2022), https://record.umich.edu/wp-content/uploads/2022/08/220804_AmicusBrief.pdf.

81 Stephanie Saul, *Affirmative Action Was Banned at Two Top Universities. They Say They Need It*, N.Y. TIMES (Aug. 26, 2022), <https://www.nytimes.com/2022/08/26/us/affirmative-action-admissions-supreme-court.html>.

82 See discussion in Part III.C.1. In some cases, the increased diversity at selective colleges was related in part to the growth in the Hispanic population over time. In some cases, large gaps remained between the Hispanic statewide representation and the Hispanic representation at selective colleges. Of course, as a legal matter, the Supreme Court never endorsed race-conscious affirmative action programs as a means of attaining proportional representation; the goal under *Grutter*, for example, was to attain a critical mass of students in order to obtain the educational benefits of diversity.

83 See KAISER FAMILY FOUNDATION, POVERTY RATE BY RACE/ETHNICITY, 2021, <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?dataView=1%C2%A4tTimeframe%3D0¤tTimeframe=0&print=true&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22-2asc%22%7D>. The discussion in this and the next few paragraphs draws from Richard D. Kahlenberg, *How to Fix College Admissions Now: Focus on Class, Not Race*, N.Y. TIMES (July 5, 2023), <https://www.nytimes.com/interactive/2023/07/05/opinion/affirmative-action-college-admissions.html>.

84 See, e.g., Peter Passell, *Surprises for Everyone in a New Analysis of Affirmative Action*, N.Y. TIMES (Feb. 27, 1997) (citing research by Thomas Kane).

preferences can bring about racial diversity, even without changing the overall size of the student body at a school.

Second, research has found that if schools go beyond a simple income- and education-based definition of economic disadvantage, they can produce significant racial and class diversity. The most important socioeconomic factors to consider are family wealth, that is, net worth, and the neighborhood and school poverty rates an applicant experiences.⁸⁵ Low levels of family wealth make it difficult to buy a home in a neighborhood with strong public schools, and living in high-poverty neighborhoods and attending high poverty schools means less opportunity and more exposure to violence.⁸⁶ Accordingly, students who have done well despite these obstacles have something special to offer.

Wealth and neighborhood poverty also both capture the history and ongoing realities of racial discrimination better than family income and parental education measures. Because of slavery, segregation, and redlining, the median Black household wealth is just one-eighth the median White household wealth.⁸⁷ And because of racial discrimination in the housing market, Black middle-income families typically live in more disadvantaged neighborhoods than low-income White families.⁸⁸ As a result, middle-income Black students typically face a more challenging set of socioeconomic obstacles than White students with the same income. Of course, some low-wealth White and Asian students living in disadvantaged neighborhoods and attending disadvantaged schools will benefit from these preferences, too, as they should.

As I noted in an article coauthored by Melvin Oliver, the former president of Pitzer College and Peter Drier of Occidental College, using wealth in admissions is practical for universities because university admissions officers have ready access to such data, which is provided by students when they apply for financial aid.⁸⁹

Information currently comes in two forms. Students provide family wealth data on the Free Application for Federal Student Aid (FAFSA). More detailed wealth data—including home equity and small-business ownership—is required

85 Anthony P. Carnevale et al. *Achieving Racial and Economic Diversity with Race-blind Admissions Policy*, in *THE FUTURE OF AFFIRMATIVE ACTION* 187–202 (Richard D. Kahlenberg ed., 2014), <https://www.luminafoundation.org/files/resources/future-of-affirmative-action.pdf>.

86 Dalton Conley, *The Why, What, and How of Class-Based Admissions Policy*, in *THE FUTURE OF AFFIRMATIVE ACTION* 203–14 (Richard D. Kahlenberg ed., 2014), <https://www.luminafoundation.org/files/resources/future-of-affirmative-action.pdf>; and Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates*, NATIONAL BUREAU OF ECONOMIC RESEARCH (May 2015), https://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf.

87 See Emily Moss et al., *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS INST. (Dec. 8, 2020), <https://www.brookings.edu/articles/the-black-white-wealth-gap-left-black-households-more-vulnerable/>.

88 JOHN R. LOGAN ET AL., *LESS SEPARATE, NO LESS EQUAL* (Sept. 27, 2022), <https://s4.ad.brown.edu/Projects/Diversity/data/report/report0727.pdf>.

89 Peter Dreier et al., *The Path to Diversity at College Now That The Supreme Court Has Struck Down Affirmative Action*, SLATE (Feb. 8, 2023), <https://slate.com/news-and-politics/2023/02/supreme-court-affirmative-action-wealth-admissions-factor.html>.

for families filling out the College Board CSS Profile, which almost four hundred colleges use to provide institutional aid.⁹⁰ Of course, extremely wealthy families are not likely to apply for financial aid. But when tuition and fees at some selective colleges can exceed \$300,000 over four years, the very fact that a family does not apply for financial aid speaks volumes about their wealth.

Applications for admission and applications for financial aid are often filled out at different times in the process (with financial aid forms filed later), so institutions wishing to use wealth (and income) data at the admissions stage may need to accelerate the process by which they ask families about their financial status, including wealth. UCLA Law School, which pioneered the use of wealth data after it was banned from using race in the 1990s, has asked families about wealth on admissions applications (as well as other socioeconomic factors) for decades. Applicants have been asked to provide wealth estimates within one of several ranges, according to Richard Sander, a law professor and economist who helped devise the program.⁹¹ The application information is later checked against financial aid data. Families who knowingly submit false information on the FAFSA can be punished by a \$20,000 fine and time in prison.⁹²

Likewise, information about neighborhood and school poverty levels is readily available to college admissions officers through the College Board's Landscape tool. Admissions officers can type a student address into the College Board's Landscape programs and learn a great deal of information about the socioeconomic status of the neighborhood. The same tool is available to examine the socioeconomic indicators in the high school a student attends.⁹³

Three sources of research help inform thinking on the effectiveness of race-neutral strategies in producing racial diversity. The first set of research analyzes outcomes in several states where racial preferences have been banned at public universities, often because of passage of a state law. The second set involves a set of simulations conducted by economists using national data. The third set involves research conducted as part of the Students for Fair Admissions litigation against Harvard and UNC.

90 See Eric Barnes, *FAFSA and CSS Profile—A Straightforward Guide to Understanding Financial Aid*, SCOIR (Oct. 4, 2021), <https://www.scoir.com/blog/fafsa-css-profile-a-straightforward-guide#:~:text=The%20CSS%20Profile%20is%20used,%2C%20scholarships%2C%20and%20loans%20directly;and%20COLLEGE%20BOARD,%20CSS%20PROFILE%202023-24%20PARTICIPATING%20INSTITUTIONS%20AND%20PROGRAMS,https://profile.collegeboard.org/profile/ppi/participatingInstitutions.aspx>.

91 See Richard H. Sander, *Experimenting with Class-based Affirmative Action*, 47 J. LEG. EDUC. 472 (1997), <https://www.jstor.org/stable/42898257>.

92 U.S. DEP'T OF EDUC., FEDERAL STUDENT AID: THE IMPORTANCE OF SUBMITTING ACCURATE INFORMATION, <https://studentaid.gov/help/submitting-accurate-info>.

93 See COLLEGE BOARD, LANDSCAPE: COMPREHENSIVE DATA AND METHODOLOGY OVERVIEW, <https://secure-media.collegeboard.org/landscape/comprehensive-data-methodology-overview.pdf>.

1. *Experience in States*

The amicus briefs of the University of California and University of Michigan notwithstanding, research finds that most universities have been able to sustain racial diversity in the face of bans on racial preferences. In the Supreme Court’s oral arguments in *SFFA v. Harvard*, President Biden’s solicitor general, Elizabeth B. Prelogar, while questioning the efficacy of race-neutral strategies in some states also noted, “there are nine states ... that have barred the use of race in college admissions, and many of the universities and colleges in those states have been able still to achieve enrollment of diverse student bodies.” She continued, “I think that it’s incumbent on every college and university around the nation to study from and learn from those examples.”⁹⁴

A 2012 study I coauthored with Halley Potter found that seven of ten leading public universities—including the University of Texas at Austin, the University of Florida, and the University of Washington—were able to produce as much Black and Hispanic enrollment using a variety of race-neutral strategies as they had in the past using race.⁹⁵ Since then, the three outliers in the 2012 study—UCLA, UC Berkeley, and the University of Michigan at Ann Arbor—have made considerable strides.

UC Berkeley said in 2020 it enrolled “the most ethnically diverse freshman admitted class in more than 30 years.” Berkeley explained,

This is based on an increase in underrepresented minority students offered admission. Specifically, and remarkably, the campus has admitted 737 African American freshmen, 200 more than it did a year ago, for the upcoming 2020–21 school year, and that is the highest number since at least the late 1980s. Among Chicanx and Latinx freshmen, the number this year jumped by more than 1,000 students to 3,379, also the highest since at least the late 1980s.⁹⁶

In 2021, UCLA admitted the highest proportion of underrepresented minority students “in over 30 years.”⁹⁷ According to the universities’ websites, UCLA had just a 26% White population and UC Berkeley’s White freshman population was 31%.⁹⁸

94 Supreme Court oral argument transcript, *Students for Fair Admissions v. Harvard*, 101, October 31, 2022. https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_bi7a.pdf.

95 Richard D. Kahlenberg & Halley Potter, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, CENTURY FOUNDATION (2012), https://production-tcf.imgix.net/app/uploads/2012/10/03175956/tcf_abaa-8.pdf. See also Ray Rodrigues & Samuel J. Abrams, *The Florida Way: Diversity Without Affirmative Action*, REAL CLEAR EDUCATION (Aug. 7, 2023), https://www.realcleareducation.com/articles/2023/08/07/the_florida_way_diversity_without_affirmative_action_970983.html.

96 Janet Gilmore, *UC Berkeley’s Push for More Diversity Shows in Its Newly Admitted Class*, BERKELEY NEWS (July 16, 2020), <https://news.berkeley.edu/2020/07/16/uc-berkeley-push-for-more-diversity-shows-in-its-newly-admitted-class/>.

97 City News Service, *UCLA 2021 Freshman Class Is Most Diverse, Academically Accomplished in History, School Says*, ABC EYEWITNESS NEWS (July 19, 2021), <https://abc7.com/ucla-admission-freshman-class-2021-admissions/10897823/>; and see also T. Watanabe, *UC Admits Largest, Most Diverse Class Ever, But It Was Harder To Get Accepted*, L. A. TIMES, July 20, 2021, A1.

98 UCLA FACTS AND FIGURES, <https://www.ucla.edu/about/facts-and-figures>; and U.C. BERKELEY, UC BERKELEY FALL ENROLLMENT DATA FOR NEW UNDERGRADUATES, <https://opa.berkeley.edu/uc-berkeley-fall-enrollment-data-new-undergraduates>.

It is important to note that graduate programs in disciplines such as law and medicine are often highly selective and therefore also require careful consideration of race-neutral strategies moving forward. UC Davis Medical School—the subject of the original *Bakke*⁹⁹ lawsuit—has created a race-neutral “adversity scale” based on a variety of socioeconomic factors that is being lauded as a national model. Although the school is highly selective—accepting just 2% of applicants—84% come from disadvantaged backgrounds, 42% are first-generation college graduates, and the entering class is 14% Black and 30% Hispanic, both of which are higher than the national average for medical schools.¹⁰⁰

Likewise, as noted earlier, UCLA Law School has long used a variety of socioeconomic factors in its admissions program, including factors such as family net worth. An analysis conducted several years after UCLA Law began implementing its admissions system showed that Black students were 11.3 times as likely to be admitted, and Hispanic students were 2.3 times as likely to be admitted through the socioeconomic admissions program than through the regular admissions process.¹⁰¹

The University of Michigan said its 2021 incoming class was “among the university’s most racially and ethnically diverse classes, with 37% of first-year students identifying as persons of color.”¹⁰² Fifteen percent were underrepresented minorities.¹⁰³ After the U.S. Supreme Court handed down its decision in *SFFA*, the University of Michigan President, Santa Ono, said that while the university had suffered losses in racial diversity because of the ban on racial preferences, “we’re really making significant progress now” and have “started to increase Black and Latino and Native American enrollment recently.”¹⁰⁴

It is important to remember that these selective universities in states where racial preferences were barred had been fighting for talented underrepresented minority students with one hand tied behind their backs. U.C. Berkeley, for example, could not use racial preferences, but most of its twelve peer institutions could—until the *SFFA* decision—count race in admissions. Consider a student who had the academic background to get into Berkeley but not to Stanford University. If she was also an Hispanic student, Stanford, until this year, could give her an admissions preference, and she very well could end up going to Stanford instead

99 438 US 265 (1978).

100 Stefanie Saul, *With End of Affirmative Action, a Push for a New Tool: Adversity Scores*, N.Y. TIMES, July 2, 2023, <https://www.nytimes.com/2023/07/02/us/affirmative-action-university-of-california-davis.html>.

101 Kahlenberg & Potter, *A Better Affirmative Action*, *supra* note 95, tbl. 1.

102 Samuel Dodge, *Largest Ever Student Body at University of Michigan This Fall, Officials Say*, MLIVE.COM (Oct. 22, 2021), <https://www.mlive.com/news/ann-arbor/2021/10/largest-ever-student-body-at-university-of-michigan-this-fall-officials-say.html#:~:text=ANN%20ARBOR%2C%20MI%20%2D%20More%20than,%20history%2C%20officials%20said%20Thursday>.

103 See UNIV. OF MICH., ANN ARBOR CAMPUS SNAPSHOT—FALL 2021, https://obp.umich.edu/wp-content/uploads/pubdata/factsfigures/2021_UMAA_Infographic.pdf.

104 Santa Ono, *Univ. of Michigan President on Achieving Diversity Without Affirmative Action*, PBS NEWSHOUR (June 29, 2023), <https://www.pbs.org/newshour/show/univ-of-michigan-president-on-achieving-diversity-without-affirmative-action>.

of Berkeley. Now that the U.S. Supreme Court has placed a national ban on racial preferences, Berkeley will for the first time in decades face a level playing field in recruiting talented underrepresented minority students.

2. *National Simulations: The Importance of Neighborhood and Wealth*

In addition to the experience in states, a number of researchers, using national data, have simulated the effects of shifting from race-based to class-based affirmative action programs at leading universities across the country. These studies include research by Thomas Kane (1998), Maria Cancian (1998), William Bowen et al. (2005), Sean Reardon et al. (2015), Sigal Alon (2015), and Anthony Carnevale et al. (2014 and 2023).¹⁰⁵

Cancian, Kane, Bowen, and Reardon find in their studies that socioeconomic preferences are unlikely to yield much racial diversity if academic standards are to be maintained.¹⁰⁶ Carnevale and Alon, by contrast, include models in their studies, which find that socioeconomic preferences can yield high levels of racial diversity while maintaining high academic standards. The key differences boiled down to the definitions of socioeconomic disadvantage that are employed and the extent to which preferences for affluent students (such as legacy preferences) are discontinued. Cancian, Kane, Bowen, and Reardon limit their definition of socioeconomic status to factors such as family income, parental education, and parental occupation. Carnevale's and Alon's studies use a more expansive definition that includes socioeconomic measure of neighborhoods and schools as well as families.

As noted above, limiting the definition of socioeconomic disadvantage to such factors as income, education, and occupation is not advisable because it is highly unfair, on average, to African American and Latino candidates who, in the aggregate, face additional disadvantages.¹⁰⁷ Even middle-class African Americans live in higher poverty neighborhoods than low-income Whites. Black and Hispanic students also are much more likely to attend high-poverty schools than White students, even those of similar income levels.¹⁰⁸ Moreover, while African Americans

105 See Thomas J. Kane, *Racial and Ethnic Preference in College Admissions*, in *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jencks & Meredith Phillips, eds., 1998); Maria Cancian, *Race-based versus Class-based Affirmative Action in College Admissions*, 17 *J. PUB. ANALYSIS & MGMT.* 94 (1998); WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* (2005); and Sean F. Reardon et al., *Can Socioeconomic Status Substitute for Race in Affirmative Action College Admissions Policies? Evidence From a Simulation Model*, *EDUC. TESTING SERV.* (2015), https://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf (finding that using parental income, education, and occupation in a socioeconomic preference will not produce sufficient racial diversity). Sigal Alon, *Race, Class, and Affirmative Action* 254–56 (2015). Carnevale et al., *Achieving Racial and Economic Diversity*, *supra*, n. 85. Anthony Carnevale et al., *Race-conscious Affirmative Action: What's Next?* at 12, *GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE* (Mar. 2023), <https://cew.georgetown.edu/wp-content/uploads/cew-race-conscious-affirmative-action-fr.pdf>.

106 See Kane, *Racial and Ethnic Preferences*, *supra* n. 105; see also Cancian, *Race-based versus Class-based*, *supra*, n. 105; Bowen et al., *Equity and Excellence*, *supra* n. 105; and Reardon et al., *Can Socioeconomic Status Substitute*, *supra* n. 105.

107 See Part III.C.

108 See, e.g., Emma Garcia, *Poor Black Children Are Much More Likely to Attend High-Poverty Schools than Poor White Children*, *ECON. POL'Y INST.* (Jan. 13, 2017), <https://www.epi.org/publication/poor-black-children-are-much-more-likely-to-attend-high-poverty-schools-than-poor-white-children/>.

typically earn incomes that are 70% of White incomes, African American median household wealth is just 10% of White median household wealth. Adding concentrated neighborhood poverty and family wealth into a socioeconomic preference is the appropriate thing to do and also will disproportionately benefit African American and Hispanic students.¹⁰⁹

In a 2015 study, Professor Sigal Alon found that if the most selective 115 American universities instituted broad reform—including effectively eliminating legacy, athletic, and racial preferences¹¹⁰—a socioeconomic boost “could not only replicate the current level of racial and ethnic diversity at elite institutions but even increase it.”¹¹¹ Professor Alon’s model looked at three variations: (1) a “socioeconomic status” model, which looks at family-based economic disadvantages; (2) a “structural” model, which looks at neighborhood-based economic disadvantages; and (3) a “multidimensional” model, which looks at both. Professor Alon found that racial diversity would meet or exceed current admissions, and socioeconomic diversity would increase under all three models. Meanwhile, because mean SAT scores would remain steady, “all this could be done without jeopardizing academic selectivity.”¹¹²

Professor Anthony Carnevale of Georgetown University conducted similar studies using national databases in 2014 and 2023. In the 2014 study, Carnevale, Stephen Rose, and Jeff Strohl examined how socioeconomic affirmative action programs, percentage plans, or a combination of the two, could work at the nation’s most selective 193 institutions.¹¹³ The authors found that if these schools used class-based affirmative action—which would include a mix of socioeconomic considerations (such as parental education, income, savings, and school poverty concentrations)—the combined African American and Hispanic representation would rise from 11% to 13%—all without the use of racial preferences. Under a different simulation (in which the top 10% of test takers in every high school was among the pool admitted to this collection of schools) the authors found that African American and Hispanic representation would rise from 11% to 17%. Under each of these scenarios, socioeconomic diversity and mean SAT scores would also rise.¹¹⁴

In 2023, Anthony Carnevale and colleagues Zachary Mabel and Kathryn Peltier

109 See KAHLBERG, EXPERT REPORT OF RICHARD D. KAHLBERG, STUDENTS FOR FAIR ADMISSIONS V. UNIVERSITY OF NORTH CAROLINA, *supra* note 51, at 22–24.

110 Alon effectively eliminates athletic, legacy, and racial preferences by replacing those students in the weakest academic quartile—whom she presumes includes those for whom preferences were decisive—with the most academically competitive economically disadvantaged students of all races.

111 Sigal Alon, *Race, Class, and Affirmative Action*, *supra* note 105 at 254–56.

112 *Id.* at 256.

113 Carnevale et al., *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, *supra* note 85; see also David Leonhardt, *If Affirmative Action Is Doomed, What’s Next?* N.Y. TIMES, June 17, 2014.

114 Carnevale et al., *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, *supra* note 85, at 192, tbls. 15.1, 15.2. The study’s breakdown is as follows: status quo (4% African American, 7% Hispanic; 14% from the bottom socioeconomic half; 1230 mean SAT); admissions by test score (1% African American, 4% Hispanic; 15% bottom socioeconomic half; 1362 mean SAT); socioeconomic affirmative action (3% African American, 10% Hispanic; 46% from bottom socioeconomic half; 1322 mean SAT); top 10% of test takers from every high school (6% African American, 11% Hispanic; 31% from bottom socioeconomic half; 1254 mean SAT).

Campbell conducted a study that examined several models for replacing race-based affirmative action with race-neutral alternatives. Many of the models fell short of producing high levels of racial diversity, but one of the models—Model 3—found that a system of class-based affirmative action that also eliminates preferences for legacies and other privileged groups and expands the applicant pool through better recruitment, would yield an increase in racial diversity. The researchers find, “Hispanic/ Latino representation at selective colleges could rise from 14.1 percent to 18.5 percent of the enrolling class, Black/ African American representation could rise from 5.9 percent to 6.6 percent, and AI/ AN/ NH/ PI representation could rise from 0.3 percent to 0.4 percent.”¹¹⁵

3. *Simulations in the Harvard and UNC Litigation*

Finally, simulations conducted in the Harvard and UNC litigation provide evidence that race-neutral alternatives can be effective in creating racial, ethnic, and socioeconomic diversity while maintaining high academic standards.¹¹⁶ The advantage of these simulations over national simulations is that as part of the discovery process, Harvard and UNC had to turn over data with detailed information. In the Harvard case, the data included more than 160,000 students who applied for admission over six cycles. The data showed who were admitted and who were rejected, and granular information not only about the race and socioeconomic status of applicants and their high school grades and standardized test scores, but also about their status as legacies, children of faculty, and donor status. Moreover, Harvard and UNC had to produce detailed information about the quantitative ratings students were assigned when evaluating more subjective criteria, such as their athletic ability, their extracurricular activities, and a measure of their perceived “personal” strength as individuals (seeking to capture such qualities as integrity and the like).

The first step was to use these data to diagnose the weights assigned to various preferences in the admissions process, including those assigned to recruited athletes, African Americans, legacies, faculty/ staff dependents, Hispanics, those applying Early Action, disadvantaged students, and first-generation students. Figure 1 shows the relative weights provided for various preferences (with larger positive logit estimates indicating larger preferences.)

115 Carnevale et al., *Race-conscious Affirmative Action*, *supra* n. 105.

116 KAHLLENBERG, EXPERT REPORT, *supra* note 2, at 45.

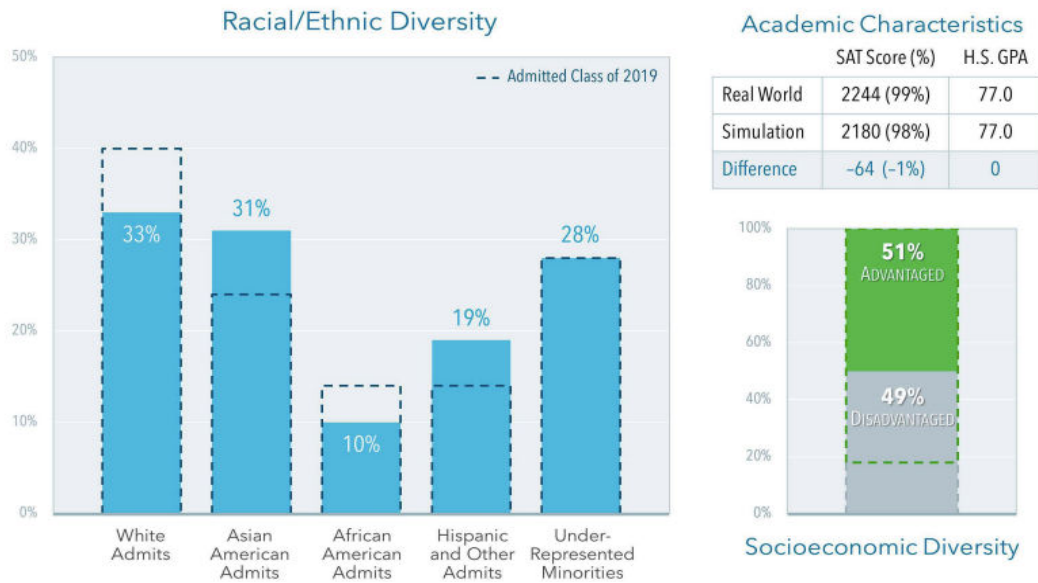
Figure 1. Harvard Admissions Preferences (Classes of 2014-2019)

Preference	Logit Estimate of Admission
Recruited Athlete	7.849
African American	2.659
Legacy	1.840
Faculty / Staff Dependent	1.704
Hispanic	1.419
Early Action	1.282
Disadvantaged	1.083
First-Generation	0.023
Asian	-0.271

Source: Richard D. Kahlenberg, Expert Report, *Students for Fair Admissions v. Harvard*, October 16, 2017, 27.

Once the relative weights are diagnosed, it is possible to run simulations that assess the effect of “turning off” preferences for factors, such as race or legacy, and increasing the weight provided to factors such as being economically disadvantaged. In the Harvard litigation, I asked Professor Arcidiacono to turn off the effects of Harvard’s preferences for race, legacy status, faculty children, and economic disadvantage. In its place, we instituted a larger socioeconomic preference that is about half the magnitude of Harvard’s existing preference for athletes.

In most (though not all) respects, diversity increased under the simulation. Socioeconomic diversity increased substantially. Asian and Hispanic admissions also increased. White admissions declined from 40% to 33% and Black admissions from 14% to 10%. Importantly, Harvard did not provide access to data about the wealth of student families. Had Arcidiacono had access to that information, which reflects our nation’s history of discrimination much better than other socioeconomic criteria, Black representation would surely have improved relative to the simulation. Academic preparation levels remained extremely high in the simulation. The average SAT in the class declining just 1 percentage point (from the ninety-ninth percentile to the ninety-eighth), despite the substantial increase in students who faced socioeconomic hurdles, and high school GPA remaining exactly the same (See Figure 2, Simulation D.)

Figure 2. Kahlenberg Simulation 7

Source: Joint Appendix in *Students for Fair Admissions v. Harvard*, Volume IV, JA 1783.
https://www.supremecourt.gov/DocketPDF/20/20-1199/222327/20220502145901917_20-1199%20Volume%20IV.pdf

D. How to Pay for Race-neutral Strategies

Race-neutral alternatives will typically be more expensive to implement than a system of racial preferences. At Harvard, switching from a student body in which 82% of students come from the top socioeconomic third of the country to one in which 51% do—as outlined in Figure 2, Simulation 7—would require a greater commitment of resources to financial aid programs, something Harvard, with its \$53 billion endowment, could afford to do on its own.¹¹⁷

But not every university is as wealthy. UNC, which has a smaller (though still very large) endowment, claimed it could not afford to make the switch to socioeconomic preferences.¹¹⁸ But if universities want to remain committed to providing the important educational benefits of a racially and socioeconomically diverse student body, they will need to make adjustments to find the resources. Indeed, about a week after the Supreme Court ruling in *SFFA v. Harvard*, UNC announced that it would, in fact, increase its financial aid budget substantially—providing free tuition to every North Carolina undergraduate coming from families making less than \$80,000 a

117 Sarah Wood, 10 *National Universities With the Biggest Endowments*, U.S. NEWS & WORLD REPORT (Sept. 13, 2022), <https://www.usnews.com/education/best-colleges/the-short-list-college/articles/10-universities-with-the-biggest-endowments>.

118 A UNC official testified at trial that “the university faces really serious financial challenges and those financial challenges make it hard for us to expand financial aid at will.” At the time of the litigation, UNC had the thirty-fifth largest endowment of 26,000 institutions of higher education worldwide and diverted some of its financial aid for non-need merit aid. See KAHLBERG, EXPERT REPORT OF RICHARD D. KAHLBERG, *STUDENTS FOR FAIR ADMISSIONS v. UNIVERSITY OF NORTH CAROLINA*, *supra* note 51, at 28; Kahlenberg “Rebuttal Report,” *supra* n. 7 at 21-22, <https://affirmativeactiondebate.files.wordpress.com/2021/06/2018.04.06-rebuttal-report-of-richard-kahlenberg.pdf> and Kahlenberg “Reply Report,” *SFFA v. UNC* at 25, <https://affirmativeactiondebate.files.wordpress.com/2021/06/final-kahlenberg-unc-reply-report-june-8-2018.pdf>.

year (in a state where the median household income is roughly \$61,000.)¹¹⁹

It will not be easy, but some universities should be able to reorder their priorities to allocate more resources to financial aid for low-income students and to wraparound services to support those students. A recent investigation by the *Wall Street Journal* found between 2002 and 2022, median spending at fifty public flagship universities rose 38% (adjusted for inflation)—money that in some cases “erected new skylines of snazzy academic buildings and dorms” and “hired layers of administrators.” The report, which some universities contested, noted that “Schools loaded their campuses with state-of-the art recreation centers and dorms to appeal to students with top test scores and minimal need for financial aid.”¹²⁰ Not all resources are fungible—some donations may be earmarked for buildings, for example. But a dramatic Supreme Court decision on the use of race requires universities to think anew about how their budgets reflect their values. Moving forward in a new legal environment, universities may wish to allocate funds to preserve racial diversity in new ways.

The other options for maintaining diversity—seeking to stretch the student essay loophole beyond the confines of the law or engaging in outright cheating—come with their own financial costs. UNC reportedly paid \$35 million in lawyers’ fees and Harvard paid more than \$27 million, and was seeking insurance to pay up to another \$15 million for lawyers. To top that off, under federal civil rights law, defendants found guilty of discriminating are often required to pay the plaintiffs’ attorneys’ fees.¹²¹

Princeton University’s Paul Starr has noted that supporting selective colleges to provide new financial aid programs to compensate for the loss of affirmative action is a manageable endeavor, given the relatively few students who attend selective colleges in the first place.¹²² The Pew Research Center estimates that more than half of colleges and universities in the United States admit two-thirds or more of their applicants, and just 3.4% of colleges and universities admit fewer than 20% of applicants. (These schools educate 4.1% of all U.S. college students.)¹²³ Likewise,

119 See Korie Dean, *UNC to Offer Free Tuition to NC Students After Supreme Court Ruling*, RALEIGH NEWS & OBSERVER (July 7, 2023), <https://www.newsobserver.com/news/local/education/article277105993.html>.

120 Melissa Korn et al., *State Colleges “Devour” Money, and Students Foot the Bill*, WALL ST. J., August 11, 2023, A1.

121 See Seven McGuire, *Can Harvard Discriminate with Essays?* WALL ST. J., August 12, 2023, A13. (quoting UNC board vice chairman John Preyer that UNC spent “in the neighborhood of \$35 million to lose a high-profile case”); and Adam Liptak, *Blunder in Affirmative Action Case May Cost Harvard \$15 Million*, N.Y. TIMES (Oct. 23, 2022), <https://www.nytimes.com/2022/10/23/us/harvard-affirmative-action-litigation-cost.html>; and CONG. RESEARCH SERV., AWARDS OF ATTORNEYS’ FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (Oct. 22, 2009), https://www.everycrsreport.com/files/20091022_94-970_5ca462bf2eacfb4f483fc98bd90d9e7313257af.pdf.

122 Paul Starr, *Moving On to Adversity-Based Affirmative Action*, AM. PROSPECT (July 3, 2023), <https://prospect.org/justice/2023-07-03-adversity-based-affirmative-action/>.

123 Drew DeSilver, *A Majority of Colleges Admit Most Students Who Apply*, PEW RES. CTR. (Apr. 9, 2019), <https://www.pewresearch.org/short-reads/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply/>; and Drew DeSilver, *Private, Selective Colleges Are Most Likely to Use Race, Ethnicity as a Factor in Admissions Decisions*, PEW RES. CTR. (July 14, 2023), <https://www.pewresearch.org/short-reads/2023/07/14/private-selective-colleges-are-most-likely-to-use-race-ethnicity-as-a->

because fewer than two hundred selective colleges have employed race-based affirmative action, researchers estimate that only about 2% of Black, Hispanic, and Native American students at four-year colleges are affected by affirmative action policies.¹²⁴ Starr argues that the financial commitment to provide financial aid to students under a new race-neutral affirmative action program at selective colleges “should be well within the means of private philanthropy and university endowments, together with existing public programs.”¹²⁵ These estimates involve undergraduate populations, and additional resources will be required to ensure that selective law schools and medical schools can afford to adopt new race-neutral programs that seek to preserve diversity.

For those institutions short of cash, the end of racial affirmative action should bring public pressure on policy makers at the state and federal levels to provide greater financial support to ease the transition to race-neutral strategies. President Joe Biden reacted to the *SFFA* decision by outlining “a new standard where colleges take into account the adversity a student has overcome”—whether the student is from Appalachia or Atlanta.¹²⁶

Conservatives, who have little history of supporting the underprivileged, will probably not lead the charge for class-based affirmative action, but they nevertheless have powerful incentives to go along with these programs.¹²⁷ For one thing, the public, while opposed to racial preferences, supports other paths to diversity. An April 2023 poll found that 69% of Americans (and 58% of Democrats) agreed that the Supreme Court should strike down race-conscious admissions as unlawful.¹²⁸ By contrast, the public *supports* class-based preferences by 61% to 39%.¹²⁹ That fact helps explain why Republican governors in states like Texas and Florida supported new types of class-based approaches to affirmative action after the use of race was discontinued in those states in the 1990s—as well as funding for the Texas Longhorn Opportunity Scholarship and Florida Opportunity Scholar Fund and Florida Student Assistance Grant.¹³⁰ Today the Republican Party routinely beats

[factor-in-admissions-decisions/](#).

124 Sarah Mervosh & Troy Closson, *The “Unseen” Students in the Affirmative Action Debate*, N.Y. TIMES (July 1, 2023), https://www.nytimes.com/2023/07/01/us/affirmative-action-students.html?nl=todaysheadlines&emc=edit_th_20230702.

125 Starr, *supra* n. 122.

126 Remarks by President Biden on the Supreme Court’s Decision on Affirmative Action (June 29, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/29/remarks-by-president-biden-on-the-supreme-courts-decision-on-affirmative-action/>.

127 See Kahlenberg, *How to Fix College Admissions Now*, *supra* note 83.

128 See *Where the Public Stands*, N.Y. TIMES, July 2, 2023, 19.

129 See, e.g., Scott Jaschik, *Poll: Public Opposes Affirmative Action*, INSIDE HIGHER ED (July 7, 2016), <https://www.insidehighered.com/news/2016/07/08/poll-finds-public-opposition-considering-race-and-ethnicity-college-admissions> (citing Gallup/Inside Higher Ed poll that Americans support counting “family economic circumstances” by 61% to 39% while opposing the use of “race or ethnicity” by 63% to 36%)

130 See Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned* in *THE FUTURE OF AFFIRMATIVE ACTION* 78, 82–83 (Richard D. Kahlenberg ed., 2014).

Democrats by about two to one among White people without a college degree—the very voters whose children could for the first time take advantage of this shift in approach to socioeconomic preferences across racial lines.

Finally, it is possible that universities will be able to increase fundraising efforts in response to the crisis created by the U.S. Supreme Court decision for two reasons.

First, Americans (including Americans of means) do not want to see higher education resegregate, and may be moved to provide resources to prevent that from happening. At UCLA, for example, when Black representation plummeted after passage of the California ban on racial preferences, alarm bells went off and funders stepped up, motivated by a desire to restore Black enrollment.¹³¹

Second, at the same time, fundraising efforts that emphasize that students benefiting from class-based affirmative action will be coming from *economically disadvantaged* backgrounds may have greater appeal than fundraising to support economically privileged students of color—what the *New Yorker's* Jay Caspian Kang called “a Benetton ad of rich kids.”¹³² In fact, in their rhetoric, supporters of affirmative action have often sought to boost the policy’s moral appeal by implying that Black and Hispanic students who benefit from racial preferences are typically from poor and working-class backgrounds. One commentator reacting to the *SFFA* decision, for example, wrote, “Today, my heart breaks for the millionth time for brown youth who saw education as a ticket out of poverty and will feel like this is the end.”¹³³ Fundraisers can point out that their universities are seeking to create a new type of affirmative action program that will, in fact, be targeted to the economically disadvantaged. Because all students who benefit from class-based affirmative action, not a small subset, will have faced economic challenges, the power to move minds and wallets may be enhanced.

E. Using Race-neutral Alternatives as a Shield Against Future Litigation

In the years to come, as universities seek to find ways to sustain racial diversity in the absence of race-conscious admissions, the use of race-neutral alternatives, such as socioeconomic preferences, will not only be a legal way of doing so, it will help provide a shield against litigation claiming that universities are “cheating” by using race in defiance of the law.

131 Jack Feuer, *The Faces of Change*, UCLA NEWSROOM (Jan. 1, 2011), <https://newsroom.ucla.edu/magazine/african-american-enrollment> (describing extensive efforts, including from the philanthropic community, after UCLA’s Black representation declined to 2% in 2006).

132 See Jay Caspian King, quoted in *Affirmative Action*, THROUGHLINE PODCAST, NATIONAL PUBLIC RADIO (June 15, 2023), <https://www.npr.org/2023/06/14/1182149332/affirmative-action>. See also Bertrand Cooper, *The Failure of Affirmative Action*, THE ATLANTIC (June 19, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/failure-affirmative-action/674439/> (noting that “Most Americans seem to think affirmative action sits at the foundation of some beneficent suite of education policies that do something significant for poor Black kids, and that would disappear without the sanction of affirmative action. But the reality is that for the Black poor, a world without affirmative action is just the world as it is—no different than before.”).

133 Gianna Nino-Tapias, quoted in Theresa Vargas, *Affirmative Action Helped Many. This Is My Story*, WASH. POST, July 2, 2023, C1, C95.

Universities should make strides to achieve high levels of racial diversity, but if they do so *without* announcing any new authentic race-neutral alternatives and *without* showing an increase in socioeconomic diversity, their actions will raise suspicions that they are still using race impermissibly in admissions. A university with good racial diversity numbers but without any new authentic race-neutral programs is placing a litigation target on its back.

Announcing new race-neutral alternative programs can also play an important signaling effect to underrepresented minorities that the university is serious about diversity and is willing to pay for it. This signaling could result in increased applications from talented socioeconomically disadvantaged students, including underrepresented minorities.

Not surprisingly, in the weeks following the Supreme Court decision, a number of colleges and universities have swiftly announced new race-neutral strategies for increasing diversity.

To begin with, a number of institutions—including Wesleyan, Occidental, Carleton, the University of Minnesota, and Virginia Tech—have announced that they are ending legacy preferences.¹³⁴ (Virginia Tech also ended its early decision program.)¹³⁵ Although Harvard has not yet made such an announcement, the former president of Harvard, Larry Summers, jettisoned his prior support for legacy preferences and said they should now be eliminated.¹³⁶ Harvard is also under pressure from a civil rights complaint filed within days of the *SFFA* decision, which alleges that Harvard's legacy preferences are racially discriminatory.¹³⁷ Legislation has also been proposed at the federal and state level to curtail or tax institutions that employ legacy preferences.¹³⁸

Around the time of the Supreme Court's decision, new financial aid programs were announced and not only by UNC. Duke University announced free tuition to incoming students from North and South Carolina (two heavily Black states) who make less than \$150,000 a year.¹³⁹

134 See Theresa Vargas, *My Kids Could Be Legacies, but They Shouldn't Be*, WASH. POST, August 13, 2023, C1, C6; and Liam Knox, *Occidental College Ends Legacy Admissions*, INSIDE HIGHER ED (July 28, 2023), <https://www.insidehighered.com/news/quick-takes/2023/07/28/occidental-college-ends-legacy-admissions>; and Liam Knox, *Carleton College Eliminates Legacy Preferences*, INSIDE HIGHER ED (Sept. 1, 2023), <https://www.insidehighered.com/news/quick-takes/2023/09/01/carleton-college-eliminates-legacy-preferences>.

135 Liam Knox, *The Common App Enters an Uncommon Era*, INSIDE HIGHER ED, Aug. 2, 2023.

136 Lawrence H. Summers, *How Colleges Can Keep Expanding Opportunity*, WASH. POST, July 3, 2023, A15; and Richard D. Kahlenberg, *Larry Summers's Unsatisfying Proposal*, INNOVATIONS BLOG, CHRONICLE OF HIGHER EDUCATION, July 16, 2012.

137 See LAWYERS FOR CIVIL RIGHTS, FEDERAL CIVIL RIGHTS COMPLAINT CHALLENGES HARVARD'S LEGACY ADMISSIONS (2023), lawyersforcivilrights.org/our-impact/education/federal-civil-rights-complaint-challenges-harvards-legacy-admissions/.

138 See, e.g., Liam Knox, *Legislating to End Legacy Preferences*, INSIDE HIGHER ED (Aug. 14, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/08/14/breathing-new-life-legacy-admissions-legislation>.

139 See Korie Dean, *UNC to Offer Free Tuition to NC Students After Supreme Court Ruling*, RALEIGH NEWS

The University of Virginia announced a plan to target enhanced recruitment at forty high schools that had in the past sent few applicants.¹⁴⁰ Lafayette College announced it would reduce the number of extracurricular activities admissions counselors would consider because, the college's president, Nicole Hurd, said, amassing a long list was particularly burdensome for low-income students who may need to care for family members or work one or more jobs.¹⁴¹

About a month after the Supreme Court ruling, the University of South Carolina announced a new plan to admit the top 10% of students, based on GPA, from high schools throughout the state.¹⁴² A month later, the University of Tennessee adopted a top 10% plan for its flagship Knoxville campus.¹⁴³ The fact that universities in two "red" states would advance percentage plans is notable.

In September 2023, Yale University, in settling a lawsuit with Students for Fair Admissions, agreed not only that it would curtail its use of race in admissions in several ways but also announced that it was launching a number of new race-neutral strategies. Yale said it would begin using data from the Opportunity Atlas, which provides a measure of economic mobility in every census tract in America, as part of its admissions process. Yale also hired two new admissions officers to work with college-access organizations to increase recruitment of disadvantaged students. Jeremiah Quinlan, Yale's dean of undergraduate admissions and financial aid, said some of the new initiatives had been under consideration for years, but "now we are extremely motivated."¹⁴⁴

And—in timing that clearly seemed connected to the U.S. Supreme Court's then-pending ruling in *SFFA*—a number of graduate programs ended their cooperation with the *U.S. News & World Report* ranking system. The arguments cited for ceasing to cooperate with *U.S. News*—including the complaint that the rankings penalize institutions that admit low income students—have been true for decades and never before prompted action.¹⁴⁵ The timing of the decisions to

& OBSERVER (July 7, 2023), <https://www.newsobserver.com/news/local/education/article277105993.html> (also noting Duke's program).

140 Jeffrey Selingo, *How Elite Colleges Will Work Around the Supreme Court Ruling*, WALL ST. J., July 8, 2023, C3.

141 Knox, *The Common App Enters an Uncommon Era*, *supra* note 135.

142 Doug Lederman, *Admitting the Top 10% for Geographic Diversity*, INSIDE HIGHER ED, Aug. 2, 2023 (regarding new South Carolina program).

143 Susan H. Greenberg, *University of Tennessee Guarantees Admission to Eligible Students*, INSIDE HIGHER ED (Sept. 11, 2023), <https://www.insidehighered.com/news/quick-takes/2023/09/11/eligible-students-guaranteed-admission-univ-tennessee#:~:text=The%20University%20of%20Tennessee%20Board,according%20to%20a%20system%20statement>.

144 Eric Hoover, *Here's How Yale Is Changing Its Admissions Practices for a New Era*, CHRONICLE OF HIGHER EDUC. (Sept. 7, 2023), <https://www.chronicle.com/article/sffa-yale-reach-agreement-to-dismiss-lawsuit>.

145 See, e.g., Dean Gerken: *Why Yale Law School Is Leaving the U.S. News & World Report Rankings*, YALE LAW SCH., (Nov. 16, 2022), <https://law.yale.edu/yls-today/news/dean-gerken-why-yale-law-school-leaving-us-news-world-report-rankings> (citing, among other things, that "the U.S. News rankings are profoundly flawed—they disincentivize programs that support public interest careers, champion need-based aid, and welcome working-class students into the profession").

stop cooperating now may suggest that those universities doing so are planning to admit more working-class students as a race-neutral alternative to racial affirmative action and do not want to lose their competitive edge if other institutions do not also take such action.

IV. CONCLUSION

The U.S. Supreme Court's decision in *SFFA* has created a crisis—and, in the words of Angel Perez, CEO of the National Association for College Admissions Counseling, “Don’t let a crisis go to waste.”¹⁴⁶ As Colorado College President Song Richardson argued, “Affirmative action made us complacent. Now that tool is gone, and I’m optimistic that all of us can work together to fix our broken system.”¹⁴⁷

The Supreme Court has created a pathway that threads a needle. Racial diversity is, for all intents and purposes, no longer a compelling interest, so it is risky to use the essay loophole at scale in a way that looks like an institution is engaging in the old way of doing business. On the other hand, seeking racial diversity is not impermissible—the benefits that flow from student body diversity are “worthy” and “commendable”—so using race-neutral alternatives, in part with the aim of improving racial diversity, remains perfectly legal.

The leading race-neutral alternative—employing socioeconomic preferences—not only has strong legal backing, it is enthusiastically embraced by the broader American public and could help put higher education back in better standing with the public.

If colleges adopt this approach, they will be picking up a thread advocated by giants from the 1960s, such as Justice William O. Douglas and Dr. Martin Luther King Jr.¹⁴⁸ In the years surrounding the passage of the 1964 Civil Rights Act, which outlawed racial discrimination in education, employment, and public accommodations, civil rights leaders vigorously debated the question of how to address the terrible legacy of the nation’s mistreatment of Black people over centuries. Some argued for racial preferences. But King suggested a different path.¹⁴⁹

In his 1964 book *Why We Can’t Wait*, King wrote that America owed its Black citizens some form of compensation for the way they’d been treated. “The nation must not only radically readjust its attitude toward the Negro in the compelling present, but must incorporate some compensatory consideration for the handicaps

146 Quoted in Liam Knox, *A National Summit on a Higher Education “Low Point,”* INSIDE HIGHER ED (July 27, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/07/27/frustration-and-uncertainty-affirmative-action-summit>.

147 *Id.*

148 This portion of the article draws from Richard D. Kahlenberg, *A New Path to Diversity*, DISSENT (Mar. 23, 2023), https://www.dissentmagazine.org/online_articles/a-new-path-to-diversity/.

149 See Richard D. Kahlenberg, *A Path Forward for Reparations?* DEMOCRACY J. (Sept. 16, 2020), <https://democracyjournal.org/magazine/a-path-forward-on-reparations/>.

he has inherited from the past.”¹⁵⁰ His proposed solution, however, was a racially inclusive Bill of Rights for the Disadvantaged for people of all races.¹⁵¹

King outlined three rationales for this approach. First, he argued that, because of the history of slavery and segregation, a Bill of Rights for the Disadvantaged would disproportionately benefit Black people and thereby serve as a remedy for past discrimination. Second, King recognized that disadvantaged Americans of all races faced not only discrimination but also deprivation, a condition that itself required a remedy. “It is a simple matter of justice that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of the forgotten white poor,” he wrote.¹⁵²

Third, King knew that the issue of racial preferences would divide the coalition of civil rights groups and organized labor behind the 1963 March on Washington. As he wrote to an editor of *Why We Can't Wait*: “It is my opinion that many white workers whose economic condition is not too far removed from the economic condition of his black brother, will find it difficult to accept a ‘Negro Bill of Rights,’ which seeks to give special consideration to the Negro in the context of unemployment, joblessness, etc. and does not take into sufficient account their plight.”¹⁵³

A similar face-off between race-based and class-based affirmative action arose in the legal arena in the early 1970s. Justice William O. Douglas, who grew up the son of a struggling single mother and went on to underscore the problem of class inequality in virtually all of his jurisprudence, supported the economic approach to admissions preferences. In 1974, when a White applicant to the University of Washington School of Law, Marco DeFunis, challenged the school’s racial preference program, Douglas, the Court’s most liberal justice at the time, suggested that class was a better basis for affirmative action than race. In a dissenting opinion to the Court’s decision to declare the *DeFunis v. Odegaard* case moot, Douglas wrote that race per se should not be considered, but a

“black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fair-minded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard.”¹⁵⁴

As I have noted elsewhere, some cynics say selective colleges, like Harvard and UNC, have always been bastions of wealth and will never change. But elite colleges can and do change for the better. In the early 1960s, it was hard to believe that Harvard would one day become majority-minority and that it and other

150 MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 134 (1964).

151 *Id.* at 137.

152 *Id.* at 138.

153 RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* 15 (1996), J304

(citing DAVID GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 312 (MORROW, 1986).

154 *DeFunis v. Odegaard*, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting).

elite all-male colleges would begin admitting women. But both of those things happened. Now that the Supreme Court has created a crisis that is shaking up higher education, it is time for selective colleges to open the door a third time.¹⁵⁵

Counsel to universities have an important role to play in guiding college leaders to a new kind of affirmative action that is legally unassailable, politically sustainable, and produces high levels of diversity by both race and class alongside academic excellence. By providing wise legal counsel to avoid risky shortcuts associated with improperly using the personal essay, lawyers can encourage institutions to go beyond past efforts to create a “Benetton ad of rich kids,” and embrace authentic race-neutral strategies that are transformative.

The multiracial gathering of first-generation college students who assembled at Harvard back in 2016 that I referenced at the beginning of this article were a relatively small and isolated group. After *SFFA v. Harvard*, universities have a chance to create a better affirmative action that taps into the talents of thousands of impressive students who have overcome odds but have, until now, largely been left behind.

155 See Kahlenberg, *How to Fix College Admissions Now* *supra* note 83.

SECRET ADMISSIONS

VINAY HARPALANI*

Abstract

*This article examines secret admissions—an ironic term I use to refer to the mysterious nature of holistic review within universities' admissions policies. In particular, I examine legal controversies that have implicated race as part of holistic review. I consider the prospect for future controversies after the U.S. Supreme Court's recent ruling in *Students for Fair Admissions v. Harvard* (2023), which outlawed race-conscious admissions policies. Additionally, I review the history of holistic admissions, and I examine how the secrecy in holistic review has influenced and been influenced by the consideration of race in admissions. My article discusses the pros and cons of flexible, individualized consideration of race within holistic review—a policy that was previously endorsed by the Supreme Court in *Grutter v. Bollinger* (2003). I emphasize the fact that holistic review obscures both the impact of race on individual admissions decisions and the manner in which various admissions criteria are integrated to make such decisions. I argue that such obfuscation aided *Students for Fair Admissions* (SFFA) in advancing its case from the lower courts to the Supreme Court. I also consider the potential for surreptitious use of race in admissions in a post-SFFA admissions world, which could lead to more scrutiny of holistic review and consequent litigation. I do all of this by reviewing scholarly and judicial discourse on holistic admissions and by sharing various personal anecdotes—from conversations about my research on race-conscious admissions policies to my experiences serving on admissions committees to stories from my students about their college and law school applications.*

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INTRODUCTION

The past summer, with its consolidated ruling in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina at Chapel Hill*¹ (hereinafter referred to collectively as *SFFA*),² the U.S. Supreme Court ended the use of race as a factor in university admissions. The Court did not explicitly say it was overturning its 2003 ruling in *Grutter v. Bollinger*,³ but in my view, it effectively did so.⁴ In *Grutter*, the Court held that the educational benefits of “student body diversity” were a compelling state interest, and that universities could use race-conscious admissions policies to attain those benefits.⁵ *Grutter*’s narrow tailoring requirements dictated that race could only be used as one flexible factor considered individually for each applicant in a holistic review process;⁶ that universities must stop using race-conscious policies if they could attain sufficient diversity without using race;⁷ and that race-conscious policies could not “unduly burden individuals who are not members of the favored racial and ethnic groups.”⁸ But in his *SFFA* majority opinion, Chief Justice Roberts changed that last narrow tailoring requirement in a way that precludes any use of race: he essentially transformed no “undue burden” into no burden at all. The Chief Justice stated that “[c]ollege admissions are zero-sum” because percentages add up to one hundred: an advantage that increases the proportion of admitted students from one group will necessarily decrease the proportion of admitted students from another group.⁹ The Court ruled in favor of *SFFA* in part because “Harvard’s [race-conscious policy] overall results in fewer Asian Americans ... being admitted” than would be admitted absent use of race.¹⁰ Any use of race at all creates such a “burden” on some group. Thus, *SFFA* nullified even the narrow parameters laid out in *Grutter*.

Nevertheless, one important aspect of *Grutter*’s legacy remains: its endorsement of holistic review.¹¹ Holistic review in admissions—the flexible,

1 *Students for Fair Admission, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) hereinafter *SFFA*.

2 In the main text, I will use italicized “*SFFA*” to refer to the cases and regular font “*SFFA*” to refer to the plaintiff organization, Students for Fair Admissions. Additionally, when specifically discussing just one of the cases, I will use both parties in the case name (e.g., *SFFA v. Harvard*).

3 539 U.S. 306 (2003).

4 In its 2022 ruling in *Dobbs v. Jackson Women’s Health Organization*, the Supreme Court was very explicit in stating that it was overruling *Roe v. Wade* (1973). See *Dobbs*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973)). However, the Court was much more subtle in how it treated race-conscious university admissions than it was with abortion rights.

5 See *Grutter*, 539 U.S. at 325.

6 *Id.* at 337–39.

7 *Id.* at 339–42.

8 *Id.* at 341.

9 *SFFA*, 600 U.S. 181, 218 (2023).

10 *Id.*

11 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (affirming University of Michigan Law School

individualized consideration of various nonacademic factors in addition to academic criteria—was around long before *Grutter*.¹² But the late Justice Sandra Day O'Connor's *Grutter* majority opinion brought significantly more attention to holistic review. *Grutter* upheld the University of Michigan Law School's holistic admissions policy, which considered race on an individualized basis, as one factor among many criteria, and with potentially variable weight for each applicant.¹³ Simultaneously, Justice O'Connor's majority opinion in *Gratz v. Bollinger* rejected the University of Michigan College of Literature, Science, and the Arts (LSA) admissions policy, which used race mechanically by giving 20 points on a 150 point scale to all underrepresented minority applicants.¹⁴ And Justice O'Connor also affirmed the Court's 1978 ruling in *Regents of the University of California v. Bakke*, where the Court struck down the University of California, Davis School of Medicine special admissions program which had reserved sixteen seats in a class of one hundred for underrepresented minority applicants.¹⁵

Justice O'Connor's preference for *Grutter*'s holistic individualized review, along with her rejection of the *Bakke* set-aside and *Gratz* point system, had many consequences. After *Grutter*, if a university wanted to use race-conscious admissions policies, holistic review was not merely an option: it was a constitutional mandate. But although that mandate is now obsolete, holistic review is not. Most selective institutions use some form of holistic review in their admissions processes,¹⁶ and they will continue to do so even without considering race. Flexible, individualized review of applicants, based on a plethora of characteristics, will become even more important in the post-*SFFA* world, as institutions seek to use various other criteria to attain racially diverse student bodies.¹⁷ And this will amplify attention given to

admissions policy), which involved “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment”). This was the first use of the term “holistic” by the U.S. Supreme Court in an admissions case. Holistic review itself remains intact after *SFFA*. See *SFFA*, 600 U.S. 181, 363 (Sotomayor, J., dissenting) (noting that *SFFA* ruling “leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications”). In this article, I use the terms “holistic review” and “holistic admissions” interchangeably.

12 See *infra* Part I.

13 *Grutter*, 539 U.S. at 334 (“[A] university may consider race or ethnicity only as a ‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” ... In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”).

14 539 U.S. 244 (2003). Technically, the LSA policy was also holistic in part, but not in the way it incorporated race. Use of race in the LSA policy was not flexible or individualized.

15 438 U.S. 265 (1978).

16 Jolene M. Maude & Dale Kirby, *Holistic Admissions in Higher Education: A Systematic Literature Review*, 22 J. HIGHER EDUC. THEORY & POL’Y, 73, 76 (2022) (noting that the College Board’s “[g]uidelines [for holistic admissions] have been adopted by a variety of professional organizations and have been incorporated into the admissions practices of colleges and universities”).

17 See Kelly Dore, *Affirmative Action Is Ending—But Holistic Admissions Can Still Allow Higher Education to Better Reflect Society*, FORTUNE (June 23, 2023), <https://fortune.com/2023/06/30/affirmative-action-end-holistic-admissions-can-still-allow-higher-education-to-better-reflect-society-supreme->

another intriguing feature of holistic admissions policies: their obscure, mysterious nature. Media coverage of *SFFA* often highlighted the lack of transparency in holistic admissions policies.¹⁸ Such obscurity is an inherent feature of a process that affords so much flexibility to admissions reviewers who are essentially instructed to use their own judgments (and biases)¹⁹ in evaluating each individual applicant. How exactly admissions decisions are made through holistic review is perhaps the “best kept secret”²⁰ in higher education.

In this article, I will explore such *secret admissions*: an ironic term I use to refer to the mysterious nature of holistic review itself—the largely idiosyncratic process by which various criteria are weighed, differently for each applicant, to grant or deny each of them admission.²¹ Many applicants know the criteria used in holistic review, which include grades, test scores, extracurricular activities, essays, personal hardships, and letters of recommendations. Universities list such criteria on their websites.²² However, the way that these criteria are integrated to make decisions is a mystery to most.²³ As part of secret admissions, I focus in particular on the flexible, individualized use of race endorsed by *Grutter*, which obscures the impact

court-politics-universities/ (“[H]igher education institutions will lean more heavily on holistic admission policies to ensure they meet their diversity, equity, and inclusion goals[.]”); Acuity Insights, *Holistic Admissions Practices On the Rise Following the Repeal of Affirmative Action*, GLOBENEWSWIRE (Oct. 19, 2023), <https://www.globenewswire.com/news-release/2023/10/19/2763299/0/en/Holistic-Admissions-Practices-On-the-Rise-Following-the-Repeal-of-Affirmative-Action.html>.

18 See, e.g., Sara Harberson, *The Truth About ‘Holistic’ College Admissions*, L.A. TIMES (June 9, 2015), <https://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html> (“Without more transparency, holistic admissions can become an excuse for cultural bias to dictate a process that is supposed to open doors.”); Josh Gerstein, *What Is Harvard Trying to Hide?*, POLITICO (Oct. 21, 2018), <https://www.politico.com/magazine/story/2018/10/21/harvard-admissions-affirmative-action-221669/> (“For years, reporters have been trying to get elite universities to be more transparent about their admissions process.”); Victor Liu, *Lack of Transparency Causes Confusion in Admissions Process*, SARATOGA FALCON (Apr. 29, 2019), <https://saratogafalcon.org/content/lack-transparency-causes-confusion-admissions-process/> (“[U]nder a holistic review for admissions, students are generally left in the dark about what admissions offices are looking for.”).

19 I use the term “biases” to reference tendencies to favor or disfavor certain attributes, and to make assumptions about who does and does not possess such attributes. In that vein, biases can yield positive or negative results for any individual applicant in a holistic admissions process. Although bias can be conscious or unconscious, my use of the term generally denotes the latter—“implicit bias.” See generally Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995); MAHZARIN BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2016).

20 Diamond D & the Psychotic Neurotics, *Best-Kept Secret, on STUNTS, BLUNTS & HIP HOP* (Chemistry Records 1992).

21 See *infra* Part I. “Secret admissions” refers specifically to the mystery regarding how holistic review works in practice.

22 See, e.g., Harvard College Admissions & Financial Aid, *What admissions criteria do you use?*, <https://college.harvard.edu/admissions> (“There is no formula for gaining admission to Harvard. Academic accomplishment in high school is important, but the Admissions Committee also considers many other criteria, such as community involvement, leadership and distinction in extracurricular activities, and personal qualities and character. We rely on teachers, counselors, and alumni to share information with us about an applicant’s strength of character, their ability to overcome adversity, and other personal qualities.”).

23 See sources cited *supra* note 18; see also *infra* text accompanying notes 75–76.

of race on any individual admissions decision.²⁴ Justice O'Connor preferred this secrecy, because she believed that it prevented racial stigma and balkanization.²⁵ But I argue that SFFA took advantage of this obfuscation in its litigation.²⁶ And in a post-SFFA admissions regime, allegations of the surreptitious, illegal use of race could lead to even more litigation.²⁷ My article thus examines how the secrecy in holistic review has influenced and been influenced by the consideration of race in admissions, and how all of this may play out in a post-SFFA admissions world. It does so not only by reviewing scholarly and judicial discourse on holistic admissions, but also through personal anecdotes—from conversations about my research on race-conscious admissions policies to stories from my students about their applications to my own experiences serving on admissions committees.

By focusing on secret admissions and its consequences, I do not aim to rebuke holistic review completely or to argue that universities should stop using it altogether. I acknowledge that holistic review has positive attributes. It allows admissions committees to consider talents and potential contributions by applicants that are not readily measured by academic criteria, and it allows individually tailored assessment of applicants' experiences and challenges, all integrated together in a flexible manner. Universities should consider any factors that relate to an applicant's ability to make contributions to their campus activities or to society more generally. Nevertheless, my article serves as a cautionary tale. Because holistic review in admissions is likely here to stay, I aim to illustrate some of the pitfalls that derive from its secretive nature. My hope is that universities take these pitfalls into account when using holistic review and aim to mitigate their potential negative consequences, through transparency and other means.

Part I explains in detail what "holistic" review in admissions means. It looks at the history of admissions policies at American universities, and it gives a basic overview of holistic review. This part illustrates that even scholars with expertise in university admissions view holistic review as an obscure process with little transparency. Part II evaluates this "secret" admissions process more closely. It considers the virtues and vices of having a secretive and obscure process for reviewing applicants, focusing on race-conscious admissions and Justice O'Connor's choice of the *Grutter* plan over the *Gratz* plan and the *Bakke* set-aside. This part shows that Justice O'Connor preferred to make race-conscious admissions policies less visible, and that doing so was consistent with her prior race jurisprudence. It also reviews how scholars and commentators reacted to this preference for obfuscation over transparency. Part III considers how the secretive nature of holistic review facilitated the legal challenge by SFFA. It goes through the SFFA litigation from the early stages, and it delves into how the Supreme Court treated holistic review in its SFFA opinion. This includes the SFFA majority's view that applicants could still discuss racial experiences in their personal essays²⁸—a holding that

24 See *infra* Parts II and III.

25 See *infra* Part II.

26 See *infra* Part III.

27 See *infra* Part IV.

28 SFFA, 600 U.S. 181, 230 (2023). ("Nothing in this opinion should be construed as prohibiting

itself obscures the difference between legal and illegal consideration of race in admissions. Part IV then examines what may happen if opponents of affirmative action think that universities are still using race itself as an admissions factor. It considers accusations that UCLA was doing so in 2008, long after California had banned race-conscious admissions. It delves into the investigation of those accusations. This part also envisions what might happen if such accusations of surreptitious use of race are translated to litigation. Strict scrutiny would not apply to post-*SFFA* litigation of this nature, because universities would have facially race-neutral admissions policies and deny using race. Plaintiffs would have the burden to prove that universities are doing so. Nevertheless, institutions tend to be risk averse. This part also argues that universities may choose to “de-quantify” admissions—to reduce use of numerical scales such as standardized test scores and numerical ratings of holistic criteria—because plaintiffs have used such metrics to illustrate racial differences.²⁹ In the Conclusion, I call for universities to be more transparent about their holistic admissions policies, not only to avoid legal controversies, but also to promote equity. I also draw upon a personal anecdote—my interaction with a student—to examine how secret admissions may impact applicants themselves—both their access to information and the personal information they may feel compelled to reveal. Holistic admissions will always have pitfalls, but my hope is that universities will make good-faith efforts to address these as best they can.

I. THE BEST-KEPT SECRET: HOW DOES HOLISTIC REVIEW WORK?

Whenever I talk about my scholarship on affirmative action with laypeople, I am reminded that academia is an elite, rarified bubble. Most Americans, including those who go to college, do not encounter race-conscious admissions policies at all. Most institutions of higher education did not use them even before *SFFA*.³⁰ And even students who went to selective universities that used race-conscious admissions often did not understand how it worked. Some were not even aware of its existence, even as they applied to college and law school. A few years ago, when I told a group of new law students that my research focused on race and university admissions, their first assumption was I meant invidious racial discrimination. I had to clarify for them that I was *not* claiming that Harvard intentionally discriminated against Black students in its admissions process. Rather, I told them,

universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”).

29 See *infra* note 221.

30 John Kroger, *The End of Affirmative Action*, INSIDE HIGHER ED (Oct. 30, 2022), <https://www.insidehighered.com/blogs/leadership-higher-education/end-affirmative-action> (“Many higher education institutions have open or close to open admissions, taking virtually all applicants. For these schools, the [SFFA] decision will have no or little impact.”); Chris Quintana, *Supreme Court Weighs Affirmative Action Case, but Most College Admissions Won’t Be Affected*, USA TODAY (Oct. 31, 2022), <https://www.usatoday.com/story/news/education/2022/10/30/college-admissions-affirmative-action-supreme-court/8233859001/> (noting that “Harvard cited surveys that found about 40% of universities consider race to some degree[,]” implying that about 60% do not); Drew Desilver, *A Majority of U.S. Colleges Admit Most Students Who Apply*, PEW RESEARCH CENTER (Apr. 9, 2019), <https://www.pewresearch.org/short-reads/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply/>.

my work focused on defending Harvard's ability to consider an applicant's race when making admissions decisions, in order to benefit underrepresented students of color, including Black students.

Even when they understand I am talking about affirmative action, the first thing laypeople often think is "quota." Numerical set-aside plans are simple enough to understand. They form an initial reference point, and nonlawyers can be forgiven for not knowing that *Bakke* banned such admissions plans.³¹ It is also relatively easy to understand a mechanical point system, such as the one rejected in *Gratz*.³² Both of these plans involve using race as a category alone, where checking a particular box yields the same benefit for all applicants who check it. This is something that laypeople can envision without much difficulty.

However, I get much more puzzled looks when I try to describe the admissions policy at issue in *Grutter*. It is more difficult to comprehend a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" and "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight[]" in order to "adequately ensure[] that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."³³ Here, checking the box alone does not explain what happens. My sense is that laypeople do have some idea of what I am talking about—that admissions committees consider nonacademic criteria in addition to grades and test scores. But they cannot easily fathom how race factors into such a process in a flexible, individualized manner that treats applicants fairly and equally. They are at a loss for how holistic review works in practice. How does an admissions committee member compare one applicant who played chess with another who played the trombone in the marching band, if both excelled at those activities and were comparable otherwise? If asked to speculate, they may say that a committee member who plays chess would pick the former, while one who plays musical instruments will pick the latter. And similarly, they may speculate that an admissions committee member will favor applicants who share their racial background. But I don't think they really believe that holistic review is so crude or simple. It's just mysterious.

The origins of holistic review itself date back a century. In his 1980 article, "The History of University Admissions," Professor Laurence Veysey discusses five phases of American university admissions.³⁴ The first two phases noted by Professor Veysey did not involve much if any holistic review.³⁵ He does note that the initial phase, "the long reign of the individual entrance exam in the old-time

31 See *supra* note 15 and accompanying text.

32 See *supra* note 14 and accompanying text.

33 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

34 Laurence Veysey, *Review: The History of University Admissions*, 8 REVS. AMER. HIST. 115, 116–17 (1980).

35 *Id.*

college, focusing on Greek, Latin, and mathematics[.]”³⁶ had loopholes that allowed admission “upon conditions” for some privileged applicants and some applicants from “less prominent backgrounds[.]”³⁷ although these were not common circumstances. The second phase, prompted by increasing student numbers in the late nineteenth century, was the development and initial use of standardized admissions tests.³⁸ Here, Professor Veysey notes that university admissions also “saw deemphasis of the classic languages as barriers to elite access and, at the same time, the creation of more-standardized yardsticks such as the certification of approved secondary schools (allowing students’ grade records to serve in lieu of any exam)[.]”³⁹ Thus, although standardized tests were used, they were “no insuperable hurdle” to the admission of legacies, athletes, and other privileged applicants.⁴⁰

It was the third phase beginning in the 1920s, where the process we now call “holistic review” (although not the term itself)⁴¹ began to emerge. Professor Veysey attributes this in large part to anti-Semitism.⁴² He describes the newfound “emphasis on ‘character and fitness,’” which resulted in the reduction of Jewish students admitted to elite universities such as Harvard, Yale, and Princeton.⁴³ At Harvard, character and fitness criteria included “‘five pillars: academic promise, personal qualities, health and athleticism, geographic distribution, and Harvard parentage.”⁴⁴ A century later, SFFA would draw on this history to analogize between those earlier practices against Jewish applicants and alleged limits on admission of Asian American students to Harvard today.⁴⁵

Professor Veysey’s fourth phase came in the post–World War II period, when anti-Semitism was less palatable, the G.I. Bill was passed, and the Cold War–driven, “post-Sputnik” need to compete technologically with the Soviet Union resulted in renewed emphasis on “intellectual meritocracy.”⁴⁶ He describes this

36 *Id.* at 116.

37 *Id.* at 116–17.

38 *Id.* at 117.

39 *Id.*

40 *See id.*

41 *Id.* at 117–19. Even Veysey’s 1980 article does not use the term “holistic.” *See generally id.*

42 *Id.* at 118.

43 *Id.* at 117–18.

44 Kristine E. Guillaume, *SFFA Argues Harvard’s ‘Holistic’ Admissions Rooted in Tactics Once Used to Limit Jewish Admits*, HARVARD CRIMSON (June 21, 2018), <https://www.thecrimson.com/article/2018/6/21/holistic-admissions-origin/>.

45 *Id.*

46 Veysey, *supra* note 34, at 119. The need to build up America’s scientific and technological infrastructure also led to changes in U.S. immigration policy, bringing about the influx of educated Asian immigrants from nations such as China and India. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 245–47 (2022). Many of these immigrants and their children became high academic achievers, facilitating the “model minority” stereotype—the notion that Asian Americans attain success through hard work and particular cultural values that other marginalized groups can emulate. This view ignores the vastly different histories of various groups and the different social barriers they face. *Id.* at 245–49. *See also* Mike Hoa Nguyen, *et*

phase as “surprisingly brief”:⁴⁷ perhaps it was mostly a recognition of changing U.S. demographics and global concerns of postwar times.⁴⁸

The fifth phase came in the wake of the Civil Rights Movement, which was also spurred on by the Cold War.⁴⁹ This was the origin of affirmative action in admissions, with an emphasis on “equality of individual opportunity.”⁵⁰ Interestingly, Professor Veysey places *Bakke* in this phase,⁵¹ but he does not discuss “diversity” or “holistic” admissions.⁵²

Nevertheless, I would argue that *Bakke* brought about a sixth phase of admissions—one where the educational benefits of diversity became key. Justice Lewis Powell’s opinion in *Bakke* drew upon the academic freedom of universities—“a special concern of the First Amendment[,]” which included “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”⁵³ In this context, Justice Powell approved of the use of race as one “plus” factor, alongside other criteria that could enhance student body diversity.⁵⁴

In their recent, extensive scholarly literature review on holistic admissions,

al., *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in SFFA v. Harvard*, 48 J. COL. & UNIV. L. 369 (2023). The model minority stereotype also led to backlash against increasing Asian American presence at elite universities in the 1980s, and to allegations of discrimination against Asian Americans in admissions. *See generally* sources cited *infra* note 210. This has all served to pit Asian Americans against other marginalized groups. *Id.* *See also* Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURVEY AM. L. 77, 144–47 (2013) (discussing Asian and South Asian Americans’ political positioning in U.S. racial landscape).

47 Veysey, *supra* note 34, at 119.

48 *Id.* *See also supra* note 46.

49 *See generally* MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2011) (illustrating that federal government supported civil rights to support U.S. foreign policy and mitigate draw of communism’s emphasis on equality).

50 Veysey, *supra* note 34, at 119.

51 *Id.* (“The fifth stage, in which, in explicit atonement for earlier historical sins, academic administrators sought to raise the number of minority entrants by outright discrimination in their favor. Hence *Bakke*.”).

52 As noted earlier, Professor Veysey does not use the term “holistic” anywhere in his article. *See generally id.* He uses the term “diversity” only twice—both in reference to Yale’s policy of seeking “geographic diversity” in the 1940s and 1950s. *See id.* at 121 n.2. Although universities considered “diversity” and used “holistic” review, these terms and concepts were not particularly prominent at the time. Professor Veysey’s article gives us at least a snapshot of how scholars viewed what we now call “holistic” admissions in 1980.

53 *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (*citing Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Professor Steve Sanders has recently argued that courts have begun showing less academic deference to universities, and that *SFFA* reflects this shift. *See* Steven Sanders, *Judges Have Long Deferred to Academe. That’s Changing.*, CHRON. HIGHER ED. (Nov. 6, 2023), <https://www.chronicle.com/article/judges-have-long-been-deferential-to-academe-thats-changing> (arguing that *SFFA* ruling showed “bracing display of skepticism toward the university defendants was also a serious blow to the longstanding doctrine of judicial deference to academic decision-making”).

54 *Bakke*, 438 U.S. at 316–18 (opinion of Powell, J.). *SFFA* might now prompt a seventh phase, where holistic criteria besides race become even more important.

Jolene Maude and Professor Dale Kirby also refer to *Bakke* as the “landmark legal case [that] set the stage for modern day holistic admission.”⁵⁵ Justice Powell’s opinion in *Bakke* did not use the term “holistic,”⁵⁶ but universities and courts came to use the term to describe the type of admissions plan he endorsed.⁵⁷ Justice Powell described Harvard’s admissions policy as a model, noting

[s]uch qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important[] ... [and] ... is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight[] ... [T]he weight attributed to a particular quality may vary from year to year depending upon the “mix” both of the student body and the applicants for the incoming class.⁵⁸

In 2003, *Grutter* brought five votes to Justice Powell’s plurality *Bakke* opinion. Justice O’Connor’s majority opinion referred explicitly to “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”⁵⁹ The Court specifically distinguished the *Grutter* (holistic review) plan from the *Gratz* (mechanical point system) plan because the former used race flexibly, in an individualized manner.⁶⁰ This was in contrast to the mechanical application of race in the *Gratz* plan, where all minority applicants received exactly the same number of points. Under an admissions policy with holistic review, race is considered alongside other admissions factors, such as those noted above,⁶¹ which could include not only academic criteria, but also socioeconomic status, geography, extracurricular activities, essay scores, personal characteristics, letters of recommendation, and any other components of an individual’s application. Universities can and do inform applicants of the holistic factors they consider

55 Maude & Kirby, *supra* note 16, at 74.

56 None of the opinions in *Bakke* used the term “holistic.” See generally *Bakke*, 438 U.S. 265.

57 Rodney Smolla, *Fisher v. University of Texas: Who Put the Holes in “Holistic”?*, 9 DUKE J. CONST. L. & PUB. POL’Y 31, 35 (2013).

58 *Bakke*, 438 U.S. at 316–18 (opinion of Powell, J.).

59 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

60 *Id.* (“Unlike the program at issue in *Gratz v. Bollinger*, *ante*, 539 U.S. 244, 123 S.Ct. 2411, the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity. See *ante*, 539 U.S., at 271–272, 123 S.Ct. 2411, 2003 WL 21434002 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but ‘did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity’). Like the Harvard plan, the Law School’s admissions policy ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’ *Bakke*, *supra*, at 317, 98 S.Ct. 2733 (opinion of Powell, J.).”).

61 See text accompanying *supra* note 58.

in the admissions process. But the weight given to any of these factors can be different for each applicant, based on the discretion of admissions reviewers. And it is this variability in the way that admissions factors are weighted, along with the discretion that reviewers have to use their own judgments (and biases) in weighing each factor, that makes holistic review seem so mysterious in its implementation.

Justice O'Connor's majority opinion in *Grutter*—the Supreme Court's first ruling on race-conscious university admissions to use the term "holistic"⁶²—raised the public profile of holistic admissions significantly. Holistic review had resolved a major constitutional dispute, defining how race could be used as a "plus" factor in admissions. Attention to holistic review increased even more,⁶³ as scholars and commentators have sought to understand how it works and how it incorporates race and other criteria. Yet, even with such attention, the definition of holistic review remains hazy. The College Board itself notes that "no single definition [of holistic review] can fully capture the legitimate variability among colleges and universities that manifest varied missions and admissions aims[.]"⁶⁴

As one starting point, the College Board gives a basic definition of "holistic admissions" as "'a flexible, highly individualized process by which balanced consideration is given to the multiple ways in which applicants may prepare for and demonstrate suitability' as students at a particular institution."⁶⁵ It recommends that holistic review in practice should have three features: (1) alignment with an institution's mission; (2) evaluation of both student ability to succeed in the educational curriculum and to make contributions to the academic community; and (3) consideration of "multiple, intersecting factors—academic, non-academic, and contextual—that enter the mix and uniquely combine to define each individual applicant[.]"⁶⁶ But beyond the academic measures, what are these "multiple, intersecting factors" and how are they considered?

Maude and Professor Kirby divide nonacademic criteria into two categories:

62 See *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

63 See, e.g., Christopher Rim, *What Colleges Really Mean by "Holistic Review,"* FORBES (Apr. 6, 2023), <https://www.forbes.com/sites/christopherrim/2023/04/06/what-colleges-really-mean-by-holistic-review/?sh=5729d096cc9b> ("The promise of a "holistic review" has become ubiquitous in higher education admissions. ... The language of the "holistic review" signals the fundamental difference in current admissions processes from those of thirty years ago.).

64 Arthur L. Coleman & Jamie Lewis Keith, *Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations*, COLL. BD. (2018), <https://professionals.collegeboard.org/pdf/understanding-holistic-review-he-admissions.pdf>.

65 *Id.* at 4 (quoting *Association of American Medical Colleges, Roadmap to Diversity: Integrating Holistic Review Principles into Medical School Admission Processes* at 5, ASSOC. AM. MED. COLLS. (2010), <https://www.aamc.org/initiatives/holisticreview/resources/>).

66 *Id.* Maude and Professor Kirby define holistic admissions as "an approach to college and university admissions that considers an individual's non-academic attributes and strengths in conjunction with traditional academic metrics." Maude & Kirby, *supra* note 16, at 75. See also Lisa S. Lewis, *Can Greentree University Adopt Holistic Admissions Practices and Still Maintain Status as an Elite Institution?*, 24 J. CASES IN EDUC. LEADERSHIP 126 (2021) ("[H]olistic admissions include consideration of a variety of applicant factors, with the intent of selecting students likely to be academically successful as well as to contribute to the school by bringing their unique selves.").

“experiences” and “attributes.”⁶⁷ Experiences are life occurrences that have shaped an applicant’s perspective and/or conferred particular knowledge and skills.⁶⁸ These may include extracurricular endeavors such as “community involvement, leadership, professional activities[,]” challenges and hardships that applicants have faced, and obstacles they have overcome.⁶⁹ Attributes include “race/ethnicity, and personal qualities, characteristics, abilities, or skills that applicants bring with them to the program.”⁷⁰

The lay public has a much better understanding of academic criteria, because practically everyone with any schooling has been formally evaluated and ranked with grades and standardized test scores. “Nonacademic” and “contextual” factors, on the other hand, seem more opaque: even when we know what they may include (extracurricular activities, personal experiences, etc.), there is no accessible or intuitive ranking scale to understand their role in evaluating applicants. Professors Michael Bastedo and Nicholas Bowman, along with Kristen Glasener and Jandi Kelly, give some basic guidance regarding how admissions committees can consider these various factors.⁷¹ Based on their study, they describe three different types of holistic review: (1) “whole file”—“considering all parts of the application and weighing them together for a result[.]”;⁷² (2) “whole person”—“treating the applicant as a unique individual in addition to considering all elements of the file ... [and] evaluat[ing] academic achievements in light of the applicant’s character, personality, or ability to contribute to the community in a unique way[.]”;⁷³ (3) “whole context”—“consider[ing] all elements of the application and valu[ing] treating applicants as unique individuals ... in the context of the opportunities available in their families, neighborhoods, or high schools[] ... tak[ing] into account ... ongoing hardships, extenuating circumstances, or other contextual factors.”⁷⁴

Nevertheless, Professor Bastedo and colleagues also note that “[a]dmissions officers themselves simply do not have a common definition of holistic review beyond ‘reading the entire file.’”⁷⁵ They note that there is “significant confusion among students, parents, and the public about holistic admissions.”⁷⁶ Mere articulation of factors considered in holistic review and general statements about how applicant files are reviewed does not significantly mitigate this confusion. The root of mystery surrounding holistic review comes from lack of consistency in its implementation. Each school uses a different type of review system, each

67 Maude & Kirby, *supra* note 16, at 75.

68 *Id.*

69 *Id.*

70 *Id.* at 74.

71 Michael N. Bastedo et al., *What Are We Talking About When We Talk About Holistic Review? Selective College Admissions and its Effects on Low-SES Students*, 89 J. HIGHER EDUC. 782 (2018).

72 *Id.* at 790.

73 *Id.* at 791.

74 *Id.* at 793.

75 *Id.* at 802.

76 *Id.* at 803.

admissions reviewer has their own subjective biases and manner of weighing various criteria, and each applicant is treated differently and individually for the purpose of weighing these criteria. Holistic review is inherently mysterious because it varies so much from school to school, reviewer to reviewer, and applicant to applicant.

So why then, in the context of a highly charged issue, such as the constitutionality of race-conscious admissions policies, did Justice O'Connor choose the *Grutter* (holistic review) plan over the *Gratz* (mechanical point system) plan? Couldn't the *Gratz* plan also attain racial diversity and do so in a more transparent and comprehensible manner?

II. WHY SECRET ADMISSIONS? (AND WHY NOT?)

One reason for holistic review is readily apparent. More than any other system, it allows admissions committees to consider, in a flexible manner, a wide variety of factors beyond academic criteria, ranging from other skills and talents to applicants' backgrounds and demonstrated resilience. Most of us would agree that grades and standardized test scores do not fully capture an applicant's potential, either to enrich campus life or to attain academic and professional success. In *Grutter*, Justice O'Connor also noted the benefits of admitting students with different experiences to the educational environment of universities: "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" ⁷⁷ She cited various studies illustrating how such diversity leads to better "learning outcomes" and "better prepares students for an increasingly diverse workforce and society[.]" ⁷⁸ And she tied these benefits to professional settings, noting that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." ⁷⁹ Universities could thus seek to enroll a "critical mass" of underrepresented students—enough so that these students wouldn't "feel isolated or like spokespersons for their race." ⁸⁰ If necessary, they could use race-conscious admissions for that purpose.

But although Justice O'Connor approved of using race to attain the educational benefits of diversity, she did so reluctantly. Her disdain for race-conscious policies was long established, and *Grutter* was the first and only case where she voted to uphold such a policy. ⁸¹ Beyond flexible, individualized review, *Grutter* imposed

⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

⁷⁸ *Id.*

⁷⁹ *Id.* Justice O'Connor also invoked the importance of diversity for national security. *Id.* at 221 ("[H]igh-ranking retired officers' and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.'").

⁸⁰ *Id.* at 319.

⁸¹ Justice O'Connor wrote numerous opinions that struck down race-conscious policies in various contexts. *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (O'Connor, J., concurring) (invalidating "layoff provision" that gave preference to minority teachers even with less seniority); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating City of Richmond's

many other limitations on the use of race. Justice O'Connor made it clear that universities should prefer race-neutral alternatives to attain diversity, and that they had to phase out use of race eventually.⁸² *Grutter* also included an aspirational statement that they may be able to do so within 25 years.⁸³

Because of her disdain for using race, Justice O'Connor viewed secrecy itself as a virtue when doing so. She chose the *Grutter* plan over the *Gratz* plan partly on that basis. Professor Heather Gerken characterized both Justice Powell's approach in *Bakke* and Justice O'Connor's view in *Grutter* as "something akin to a 'don't ask, don't tell' approach to race-conscious decisionmaking: use race, but don't be obvious about it."⁸⁴ Justice O'Connor disliked race-conscious policies because she believed they were divisive and stigmatizing. Her prior race jurisprudence indicated a particular concern for stigma and stereotyping. In *City of Richmond v. J.A. Croson Co.*, she described the harm of government racial classifications:

Classifications based on race carry a danger of stigmatic harm ... they may in fact promote notions of racial inferiority and lead to a politics of racial hostility ... reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth[.]⁸⁵

Justice O'Connor was particularly concerned with the message sent by government action. In her dissenting opinion in *Metro Broadcasting, Inc. v. FCC*, she noted that "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, but the ... Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."⁸⁶ She reiterated this view in *Shaw v. Reno*, emphasizing that "[r]

minority set-aside contracting program); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (rejecting North Carolina's congressional redistricting plan on ground that it relied too much on racial classifications). Justice O'Connor dissented in the few cases prior to *Grutter* where the Court upheld race-conscious policies. See *U.S. v. Paradise*, 480 U.S. 149 (1987) (O'Connor, J., dissenting) (dissenting from Court's ruling that upheld "one-black-for-one-white promotion requirement"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (O'Connor, J., dissenting) (dissenting from Court's ruling that upheld race-conscious policies of the Federal Communications Commission).

82 *Grutter*, 539 U.S. at 342 (noting "all governmental use of race must have a logical end point[] ... and ... [un]iversities ... should draw on the most promising aspects of ... race-neutral alternatives as they develop").

83 *Id.* at 343 (noting "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today").

84 Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007). See also Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123, 134 (2023) ("[Holistic] processes of admission are impenetrable to the outside spectator. They are, following *Grutter*, impenetrable by design. Their highly pluralist decision criteria, their lack of recorded explanations of individual decisions, and their use of multilevel procedures with multimember votes all make it impossible to know how decisionmakers weigh different candidates against each other. The point is to obscure the reasons that any particular candidate was admitted, especially as it relates to race, ethnicity, and other such diversity criteria.").

85 488 U.S. at 494 (quoting *Univ. of Calif. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of J. Powell)).

86 497 U.S. at 602 (1990) (O'Connor, J., dissenting).

acial classifications ... pose the risk of lasting harm to our society ... [because] ... [t]hey reinforce the belief ... that individuals should be judged by the color of their skin."⁸⁷ She also expressed the concern that government use of race may "balkanize us into competing racial factions."⁸⁸

In evaluating Justice O'Connor's majority opinion in *Shaw*, Professors Richard Pildes and Richard Niemi define an "expressive harm" as a harm "that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."⁸⁹ They argue that Justice O'Connor's constitutional jurisprudence shows "a general attentiveness to the expressive dimensions of public action."⁹⁰ The meaning conveyed by public action must respect "relevant public values."⁹¹ Because Justice O'Connor viewed racial classifications as harmful, she thought that if the government had to use them, they should remain obscure and out of the public view. That is one reason why she opted for the *Grutter* plan over the *Gratz* plan: she believed the former involved less racial stigma and stereotyping of individuals and groups.⁹² Justice O'Connor thought the harm of race-conscious policies was attenuated when embedded within holistic review, because the use of race was less obvious, particularly on the level of individual applicants. In the *Grutter* plan, every individual was treated differently, and all members of a group did not receive the same benefit. Holistic review does not reveal whether race mattered a little bit, a lot, or not at all for the admission of any given applicant.⁹³ And Justice O'Connor valued such a process

87 509 U.S. 630, 657 (1993) (striking down North Carolina's congressional redistricting plan); see also *id.* at 643 ("[A]n explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.").

88 *Id.* at 657 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions[.]"). See also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1299 (2011) ("Justice O'Connor interprets equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion. Concern with balkanization thus supplies affirmative reason to allow affirmative action and to limit it[.]").

89 Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 *MICH. L. REV.* 483, 506–07 (1993). Professors Pildes and Niemi also elaborate that such an expressive "harm is not concrete to particular individuals," but rather "lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values." *Id.* at 507. Professors Pildes and Niemi argue that Justice O'Connor's *Shaw* opinion is based on her view that "the state ... impermissibly endorsed too dominant a role for race[.]". *Id.* at 509. They note that her belief "might rest on the intrinsic ground that the endorsement is wrong, in and of itself," or "on the instrumental ground that this state endorsement threatens to reshape social perceptions along similar lines." *Id.*

90 *Id.* at 520 n.123.

91 *Id.* at 507.

92 See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 *U. PA. J. CONST. L.* 463, 485–95 (2012) (discussing how *Grutter* fit into Justice O'Connor's prior race jurisprudence).

93 See *id.* at 493 ("A holistic admissions process—which includes individualized review, considers race in a flexible manner, and uses diversity factors other than race—is necessary to yield a critical mass that includes diversity within racial groups. By definition, achieving such within-group diversity reduces stigmatic harm, because it requires admissions committees to consider factors

not only because of its flexibility, but also because of its secrecy. As Professor Michelle Adams noted, the *Grutter* majority “was more concerned with how the Law School’s application process actually appeared and the message that it sent to the public than with its impact on any particular white applicant[] ... the message communicated by the governmental action was paramount.”⁹⁴ In a sense, that message seemed contradictory: universities can admit to using race but must simultaneously obscure how race is used.

Some scholars have supported this view and argued in favor of more obscure race-conscious admissions policies, based on the potential for negative public reaction to explicit use of race. Twenty years before *Grutter*, the late Professor Paul Mishkin contended that “less explicitly numerical systems” of admissions minimize the stigmatization of underrepresented students as beneficiaries of separate privileges.⁹⁵ Professor Mishkin asserted that

The description of race as simply “another factor” among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect.⁹⁶

Similarly, Daniel Sabbagh has argued that the “very nature of what may be conceived as the ultimate goal of affirmative action ... the deracialization of American society ... would make it counterproductive to fully disclose that policy’s most distinctive and most contentious features”⁹⁷ and that the Supreme Court has “made a significant, yet underappreciated, contribution ... [by] ... minimizing the visibility and distinctiveness of race-based affirmative action.”⁹⁸

More broadly, Professors Jack Balkin and Reva Siegel have contended that “[l]aws dismantling status hierarchies cannot redistribute opportunities to subordinate groups too transparently” because doing so may generate backlash.⁹⁹ Professors Balkin and Siegel note that subordinate groups have often made gains

besides race and to treat applicants of the same race differently based on non-racial factors.”).

94 See Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 TUL. L. REV. 1941, 1953 (2004).

95 See Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983) (“The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time.”).

96 *Id.* Ironically, Professor Mishkin also represented the Regents of the University of California in *Bakke*, where he argued in favor of the “more explicitly separate and structured” University of California Davis School of Medicine set-aside plan. See *In Memoriam Paul Mishkin*, <https://senate.universityofcalifornia.edu/files/inmemoriam/html/pauljmishkin.html> (last visited Jan.15, 2024)

97 See Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 412 (2003). Sabbagh viewed those contentious features as affirmative action’s “nonmeritocratic component and the extent to which some ... programs take race into account[.]” *Id.*

98 *Id.*

99 Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020* 105 (Jack M. Balkin & Reva B. Siegel eds., 2009).

through doctrines and policies that benefited dominant groups as well, thus obscuring any relative redistribution.¹⁰⁰ Because *Grutter's* endorsement of holistic review also emphasized consideration of factors besides race, one can envision and accurately describe the *Grutter* plan as potentially beneficial to applicants of all racial backgrounds.

But there are also scholars who have critiqued the choice of the *Grutter* holistic admissions plan over the *Gratz* point plan. And those critiques have largely dealt with the issue of secrecy. Professor Cristina Rodriguez argued that embedding race within individualized, holistic review is actually antithetical to the values that Justice O'Connor espoused:

[I]ndividualized consideration is ultimately more likely to thwart the long-term objectives of reducing the salience of race in our society and eliminating race-based stereotyping[] ... [because] ... [i]ndividualized consideration demands that officials prioritize among members of a racial group according to race-related criteria, whereas mechanical decision making simply demands recognition of the existence of broad categories and the membership of certain individuals in those categories, based on individual self-identification[] ... individualized consideration give[s] state officials power to define the content of a racial category, and it is that process of definition, not the taking of race into account in and of itself, that undermines the integrity of the individual [.]¹⁰¹

Professor Rodriguez also contended that while flexible, holistic, individualized review may be less stigmatizing to applicants than an explicit point system, it is doubtful that this difference has any significant effect on public perception of race-conscious policies.¹⁰² And if holistic admissions policies are more likely to prompt litigation, which leads to negative public sentiment, then they may actually be more stigmatizing in the long run.¹⁰³

100 *Id.*

101 Cristina M. Rodríguez, *Against Individualized Consideration*, 83 IND. L.J. 1405, 1406 (2008).

102 *Id.* at 1416 (expressing “skeptical[ism] that individualized consideration has any meaningful effect on the general population’s perceptions of minorities in a world with affirmative action, or that permitting an admissions office to obfuscate its precise use of race actually diminishes the resentment affirmative action engenders”).

103 *But see* Balkin & Siegal, *supra* note 99, at 105 (arguing that efforts to redistribute resources to subordinated groups often require obfuscation to be politically viable). Professor Yuvraj Joshi has argued that “perhaps the most powerful critique” of using race in more indirect and obscure ways is that doing so “impedes the pursuit of racial justice.” Yuvraj Joshi, *Racial Indirection*, 52 U.C. DAVIS L. REV. 2495, 2539 (2019). Professor Joshi is not specifically focused on the secrecy inherent in holistic review, but that is part of his analysis. His article examines “racial indirection”: “practices that produce racially disproportionate results without the overt use of race ... includ[ing] practices that employ racial categories in subtle and partial ways as well as those that rely on ostensibly “neutral” factors and considerations to produce racial impact.” *Id.* at 2497–98. As Professor Joshi notes, many social justice advocates believe that direct and explicit race-conscious policies and conversations about race are necessary to achieve racial equity and justice. *Id.* at 2540. One could critique Justice O’Connor’s choice in *Grutter* on grounds that obfuscation of race serves to reduce perceptions of its salience and to minimize the acknowledgement of racism.

Other legal scholars have also criticized the Court's preference for more secretive race-conscious admissions policies. Professor Cass Sunstein called *Grutter* a "puzzling and probably indefensible conclusion[,]” contending that “[i]t is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment[.]”¹⁰⁴ Professor David Crump argued that the *Gratz* plan could be viewed as “constitutionally superior” because the *Grutter* plan gave universities “unlimited discretion” and obscured the use of race.¹⁰⁵ In contrast, the holistic review required by *Grutter* resisted any straightforward analysis of weight that could be accorded to race, whether it be at the group level (set-aside seats) or the individual level (number of points).¹⁰⁶

This lack of attention to the weight given to race has also led scholars to critique *Grutter*. Professor Ian Ayres and Sidney Foster criticized *Grutter* for its “fail[ure] to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not.”¹⁰⁷ Although they noted the difficulty of assessing weight given to race in a holistic review process,¹⁰⁸ Professors Ayers and Foster contended that the *Grutter* holistic admissions system gave more weight to race than the *Gratz* point system.¹⁰⁹ *Grutter*'s language did suggest limitations on the weight that could be given to race: it could not be a “predominant factor” in admissions, nor could it “unduly burden” any groups.¹¹⁰ But *Grutter* did not give guidance on how to determine when race is a predominant factor or when it unduly burdens any group.

The dissenting Justices in *Grutter* viewed holistic admissions and individualized review as a cover for unconstitutional “race preferences,” no different from the set-asides proscribed in *Bakke*. Chief Justice William Rehnquist called the University of Michigan Law School's admissions policy “a naked effort to achieve racial balancing.”¹¹¹ Similarly, the late Justice Scalia's dissent referred to it as “a sham to cover a scheme of racially proportionate admissions.”¹¹² And Justice Anthony Kennedy, whose dissent approved of using race “as one modest factor among

104 Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1902 (2006).

105 David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 528–29 (2004) (“One can argue that the undergraduate Michigan program at issue in *Gratz*, involving a fixed-point system, should have been regarded as constitutionally superior to the unlimited discretion model in *Grutter* At least in such a system the invidious exercise of discretion has been structured, confined, and checked The point system should instead have been preferred because it makes the racial remedy visible”).

106 See Harpalani, *supra* note 92, at 528–30.

107 Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 558 (2007).

108 *Id.* at 583 (“It is difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action.”).

109 *Id.* at 534 (concluding that “the Law School gave more weight to race than the College.”).

110 *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003). See also Harpalani, *supra* note 92, at 528–29.

111 *Grutter*, 539 U.S. at 379 (Rehnquist, CJ, dissenting)

112 *Id.* at 347. (Scalia, J., dissenting).

many others,”¹¹³ found that “the Law School ... mask[s] its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”¹¹⁴ The *Grutter* dissenters thus saw holistic review as a cover for the same activity that the majority (and *Bakke*) deemed unconstitutional.

Even the late Justice Ruth Bader Ginsburg and Justice David Souter, who voted in favor of the *Grutter* holistic admissions policy, nevertheless seemed to critique it and to extoll some of the virtues of the *Gratz* point system. In her *Gratz* dissent, Justice Ginsburg wrote that “[i]f honesty is the best policy, surely ... [an] ... accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”¹¹⁵ Similarly, Justice Souter wrote that “[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball.”¹¹⁶

The Court’s preference for *Grutter*’s holistic review over the *Bakke* set-aside plan and the *Gratz* point system made race-conscious admissions policies more nuanced and flexible, but also made it harder to evaluate their constitutionality. If either of those other plans had been upheld, then universities and prospective litigants would know more precisely how race had been used and how much it was weighted in admissions. They could use those guideposts to assess the constitutionality of admissions policies before litigation. For example, had the Justices upheld the set-aside plan at issue in *Bakke*, universities and courts would have notice that setting aside 16% or so of seats for underrepresented students was constitutional. Similarly, if the Court had affirmed the point system in *Gratz*, then 20 points on a 150-point scale (13.3% or so) would have modeled an acceptable weight on race in the admissions process. But there were no such guideposts in *Grutter* to tell whether race-conscious admissions policies are unduly burdening any group, or whether race has become a predominant factor in admissions. And this lack of clarity could only lead to more controversy and litigation.

III. LITIGATING SECRET ADMISSIONS I: HOW *GRUTTER* LED TO *SFFA*

Twenty years ago, when *Grutter* was first decided, two legal giants from opposite ends of the ideological spectrum foresaw the barrage of lawsuits to come. The late Justice Antonin Scalia—champion of conservative activists and nemesis of progressives—stated so in his *Grutter* dissent. Justice Scalia lamented that the *Grutter* decision “seems perversely designed to prolong the controversy and the litigation.”¹¹⁷ Although Scalia would have struck down affirmative action altogether, he intimated “even a clear anticonstitutional holding that racial

113 *Id.* at 392–93 (Kennedy, J., dissenting).

114 *Id.* at 389.

115 *See Gratz v. Bollinger*, 539 U.S. 244, 304–05 (2003) (Ginsburg, J., dissenting).

116 *Id.* at 298 (Souter, J., dissenting). *See also* Salib & Krishnamurthi, *supra* note 84, at 125 (contending that under *Grutter*’s regime, “before *SFFA*, most colleges’ affirmative action programs were quasi-legal at best; that colleges knew this; and that they compensated by intentionally obscuring the programs’ inner workings”).

117 *Grutter*, 539 U.S. at 348 (2003) (Scalia, J., dissenting).

preferences in state educational institutions are OK” would have been better than the *Grutter* majority’s insistence on revisiting the issue.¹¹⁸ In ironic agreement with Justice Scalia was the late Professor Derrick Bell—founder of Critical Race Theory, and long revered by social justice advocates for his scholarship and activism.¹¹⁹ Professor Bell criticized *Grutter* for its reliance on diversity rather than racial justice as the basis to uphold affirmative action.¹²⁰ Professor Bell thought of the diversity rationale as a “distraction” and referred to *Grutter* as a “litigation-prompting” decision that would make it hard to distinguish victory from defeat.¹²¹

Professor Bell and Justice Scalia proved to be prophetic. Beyond serving as a blueprint on how to implement race-conscious admissions policies, one can readily see *Grutter* as a guideline for how to bring legal challenges against such policies. Justice O’Connor’s proposition that race-conscious admissions must have an end point was an invitation for further lawsuits.¹²² Litigants could readily argue that the time had come when universities could attain sufficient diversity without using race-conscious policies. And because strict scrutiny applies to all racial classifications,¹²³ universities bore the burden to show that their race-conscious admissions policies were necessary and complied with all of *Grutter*’s other requirements.¹²⁴

118 *Id.* Justice Scalia laid out what he thought future lawsuits might look like. *Id.* at 348–49 (“Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant ‘as an individual,’ ... and sufficiently avoids ‘separate admissions tracks,’ ... to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a “‘good faith effort’” and has so zealously pursued its ‘critical mass’ as to make it an unconstitutional de facto quota system, rather than merely “‘a permissible goal.’” ... Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. ... Still other suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. ... And still other suits may claim that the institution’s racial preferences have gone below or above the mystical *Grutter*-approved ‘critical mass.’ Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution’s composition of its generic minority ‘critical mass.’”). To one extent or another, all these issues did come up in the *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) [hereinafter *Fisher I*] and *SFFA*, 600 U.S. 181 (2023) litigations.

119 See DERRICK BELL OFFICIAL WEBSITE, <https://professorderrickbell.com/> (last visited Jan. 16, 2024); Vinay Harpalani, *From Roach Powder to Radical Humanism: Professor Derrick Bell’s “Critical” Constitutional Pedagogy*, 36 SEATTLE UNIV. L. REV. xxiii (2013).

120 Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003).

121 *Id.* at 1631.

122 *Grutter*, 539 U.S. at 342 (noting “all governmental use of race must have a logical end point[] ... and ... [un]iversities ... should draw on the most promising aspects of ... race-neutral alternatives as they develop”); *id.* at 343 (noting “expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today”).

123 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

124 *Fisher I*, 570 U.S. 297 (2013), the first post-*Grutter* lawsuit involving race-conscious university admissions, highlighted another vague aspect of *Grutter*: the notion of critical mass. The *Fisher* Plaintiffs questioned whether the University of Texas at Austin (UTA) needed to use a race-conscious admissions policy to attain a critical mass of underrepresented students and the educational benefits of diversity. *Id.* But as Justice Kennedy’s majority opinion noted in *Fisher v. University of Texas at Austin*, 579 U.S. 365, 377–78 (2016) [hereinafter *Fisher II*], UTA’s admissions plan was “sui generis”

In this context, the SFFA plaintiffs took full advantage of the obscurity of holistic review. This was particularly apparent in *SFFA v. Harvard*, the case which received the most media attention. Here, SFFA argued that that holistic review masked intentional discrimination and implicit bias¹²⁵ against Asian Americans. Harvard's complex and mysterious holistic review process allowed SFFA to entangle two claims: (1) Harvard discriminates against Asian Americans in favor of White applicants; and (2) Harvard's holistic admissions policy does not meet *Grutter's* narrow tailoring criteria.¹²⁶ In its Complaint, SFFA asserted,

Harvard has a history of using the rubric of “holistic” admissions in general, and ... to limit the admission of Jewish applicants and other minority groups. Indeed, Harvard is using the same pretextual excuses to justify its disparate treatment of Asian Americans that it used to deny that it was discriminating against Jewish applicants in the past.¹²⁷

SFFA also argued that Harvard used race as more than a “plus” factor,¹²⁸ and it put forth complex statistical models to support this argument. It contended that “Statistical evidence reveals that Harvard uses “holistic” admissions to disguise the fact that it holds Asian Americans to a far higher standard than other students and essentially forces them to compete against each other for admission.”¹²⁹ In these ways, holistic review—with its complexity and mysteriousness—was at the center of SFFA's claims.

Although Harvard prevailed at the District Court for the Eastern District of Massachusetts, Judge Allison Burroughs was critical of Harvard's personal rating score—part of the holistic review process that assesses various “qualities

because much of UTA's admitted class came through the race-neutral Top Ten Percent Law.

As President Rodney Smolla noted, holistic admissions were prominent in the *Fisher I* oral argument, as UTA attempted to explain why it needed to use holistic review to attain a critical mass of Black and Hispanic students. See Smolla, *supra* note 57, at 41, 45. Holistic admissions also came into play for the Plaintiff's argument that race was too small of a factor in UTA's admissions policy to be useful in attaining educational benefits of diversity. *Id.* at 384. This argument relied on the unknown weight of race, but it was rejected by the Court. *Id.* at 384–85 (“[I]t is not a failure of narrow tailoring for the impact of racial consideration to be minor. ... [This] should be a hallmark of narrow tailoring, not evidence of unconstitutionality.”). The *Fisher* Court ultimately upheld UTA's admissions policy. *Id.*

125 For more discussion of implicit bias, see sources cited *supra* note 19.

126 Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, UNIV. OF PITTSBURGH, CTR. CIV. RTS. & RACIAL JUSTICE, <https://www.civilrights.pitt.edu/asian-americans-and-bait-and-switch-attack-affirmative-action-vinay-harpalani>.

127 Complaint at ¶ 437, *Students for Fair Admissions v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), 2014 WL 6241935. *Id.* at ¶ 35 (“The ‘Harvard [admissions] Plan’ itself—and the concept of an admissions system based on a “holistic” review of applicants instead of admission based on academic qualifications—was formulated for the specific purpose of discriminating against disfavored minority groups.”). See also *supra* notes 41–45 and accompanying text.

128 *Id.* at ¶ 457.

129 *Id.* at ¶ 5. See also generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 141 (D. Mass. 2019), *overruled*, 600 U.S. 181 (2023)).

of character.”¹³⁰ She noted that “the disparity between white and Asian American applicants’ personal ratings has not been fully and satisfactorily explained.”¹³¹ She further noted that “[i]t is ... possible, although unsupported by any direct evidence ... that ... implicit biases [] disadvantaged Asian American applicants in the personal rating relative to white applicants[,]”¹³² and she suggested that Harvard’s admissions reviewers might benefit from implicit bias training.¹³³

On appeal to the U.S. Court of Appeals for the First Circuit, SFFA seized on this suggestion. It argued that Harvard bore the burden to explain differences between White and Asian American applicants’ personal ratings scores.¹³⁴ And while the First Circuit rejected this argument and affirmed the district court ruling, SFFA’s argument again highlighted the possibility that holistic review can mask discrimination and bias. SFFA was still able to ground its appeal to the U.S. Supreme Court in the obscurity of holistic review. It argued that Harvard penalizes Asian Americans,¹³⁵ that it uses race as more than a plus factor,¹³⁶ and that it engages in “racial balancing.”¹³⁷ Ironically, while SFFA raised the dubious history of holistic admissions and claimed that it served to mask discrimination, the Plaintiffs did not rebuke holistic review itself. At oral argument, UNC Counsel Patrick Strawbridge actually stated that “there’s nothing wrong with holistic ... review[,]”¹³⁸ even though the crux of SFFA’s argument was that holistic review covered up racial discrimination.

With its current supermajority of conservative Justices, the Court was bound to outlaw race-conscious admissions policies. Chief Justice Roberts’s *SFFA* majority opinion held that Harvard and UNC had not defined their diversity-related goals well enough to constitute a compelling interest,¹³⁹ and had not shown how race-conscious admissions would allow it to meet those allegedly ill-defined goals.¹⁴⁰ The Court also found that admissions are a zero-sum game where it is unacceptable

130 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 141 (D. Mass. 2019), *overruled*, 600 U.S. 181 (2023)). (“The personal rating criteria ... encourage admissions officers to consider ‘qualities of character’ such as ‘courage in the face of seemingly insurmountable obstacles, ‘leadership’ ‘maturity,’ ‘genuineness, selflessness[,] humility,’ ‘resiliency,’ ‘judgment,’ ‘citizenship,’ and ‘spirit and camaraderie with peers.’”).

131 *Id.* at 171.

132 *Id.*

133 *Id.* at 204.

134 Brief of Appellant Students for Fair Admissions, Inc. at 27, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) (arguing that “because the district could not rule out “overt discrimination or implicit bias at work to the disadvantage of Asian American applicants[,] Harvard had not satisfied this burden”).

135 See Brief for Petitioner at 72, *SFFA*, 600 U.S. 181 (2023).

136 *Id.* at 77.

137 *Id.* at 75.

138 Transcript of Oral Argument at 60, *Students for Fair Admissions v. President and Fellows of Harvard College* (No. 20-707).

139 *SFFA v. President and Fellows of Harvard College*, 600 U.S. 181, 215 (2023).

140 *Id.*

to use race in a manner that lowers the percentage of any group¹⁴¹—a holding that effectively overturned *Grutter*.¹⁴²

The concurrences by Justices Thomas and Gorsuch drew upon SFFA's arguments about holistic review. Justice Thomas noted that "Harvard's 'holistic' admissions policy began in the 1920s when it was developed to exclude Jews."¹⁴³ Drawing from SFFA's argument, Justice Gorsuch stated:

SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." ... Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without "'stat[ing] frankly'" that they were "'directly excluding all [Jews] beyond a certain percentage.'" ... SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits.¹⁴⁴

Justice Gorsuch also referenced the lack of clarity about how much weight is given to race in a holistic admissions process: "[T]he parties debate *how much* of a role race plays in admissions at Harvard and UNC[] ... when making admissions decisions in 'holistic' review of each applicant."¹⁴⁵

But it was the dissents by Justices Sotomayor and Jackson that most illustrated how significant holistic review was to the *SFFA* cases. The dissenting opinions went into much detail, describing the workings of holistic review at length.¹⁴⁶ Justices Sotomayor explained thoroughly that race can be "considered as one factor of many in the context of holistic review" if "that use is 'contextual and does

141 *Id.* at 218-19 ("College admissions are zero-sum" because percentages add up to 100: an advantage that increases the percentage of one group will necessarily decrease the percentage of another.").

142 *See* text accompanying *supra* notes 3-10.

143 *SFFA*, 600 U.S. 181, 257 (Thomas, J., concurring).

144 *Id.* at 298 (Gorsuch, J., concurring).

145 *Id.* Well before *SFFA*, during the *Fisher* litigation, President Smolla contended that

Affirmative action in admissions in American higher education may be on its way out in part because the ideal of a genuinely holistic approach to admissions has not been matched by the realities of admissions programs in practice at many universities. As with so many human enterprises, the reality on the ground is not as pure or pleasing as the lofty ideal considered as an abstraction. The walk does not entirely match the talk. That dissonance has contributed to a gap in trust and credibility between many of the leading institutions in higher education and leaders in American politics, culture, and, most critically for legal purposes, the judiciary.

Smolla, *supra* note 57, at 64-65.

146 Of the forty-eight references to "holistic" in the *SFFA* opinions, forty-three were in the dissents. *SFFA*, 600 U.S. 181 at 318, 384 .

not operate as a mechanical plus factor.”¹⁴⁷ She described Harvard’s admissions process in detail:

[I]t involves six different application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. ... Consistent with that “individualized, holistic review process,” admissions officers may, but need not, consider a student’s self-reported racial identity when assigning overall ratings. ... To choose among those highly qualified candidates, Harvard considers “plus factors,” which can help “tip an applicant into Harvard’s admitted class.” ... To diversify its class, Harvard awards “tips” for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. ... Consistent with the Court’s precedents, Harvard properly “considers race as part of a holistic review process,” “values all types of diversity,” “does not consider race exclusively,” and “does not award a fixed amount of points to applicants because of their race.”¹⁴⁸

Justice Jackson also delved into the fray, describing the complexities of UNC’s admissions process:¹⁴⁹

UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information. But applicants are *not* required to submit demographic information like gender and race. UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: “academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria.” Drawing on those 40 criteria, a UNC staff member ... would consider, with respect to each, his “engagement outside the classroom; persistence of commitment; demonstrated capacity for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests.” Relevant, too, would be his “relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or step-child of Carolina alumni.” The list goes on. The process is holistic, through and through.¹⁵⁰

After describing this complex process, Justice Jackson herself poses the

147 *Id.* at 346 (Sotomayor, J., dissenting).

148 *Id.*

149 Justice Jackson recused herself from *SFFA v. Harvard*, because she had served on Harvard’s Board of Overseers. Nate Raymond, *U.S. Supreme Court Pick Jackson to Recuse from Harvard Race Case*, REUTERS (Mar. 23, 2022), <https://www.reuters.com/legal/government/us-supreme-court-pick-jackson-recuse-harvard-race-case-2022-03-23/>.

150 *SFFA*, 600 U.S. 181 at 398-99 (Jackson, J., dissenting).

operant question: “So where does race come in?”¹⁵¹ She spends the next four pages explaining this.¹⁵²

Why these long explanations? Justice Jackson notes how the Plaintiffs’ case was built on mischaracterizing holistic review: “what SFFA caricatures [UNC’s admissions process] as an unfair race-based preference cashes out, in a holistic system[.]”¹⁵³ It seems that Justices Sotomayor and Jackson became in tune with the overall litigation strategy here and recognized that holistic review was the cover for all SFFA’s and the majority’s assertions of discrimination. Secret admissions allowed SFFA to make its main contentions even more readily, and Justices Sotomayor and Jackson sought to demystify holistic review and the use of race within it.

Oddly enough, Chief Justice Roberts’s majority opinion did give one nod to the use of race within a holistic admissions process. While universities cannot consider race itself, they can consider the impact of race on individual applicants through the same components of holistic review admissions committees already use.¹⁵⁴ The majority states that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹⁵⁵ Some college counseling firms saw this as a “loophole,” contending that while the “race box”

151 *Id.*

152 *Id.* at 399-402 (“According to UNC’s admissions-policy document, reviewers may also consider ‘the race or ethnicity of any student’ (if that information is provided) in light of UNC’s interest in diversity. ... And, yes, ‘the race or ethnicity of any student may—or may not—receive a “plus” in the evaluation process depending on the individual circumstances revealed in the student’s application.’ ... [T]o be crystal clear: Every student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. ... [A] plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission. ... [E]very applicant is also eligible for a diversity-linked plus (beyond race) more generally. [D]iversity broadly, including ‘socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents.’ ... When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants’ identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced). ... And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there. ... A reader of today’s majority opinion could be forgiven for misunderstanding how UNC’s program really works, or for missing that, under UNC’s holistic review process, a White student could receive a diversity plus while a Black student might not. ... UNC has concluded that ... understanding the full person[] ... means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant’s race-linked experience bears on his capacity and merit. ... So, to repeat: UNC’s program permits, but does not require ... admissions officers to [to consider race and race-linked experiences]. ... Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual’s resilience and likelihood of enhancing the UNC campus. ... Furthermore, and importantly, the fact that UNC’s holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant.”).

153 *Id.* at 401.

154 *Id.* at 230.

155 *Id.*

cannot be considered, the “story” about race will matter a lot.¹⁵⁶ Colleges and universities have designed their essay prompts around the majority’s statement.¹⁵⁷ Sarah Lawrence College actually quoted Chief Justice Roberts’s opinion in one of its essay prompts and asked applicants to “[d]raw[] upon examples from your life, a quality of your character, and/or a unique ability you possess, [to] describe how you believe your goals for a college education might be impacted, influenced, or affected by the Court’s [SFFA] decision.”¹⁵⁸

However, Chief Justice Roberts insisted this “loophole” does not allow consideration of race itself. Rather, it allows consideration of individual characteristics—not unlike those assessed by Harvard’s personal rating score¹⁵⁹—that are merely manifested through racial experiences. The majority gives examples:

A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.¹⁶⁰

The Chief Justice asserted that “universities may not simply establish through application essays or other means the regime we hold unlawful today.”¹⁶¹ He noted that “what cannot be done directly cannot be done indirectly”¹⁶² in the “shadows.”¹⁶³ Justice Sotomayor also seemed quite skeptical about the consideration of racial experiences through essays, calling it a “false promise” and “nothing but an attempt to

156 See, e.g., Jordan Weissmann, *How John Roberts Remade the College Application Essay*, SEMAFOR (June 29, 2023), <https://www.semafor.com/article/06/29/2023/supreme-court-affirmative-action-decision-essays> (“It’s a huge loophole,” Brian Taylor, managing partner at Ivy Coach, told Semafor. “Will the Common App likely ban the race box on applications? Yes. But colleges are going to find ways around that race box. It’s going to be more about the story.”).

157 See, e.g., Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your ‘Identity’*, N.Y. TIMES (Aug. 18, 2023), <https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html> (“A review of the essay prompts used this year by more than two dozen highly selective colleges reveals that schools are using words and phrases like ‘identity’ and ‘life experience,’ and are probing aspects of a student’s upbringing and background that have, in the words of a Harvard prompt, ‘shaped who you are.’ That’s a big change from last year, when the questions were a little dutiful, a little humdrum—asking about books read, summers spent, volunteering done.”); Sarah Bernstein, *US Colleges Refashion Student Essay Prompts After ban on Affirmative Action*, REUTERS (Aug. 1, 2023), <https://www.reuters.com/world/us/us-colleges-refashion-student-essay-prompts-after-ban-affirmative-action-2023-08-01/> (noting that “students applying to Emory University in Atlanta this fall will get new essay prompts aimed at teasing out details about their cultural backgrounds”).

158 See Sarah Lawrence College, *First Year Applicants*, <https://www.sarahlawrence.edu/admission/apply/first-year.html#acc-312-essays>.

159 See *supra* note 130.

160 SFFA, 600 U.S. 181 at 231.

161 *Id.*

162 *Id.*

163 *Id.*

put lipstick on a pig.”¹⁶⁴

But the distinction between the admissions regime that the *SFFA* majority endorses and the one it outlaws is far from clear. It may be even more vague than all the features of *Grutter* noted earlier. The only aspect missing now is the one that made race a little easier to see—the box where applicants can designate their race. Without that box, race becomes even more obscure on applications. If universities continue to use holistic review, what is to stop them from using not just essays that discuss race, but also race itself discerned from those essays?¹⁶⁵

IV. LITIGATING SECRET ADMISSIONS II?: “WINKS, NODS, AND DISGUISES”

Although Chief Justice Roberts warned universities about using race surreptitiously, what happens in the “shadows” is bound to be an issue. In the context of holistic review, the *SFFA* majority’s nod to discussion of race in essays brings to mind Justice Ginsburg’s dissents in *Gratz* and *Fisher v. University of Texas at Austin (Fisher I)*. In *Fisher I*, Justice Ginsburg opined that “[a]s for holistic review, if universities cannot explicitly include race as a factor, many may ‘resort to camouflage’ to ‘maintain their minority enrollment.’”¹⁶⁶ Specifically, she noted that universities might use names to assess ethnicity,¹⁶⁷ “encourage applicants to write of their cultural traditions in [their] essays[,] ... [to] highlight the minority group associations to which they belong[,]”¹⁶⁸ and use other indirect means.¹⁶⁹ In fact, all of these are components of holistic review that can reveal an applicant’s race. And as Justice Ginsburg suggested in her *Gratz* dissent, admissions committees who are particularly motivated to maintain racial diversity could resort to the “winks,

164 *Id.* at 363 (Sotomayor, J., dissenting).

165 *Cf.* Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 800 (2015) (“A holistic admissions plan inherently considers race, even if there is no explicit ‘plus’ factor allowed, because race can come into play through other holistic factors that are considered.”); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146 (2008) (exploring unconscious racial biases in admissions and raising “the question of whether race can in fact be eliminated from admissions processes”); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management At UC-Berkeley, UT-Austin, and UW-Madison*, 32 L. & SOC. INQUIRY 985, 1015 (2007) (“[T]he line between race-based and race-blind policy making can be quite blurry.”).

166 *Fisher v. Univ. of Texas*, 570 U.S. 297, 335-36. (Ginsburg, J., dissenting).

167 *See* Roland G. Fryer & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. ECON. 767 (2004); *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003).

168 *See Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting) (“One can reasonably anticipate ... that colleges and universities will seek to maintain their minority enrollment ... whether or not they can do so in full candor through adoption of affirmative action plans. ... Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers’ recommendations may emphasize who a student is as much as what he or she has accomplished[.].”)

169 *See* sources cited in notes 165-166.

nods, and disguises” to do so.¹⁷⁰

There have been accusations of such “winks, nods, and disguises” in the past. In 1996, the state of California enacted a popular referendum, amending its constitution to ban race-conscious policies, including the use of race in admissions.¹⁷¹ Since the ban went into effect in 1998—two decades before the SFFA cases—California’s public universities have not been allowed to use race as a factor in admissions.

Nevertheless, in 2008, two faculty members at the University of California at Los Angeles (UCLA), Professor Tim Groseclose (now of George Mason University) and Professor Richard Sander (of UCLA School of Law), accused UCLA of surreptitiously using race in its undergraduate holistic admissions process and thus defying California’s constitutional ban.¹⁷² Specifically, Professors Groseclose and Sander accused admissions committee members of using personal statements and other information on applications to determine the race of applicants, and then employing this knowledge to benefit African American applicants. Some years later, each of them wrote books discussing these allegations.¹⁷³

Professor Sander went into the history of admissions policies in the University of California (UC) system. Prior to 2001, the main path for California high school students to gain acceptance to the UC system was to attain “a combination of high school grades and standardized test scores that put them in the top eighth,

170 See *Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting); see also *id.* at 298 (Souter, J., dissenting) (lamenting that admissions would “become an exercise in which the winners are the ones who hide the ball”).

171 CAL. CONST. art. 1, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

172 See TIM GROSECLOSE, REPORT ON SUSPECTED MALFEASANCE IN UCLA ADMISSIONS AND THE ACCOMPANYING COVER-UP (2008) (on file with author); Richard Sander, *The Consideration of Race in UCLA Undergraduate Admissions*, Oct. 20, 2012 (on file with author). See also Scott Jaschik, *Is ‘Holistic Admissions’ a Cover for Helping Black Applicants?*, INSIDE HIGHER ED (Sept. 2, 2008), <http://www.insidehighered.com/news/2008/09/02/ucla>; Alexia Boyarsky, *Findings by Law Professor Suggest That UCLA Admissions May Be Violating Prop 209*, DAILY BRUIN (Oct. 23, 2012), [HTTP://DAILYBRUIN.COM/2012/10/23/FINDINGS-BY-LAW-PROFESSOR-SUGGEST-THAT-UCLA-ADMISSIONS-MAY-BE-VIOLATING-PROP-209/](http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209/). Professors Groseclose and Sander were not the first to make accusations of racial bias in the UC system. See Lipson, *supra* note 165, at 1015 (noting that former UC Board of Regents member and noted race-conscious admissions opponent “Ward Connerly . . . put forth and later partially retracted accusations that the admissions officials at UC-Berkeley were ‘slipping’ race in through the back door via individual assessment (e.g., by preferring applicants from school districts that are predominantly African American or Hispanic, by preferring applicants with names that are predominantly African American or Hispanic, and/or by preferring applicants who identify or give clues that they are African American or Hispanic in their personal statements.”)

173 See TIMOTHY GROSECLOSE, CHEATING: AN INSIDER’S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA (2014); RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 169–70 (2012) (contending that as of 2012, “the University of California system is still, formally race-neutral, but in practice it has come very close to a form of racial proportionality . . . neither voters nor state officials can end university racial preferences by a single stroke”).

academically, of California high school seniors.”¹⁷⁴ A significant percentage of applicants were admitted based on academic criteria alone.¹⁷⁵ There were “special admission” programs designed to boost enrollment of underrepresented groups, but these were much less effective after California’s constitutional ban on race-conscious policies went into effect in 1998.¹⁷⁶ In 2001, the UC Regents adopted the “Eligibility in the Local Context [EIC]” plan, which “specified that students whose UC-adjusted grades put them in the top 4% of their high school classes would be UC-eligible.”¹⁷⁷ EIC was expected to boost admission of Black and Latina/o students from highly segregated schools where achievement was generally lower.¹⁷⁸ It did increase the numbers significantly at many of the UC undergraduate campuses, but there was only a modest effect at the two flagship campuses—UC Berkeley and UCLA.¹⁷⁹

Foreshadowing Chief Justice Roberts in *SFFA*, the University of California (UC) system began using admissions essays more widely, along with consideration of other nonacademic criteria.¹⁸⁰ Here, applicants could discuss life experiences and hardships and the ways they could contribute to diversity.¹⁸¹ Through some of these application components, applicants could readily reveal their racial backgrounds. In 2002, Professor Sander noted that UC Berkeley adopted a holistic admissions policy, which considered all applicant characteristics, including “personal quality” indices that measured factors such as “socioeconomic status, hardships overcome, writing ability, and extracurricular activities.”¹⁸² Proponents of the holistic policy thought it would boost enrollment of underrepresented applicants who were strong on nonacademic criteria.¹⁸³ Opponents thought it could become a cover for illegal use of race, ascertained through personal essays or other information on applications.¹⁸⁴ However, the policy had little effect on enrollment of Black and Latina/o students at UC Berkeley.¹⁸⁵

UCLA also adopted a holistic admissions policy for the entering class of fall 2007.¹⁸⁶ In contrast to UC Berkeley, there was a dramatic increase in Black student

174 Sander, *supra* note 172, at 3.

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* at 3–4.

181 *Id.* at 3.

182 *Id.*

183 *Id.*

184 *Id.* at 3–4.

185 *Id.* at 4 (“Berkeley’s holistic system went forward, but it is not clear that it had the effects predicted by either its supporters or its critics. African-American and Hispanic freshman admissions did not change much.”).

186 *Id.*

enrollment at UCLA.¹⁸⁷ From 1995 to 1997, UCLA enrolled over two hundred new Black students each year. In 1998, the first year that California's constitutional ban on affirmative action went into effect, this number dipped to less than 150. New Black student enrollment at UCLA fluctuated over the next decade, but it never went significantly over 150, and in 2006, it was at a low of about 100. But for both 2007 and 2008, new Black student enrollment doubled to over 200.¹⁸⁸

This increase prompted Professors Groseclose and Sander to raise the possibility that admissions officers were covertly using race itself as a criterion. Professor Sander contended that “[h]olistic admissions by itself did not add anything to African-American admissions at UCLA; rather, it provided a cover for illegal discrimination by UCLA’s admissions office.”¹⁸⁹ Professor Sander claimed that the secretive nature of holistic review served to obscure the use of race in the admissions process.

Consequently, UCLA commissioned the late Professor Robert Mare of the sociology department to conduct an independent review of the University’s undergraduate holistic admissions process.¹⁹⁰ Professor Mare used data from the fall 2007 and fall 2008 admissions cycles.¹⁹¹ His report also laid out the pathways to admission, factors considered in holistic review, and ratings scales for UCLA’s undergraduate holistic admissions process. His investigation gives one model for assessing post-*SFFA* accusations that universities are still using race itself as an admissions factor, rather than personal qualities tied to racial experiences.

In its various phases and components, the admissions process reviewed by Professor Mare considered a plethora of factors to determine which applicants would be admitted, including grades, difficulty of classes taken, standardized test scores, extracurricular activities, school and community involvement, contribution to family income (if working), academic enrichment activities (which could also be work) socioeconomic status, and other challenges and “limits to academic achievement.”¹⁹² Based on holistic assessment of these criteria, applicants were rated by admissions reviewers on a quantitative scale: “1 (emphatically recommend for admission ...), 2 (strongly recommend for admission ...), 2.5 (recommend for admission), 3 (acceptable for admission ...), 4 (qualified ...), 5 (recommend deny ...).”¹⁹³

187 See *BLACK BRUIN HISTORY AT UCLA*, <https://newsletter.alumni.ucla.edu/connect/2021/feb/black-bruin-history/default.htm> (last visited Jan. 17, 2024) (giving new enrollment numbers of Black students at UCLA for each year from 1995 to 2015).

188 *Id.* Although the number of new admitted Black students at UCLA dropped slightly below 200 in 2009 and 2010, it was above 200 from 2011-2013 and exceeded 250 in 2014 and 2015. *Id.* In 2021, after implementing increased recruitment efforts and other activities, UCLA enrolled 346 new Black students. Janell Ross, *The ‘Infamous 96’ Know Firsthand What Happens When Affirmative Action Is Banned*, *TIME*, July 1, 2023, <https://time.com/6291241/affirmative-action-infamous-96-ucla-supreme-court/#:~:text=In%202021%20there%20were%201%2C185,slightly%20lower%20than%20UCLA's%20figures..>)

189 Sander, *supra* note 172, at 1.

190 ROBERT D. MARE, *HOLISTIC REVIEW IN FRESHMAN ADMISSIONS AT UCLA*, UCLA Comm. on Undergraduate Admissions & Rel. with Schools (CUARS) (Jan. 2012) (on file with author).

191 *Id.* at 11.

192 *Id.* at 1–2.

193 *Id.* at 22.

UCLA had a number of pathways to admission, most of which employed holistic review to varying degrees.¹⁹⁴ “Regular Review” admittees came from general holistic ratings on a numerical scale, scored by one or two application reviewers.¹⁹⁵ “Athletic Admission” involved a separate admissions committee, and while athletes might submit regular applications, they were reviewed differently.¹⁹⁶ “Final Review” generally involved applicants who had received discrepant scores during Regular Review and were referred for further consideration.¹⁹⁷ “Supplemental Review” was for applicants referred by readers during Regular Review because those readers “believe that they cannot score the applicant on the basis of the information contained in the application or if they believe that the applicant deserves special consideration because of personal circumstances reflected in the application.”¹⁹⁸ More information, such as letters of recommendation and updates about academic performance and personal circumstances, was solicited from applicants submitted for Supplemental Review.¹⁹⁹ “School Review” was for a “small number of applicants ... based on special circumstances that surround their high schools”: for example, if an applicant had strong academic credentials but did not stand out because they went to a school that had many academically strong students.²⁰⁰

Professor Mare’s review found that

1. Relative to the applicant pool, White, East Asian American, and South Asian American applicants were more represented among admitted students than Black, Latina/o, and Southeast Asian applicants, due principally to disparities during Regular Review;²⁰¹
2. Black and Latina/o applicants were disproportionately represented in Supplemental Review;
3. For “holistic read scores” during Supplemental Review and Final Review, Black applicants were rated “somewhat more favorabl[y]” and East and South Asian American applicants were rated “somewhat less favorabl[y]” than other applicants who were “otherwise similar in academic qualifications, personal characteristics, and measured challenges and hardships;”²⁰²
4. When controlling for racial differences in all other applicant characteristics, “Whites, African Americans, and Latinos are overrepresented among those admitted and Asian American applicants are underrepresented.”²⁰³

194 *Id.* at 22–25.

195 *Id.* at 22.

196 *Id.* at 23.

197 *Id.* at 24.

198 *Id.*

199 *Id.* at 24–25.

200 *Id.* at 25.

201 *Id.* at 3.

202 *Id.* Mare used the term “North Asian” to combine students of East Asian (Chinese, Japanese, Korean, Mongolian) and South Asian (Indian, Pakistani, Bangladeshi, Sri Lankan, Maldivian) descent.

203 *Id.*

On this last finding, Mare further noted that for Black and Latina/o applicants, this effect occurs primarily in Final and Supplemental Review, and that the “disadvantages of Asian applicants occur, with varying magnitudes, throughout the admissions process.”²⁰⁴

Professor Mare’s overall conclusion was that “[S]ome disparities in outcomes ... favor some groups and disfavor others among applicants who are otherwise similar on their measured characteristics. Whether these disparities are considered small or large is a normative, policy issue—not a scientific one.”²⁰⁵ Despite the ambivalent conclusion by Professor Mare, UCLA itself stated that “Mare’s report found no evidence of bias in UCLA’s admissions process[,]”²⁰⁶ that the differences reported by Mare “ar[ose] almost exclusively in supplemental review, a step ... that is intended to give additional attention to atypical applicants[,]”²⁰⁷ and that “those ... differences can be explained by the nuances and context of the applicant’s experience[.]”²⁰⁸

Although this matter did not go further, the type of controversy that occurred at UCLA could well happen again. Opponents of affirmative action are bound to accuse universities of using race surreptitiously. But it will be difficult to separate impermissible use of race itself from the permissible consideration of racialized experiences in applicants essays referenced by Chief Justice Roberts in the *SFFA* majority opinion.²⁰⁹ And as the controversy at UCLA suggests, admissions committees or individual admissions reviewers could still use race illegally—or at least be accused of doing so.²¹⁰ Justice Ginsburg’s comment about “winks, nods, and disguises” suggested as much, and Justice Souter also warned in his *Gratz* dissent that equal protection could very well “become an exercise in which the

204 *Id.* See also *id.* at 76 (“In 2007, as in 2008, African American, Latino, and Southeast Asian applicants are underrepresented in the admission cohort, whereas Whites and North Asians are overrepresented. Once the differences in the measured characteristics of the groups are taken into account, the net advantages shift to Whites, Blacks, and Latinos, whereas both Asian groups experience a net disadvantage.”). See also *id.* at 3 (“Among otherwise equivalent applicants, Whites, African Americans, and Latinos are overrepresented among those admitted and Asian American applicants are underrepresented.”)

205 *Id.* at 4.

206 Ricardo Vazquez, *Independent Report Confirms UCLA Admissions Process Working as Intended by Faculty*, UCLA OFFICE OF MEDIA RELATIONS, <http://newsroom.ucla.edu/stories/independent-report-confirms-ucla-234132>. Conversely, Professor Sander argued that Mare’s report supported his findings. See David Leonhardt, *Race, ‘Holistic Admissions’ and U.C.L.A.*, N.Y. TIMES, Oct. 13, 2012, <https://archive.nytimes.com/economix.blogs.nytimes.com/2012/10/13/race-holistic-admissions-and-u-c-l-a/> (last visited Jan. 17, 2024), (“Intriguingly, both Mr. Sander and U.C.L.A. argue that the Mare report is consistent with their findings.”).

207 *Id.*

208 *Id.*

209 See text accompanying *supra* notes 154–61.

210 Even before *SFFA*, there were many allegations that universities were intentionally discriminating against Asian Americans. See DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN PACIFIC AMERICANS AND RACIAL POLITICS* 64–83 (1998); Vinay Harpalani, *The Supreme Court, 2022 Term—Response: The Need for an Asian American Supreme Court Justice*, 137 HARV. L. REV. F. 23, 30–31 (2023). The Department of Education Office of Civil Rights (OCR) actually found that UCLA had discriminated against five students of Asian descent in 1987 and 1988. Harpalani, *supra* note 46 at 272. OCR ordered UCLA to admit those students. *Id.*

winner are the ones who hide the ball.”²¹¹ Some might even view this action as a morally justified act of “civil disobedience.”²¹²

If such accusations are widespread and taken seriously, they may well prompt investigation and litigation. And controversies about the impermissible use of race in a post-*SFFA* regime would be even messier than under the *Grutter* regime. Universities would not admit to direct and explicit use of race—as they did in *Bakke*, *Gratz*, *Grutter*, *Fisher*, and the *SFFA* cases—because now, doing so would be to admit they are violating the law. Plaintiffs would thus face another well-known obstacle if they filed a post-*SFFA* case accusing universities of using race directly in admissions: the intent doctrine. Facially race-neutral policies that merely have a disparate impact on different racial groups do not violate the Fourteenth Amendment.²¹³ The Equal Protection Clause only applies to the intentional use of race by government actors.²¹⁴

211 *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

212 See Salib & Krishnamurthi, *supra* note 84, at 149 (“[O]ne could think of noncompliance as a kind of civil disobedience. Under this frame, universities accept that the Supreme Court’s interpretation of Title VI and the Constitution is coextensive with the law. But they believe that the law itself is immoral, sufficiently so to justify breaking it.”). Professors Salib and Krishnamurthi discuss several other justifications that universities could use to defy Supreme Court precedent. *Id.* at 149-52. They note that “anti-judicial-supremacist thinking has lately become fashionable among a surprisingly wide variety of legal thinkers[,]” across the ideological spectrum, including Professors Ryan Doerfler, Samuel Moyn, Nikolas Bowie, Daphna Renan, Michael Stokes Paulsen, and William Baude. *Id.* at 150. They also contend that

Colleges might justify post-*SFFA* affirmative action to themselves on grounds of legal incoherence[] ... if they ... had to obscure those policies for fear of capricious liability, then the fault was with the Court for writing such a bad opinion. ... [T]he Court held that colleges may continue to favor students who, among other things, overcame racial discrimination. Such features of an applicant are, at a minimum, highly correlated with racial/ethnic background. Indeed, they might be so highly correlated as to be coextensive. There simply might not be any Black applicants to Harvard who, by Harvard’s lights, have not faced and overcome anti-Black racism. How, then, should the diligent judicial supremacist Director of Admissions ensure compliance with *SFFA* among her staff? How could she be sure that they were acting on desiderata merely coextensive with race, rather than on race itself? ... Should she police admissions staff who slip and use the old, functionally identical criteria? Interrogate them to identify their true internal conceptual schema? Fire them if she suspects they have the wrong one? Or should she instead perhaps conclude that drawing these distinctions is a bit like counting angels on pinheads, and ignore them? ... [S]he might feel justified in moving forward without much change, declining to record the details of admissions decisions, and placing any applicable blame on the Court for issuing yet another mysterious holding on affirmative action. *Id.* at 151-52.

Professors Salib and Krishnamurthi do not endorse any of the above propositions. Rather, they note that “[e]ach seems at least somewhat plausible to us, but we take no position on their ultimate validity.” *Id.* at 149.

213 See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that U.S. Supreme Court has “not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another”); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause protects only against discrimination that occurs “because of, not merely in spite of, its adverse effects upon an identifiable group”).

214 The intent doctrine most likely also applies to Title VI of the Civil Rights Act of 1964, which reaches private universities. In past cases, the Supreme Court has stated that standards for violating

In past cases challenging affirmative action in admissions, universities admitted to using race-conscious policies, so strict scrutiny automatically attached. This placed a high burden on universities: they had to show that their policies were narrowly tailored to a compelling state interest. But now, universities will contend they are only using facially race-neutral admissions policies. In post-*SFFA* litigation, plaintiffs would bear the burden to prove that universities are being disingenuous and intentionally using race.²¹⁵

How would they do so? Unless there was direct, smoking gun evidence that a university used race impermissibly for admissions decisions, plaintiffs would have to rely on statistical evidence. In the cases before *SFFA*, such evidence served not to demonstrate that universities were using race (they admitted doing so legally), but rather to approximate and highlight the weight given to race in the admissions process. For example, in both *Bakke* and *Grutter*, the Plaintiffs submitted data showing disparities in grades and test scores between admitted underrepresented and nonunderrepresented students.²¹⁶ The *Grutter* Plaintiffs used this evidence

Title VI of the Civil Rights Act of 1964 are the same as for the Equal Protection Clause. *See* Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001) (noting “that § 601 [of Title VI] ‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment’”) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of J. Powell)). In his *SFFA* concurrence, Justice Neil Gorsuch opined that Title VI is stricter than the Equal Protection Clause and proscribes all racial classifications. *SFFA*, 600 U.S. 181 at 308 (2023) (Gorsuch, J. concurring) (“Under Title VI, it is always unlawful to discriminate among persons even in part because of race, color, or national origin.”). But Justice Gorsuch was referring to intentional racial classifications. Also, in *Guardians Association v. Civil Service Commission of City of New York*, only two Justices opined that Title VI does not require any proof of discriminatory intent. *See* 463 U.S. 582, 584 n.2 (1983) (“Justice [Thurgood] Marshall would hold that, under Title VI itself, proof of disparate impact discrimination is all that is necessary. . . . I [Justice Byron White] agree with Justice Marshall that discriminatory animus is not an essential element of a violation of Title VI.”). Four Justices (Chief Justice Warren Berger and Justices Sandra Day O’Connor, Lewis Powell, William Rehnquist) held unequivocally that Title VI required proof of discriminatory intent, while Justices Harry Blackmun, William Brennan, and John Paul Stevens found that “although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate impact standard are valid.” *Id.* Although it is possible that the Court could recognize disparate impact liability under Title VI, that is highly unlikely in my view—especially with the current Justices. *But cf.* Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. COL. & UNIV. L. 239, 60-61 (2023) (arguing that U.S. Department of Education and Department of Justice regulations for implementing Title VI do “include a provision that prohibits universities from employing admissions criteria that disproportionately and unjustifiably exclude students of color.”) *See generally also* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PENN. L. REV. 1075, 1145–55 (2009) (discussing Title VI interpretation and implementation).

215 It is possible that this burden could change if the Supreme Court grants cert and rules on *Coalition for TJ v. Fairfax, County School Board*. In this case, the District Court for the Eastern District of Virginia ruled that the newly implemented race-neutral admissions policy for Thomas Jefferson High School for Science and Technology, a public magnet high school, violated the Equal Protection Clause because it had a disparate impact on the admission of Asian American students and was motivated by racial animus. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809. However, this ruling was overturned on appeal. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023).

216 *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 277 n.7 (1978) (comparing Plaintiff Alan Bakke’s GPA and MCAT scores with those of all admitted applicants and those admitted via the special admissions program); *see* Grutter v. Bollinger, 137 F. Supp. 2d 821, 838 (E.D. Mich. 2001), *overruled by* Grutter v. Bollinger, 539 U.S. 306 (2003) (Plaintiffs’ expert witness concluding that “that

to support their claim that the University of Michigan Law School was using a de facto quota system in violation of *Bakke*—an argument rejected by the *Grutter* majority.²¹⁷ And SFFA employed complex statistical models of holistic review processes, incorporating not only academic criteria, but a variety of factors that go into a holistic admissions process.²¹⁸ Through such models, SFFA contended that Harvard and UNC used race as more than just a plus factor for underrepresented applicants.

But in the post-*SFFA* world, universities would deny using facially race-conscious policies. Plaintiffs would have to use statistical evidence to establish intentional use of race itself—in the mix of admissions committees' consideration of essays about racialized experiences and other factors incorporated in holistic review, including socioeconomic status, personal hardship, geographic criteria, and other factors.²¹⁹ And the Supreme Court has set a high bar for statistical evidence itself to prove intent. When alleging intentional use of race, plaintiffs would have to show that academic and other differences between admitted applicants of different racial groups are “unexplainable on grounds other than race.”²²⁰ Their ability to do so would depend on the magnitude of these differences,²²¹ in relation to the total

[a]ll the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance for the particular ethnic group at a given selection index value.”). *But see* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002) (cited in *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (“In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.”)).

217 *Grutter*, 539 U.S. at 335–36 (“The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.”).

218 *See supra* notes 128-129 and accompanying text.

219 *See supra* Part I.

220 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”); *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (“[S]tatistical proof normally must present a ‘stark’ pattern to be accepted as the sole proof of discriminatory intent under the Constitution.”). The *McCleskey* majority opinion also gave examples of such “stark pattern[s].” *Id.* n.12 (“*Gomillion v. Lightfoot*, 364 U. S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), are examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city ‘from a square to an uncouth twenty-eight-sided figure.’ 364 U.S. at 364 U. S. 340. The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the white applicants received permits, but none of the over 200 Chinese applicants was successful. In those cases, the Court found the statistical disparities ‘to warrant and require,’ *Yick Wo v. Hopkins*, *supra*, at 118 U. S. 373, a ‘conclusion [that was] irresistible, tantamount for all practical purposes to a mathematical demonstration,’ *Gomillion v. Lightfoot*, *supra*, at 364 U. S. 341, that the State acted with a discriminatory purpose.”).

221 Professors Salib and Krishnamurthi contend that *Washington v. Davis* and *McCleskey v. Kemp* will prevent plaintiffs from prevailing in challenges where intentional use of race has to be proven. *See* Salib & Krishnamurthi, *supra* note 84, at 123, 126, 136-37, 152-53. They further argue that “the result in

of applicants to the academic program and the other admissions criteria that were considered.²²² Courts would have to evaluate statistical differences between racial groups and determine if they form “a ‘stark’ pattern”²²³ that is “unexplainable on grounds other than race.”²²⁴

Rather than inviting more lawsuits however, universities are likely to be risk averse.²²⁵ What has already been happening, and what I suspect may continue in

SFFA need have no impact at all: colleges will still be able to operate affirmative action programs as they have been, with only very minor changes.” *Id.* at 152. But the degree to which universities have used race can appear to be quite stark. In their study of 7410 accepted applicants at several selective private higher education institutions, Professor Thomas Espenshade and Alexandria Walton Radford found that for Fall 1997, using White admitted applicants as a baseline, race-related admissions plus factors were equivalent to 310 points (out of 1600 total) on the SAT for Black admittees and 130 points for Hispanic admittees, while Asian admittees outscored Whites by 140 points. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* 92–93 (2009). At Harvard itself, for the classes admitted from 1995 to 2013, “Asian-Americans admitted to Harvard earned an average SAT score of 767 across all sections. ... [W]hite admits earned an average score of 745 across all sections, Hispanic-American admits earned an average of 718, Native-American and Native-Hawaiian admits an average of 712, and African-American admits an average of 704.” Sheri S. Avi-Yonah & Molly C. McCafferty, *Asian-American Harvard Admits Earned Highest Average SAT Score of Any Racial Group From 1995 to 2013*, HARVARD CRIMSON (Oct. 22, 2018), <https://www.thecrimson.com/article/2018/10/22/asian-american-admit-sat-scores/>. Also, Professors Peter Arcidiacono, Josh Kinsler, and Tyler Ransom report average SAT scores by race for students admitted to Harvard for the Class of 2017: White = 1492; Asian American = 1536; African American = 1434; Hispanic = 1454; Native American = 1450. Peter Arcidiacono, Josh Kinsler, & Tyler Ransom, *Recruit to Reject? Harvard and African American Applicants*, 88 ECON. EDUC. REV. 1, 5 (2022). The authors also found that “[a]n African American applicant [to Harvard] who scored above a 740 on the SAT math was 4.46 times as likely to be admitted as a similar-scoring Asian American applicant for the Class of 2009 and was 4.65 times as likely to be admitted for the Class of 2016.” *Id.* at 2. Nevertheless, many race-neutral facets of Harvard’s admissions process disadvantage Asian Americans. See Harpalani, *The Need for an Asian American Supreme Court Justice*, *supra* note 210, at 37–38 (noting that Asian Americans have lowest representation of any racial groups among “athletes, legacy applicants, applicants on the Dean’s Interest List [primarily relatives of donors], and children of faculty or staff[.]”). See also generally Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590 (2017); Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

As with *SFFA*, litigants would employ statistical models to argue whether or not such difference among racial groups demonstrate intentional discrimination, and courts would make the final determination.

222 See Sander & Taylor, *supra* note 173, at 158 (“For many small programs ... [t]he number of students was so small, and the criteria for selection so selective, that outside investigators could not easily detect racial discrimination. For larger programs, such as law schools or business schools, that would obviously be more difficult.”).

223 *McCleskey*, 481 U.S. 279, 293. See also *supra* note 220.

224 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264. See also *supra* note 220.

225 One example of this risk aversion is the removal of check boxes for racial categories from applications. See Anemona Hartocollis, *Colleges Will Be Able to Hide a Student’s Race on Admissions Applications*, N.Y. TIMES (May 26, 2023), <https://www.nytimes.com/2023/05/26/us/college-admissions-race-common-app.html> (noting that “the Common App has made a pre-emptive move on what is known as the ‘race box’ ... colleges will be able to hide the information in those boxes from their own admissions teams”); Pericles Lewis & Jeremiah Quinlan, *An Update on Yale College’s Response to the Supreme Court Ruling on Race in Admissions*, YALE COLLEGE (Sept. 7, 2023), <https://yalecollege.yale.edu/get-know-yale-college/office-dean/messages-dean/update-yale-colleges-response-supreme-court-ruling> (“Reviewers will not have access to applicants’ self-identified race and/or ethnicity, and admissions officers involved in selection will not have access to aggregate data on the racial or ethnic

various forms, is the “de-quantification” of admissions. Universities could reduce the use of numerical scales and criteria and rely more on unquantified judgments of admissions committees as part of holistic review. This would reduce the amount of statistical data that potential plaintiffs could use to claim that universities are intentionally using race.

The reduced use of standardized college entrance exams is one example of such de-quantification. For well over a decade now, universities have been making such exams optional for admission, or eliminating their consideration altogether.²²⁶ This has occurred for various reasons, including removal of what some perceive as a barrier to the admission of underrepresented groups,²²⁷ desire to emphasize other holistic attributes in the admissions process, and the difficulty of test administration during the COVID-19 pandemic.²²⁸ For the fall 2023 cycle, over 80% of four-year undergraduate institutions had either made submission of standardized test scores optional or eliminated their usage altogether.²²⁹ In the past, such test scores

composition of the pool of applicants or admitted students.”).

226 See Kevin Carey, *The SATs Are: a) Dying; b) Already Dead; c) Alive and Well; d) Here Forever*, VOX (May 2, 2023), <https://www.vox.com/23700778/sat-act-standardized-tests-college-high-school>.

227 See, e.g., Richard V. Reeves & Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, BROOKINGS INST. (Feb. 1, 2017), <https://www.brookings.edu/articles/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/> ([I]nequalities in SAT score distribution reflect and reinforce racial inequalities across generations.”); Aaron W. Hughley, *Why Standardized Testing Is Not Essential in College Admissions*, 517 COUNTERPOINTS: COLLEGES AT THE CROSSROADS: TAKING SIDES ON CONTESTED ISSUES 329, 339 (2018) (“[S]tandardized tests designed to level the playing field are perpetuating the social order by making it much more difficult for those from low-income families to effectively compete with their wealthier counterparts.”). *But see* Natalia Mehlman Petrzela, *The SAT Is a Better Measure of Wealth than Aptitude. We Should Still Keep It, Though*, MSNBC (Nov. 2, 2023), <https://www.msnbc.com/opinion/msnbc-opinion/sat-test-harvard-study-rca121948> (“It is this promise of the SAT to counterbalance an opaque and unfair system—to democratize college admissions—what explains why marginalized groups often advocated for such exams. Jews in the 1930s, for example, knew a high SAT score would make it harder for universities to exclude them based on their accent, public school education or failure to meet a deliberately nebulous criterion of ‘character.’ Today, Asian American advocates make similar arguments, and some have pointed out that the push to de-emphasize testing and academics just happens to come as their performance threatens the status of white students. Ironically, eliminating standardized assessments reopens the door to all sorts of ambiguous ‘qualitative’ measures that serve to disadvantage kids in the same, difficult-to-detect ways that the old boys’ network of yore did. Such a shift will only ensure that students who have legacy connections, extracurricular opportunities and in-depth recommendations written by guidance counselors at well-resourced schools have an even greater advantage.”).

See also Lyn Letukas, *Nine Facts About the SAT That Might Surprise You*, COLL. BD. RSCH. (2015), <https://files.eric.ed.gov/fulltext/ED562751.pdf> (critiquing notion that “[t]he SAT is biased against minorities”).

228 See Carey, *supra* note 226.

229 Michael T. Nietzel, *More Than 80% Of Four-Year Colleges Won’t Require Standardized Tests For Fall 2023 Admissions*, FORBES (Nov. 15, 2022), <https://www.forbes.com/sites/michaelt Nietzel/2022/11/15/more-than-80-of-four-year-colleges-wont-require-standardized-tests-for-fall-2023-admissions/?sh=334b318a7fb9>. The Massachusetts Institute of Technology (MIT) has gone against this trend and reinstated its standardized college entrance exam requirement. See Eric Levenson, *MIT Will Once Again Require Applicants to Take the SAT or ACT, Bucking Anti-test Movement*, CNN (Mar. 29, 2022), <https://www.insidehighered.com/admissions/views/2022/05/09/why-mit-was-right-reinstate-sat-opinion>; Les Perelman, *MIT and the Reinstatement of the SAT*, INSIDE HIGHER ED (May 8,

have also been used by antiaffirmative action plaintiffs to establish the magnitude of race-conscious policies and their burden on some racial groups.²³⁰ And now in a post-*SFFA* world, universities seeking to avoid lawsuits alleging the use of race now have even more incentive to eliminate use of standardized entrance exams.²³¹

If the use of standardized tests declines, universities may rely more on another quantified measure—high school grades—to make admissions decisions. However, because they are not standardized across schools, it is harder to use grades to compare applicants. And high school grade inflation has compounded that problem.²³² The 2019 National Assessment of Educational Progress High School Transcript Study (NAEP-HSTS) reported that, adjusting GPAs to a 4.0 scale, the average overall high school GPA across the nation rose from 2.68 in 1990 to 3.11 in 2019.²³³ Moreover, the average high school GPA for academic courses rose from 2.54 to 2.98,²³⁴ and grades for every type of high school course showed a statistically significant increase in the last thirty years.²³⁵ And this trend has tended to benefit “students from wealthier (and whiter) high schools than average”²³⁶—thus exacerbating inequities between more privileged and less privileged students.²³⁷ There is also evidence that the correlation between grades and standardized test scores has decreased over time—particularly after the COVID-19 pandemic.²³⁸

2022), <https://www.insidehighered.com/admissions/views/2022/05/09/why-mit-was-right-reinstate-sat-opinion>.

230 See *supra* note 216.

231 The elimination of standardized entrance exams itself has led to legal and political controversies, with Asian Americans often at the center. See generally Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759 (2022).

232 See Fred Hess, *High School Grade Inflation Is s Problem. Getting Rid of the SAT Would Make It Worse*, FORBES (Mar. 30, 2022), <https://www.forbes.com/sites/frederikhess/2022/03/30/high-school-grade-inflation-is-a-problem-getting-rid-of-the-sat-would-make-it-worse/?sh=1fb1ca3aae7a>; Tim Donahue, *If Everyone Gets an A, No One Gets an A*, N.Y. TIMES (Oct. 23, 2023), https://www.nytimes.com/2023/10/23/opinion/grade-inflation-high-school.html?unlocked_article_code=1.Bk0.gIpw.fwUnL.UNJzWt&smid=url-share.

233 See 2019 NAEP High School Transcript Study (HSTS) Results, https://www.nationsreportcard.gov/hstsreport/#coursetaking_1_0_el (last visited Jan. 18, 2024).

234 *Id.*

235 *Id.* Another study indicated that from the graduating class of 1998 to that of 2016, the average high school GPA of students who enroll in four-year colleges increased from 3.27 to 3.38. Scott Jaschik, *High School Grades: Higher and Higher*, INSIDE HIGHER ED (July 16, 2017), <https://www.insidehighered.com/admissions/article/2017/07/17/study-finds-notable-increase-grades-high-schools-nationally>. Additionally, “the proportion of students with A averages (including A-minus and A-plus) increased from 38.9 percent of the graduating class of 1998 to 47 percent of the graduating class of 2016.” *Id.*

236 *Id.*

237 *Id.* (“High schools ‘most prone to grade inflation are the resourced schools[.]’ ‘the ones with the highest level of affluence.’ For those at high schools without resources, generally with lower GPAs, grade inflation elsewhere ‘puts them at a disadvantage in the college admissions process.’”).

238 See Dan Goldhaber & Maia Goodman Young, *Course Grades as a Signal of Student Achievement: Evidence on Grade Inflation Before and After COVID-19* at 9, CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RSCH. (Nov. 2023), <https://caldercenter.org/sites/default/files/CALDER%20Brief%2035-1123.pdf> (noting that in Washington State middle and high schools, “w]e find modest increases in student grades in the decade before the pandemic that accelerated (consistent with state guidance)

With the reduced value of grades to compare applicants and the potential phase-out of standardized entrance exams,²³⁹ universities may rely even more on holistic review of nonacademic criteria.

But nonacademic factors in holistic review are also quantified at some universities. Such factors have been used in investigation and litigation. Harvard's personal rating score is one example that featured prominently in the *SFFA* litigation, with the Plaintiffs arguing that it demonstrated discrimination against Asian Americans.²⁴⁰ Professor Groseclose's allegations that UCLA was using race to make admissions decisions employed socioeconomic data such as family income.²⁴¹ And Professor Mare's analysis of UCLA's admissions policy was based on "holistic read scores."²⁴²

Unlike standardized tests and GPAs though, quantification is not an integral feature of holistic review itself. I have served on admissions committees at two law schools that used holistic review as part of a selective admissions process. At both of these law schools, many applicants were admitted automatically via academic criteria (undergraduate GPA and standardized test scores). However, the admissions director referred for committee review those applicants with academic criteria "on the bubble" or those having potential character and fitness issues or other special circumstances.²⁴³ The admissions committees at these law schools had access to applicants' academic records, personal essays, letters of recommendation, and other components of holistic review. But at neither law school did we assign quantitative scores to any of these components, or to the applicants we reviewed. We simply discussed their applications individually at committee meetings and then voted on whether to accept, deny, or wait-list each applicant.

after the pandemic's onset. ... We also see evidence, again especially in math, that the relationship between grades and test scores has diminished over time. These results are descriptive and do not illustrate the degree to which grading standards might vary across contexts, such as school system type, pandemic-related closures, or across student subgroups and test achievement level."); *Id.* at 2 ("Following the pandemic, grades returned to pre-pandemic averages in most subjects. But test achievement is far below its prepandemic levels—including in Washington State ... hence we might expect a greater divergence between the grades students receive and their standardized test scores."). See also Evie Blad, *Students' Grades May Not Signal Actual Achievement, Study Cautions*, EDUC. WK. (Nov. 10, 2023), <https://www.edweek.org/leadership/students-grades-may-not-signal-actual-achievement-study-cautions/2023/11> (noting "concerns that the pandemic led to grade inflation, which misleads parents about just how much their kids have learned").

239 See Jaschik, *supra* note 235.

240 See *supra* notes 130–31 and accompanying text.

241 See Groseclose, *supra* note 172.

242 See *supra* notes 201–205 and accompanying text.

243 Renée Ferrell, Director of Admissions, Financial Aid, & MSL Program at University of New Mexico School of Law, told me that "[a]t many law schools, all files are reviewed by one or more admissions officers and only sent to faculty admissions committees in extreme cases (such as for character and fitness review). This is intended to limit the biases that impact a file's decision, though I could argue it really just applies a consistent bias (my bias as opposed to various faculty biases) to all applicants." Email from Renée Ferrell, Dir. of Admissions, Fin. Aid, & MSL Program to Vinay Harpalani, Professor of Law & Don L. & Mabel F. Dickason Endowed Chair in Law, Univ. of N.M. Sch. of Law (Nov. 21, 2023, 12:09 MST) (on file with author).

Elite universities are in a different position: they receive far more competitive applications than they can accept for a given class. Those institutions employ holistic review for practically all of their applicants, and they often have quantitative ranking systems for various components of applications.²⁴⁴ But it may not be necessary to use such quantitative rankings. After *Gratz* and *Grutter*, “institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems[.]”²⁴⁵ While it may be more administratively cumbersome,²⁴⁶ universities could adjust their holistic assessments of applicants to be less quantitative or to produce less data that could be used in litigation. If they do so, the result would be even more secret admissions.

V. CONCLUSION: SECRET ADMISSIONS FOR THE APPLICANT

In this article, I have examined the secrecy of holistic review in admissions, along with many of its consequences. While holistic review has many benefits, its obscure nature contributes to lack of public understanding regarding admissions, invites litigation to challenge admissions policies, and facilitates the potential for subterfuge through surreptitious use of race. As universities continue to use holistic review in the post-*SFFA* era, they should also strive to be as transparent as possible about their admissions processes. Although Justice O’Connor and others believed that opaqueness would help avoid controversy around race-conscious admissions, the opposite has proven to be true.

Transparency is also better for equity among applicants. Opaqueness undermines the very purpose of holistic review—it thwarts diversity by giving more advantages to the most privileged applicants²⁴⁷ who can hire college counseling services to guide them.²⁴⁸ In their review of holistic admissions, Bastedo and colleagues lament that

244 See, e.g., *SFFA*, 600 U.S. 181, 194-96 (2023) (describing admissions process at Harvard and at University of North Carolina at Chapel Hill).

245 See Harpalani, *supra* note 92, at 532 n.309. See also *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (“Respondents contend that ‘[t]he volume of applications and the presentation of applicant information make it impractical for [undergraduate admissions] to use the . . . admissions system’ upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”)

246 Cf. Jeffrey Selingo, *The Cynical Reason College Applications Are Surging*, N.Y. TIMES (Mar. 16, 2023), <https://www.nytimes.com/2023/03/16/opinion/college-admissions-common-app.html> (“Application inflation is most acute at the nation’s brand-name and top-ranked public and private colleges, whose application numbers have ticked up 32 percent since 2020, according to the Common App. Since nearly all these selective colleges promise that applicants will get a holistic review, not one based only on grades or a test score (if submitted), their admissions staffs are under pressure to wade through a rising pile of applications—with their essays, recommendations and laundry lists of activities—in the same amount of time as before.”).

247 Bastedo et al., *supra* note 71, at 802.

248 See Michael T. Nietzel, *Academic Influence’s New Consumer Guide to College Admissions Coaches*, FORBES (June 6, 2021), <https://www.forbes.com/sites/michaelt Nietzel/2021/06/06/academic-influences-new-consumer-guide-to-college-admissions-coaches/?sh=2b392e9478a7> (“[T]he use of college admissions consultants . . . adds one more advantage easily purchased by the wealthy but largely unavailable to poor families, extending the privileges that well-to-do families already enjoy when it comes to college admissions.”); Josh Moody, *What to Look for When Hiring a College Consultant*, U.S. NEWS (Apr. 4,

exacerbated information asymmetries in admissions knowledge between wealthy and poor students[,] ... undermatching of low-income students[,] ... [and] ... forms of gaming and manipulation ... are all facilitated by the ambiguity and seeming arbitrariness in college admissions decisions[.]²⁴⁹

My own experience talking with students illustrates how less privileged students don't have access to information about holistic review. I conclude this Article by recounting a personal anecdote that illustrates two of the pitfalls of holistic review for applicants—particularly those who are less privileged. This anecdote involves a former student of mine, who I will call Raaz.²⁵⁰

Raaz became comfortable talking to me after taking one of my classes. In our conversations, she shared with me the adversity she encountered during her journey to law school. She is a woman of color who grew up in poverty: her family was on welfare, and she was eligible for free lunch throughout her childhood. She and her siblings were raised by a single mother, and as the oldest child, she took on a lot of family responsibilities. During high school, she worked nights at a fast-food restaurant to help pay her family's bills. She married in her late teens and had a full-time job right out of high school. After taking classes part-time and online, she graduated from college in her late twenties, while still holding a full-time job and raising her family. Her job sometimes involved working with lawyers, and she admired what they did and the respect they garnered, which eventually motivated her to apply to law school.

In her late thirties, Raaz, now divorced after an abusive relationship, finally determined it was time. But she still worked long hours, and although her children were almost adults, she was quite involved in their lives. She took the LSAT cold, without any practice exams: she didn't even know what sections were on it. All she knew was that she wanted to be a lawyer and needed to take this test to go to law

2019), <https://www.usnews.com/education/best-colleges/articles/2019-04-04/what-to-look-for-when-hiring-a-college-consultant> (“According to [Independent Educational Consulting Association] data, the average hourly fee for a consultant in 2017 was \$200. A quarter of consultants charge more than \$200 per hour while 15 percent charge less. Comprehensive package fees can range from a low of \$850 up to a high of \$10,000.”); Francesca Maglione & Paulina Cachero, *Ultra-Rich Buy Ultra-Luxury Counseling to Get Kids into Harvard*, BLOOMBERG (Sept. 15, 2023), <https://www.bloomberg.com/news/articles/2023-09-15/wealthy-parents-are-spending-750-000-to-get-kids-into-harvard-yale?embedded-checkout=true> (noting that \$750,000 is college counseling service Command Education's “going rate for advice on landing a coveted spot in the Ivy League for students who want to start college prep in the 7th grade”).

249 Bastedo et al., *supra* note 71, at 802. Renée Ferrell also had insights about how less privileged applicants attempt to gain access to information: “Increasingly, students aren't looking to the professional consultants, but are turning to these public forums [such as Reddit threads]. They'll list their test scores, GPA, work experience, and maybe a few other factors. Then they ask other people (who have nothing to do with admissions) their chances of admission. ... These forums are most often dedicated to the elite institutions.” Email of Renée Ferrell, *supra* note 243. Needless to say, this yields lower quality advice for less privileged applicants.

250 “Raaz” is a pseudonym that means “secret” in Hindi. See English translation of ‘राज़’, <https://www.collinsdictionary.com/dictionary/hindi-english/%E0%A4%B0%E0%A4%BE%E0%A4%9C%E0%A4%BC> (last visited Jan. 18, 2024). I have altered some of the facts to keep this person's identity anonymous. Nevertheless, the incidents and experiences I describe are real, with only nominal alterations that do not affect the spirit of my commentary.

school. She gave no other thought to the LSAT: it was just another thing she had to do—another hurdle to jump over.²⁵¹ She saved money to pay the testing fee, signed up for the test, and showed up on Saturday morning to take it.

In the midst of applying to law school, Raaz had no idea about holistic admissions. She did not consult anyone about her application, merely filling it out one evening. She thought her personal statement should just tell why she was interested in becoming a lawyer, in very basic terms, so that law school admissions committees would take her seriously. Nowhere on her application did she indicate any of the hardships she went through and the challenges she overcame. It did not occur to her that law schools would consider any of these things. She certainly did not know that there is an entire profession of admissions counselors devoted to helping privileged students in elite circles polish their admissions essays, choose and lay out their extracurricular activities, and take other measures to make their applications look impressive to admissions committees.²⁵² Nevertheless, she was accepted to law school and was very successful, both as a student and in her subsequent legal career.

But perhaps even more telling is the second pitfall I saw when talking with Raaz. When I explained to Raaz that highlighting her personal story and resilience could help her in the future, she wanted no part of it. She did not want to share her personal challenges and struggles in an application or interview. She told me that what I called “resilience” was what she thought of as “the grace of God,” not an academic or professional credential. Growing up, Raaz was taught that resilience meant not making excuses—that talking about her struggles was a sign of weakness, or at least that it could be seen as such. In her mind, it was her achievements that should matter, not the life obstacles she had to overcome to attain them.

Additionally, overcoming challenges and showing resilience had often been very traumatic for Raaz. She and I had become close enough that she was willing to share her experiences with me, but not with people she did not know or trust. The thought of doing so seemed embarrassing to her. Later, when Raaz asked me to write a letter of recommendation for her, we revisited the conversation. I offered to include some of the challenges she overcame in my letter and to discuss her resilience. But Raaz was very clear that she did not want me to share any of this information. Even when I reiterated that it could augment her application, Raaz was adamant that I just write about her academic performance and my interactions with her. She had indeed done well in my classes, and I respected her wishes when I wrote the letter. It is understandable that she did not want her struggles to be on display for others to evaluate, even if that would have helped her application.²⁵³

251 It was actually kind of refreshing for me to hear Raaz’s account here, given the obsession that applicants to elite law schools have with scoring high on the LSAT.

252 See *supra* note 248.

253 There have been many occasions where students have given me permission to write about their resilience in facing life challenges. Nevertheless, others have shared Raaz’s perspective, which I believe is common enough that universities should take it seriously. See also Feingold, *supra* note 214 at 270 note 184.

All of this has implications for the so-called essay loophole in Chief Justice Roberts's *SFFA* majority opinion. Christopher Rim, CEO of the college consulting firm Command Education, put it well: "If colleges place greater emphasis on the essay in a post-affirmative action admissions landscape, students will face all the more pressure to share their racial trauma, describing and justifying their lived experience for the (predominantly white) eyes of admissions officers."²⁵⁴ The irony here is that applicants who might benefit most from writing essays about their experiences with discrimination, overcoming challenges, and resilience may not want to write about such experiences and may actually want to hide these experiences, much less bring attention to them in an essay.²⁵⁵

Indeed, universities may be able to mitigate many of the pitfalls I have mentioned. They can take measures to avoid litigation, to inform the public more about holistic review, and to make admissions counseling more available to applicants from less privileged backgrounds. For all of these pitfalls, transparency can be part of the cure. But when considering the adversity faced by applicants, transparency becomes the dilemma. Universities need to be sensitive to the fact that holistic review, for all of its benefits, may compel some applicants to make admissions about their backgrounds that they would rather keep secret.²⁵⁶

254 Christopher Rim, *Why the Common App College Essay Can't Be an Affirmative Action Loophole*, FORBES (July 18, 2023), <https://www.forbes.com/sites/christopherrim/2023/07/18/why-the-common-app-college-essay-cant-be-an-affirmative-action-loophole/?sh=3b471f8174c7>

255 See Elijah Megginson, *When I Applied to College, I Didn't Want to 'Sell My Pain'*, N.Y. TIMES (May 9, 2021), [HTTPS://WWW.NYTIMES.COM/2021/05/09/OPINION/COLLEGE-ADMISSIONS-ESSAYS-TRAUMA.HTML](https://www.nytimes.com/2021/05/09/opinion/college-admissions-essays-trauma.html) ("As I kept rewriting my personal statement, it kept sounding clichéd. It was my authentic experience, but I felt that trauma overwhelmed my drafts. I didn't want to be a victim anymore. I didn't want to promote that narrative. I wanted college to be a new beginning for me."); Crimson Editorial Board, *College Essays and the Trauma Sweetspot*, HARVARD CRIMSON (Oct. 21, 2022), <https://www.thecrimson.com/article/2022/10/21/editorial-college-admissions-essay/> ("For students who have experienced genuine adversity, ... pressure to package adversity into a palatable narrative can be toxic. The essay risks commodifying hardship, rendering genuinely soul-molding experiences like suffering recurrent homelessness or having orphaned grandparents into shiny narrative baubles to melt down into a Harvard degree. It can make applicants, accepted or not, feel like their admissions outcomes are tied to their most vulnerable experiences. The worst thing that ever happened to you was simply not enough, or alternatively, it was more than enough, and now you get to struggle with traumatized-imposter syndrome."); Claire Hodgdon, *College Essays and Trauma: Students Are Being Pushed to Write About Their Worst Experiences*, TEEN VOGUE (Sept. 21, 2023), <https://www.teenvogue.com/story/college-essays-trauma-students> ("Trauma should not be a deciding factor in college admissions. Students should not need traumatic experiences in their past in order to be competitive applicants, nor should they feel forced to disclose anything that they may have gone through. Pain should not be the avenue through which students must represent themselves. ... At its worst, college essays force high school students to search through their personal experiences for a trauma they think they can sell.").

256 This dilemma occurs whenever hardship and demonstrated resilience is a criterion in any selective process. The best universities can do here is to make sure applicants have various options for essay topics, such that they can avoid revealing personal stories that they would rather not reveal. It is also important to provide sufficient mental health resources at all levels, so that individuals who face trauma are not haunted by it and may come to the point where they can discuss it more openly if they want to.

RACIAL STEREOTYPES ABOUT ASIAN AMERICANS AND THE CHALLENGE TO RACE-CONSCIOUS ADMISSIONS IN SFFA V. HARVARD

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Abstract

Following the U.S. Supreme Court's 2023 decision in SFFA v. Harvard to upend nearly fifty years of legal precedent for race-conscious admissions, this article summarizes arguments grounded in decades of social science research that sought to dispel the erroneous claims put forth by the plaintiffs. In critiquing the inaccuracies and contradictions embedded within the Court's opinion, we argue that SFFA and the Court relied on inaccurate logics regarding race that were devoid of empirical research on the heterogeneity amongst Asian Americans as a racial category. We put forth evidence that contextualizes the racialized experiences of Asian Americans—influenced by historical immigration patterns of exclusion and hyperselectivity—and how they facilitate harmful stereotypes such as the model minority myth. Thus, it is incumbent upon social scientists to actively counteract misinformation and misrepresentation through the continued production and dissemination of empirical research. While race-conscious admissions may no longer be permissible, we contend that universities and colleges are uniquely positioned to reimagine new avenues for enhancing educational access that is rooted in racial equity.

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INTRODUCTION

In June 2023, the U.S. Supreme Court upended nearly fifty years of precedent by striking down Harvard's and the University of North Carolina, Chapel Hill's race-conscious admissions policies, in *Students for Fair Admissions [SFFA] v. Harvard* and *SFFA v. University of North Carolina [UNC]*. In a consolidated opinion authored by Chief Justice Roberts, the Court held that the consideration of race as one of many factors in admissions violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, in part, because the admissions programs at each institution "lack[ed] sufficiently focused and measurable objectives warranting the use of race, involve[d] racial stereotyping, and lack[ed] meaningful end points."¹ In two separate dissenting opinions, Justice Sotomayor and Justice Jackson, respectively, framed the majority's conclusion as an "unjustified exercise of power"² lacking "any basis in law, history, logic, or justice."³ Their dissents draw from the extensive body of research and the evidence presented in the trial court supporting the constitutionality of the practice. The rationale in each of the dissenting opinions and that of the majority's opinion reflect two wholly different understandings (and use) of the social science evidence informing the legal issues.

In fact, the role of social science, and its absence—as reflected in the outsized role that misinformation about Asian Americans played in the case against Harvard—was particularly concerning for those of us in the social science community who study these issues and who believe that legal developments should be grounded in empirical realities rather than inaccuracies or myths. Thus, as the lawsuit against Harvard made its way through the courts, it became crucial for us, as social scientists, to counter this misinformation and present, at all stages of the deliberations, the comprehensive body of rigorous research that supported the legality of Harvard's policy. At the trial court, 531 social scientists and scholars on college access, Asian American Studies, and race filed an amicus curiae brief in support of Harvard. At the court of appeals, 678 social scientists and scholars joined the amicus brief. And at the Supreme Court, 1241 social scientists joined in an unprecedented collective effort to inform the Court's deliberations with the social science research relevant to the legal issues. Each brief was led by a select group of scholars from institutions across the United States (including four coauthors in this article), with the assistance of a pro bono attorney.

In this article, we draw from the arguments and synthesis of research presented in the amicus brief filed at the Supreme Court by 1241 social scientists and scholars to explain the myths and inaccuracies about Asian Americans that underlie the

1 *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181 (2023). [hereinafter *SFFA v. Harvard*]. In a footnote, the Court explained that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." The Court proceeded under the assumption that the same standard of scrutiny applied to each university's admissions policy. *Id.* at 198, n. 2.

2 *Id.* at 384 (Sotomayor, J., dissenting).

3 *Id.* at 385 (Jackson, J., dissenting).

majority and concurring opinions, and the implications of this misuse of social science for the future of race-conscious educational policies. We argue that the majority opinion and concurring opinions reflect inaccurate logics about Asian Americans, including their questioning of the heterogeneity of Asian Americans as a racial category and their paradoxical use of the same category to ascribe discrimination. Additionally, we emphasize the role that race-conscious admissions play in the lives of Asian Americans, and the myths that SFFA advanced in its arguments that were adopted by the Court.

In Part I of this article, we outline the background of the challenge against Harvard and the interest that motivated social scientists to file an amicus brief in the case. In Part II, we present a summary of social science research that describes how immigration patterns—embedded in either federally sanctioned exclusion or through hyperselectivity—have facilitated harmful stereotypes such as the model minority myth, and we dispel the inaccuracies about Asian Americans underlying the majority’s opinion and Justice Thomas’s concurrence in particular. In Part III, we conclude with important implications based upon the Court’s ruling for educational policy and practice, which will require new and renewed commitments to racial equity efforts.

I. BACKGROUND ON THE CASE AND THE INTEREST OF SOCIAL SCIENTISTS

The lawsuits against Harvard and UNC Chapel Hill were led by conservative activist Edward Blum, who established SFFA with the explicit aim to eliminate the use of race-conscious affirmative action in college admissions. Blum is no stranger to the Court and has led other affirmative action cases. Prior to *Harvard* and *UNC*, Blum challenged the University of Texas at Austin’s admissions policy by recruiting Abigail Fisher as his plaintiff in *Fisher v. Texas*, which went up to the Supreme Court twice.⁴ Indeed, Blum maintains a notorious history of utilizing legal challenges to dismantle long-held civil rights policies, including minority voting rights. In 2013, Blum led a successful case that ended federal review of changes to election practices in places that had previously discriminated against minority voters. That case, *Shelby County v. Holder*,⁵ significantly weakened the 1965 Voting Rights Act.⁶

As social scientists specializing in educational matters that focus on Asian Americans, college access, and/or racial dynamics within higher education, we were concerned about the inaccurate and misguided arguments SFFA advanced to challenge Harvard’s race-conscious admissions policy. In light of this concern, we felt compelled as experts to provide the Court with the empirical evidence that substantiated the legality of Harvard’s admissions policy and addressed SFFA’s arguments. We wanted the Court to base its decision on rigorous research informing

4 570 U.S. 297 (2013) [hereinafter *Fisher I*]; *Fisher v. Texas*, 579 U.S. 365 (2016) [hereinafter *Fisher II*].

5 570 U.S. 529 (2013).

6 See, e.g., Pamela Edwards, *One Step Forward, Two Steps Backward: How the Supreme Court’s Decision in Shelby County v. Holder Eviscerated the Voting Rights Act and What Advocates Should Do About It*, 17 BERKELEY J. AFR.-AM. L. & POL’Y 174 (2015).

the educational judgments Harvard considered in designing and implementing its whole-person review process, rather than the disinformation and unverified assertions SFFA presented. For example, we were concerned by SFFA's reliance on racial stereotypes and the myth of an Asian penalty, its excessive focus on limited measures of academic success that research has shown to be unreliable as isolated measures of merit, and specious manipulation of data to present an inaccurate and nonempirical argument about the negative impact of race-conscious admissions on Asian American applicants. Ultimately, amici were concerned that the removal of race-conscious admissions would harm, rather than benefit, Asian American applicants by dismantling long-held civil rights tools that uplift minoritized and communities of color, including Asian Americans. Thus, the brief drew on amici's original research and their review of the literature, including the most extensive and up-to-date body of knowledge about how race-conscious admissions processes benefit Asian Americans.

Over 1200 amici researchers and nationally recognized scholars with doctoral degrees joined the brief. The group consisted of researchers and scholars from 381 colleges, universities, institutions, and organizations throughout the United States, with expertise spanning numerous fields and disciplines, including education, Asian American Studies, sociology, anthropology, psychology, public policy, political science, and history. Many amici members are recipients of national honors and awards in their respective fields. Twenty-seven amici are members of the American Academy of Arts & Sciences, 32 are members of the National Academy of Education, 40 are fellows of the American Educational Research Association, and 70 are past or current presidents of national organizations such as the American Educational Research Association, the Association for the Study of Higher Education, and the Association for Asian American Studies.

II. DISPELLING INACCURACIES ABOUT ASIAN AMERICANS IN THE DECISION

In upending nearly half a century of Court precedent, the majority opinion reflected significant inaccuracies and troubling assumptions concerning the lived experiences of Asian Americans. Specifically, the Court (1) utilized problematic racial stereotypes about Asian Americans, (2) weaponized the diversity of Asian Americans as a racial category, and (3) proliferated the misconception that race-conscious admissions processes harm Asian American applicants. Our amicus brief addressed many of these erroneous claims, and the following sections will explain each of these errors in greater detail.

A. Racial Stereotypes About Asian Americans

The Court relied on problematic racial stereotypes about Asian Americans in its majority opinion. The entire framing of the case by SFFA suggested that Asian Americans as a whole faced a penalty in admissions. This assertion fundamentally rests on a harmful racial stereotype that frames Asian Americans as a so-called "model minority"—where they are viewed as unparalleled in their academic achievements and occupational successes, due to their inherent values about

education and hard work, more so than other racial minorities.⁷ The model minority myth relies on multiple erroneous characteristics about Asian Americans, including: (1) all group members are the same; (2) members are not really racial and ethnic minorities; (3) they do not encounter challenges due to their race; (4) they do not seek or require resources or sources of support; and (5) their college degree attainment is equated to achieving success.⁸ Consequently, the model minority myth stereotype has remained contested: on one hand, “opponents of equal opportunity programs or policies” have weaponized the stereotype for policy-dismantling agendas; on the other hand, social scientists have sought to dispel the stereotype and to highlight complex educational experiences of Asian Americans that are intersected with intraracial diversity, immigration, and socioeconomic status.⁹ In this section, we outline the social and historical factors that further propel the model minority myth stereotype and that SFFA and Justice Thomas disregard. Specifically, we outline exclusion-oriented and hyperselective immigration policies enacted by the United States that drive academic achievement for some Asian Americans, while reinforcing negative stereotypes about other students of color, and related arguments about the academic achievement of Asian Americans that leverage the model minority myth stereotype.

1. *Immigration Policies and Effects on Asian Americans*

Much of the Court’s reasoning citing negative discrimination as a basis for banning race-conscious admissions reproduced negative stereotypes against Asians and Asian Americans. Asians and Asian Americans are too often characterized as a hardworking, meritorious racial monolith—without considering the unique experiences of ethnic groups that fall within the Asian diaspora. In addition to cultural, heritage, or linguistic diversity, these experiences include differences regarding immigration or refugee backgrounds and income level. Research and data provided in our brief highlighted Asian Americans having the largest in-group economic disparity—with “Asians in the top 10% of the income distribution earning 10.7 times more than Asians in the bottom 10th percentile between 1970 and 2016.”¹⁰ Research demonstrates that income inequalities are linked to immigration and migration patterns—with the Immigration and Nationality Act of 1965 allowing educated, professionally skilled Asian migrants into the United States. On the other hand, refugees from countries, such as Vietnam, Laos, and Cambodia, arrived and resettled into the United States under completely different circumstances and, as a result, face a multitude of challenges that exacerbate socioeconomic disparities.¹¹

7 OiYan Poon et al., *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 REV. EDUC. RSCH. 469, 473–76 (2016).

8 Samuel D. Museus & Peter N. Kiang, *Deconstructing the Model Minority Myth and How It Contributes to the Invisible Minority Reality in Higher Education Research*, 142 NEW DIR. FOR INSTT. RSCH. 5 (2009).

9 *Id.*

10 Rakesh Kochhar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America’s Racial and Ethnic Groups*, PEW RSCH. CTR. (2018), <https://www.pewresearch.org/short-reads/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups/>.

11 SE. ASIAN RES. ACTION CTR., *SOUTHEAST ASIAN AMERICAN JOURNEYS: A NATIONAL SNAPSHOT OF OUR COMMUNITIES* (2020).

Contrary to how the Court's majority opinion,¹² and Justice Gorsuch's¹³ and Justice Thomas's¹⁴ concurring opinions, paradoxically criticize race and racial categories, as well as how Justice Thomas specifically utilizes anecdotal stereotypes derived from the model minority myth,¹⁴ key historical and policy mechanisms—not innate ability or inherent cultural attitudes—account for differences in GPA and test scores between Asian Americans and other racial groups. Building on decades of scholarship in Asian American Studies to illuminate the historical and social origins of the Asian American educational achievement advantage, sociologists Jennifer Lee and Min Zhou provide strong evidence from quantitative and other sources of empirical data that Asian American academic achievement “cannot be explained by superior traits intrinsic to Asian culture or by the greater value that Asians place on education or success.”¹⁵

Instead, a strong body of research shows that Asian Americans' notable educational success (on average) is due to contextual factors, including immigration policies. Although previous immigration policies in the eighteenth, nineteenth, and twentieth centuries, such as the Chinese Exclusion Act of 1882, Immigration Act of 1917, and Immigration Act of 1924 placed racial quota systems and other restrictions on specific Asian countries,¹⁶ throughout much of the Exclusion Era, there were limited exceptions granted to allow for the migration of Chinese and other Asian international students¹⁷ to the United States. Moreover, the Immigration and Nationality Act of 1965 included amendments that highlighted two immigration priorities: highly valued skills and family reunification.¹⁸

Despite previous restrictive and exclusionary policies, the Immigration and Nationality Act of 1965 facilitated a hyperselective process that encouraged the migration of educated or skilled Asian immigrants into the United States. Thus, the “hyper select[ion] of immigrants from certain Asian countries explains why the typical immigrant admitted to the United States from China is more likely to have a college degree than both the average US resident and the average resident in China.”¹⁹ In contrast, the typical Mexican immigrant admitted to the United States is less likely than the typical Mexican resident to hold a college degree.

12 *SFFA v. Harvard*, 600 U.S. 181, 216 (2023).

13 *Id.* at 291 (Gorsuch, J., concurring).

14 *Id.* at 282 (Thomas, J., concurring).

15 JENNIFER LEE & MIN ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX* 29 (2015).

16 Jane Junn, *From Coolie to Model Minority: U.S. Immigration Policy and the Construction of Racial Identity*, *DU BOIS REV.* 355, 362–65, 368 (2007).

17 See MADELINE Y. HSU, *THE GOOD IMMIGRANTS: HOW THE YELLOW PERIL BECAME THE MODEL MINORITY* 47–48 (2015).

18 Pub. L. No. 89-236, 79 Stat. 911 (1965); Madeline Y. Hsu & Ellen D. Wu, “Smoke and Mirrors”: *Conditional Inclusion, Model Minorities, and the Pre-1965 Dismantling of Asian Exclusion*, *J. AM. ETHNIC HIST.* 43, 53–54 (2015); Jennifer Lee & Min Zhou, *From Unassimilable to Exceptional: The Rise of Asian Americans and “Stereotype Promise,”* 16 *NEW DIVERSITIES*, 7, 10–13 (2014), https://newdiversities.mmg.de/wp-content/uploads/2014/11/2014_16-01_02_Lee.pdf.

19 Raquel Rosenbloom & Jeanne Batalova, *Chinese Immigrants in the United States*, *MIGRATION INFORMATION SOURCE* (2023), <https://www.migrationpolicy.org/article/chinese-immigrants-united-states>.

Overall, the lasting impact of the Immigration and Nationality Act of 1965 allowed an influx of highly educated Asian immigrants to enter the United States through employment-based preferences.²⁰

These two immigration priorities—the selection of highly educated immigrants and family-reunification—continue to shape immigration into the twenty-first century. The majority of Asian American adults (71%) are foreign-born²¹ and the vast majority of current Asian immigrants (of all legal statuses) that arrived after 1990²² more likely benefited from the increased number of visas granted due to occupational skills and education.²³ In 2020, immigrants from China and India accounted for more than 85% of all H1-B visa grantees,²⁴ and immigrants from Asia were more likely to be granted permanent residency due to employment-based preferences.²⁵ Further, international student visas are more likely to go toward students from Asia.²⁶ While occupational skills and education have benefited Asian immigrants, family reunification remains a main pathway for all immigrants to enter the United States. Still, there appears to be advantages associated with Asian immigrants who were recruited based on their educational attainment. These same immigrants have been able to sponsor relatives—more likely who share similar educational backgrounds—through family reunification.

Regardless, the United States's hyperselective recruitment of Asian immigrants has notably facilitated the entry of Chinese and Indians—the two largest groups within the Asian racial category. Consequently, this challenges the stereotypical notion that the success of Asian American immigrants in the United States is based on innate intellect or ingrained cultural characteristics. If that were true, we would expect to see the same levels of educational achievement in Asia as in the United States. However, research indicates that more than 50% of Chinese immigrants in the United States held a bachelor's degree, but only 4% of adults in China did in 2015.²⁷ Similarly, approximately 70% of Indian immigrants in the United States earned a bachelor's degree, but only 15% of college-aged adults enroll in college

20 Arun Peter Lobo & Joseph J. Salvo, *Changing U.S. Immigration Law and the Occupational Selectivity of Asian Immigrants*, 32 INT'L MIGRATION REV. 737, 757–58 (1998).

21 Rosenbloom & Batalova, *Chinese Immigrants in the United States*, *supra*, note 19.

22 Abby Budiman & Neil G. Ruiz, *Key Facts About Asian Americans, a Diverse and Growing Population*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/fact-tank/>.

23 Mary Hanna & Jeanne Batalova, *Immigrants from Asia to the United States*, MIGRATION POL'Y INST. MIGRATION INFO. SOURCE (Mar. 10, 2021), <https://www.migrationpolicy.org/article/immigrants-asia-united-states-2020>.

24 Muzaffar Chishti & Stephen Yale-Loehr, *The Immigration Act of 1990: Unfinished Business a Quarter-Century Later*, 2 (2016), MIGRATION POL'Y INST., <https://www.migrationpolicy.org/research/immigration-act-1990-still-unfinished-business-quarter-century-later>.

25 Hanna & Batalova, *Immigrants from Asia to the United States*, *supra* note 23, at 29.

26 Neil G. Ruiz, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations* (Aug. 2014), GLOB. CITIES INITIATIVE, https://www.brookings.edu/wp-content/uploads/2014/08/foreign_students_final.pdf.

27 Jennifer Lee, *From Undesirable to Marriageable: Hyper-Selectivity and the Racial Mobility of Asian Americans*, 662 ANNALS AM. ACAD. POL. & SOC. SCI., 79, 82 (2015).

in India.²⁸

While several Asian American groups willingly chose to immigrate to the United States, it is important to recognize that Southeast Asian Americans experienced forced migration from their home countries, fleeing war, violence, and genocide.²⁹ The mass exodus of refugees from Southeast Asia in the 1970s and 1980s can be attributed to a combination of factors, including the legacies and repercussions of colonization and war.³⁰ The involuntary nature of Southeast Asians' arrival in the United States, driven by circumstances beyond their control, carries significant implications for their markedly differing levels of educational attainment.³¹ For example, in 2016, 29% of Vietnamese, 18% of Hmong, 18% of Laotian, and 16% of Cambodians earned a bachelor's degree, compared to 54% of Asians, overall.³² Thus, Asian Americans' educational achievements trace to intentional U.S. immigration policies and other contextual factors, not allegedly inherent cultural traits that are tied to race.

2. Asian American Academic Achievement

A related dimension of the model minority myth that permeated throughout the case focused on Harvard and UNC's evaluations of Asian American students' academic performance. Notably, SFFA narrowly framed them as "substantially stronger" than other demographic groups "on nearly every measure of academic achievement, including SAT scores" and "GPA."³³ Indeed, the majority opinion relied on these academic measures to argue that Asian American applicants with higher standardized test scores and GPAs were less likely to be accepted to Harvard and UNC than non-Asian American applicants with lower test scores and GPAs. The Court wrote that "over 80% of all black applicants in the top academic decile were admitted to UNC, while under 70% of white and Asian applicants in that decile were admitted" and "an African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the top decile (12.7%)."³⁴

28 U.S. Citizenship & Immigration Services, *Characteristics of H-1B Specialty Occupation Workers* 8 (2021), https://www.uscis.gov/sites/default/files/document/reports/Characteristics_of_Specialty_Occupation_Workers_H-1B_Fiscal_Year_2020.pdf; <https://timesofindia.indiatimes.com/home/education/news/only-10-of-students-have-access-to-higher-education-in-country/articleshow/28420175.cms>.

29 Jason Chan, et al., *Forced Migration and Forged Memories: Acts of Remembrance and Identity Development Among Southeast Asian American College Students*, in *SQUARE PEGS AND ROUND HOLES: ALTERNATIVE APPROACHES TO DIVERSE STUDENT DEVELOPMENT THEORY* 114 (Fred A. Bonner II et al. eds., 2021).

30 SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* (1991); KHATHARYA UM, *FROM THE LAND OF SHADOWS: WAR, REVOLUTION, AND THE MAKING OF THE CAMBODIAN DIASPORA* (2015).

31 SE. ASIAN RES. ACTION CTR., *SOUTHEAST ASIAN AMERICAN JOURNEYS: A NATIONAL SNAPSHOT OF OUR COMMUNITIES* (2020).

32 NAT'L CTR. FOR EDUC. STAT., *INDICATOR 27 SNAPSHOT: ATTAINMENT OF A BACHELOR'S OR HIGHER DEGREE FOR RACIAL/ETHNIC SUBGROUPS. [DATA SET]* INSTITUTE OF EDUCATION SCIENCES (2019), https://nces.ed.gov/programs/raceindicators/indicator_rfas.asp.

33 *SFFA v. Harvard*, Pet. Br. at 72-73 (2022).

34 *SFFA v. Harvard*, 600 U.S. 181, 197. (2023). In a footnote on page 5, the Court challenged Justice Jackson's dissenting opinion in *Students for Fair Admissions v. University of North Carolina et al.*,

However, decades of social science research have demonstrated that the academic metrics that the Court relied on are not the objective measures that they claim them to be. While the model minority stereotype has serious documented downsides, the presumed academic competence it ascribes to Asian Americans may artificially boost the academic performance of many Asian American students, while doing the opposite for members of other racial minorities.³⁵ Although all stereotypes are harmful, some Asian Americans are able to leverage the model minority stereotype into “symbolic capital” when it comes to education: “The positive perceptions of Asian American students by their teachers, guidance counselors, and school administrators manifest as a form of symbolic capital that positively affects the grades they receive, the extra help they are offered with their coursework, and the encouragement they receive when they apply to college.”³⁶ Asian Americans are more likely to be placed in AP classes and special programs for the gifted, which are “invaluable institutional resources that are not equally available to all students,” especially to Latinx and Black students.³⁷ In addition, “stereotype promise” born of the model minority myth can spur Asian American students to perform at higher levels than they would without the positive views and support of parents, relatives, and teachers.³⁸ Focusing only on test scores and grades, as both SFFA and the majority do, papers over these social and historical forces, disguising positive bias attributed to race as individual effort and merit.

Furthermore, while grades and standardized test scores may appear more objective, a large body of research shows that neither is a fair and impartial measure of academic talent. Data from the organizations that sponsor standardized admissions tests show that scores are in large part a reflection of parental education and family income.³⁹ Asian Americans as a group do well on these measures because on average they are the racial group with the highest levels of educational access, parental education, and income.⁴⁰ Although it is not true of all Asian American subgroups or all applicants within advantaged groups, Asian American applicant files, including teacher recommendations, may emphasize these students’ academic strengths and especially STEM (science, technology, engineering, and mathematics) intellectual interests, more so than for other applicants.⁴¹

U.S. 600 181 (2023). The Court proceeded to claim that race played a factor with both UNC Chapel Hill’s and Harvard’s admissions process.

35 Lee & Zhou, *From Unassimilable to Exceptional*, *supra* note 18, 16–19.

36 LEE & ZHOU, *THE ASIAN AMERICAN ACHIEVEMENT PARADOX*, *supra* note 15, at 118.

37 *Id.* at 116.

38 *Id.*

39 COLL. BD., 2017 SAT SUITE OF ASSESSMENTS ANNUAL REPORT, TOTAL GROUP 3 (2017); Krista Mattern et al., *ACT Composite Score by Family Income 1* (2016), ACT, INC., <https://www.act.org/content/dam/act/unsecured/documents/R1604-ACT-Composite-Score-by-Family-Income.pdf>; see also Greg J. Duncan & Richard J. Murnane, *Growing Income Inequality Threatens American Education*, KAPPAN MAG., Mar. 2014, at 8, 10.

40 Lee & Zhou, *From Unassimilable to Exceptional*, *supra* note 18. *Supra* note 18 at 5.

41 See Brian Heseung Kim, *Applying Data Science Techniques to Promote Equity and Mobility in Education and Public Policy* (May 2022) (Ph.D. dissertation, University of Virginia) (on file with author).

Perhaps, colleges like Harvard and UNC, should acknowledge the flaws of tests like the SAT and ACT, as they have questionable strength in identifying students who would be academically successful in college.⁴² In order to expand diversity in admissions, colleges should decrease their reliance on these questionable metrics. There has been movement in this direction, as more than one thousand accredited institutions of higher education announced that they would not require standardized tests as part of their admissions practices, even before the height of the COVID-19 pandemic.⁴³ That number has nearly doubled since.⁴⁴ This trend recognizes the limitations of such tests as measures of academic potential among prospective students.⁴⁵ Furthermore, colleges that have opted to either remove standardized testing requirements or go test-optional send a “strong message” to students that “test scores have been a major barrier of access to generations of students, particularly those of underrepresented backgrounds.”⁴⁶ Moreover, the move toward “test free”⁴⁷ compels colleges to shift priorities away from competitive college rankings and toward evaluating applicants as a whole, rather than reducing students to the sum of their scores.

Teachers’ assessments of students, too, are subject to racial biases, which affect GPAs. Scholarship on implicit bias shows that teachers have higher expectations for White and Asian American students than for Black and Latinx students.⁴⁸ A study of more than ten thousand high school sophomores and their teachers found that math and English teachers dramatically underestimated the academic abilities of Black and Latinx students with similar test scores and homework completion relative to their White peers, and that those lower expectations affected student outcomes, including GPA.⁴⁹

Indeed, not every stellar student will receive outstanding test scores or GPAs. In her dissenting opinion, Justice Sotomayor recalled Justice Kennedy’s comments

42 Saul Geiser, *SAT/ACT Scores, High-School GPA, and the Problem of Omitted Variable Bias: Why the UC Taskforce’s Findings Are Spurious*, UC BERKELEY: CTR. FOR STUDIES IN HIGHER EDUC. (2020), <https://cshe.berkeley.edu/publications/satact-scores-high-school-gpa-and-problem-omitted-variable-bias-why-uc-taskforce's>.

43 *More Than 1080 Accredited Colleges and Universities That Do Not Use ACT/SAT Scores to Admit Substantial Numbers of Students into Bachelor-Degree Programs (Current as of Winter 2019–2020)*, FAIRTEST, <https://tinyurl.com/ywcf98mp> (archived link).

44 *1,835+ Accredited, 4-Year Colleges & Universities with ACT/SAT-Optional Testing Policies for Fall, 2022 Admissions (Current as of May 15, 2022)*, FAIRTEST, <https://www.fairtest.org/university/optional>.

45 See, e.g., Kelly Rosinger, *Toppling Testing? COVID-19, Test-Optional College Admissions, and Implications for Equity*, THIRD WAY (Sept. 2, 2020), <https://www.thirdway.org/report/toppling-testing-covid-19-test-optional-college-admissions-and-implications-for-equity#:~:text=With%20physical%20test%20taking%20rendered,shifts%20to%20test%20optional%20admissions..>

46 Julie J. Park & OiYan A. Poon, *Test-free Admissions: Why Wait?* INSIDE HIGHER ED. (Sept. 25, 2023), <https://www.insidehighered.com/opinion/views/2023/09/25/its-time-consider-test-free-admissions-opinion#>.

47 *Id.*

48 See generally Harriet R. Tenenbaum & Martin D. Ruck, *Are Teachers’ Expectations Different for Racial Minority Than for European American students? A Meta-Analysis*, 99 J. EDUC. PSYCH. 253 (2007).

49 Hua-Yu Sbastian Cherng, *If They Think I Can: Teacher Bias and Youth of Color Expectations and Achievement*, 66 SOC. SCI. RSCH. 170, 179–80, 179 tbl.6 (2017).

from *Fisher II* that

such a system would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.⁵⁰

B. Diversity Within the Asian American Community

While propelling racial stereotypes about Asian Americans the Court's majority opinion further weaponized the diversity of Asian Americans to eliminate the use of race-conscious admissions. Specifically, the ruling challenged the legitimacy of racial categories and argued that they were an "imprecise"⁵¹ method to fully capture the diversity of Asian Americans. Furthermore, the majority discussed how lower personal rating scores were associated with Asian American applicants, suggesting that racial discrimination occurs when assigning these scores in admissions decisions. In both areas, the Court's majority opinion ignored the empirical research that explains racial and ethnic formation for Asian Americans, and demonstrates the nondiscriminatory reasons associated with the diversity and complexity of the Asian American educational experience, particularly in high school.

1. Racialization and Racial Categories

The Court's majority opinion and Justices Thomas's and Gorsuch's concurring opinions critiqued the Asian American racial category as a mechanism to challenge race altogether. For example, in his concurring opinion, Justice Gorsuch made several blanket statements about the educational experiences of Asian Americans. Notably, the Court's majority believed that racial categories are "overbroad."⁵² Justice Thomas's and Justice Gorsuch's concurring opinions further criticize the utilization of governmental racial categories, particularly as they inaccurately viewed them to be lacking in scientific, anthropological, sociological, and ethnological expertise.⁵³ In his concurring opinion, Justice Gorsuch inaccurately opined:

[t]hese classifications rest on incoherent stereotypes. Take the Asian category. It sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world's population. This agglomeration of so many peoples paves over countless differences in language, culture, and historical experience. It does so even though few would suggest that all such persons share 'similar backgrounds and similar ideas and experiences. Consider, as well, the development of a separate category for Native

50 *Fisher II*, 579 U. S., 365, 386 (2016).

51 *SFFA v. Harvard*, 600 U.S. 181, 216 (2023).

52 *Id.*

53 *Id.* at 291 (Gorsuch, J., concurring).

Hawaiian or Other Pacific Islander. It seems federal officials disaggregated these groups from the Asian category only in the 1990s and only in response to political lobbying. And even that category contains its curiosities. It appears, for example, that Filipino Americans remain classified as Asian rather than Other Pacific Islander.⁵⁴

Here, the Justices advocate for the dismantling of racial categories because of the heterogeneity within racial groups. Interestingly, Justice Alito introduced this similar approach in his dissent in *Fisher II*. This argument, however, illustrates a fundamental flaw with the decision. On the one hand, the decision assumes that Asian Americans, as a racial category, face discrimination. That is, the Court makes the case that Asian Americans, as a whole, face a penalty in admissions. At the same time, the decision attacks the very racial category it relies upon, arguing that diversity within the Asian American category renders the category meaningless.

The Justices' lack of understanding of how racial and ethnic categories are constructed in the United States, and the interplay between the two, is easily explained through social science research. For instance, scholars have long documented the formation of racial and ethnic categories in the United States, and the history of the ever-evolving slipperiness of these categories, especially as they pertain to Asian Americans and Pacific Islanders. Indeed, Asian American and Pacific Islander racial and ethnic categories have been constructed through multiple social and historical forces, including panethnic coalitions due to shared racialized experiences to address common policy concerns, as well as through disaggregated approaches to advance solutions that are unique to specific ethnic communities.⁵⁵ The Court's majority opinion ignores the simple fact that Asian Americans are a racial category with shared experiences that simultaneously are comprised of diverse subgroups with unique differences that can and do occur simultaneously.

Indeed, social science research provides a much more nuanced approach to understanding the category of "Asian American." Yen Le Espiritu writes that construction of the panethnic Asian American category involves the creation of a common heritage through an awareness of their shared "history of exploitation, oppression, and discrimination."⁵⁶ In addressing these shared issues, "Asian American activists found this political label a crucial rallying point for raising political consciousness about social problems, for creating coalitional efforts, and for asserting demands for recognition and resources from state institutions."⁵⁷ Moreover, Janelle Wong and Sono Shah empirically demonstrate the manner in which Asian Americans, who are diverse across national origin, generation,

54 *Id.* at 291-292 (Gorsuch, J., concurring).

55 Omi, Michael, and Howard Winant. *Racial Formation in the United States*, Taylor & Francis Group, (2014); Gogue et al. Inclusions and exclusions: racial categorizations and panethnicities in higher education, *International Journal of Qualitative Studies in Education*, 35:1, 71-89 (2021); M. Omi et al., *Panethnicity and Ethnic Heterogeneity: The Politics of Lumping and Disaggregating Asian Americans and Pacific Islanders in Educational Policy*, in *MEASURING RACE: WHY DISAGGREGATING DATA MATTERS FOR ADDRESSING EDUCATIONAL INEQUALITY* 46-66 (Robert T. Teranishi et al. eds., 2020); Yen Le Espiritu, *Asian American Panethnicity: Bridging Institutions and Identities* (1992).

56 Espiritu, *supra* note 55, at 17.

57 Omi et al., *supra* note 55, at 50.

socioeconomic status, and party identification, shared extraordinary consensus on a wide range of political and social issues.⁵⁸

Ironically, in challenging the racial classification, the majority opinion illustrates how race, particularly the Asian American racial category, can be manipulated for political advantage.⁵⁹ In the end, the remedy proposed by the Court takes aim at social science research that demonstrates that although racial categories are socially constructed, there are real and material consequences to ignoring race, racialization, and racism, such as pathways to citizenship, voting rights, healthcare, employment, property ownership, and wealth accumulation.

2. *Personal Rating*

Although SFFA cited concerns regarding the consideration of race and its effect on an applicant's personal ratings score, there is little factual basis to support SFFA's allegations of discrimination. As a result, the First Circuit correctly affirmed the district court's finding that "when controlling for other factors, race" is correlated with personal ratings, but does not "influence[] the personal rating."⁶⁰ The Court's majority opinion pointed to Asian American applicants scoring lower on the personal rating than other students of color,⁶¹ suggesting that racial discrimination occurs when these scores are assigned and used in admissions decisions. However, there are nondiscriminatory reasons for differences among average personal ratings, which takes into account unique aspects of Asian American educational experiences, as documented in numerous social science research studies.

Within the Harvard application review process, admissions officers rate applicant materials across six categories: academic, extracurricular, athletic, school support, personal, and overall. The overall rating is a composite score of the other five categories previously mentioned. The personal rating accounts for the full range of assets a student may contribute to the campus community. The personal rating prompts admissions officers to review a myriad of applicant materials, such as personal statements, teacher and counselor recommendation letters, and notes from interviews in order to assign a personal rating that encompasses the applicant's perspectives, interests, and talents that may not be reflected in the other categories. Thus, the personal rating reflects a range of qualities an applicant possesses that indicates the applicant's potential to succeed at and contribute to Harvard—all of which may come from the applicant's experience with overcoming adversity, their personal commitment to the community, and future growth. Additionally, the personal rating allows the Harvard admissions committee to consider the diverse range of research and career interests represented amongst the

58 Janelle Wong & Sono Shah, *Convergence Across Difference: Understanding the Political Ties That Bind with the 2016 National Asian American Survey*, 7 RUSSELL SAGE FOUND. J. SOC. SCI. 70 (2021).

59 Jeana E. Morrison et al. *Affirmative Action and Racialization in the United States and Brazil*, in WORLD YEARBOOK OF EDUCATION 2023: RACIALIZATION AND EDUCATIONAL INEQUALITY IN GLOBAL PERSPECTIVE 210 (Janelle Scott & Monisha Bajaj eds., 2023).

60 Petitioner's Appendix, *SFFA v. Harvard*, Appendix A at 87–89 (2021).

61 *SFFA v. Harvard*, 600 U.S. 181, 196 (2023).

pool of applicants.⁶² While race may be “correlated with the applicant’s personal rating, it does not necessarily influence[] the personal rating.”⁶³ UNC follows a similar application review process—admissions readers award a numerical rating for several categories, and admissions readers may attribute a “plus” toward the applicant’s race.

Although personal ratings account for one aspect of the Harvard admissions holistic review process, SFFA utilized the personal ratings as a tool to allege intentional discrimination by the forty-member Harvard admissions committee. Consequently, news media outlets have mischaracterized the personal rating category as a “personality rating,” thereby misinforming the general public that Harvard applicants are assessed on the basis of whether their personality is sparkling or drab.⁶⁴ While the district court found there were limited differences in the personal rating scores amongst applicants and, thus, no evidence of discrimination⁶⁵—which was upheld by the court of appeals—the Supreme Court’s majority opinion ignored both preceding determinations and concluded that race served as a consequential factor in determining an applicant’s personal rating score. Based on the notion that the admissions process is a zero-sum game, the Court’s majority opinion determined that Harvard’s holistic admissions review relied on racially stereotyping applicants⁶⁶ thus, violating the Equal Protection Clause on the grounds that race may never be used as a “negative” or operate as a “stereotype.”⁶⁷ Therefore, the Court’s majority opinion asserts that race serves as a consequential factor in admissions review and decisions.

Notwithstanding this assertion, social science research and data provided two conclusions that can explain the limited differences found amongst the average personal rating scores across racial groups. First, Asian Americans are more likely to attend public high schools, which may have larger student enrollment that affects access to resources. Second, Asian Americans are more likely to apply to selective colleges than other ethnic groups,⁶⁸ which may not reflect the best “fit” for the applicant. Because public high schools are more likely to serve a larger student body, both teachers and guidance counselors experience heavier workloads that affect

62 Petitioner’s Appendix, *SFFA v. Harvard*, Appendix A at 89 (2021). *See, e.g., Id.* at 125, 190–91; JA1419; JA668–70.

63 Petitioner’s Appendix, *SFFA v. Harvard*, Appendix A at 87–89 (2021). *See, e.g., Id.* at 125, 190–91; JA1419; JA668–70.

64 Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, N.Y. TIMES, (June 15, 2018), <https://www.nytimes.com/2018/06/15/us/harvard-asian-enrollment-applicants.html#:~:text=Harvard%20consistently%20rated%20Asian%20American,in%20a%20lawsuit%20against%20the>.

65 *See Students for Fair Admissions, Inc., Plaintiff, v. President and Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 194 (D. Mass. 2019).

66 *SFFA v. Harvard*, 600 U.S. 181, 220 (2023).

67 *Id.* at 219–20.

68 Brain P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 SOC. SCI. RES. 310, 317 (2010).

their ability to allocate time⁶⁹ toward writing strong letters of recommendation.⁷⁰ This workload is a stark contrast to private high school teachers and guidance counselors—whose workloads may be notably smaller, thus allowing them more time to write in-depth letters of recommendation. Consequently, applicants attending private high schools—who are less likely to be Asian American—have higher chances for consideration due to their higher quality letters. As a result, these applicants are more likely to receive higher school support ratings, which are essential when calculating Harvard’s personal ratings.⁷¹ Such differences in letter quality may point to disparities between private and public schools—rather than race—as an external factor outside of Harvard admissions’ control.

Justice Sotomayor detailed these complex issues in her dissent, writing “under-represented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses. It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.”⁷² Similarly, in her dissenting opinion, Justice Jackson referenced such research examining the relationship between policies, its implications on wealth accumulation, and economic disparities amongst racial groups. While obtaining a college degree can lead to opportunities for professional employment, the legacy of exclusionary policies (e.g., from slavery to property ownership) may not entirely close the economic gap. In her dissenting opinion, Justice Jackson wrote, “in 2019, Black families’ median wealth was approximately \$24,000. For White families, that number was approximately eight times as much (about \$188,000). These wealth disparities ‘exis[t] at every income and education level,’ so, ‘[o]n average, white families with college degrees have over \$300,000 more wealth than black families with college degrees.”⁷³ Still, Justice Jackson argues that pursuing higher education provides opportunities for economic advancement—and the consideration of race as a factor can be a mechanism to acknowledge historical wrongdoings and yields benefits for all applicants alike.

Nonetheless, in his concurring opinion Justice Thomas disagrees with Justice Jackson—claiming the relationship between race and economic disparity reinforces negative stereotypes about racial groups (e.g., poverty is seen as an inherited or cultural trait for particular racial groups). Justice Thomas argues for applicants to be assessed based on their individual abilities to overcome barriers rather than on the color of their skin. Notably, in his concurring opinion, Justice Thomas posits, “how [] would Justice Jackson explain the need for race-based preferences to the

69 ROBERT T. TERANISHI, *ASIANS IN THE IVORY TOWER: DILEMMAS OF RACIAL INEQUALITY IN AMERICAN HIGHER EDUCATION* 78–79 (2010); Ashley B. Clayton, *Helping Students Navigate the College Choice Process: The Experiences and Practices of College Advising Professionals in Public High Schools*, *REV. HIGHER EDUC.* 1401, 1404–09 (2019).

70 Julie J. Park & Sooji Kim, *Harvard’s Personal Rating: The Impact of Private High School Attendance*, *ASIAN AM. POL’Y REV.* 3 (2020), <https://aapr.hkspublications.org/2020/10/04/harvards-personal-rating-the-impact-of-private-high-school-attendance/>.

71 *Id.* See Petitioner’s Appendix, *SFFA v. Harvard*, Appendix B at 173, 189-92 (2021).

72 *SFFA v. Harvard*, 600 U.S. 181, 335 (2023) (Sotomayor, J., dissenting).

73 *Id.* 393–94 (Jackson, J., dissenting).

Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color?"⁷⁴ Despite Justice Thomas's rhetorical question, he does not provide an alternative solution to address the implications of decontextualizing a student experiencing economic disparities by excluding race as a factor. Particularly, for Asian American students who attend public schools and receive less in-depth letters of recommendation, the consideration of race supplements an admissions officer's review process.

A related factor reflected in letters of recommendation for students may include unintentional racial bias affecting how high school guidance counselors and teachers write these letters. While this aspect is in no way intended to be a generalized statement that all high school guidance counselors and teachers are racially biased, research indicates that Asian Americans "are slightly less likely than" otherwise similarly situated White students "to have positive statements about them in letters."⁷⁵ In fact, Asian American students "receive less positive letters than [w]hite students do from *the same teacher*, even conditional on having the same observable characteristics," indicating that "the differences in letter positivity ... observe[d] for Asian students are *primarily* happening at the individual teacher level, rather than the result of sorting to different teachers."⁷⁶ The potential for implicit bias is yet an additional reason why it is critical that admissions officers at Harvard and UNC be able to consider an applicant's race through their respective holistic application review processes.⁷⁷ In contrast to issues with implicit bias in high school letters of recommendation, Harvard and UNC's procedures involve several steps for application review, including an initial reading and scoring of the applicant's materials based on various factors, a multiple-person committee review, and consensus-building following a reexamination of the applicants. For Harvard⁷⁸ and UNC,⁷⁹ race is considered one of many factors during the review (e.g., Harvard's personal rating score) and can also be ascribed a "tip" or a "plus" toward the applicant when considering their potential contributions for the campus. Given the rigor of these processes, the district court correctly found that there was no evidence of bias within Harvard's holistic admissions review process. Yet, even if implicit bias operated within college admissions, removing race-conscious admissions will only make matters worse, as we explain in Part II.C.

Another factor that can explain the marginal differences in personal ratings includes differences in application patterns across racial and ethnic groups. First, Asian American students, in comparison to other racial and ethnic groups, are more likely to apply to highly selective universities.⁸⁰ Second, Asian American students, particularly those from high- and middle-income families, are more likely

74 *Id.* at 286 (Thomas, J., concurring).

75 Kim, *Applying Data Science Techniques*, *supra* note 41, at 139.

76 *Id.* at 140.

77 Lee and Zhou, *From Unassimilable to Exceptional*, *supra* note 18.

78 *SFFA v. Harvard*, 600 U.S. at 194–96.

79 *Id.* at 196–98.

80 An, *supra* note 68, at 310, 317; see See Brian P. An, *The Relations Between Race, Family Characteristics, and Where Students Apply to College*, 39 SOC. SCI. RSCH. 310, 317 (2010).

to apply to more colleges than the national population.⁸¹ Finally, Asian Americans may also be more likely than other students to fill out an application to Harvard, even if Harvard may not be the best fit. As a consequence, the cross-section of Asian American students who apply to Harvard is likely to be materially different from the cross-section of applicants of other ethnicities.⁸² Because a materially disproportionate number of Asian American students apply to Harvard every year, it is no surprise that many of them—like many high achieving students of all races and ethnicities—do not receive the highest possible personal rating at Harvard, which rejects more than 95% of applicants every year.

C. Harm and Benefits

Justice Gorsuch's concurring opinion reiterates the sentiments of the majority opinion, further arguing that race influenced the admissions officers to "award a 'tip' or 'plus' to applicants from certain racial groups, but not others."⁸³ Justice Gorsuch asserts that the consideration of race—as a factor—delineates "winners" and "losers" on the basis of their skin color. Notably, he deems Asian Americans as losers in contrast to Black and Latinx students, who are the presumptive winners. Aligning with Justice Thomas's concurring opinion—which categorically opposed the utilization of race—Justice Gorsuch asserts that Harvard's reliance on race reproduced negative stereotypes against Asians, without regard to the cultural, language, and historical differences amongst ethnic groups who fall within the scope of the "Asian" category. As Justice Thomas's and Justice Gorsuch's concurring opinions state, Harvard's utilization of race fell into danger of employing a stereotype where all Asian Americans are the same and think alike.

But these conclusions belie the evidence presented at trial and considered in the district court's and the court of appeals' decisions. For example, trial testimony showcased how Asian American applicants actually benefit from Harvard's approach to the personal rating, which allows them to counter harmful racial stereotypes by displaying their full selves. Harvard students Thang Diep and Sally Chen both testified and placed their Harvard applications into evidence.⁸⁴ Each application demonstrated the students' academic qualifications and highlighted their diverse Asian American identities.⁸⁵ Thang's personal statement included positive declarations concerning his racial and ethnic identity, stating that he was "no longer ashamed of [his] Vietnamese identity" because his high school "program allowed [him] to embrace" it.⁸⁶ Thang's identity, experiences, and leadership in confronting racism as a low-income Vietnamese American immigrant were central to his successful application, even though his SAT score was "on the lower end

81 Mitchell J. Chang et al., *Beyond Myths: The Growth and Diversity of Asian American College Freshman, 1971–2005* 16, HIGHER EDUC. RSCH. INST. UNIV. OF CALIF. L.A. (2007), <https://www.heri.ucla.edu/PDFs/pubs/TFS/Special/Monographs/BeyondMyths-AsianTrends.pdf>.

82 JULIE J. PARK, RACE ON CAMPUS: DEBUNKING MYTHS WITH DATA 90–91 (2018).

83 *SFFA v. Harvard*, 600 U.S. at 294 (Gorsuch, J., concurring).

84 *SFFA v. Harvard*, 2 Joint Appendix. 947-58, 967-72 (Court of Appeals 2022).

85 *Id.*

86 *Id.* at 947-958.

of the Harvard average.”⁸⁷ Sally Chen similarly did not have test scores stellar enough for her high school counselor to encourage her to apply to Harvard—but her admissions file noted that her Chinese American cultural background and engagements *contributed* to her sense of “responsibility to advoca[te]” and “speak[] up,” and bolstered her “Personal Qualities Rating.”⁸⁸ She testified that she “appreciated the ways in which [her] admissions reader saw what [she] was trying to say when [she] was talking about the significance of growing up in a culturally Chinese home.”⁸⁹

Contrary to Justice Gorsuch’s concurring opinion, Thang and Sally benefited from Harvard admissions officers’ consideration of their diverse racial and ethnic experiences when reviewing application materials and awarding personal scores. In fact, Thang and Sally’s testimonies demonstrated qualities such as persistence with overcoming adversity, personal commitment, and future growth—all of which admissions officers considered when assessing the applicant’s potential to succeed and contribute to Harvard and beyond. Arguably, these are also qualities that the Court’s majority opinion expressed admissions officers can consider if applicants write, in essays, about how their experiences, in relation to race, are directly connected to “courage and determination.”⁹⁰ However, this language places a burden on students to connect their experiences (e.g., embracing a Vietnamese identity) with the qualities that admissions officers can deem relevant (e.g., motivation, leadership, courage). The language also assumes that admissions officers will feel free to connect the two, which is particularly challenging with a decision that also tells them race cannot be part of their consideration. By disconnecting a student’s racial background/experience from the knowledge, skills, or values that background/experience may represent and prohibiting a consideration of the first (racial background and experience), the Court’s majority decision ultimately deprives future students of the benefit of having the totality of their racialized experiences considered by admissions officers.

The Court’s majority opinion relies on inaccurate assumptions about Asian Americans to construct a false argument. In his concurring opinion, Justice Thomas furthers this assertion by stating, “Asian Americans can hardly be described as the beneficiaries of historical racial advantages.”⁹¹ Justice Thomas continues on to recount various racist and discriminatory policies—from nineteenth-century Chinese exclusion⁹² and its contemporary, twentieth-century Japanese internment⁹³ and immigration quotas, to segregation—some of which have been sanctioned by the Supreme Court. While Justice Thomas concedes that several civil rights violations, like segregation, have later been overturned by the Supreme Court,

87 *Id.*

88 *Id.* at 967-972.

89 *Id.*

90 *SFFA v. Harvard*, 600 U.S. 181, 231 (2023).

91 *Id.* at 272 (Thomas, J., concurring).

92 See 1882 Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (May 6, 1882).

93 See *Korematsu v. United States*, 323 U.S. 214 (1944).

“remedies” like affirmative action occur at the “expense of Asian American college applicants.”⁹⁴

However, the empirical evidence suggests that the opposite is true. Failing to consider race as one of many factors in admissions would instead harm Asian American applicants. As previously discussed, Southeast Asian Americans arrived as refugees and under completely different circumstances compared to East and South Asian immigrants. These vividly contrasting migration patterns resulted in differing education attainment rates, lower rates of attending highly selective universities, and lower rates of college degree attainment. Additionally, Southeast Asian Americans are overrepresented at the community colleges—with some intending to complete introductory coursework to transfer into four-year universities, hopeful to potentially benefit from race-conscious admissions programs. Indeed, race has a complex history with higher education and also has increased access for underrepresented groups, including Southeast Asian Americans.

Prior to the Court’s ruling, Southeast Asian Americans were already underrepresented at highly selective universities like Harvard and UNC. Thus, given the Court’s decision, at best we can expect this underrepresentation to remain or at worst observe this disparity to further widen. Still, the Court’s majority opinion and Justices Thomas’s and Gorsuch’s concurring opinions punish Southeast Asian American students and is a disservice to the heterogeneous experiences of Asian Americans. Indeed, “[r]emoving considerations of race and ethnicity from Harvard’s admissions process entirely,” the district court found, “would deprive applicants, including Asian American applicants, of their right to advocate for the value of their unique background, heritage, and perspective and would likely also deprive Harvard of exceptional students who would be less likely to be admitted without a comprehensive understanding of their background.”⁹⁵ And such a restriction would limit the ability of colleges and universities to build a truly diverse class of students and “to pursue the educational benefits that flow from student body diversity.”⁹⁶

The Court’s majority opinion’s contention that the *only* way to mitigate such biases is to remove race as a consideration from Harvard’s admissions process defies logic. Eliminating any awareness of race in admissions would only *perpetuate* biases,⁹⁷ and would limit and/or deny Harvard’s ability to account for structural racial biases, such as disparities in K–12 schooling where research indicates that few aspects of any child’s educational journey remain untouched by racial biases, which are all too common and can have devastating effects. We can see an example

94 *SFFA v. Harvard*, 600 U.S. at 273 (2023) (Thomas, J., concurring).

95 *SFFA v. Harvard*, Petition Appendix. 246 (Court of Appeals. 2020).

96 *Fisher II*, 579 U.S. 365, 376 (2016) (quotation marks omitted).

97 Liliana M. Garces & Courtney D. Cogburn, *Beyond Declines in Student Body Diversity: How Campus-level Administrators Understand a Prohibition on Race-conscious Postsecondary Admissions Policies*, 52 AM. EDUC. RSCH. J. 828, 849–55 (2015); Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781, 781–83, 790–803 (2015); Jeffrey F. Milem et al., *Making Diversity Work on Campus: A Research-Based Perspective* iv (2005), AM. ASSN. COLLS. & UNIVS., https://web.stanford.edu/group/siher/AntonioMilemChang_makingdiversitywork.pdf.

of this in teachers' letters of recommendation which can contain more positive sentences when written for White applicants than for Black and Asian American applicants. Those content differences are largely influenced by students' access to, and involvement in, specific activities, coursework, and opportunities from other parts of the educational pipeline. Supposedly "neutral" recommendation letters seem to reify other disparities in education, which are themselves affected by racial biases and race-linked opportunities from preschool onward.⁹⁸ Unless admissions officers are aware of this and thus able to effectively account for it in reviewing applicant files, the file materials are poised to magnify the effects of race-based disparities that affect an applicant's submissions.

Indeed, removing any consideration of race would not result in more Asian American students being admitted across the board. Rather, removing any consideration of race would result in displacing some Asian American students who have benefited from race-conscious holistic admissions.⁹⁹ Anthony Carnevale and Michael C. Quinn demonstrate that by practicing admissions using a race-evasive approach,

one in five of the Asian American students attending [highly selective] colleges would not have been admitted under a test-only admissions policy. And, further, the Asian American students who would be displaced by such a policy are almost twice as likely as non-Asian American students to have low test scores (in the bottom quartile of the applicant pool).¹⁰⁰

Contrary to the Court's decision, social science research demonstrates that race-conscious admissions benefit Asian American students, especially given their highly diverse experiences. And even when incorrectly treating Asian Americans as a monolith, as SFFA and the Court's majority opinion did, holistic-review practices can increase the odds of admission for Asian Americans at highly selective universities, while also maintaining high academic metrics of achievement, as well as socioeconomic and racial diversity, within an admitted class.¹⁰¹ Harvard's statistics confirm those social science findings. Even among the subset of applicants that SFFA focused on (nonathletics, lineage, dean / director lists, and children of faculty / staff applicants), for the years under review in this case, Asian American applicants were admitted at a higher rate (5.15%) than White applicants (4.91%).¹⁰² And the proportion of Asian Americans in each admitted class at Harvard increased by 29% in the decade leading up to the years under review.¹⁰³ Petitioner's allegation of intentional discrimination against Asian Americans—who are 6% of the U.S. population, over

98 Kim, *Applying Data Science Techniques*, *supra* note 41, at 137–39.

99 Anthony Carvalae & Michael C. Quinn, *Selective Bias: Asian Americans, Test Scores, and Holistic Admissions* (2021), GEO. UNIV. CTR. ON EDUC. AND THE WORKFORCE, <https://cew.georgetown.edu/cew-reports/selectivebias/>.

100 *Id.*

101 Michael N. Bastedo et al., *Information Dashboards and Selective College Admissions: A Field Experiment* 3 (2017).

102 SFFA v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019), District Court Document. 419-33 ¶¶ 70-71 & Exhibit. 7; Dist. Ct. Doc. 420 ¶ 229; Dist. Ct. Doc. 414-2 ¶ 638.

103 *Id.* at 420 ¶ 113; *see also SFFA v. Harvard*, Petition Appendix at 207-208.

25% of students admitted to Harvard's incoming class, and nearly 30% of enrolled students—lacks a basis in common sense as well as evidentiary support.¹⁰⁴ Those statistics and research indicate that Asian American applicants benefit from Harvard's whole-person review. The fact that Asian American applicants benefit from Harvard's whole-person review is no surprise—because individual Asian American applicants come from a diverse set of backgrounds and experiences.¹⁰⁵

III. THE FUTURE OF RACE CONSCIOUS ADMISSIONS

Since the Court's 1978 decision in *Regents of the University of California v. Bakke*,¹⁰⁶ the U.S. Supreme Court has slowly chipped away at race-conscious tools that permit colleges and universities to build a racially and ethnically diverse student body. The effects of this trend will likely pose significant and adverse consequences for students of color, including Asian Americans, in the realm of college admissions. This final part will outline these consequences and the implications for future racial equity efforts, with a particular focus on the role of Asian Americans in this ever-evolving issue, including considering the impact of race in personal statement prompts and demonstrating new or renewed commitments to racial and ethnic diversity across all programs, offices, and units within the organizational structure of the university.

A. Asian Americans and Affirmative Action

Contrary to the SFFA agenda, multiple surveys of Asian American adults conducted between 2001 and 2020 revealed strong support for race conscious admissions—with support ranging from 61% to 70%.¹⁰⁷ Even Asian American opponents of race-conscious admissions policies support principles of whole-person review.¹⁰⁸ That support likely reflects the benefits that Asian American applicants reap from processes that evaluate them as individuals. Findings show that an overwhelming majority of Asian Americans are greatly benefiting from their college experiences,

104 U.S. Census Bureau, Quick Facts, Population Estimates (2021), <https://www.census.gov/quickfacts/fact/table/US/PST040222>; 25 Harvard Coll., Admissions Statistics, <https://college.harvard.edu/admissions/admissions-statistics>; see also *SFFA v. Harvard*, Petition Appendix. 113, 207-08, 264 (Court of Appeals.2022).

105 See *supra*, 386-390.

106 438 U.S. 265 (1978).

107 Jennifer Lee et al., *Asian American Support for Affirmative Action Increased Since 2016*, DATA BITS BLOG FOR AAPI DATA (Feb. 4, 2021), <https://aapidata.com/blog/affirmative-action-increase/>; AAPI Data, *Inclusion, Not Exclusion: Spring 2016 Asian American Voter Survey A25*; AAPI Data, *An Agenda for Justice: Contours of Public Opinion Among Asian Americans 8–9* (2014), <http://aapidata.com/wp-content/uploads/2014/11/APV-AAJC-issues-nov7.pdf>; Nat'l Asian Am. Survey, *Where Do Asian Americans Stand on Affirmative Action?* (June 24, 2013), <https://naasurvey.com/where-do-asian-americans-stand-on-affirmative-action/>; Pei-te Lien et al., *The Politics of Asian Americans: Diversity and Community* 17, 191 (2004), <https://www.routledge.com/The-Politics-of-Asian-Americans-Diversity-and-Community/Lien-Conway-Wong/p/book/9780415934657>.

108 OiYan A. Poon et al., *Asian Americans, Affirmative Action, and the Political Economy of Racism: A Multidimensional Model of Racial Ideologies*, 89 HARV. EDUC. REV. 201, 223 (2019).

even if they were not admitted to their first-choice school.¹⁰⁹ It is therefore no surprise that SFFA was unable to “present a single admissions file that reflected any discriminatory animus, or even an application of an Asian American who it contended should have or would have been admitted absent an unfairly deflated personal rating.”¹¹⁰

Scholars have argued that the racialization of and subsequent racial stereotypes associated with Asian Americans strongly led to their varied role in the affirmative action in college admissions debate.¹¹¹ Vinay Harpalani acknowledges this phenomenon, citing that the complex social and political forces facilitating Asian immigration created a nexus of conflict for Asian Americans being perceived as both the model minority and the perpetual foreigner. Simultaneously, Asian Americans are seen as high academic achieving, “exemplary” minorities and also consistently “othered,” due to perceived ties to their homeland countries. As a consequence, these compounding harmful stereotypes have made Asian Americans—as a racial, minoritized group—ideal targets to serve as a wedge between Whites and other racial minorities concerning access to higher education.¹¹² Thus, Harpalani argues that SFFA exploited the notions of negative action against Asian Americans in the 1980s with affirmative action today, conflating the two as “the first major litigation that has made this link the centerpiece of its attack on race-conscious university admissions.”¹¹³ To combat implications from this conflation, there must be a greater commitment to and engagement with Asian Americans to confront misunderstandings—especially those that are deviously deployed by organizations like SFFA—about panethnic heterogeneity and diversity across Asian American ethnic groups. Cross-racial alliances must also be sustained in continuing to advocate for racial justice and to repair the coalitional harm that the Court’s ruling may have—specifically by creating the false appearance that Asian Americans collectively seek to undermine race-conscious policies in education.

B. Reconsidering Race Within Personal Statements

Despite the Court’s decision to end race-conscious admissions, at the end of its majority opinion, the Court acknowledged that “nothing in the opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹¹⁴ This language in the opinion leaves room for important considerations about how an applicant’s experience in relation to race is connected to skills, knowledge, or the values that an applicant brings, and that would advance institutional goals. However, the Court follows this language with an admonition that universities cannot assess a students’ experiences in ways that would otherwise circumvent

109 Mike Hoa Nguyen et al., *Asian Americans, Admissions, and College Choice: An Empirical Test of Claims of Harm Used in Federal Investigations*, 49 EDUC. RESEARCHER 579, 587–88 (2020).

110 *SFFA v. Harvard*, Petition Appendix. 246 (Court of Appeals 2020).

111 Morrison et al., *supra* note 59.

112 Vinay Harpalani, *Asian Americans, Stereotypes, and Admissions*, 102 BU L. REV. 233 (2022).

113 *Id.* at 265.

114 *SFFA v. Harvard*, 600 U.S. 181, 230 (2023).

the ruling. Specifically, the Court stated “universities may not simply establish through application essays or other means the regime we hold unlawful today.”¹¹⁵ This language provides an open door for the ongoing threat of litigation by individuals like Ed Blum, who within weeks of the Court’s decision sent a letter to colleges and universities in an effort to overstate the reach of the decision to areas outside of admissions, such as outreach and recruitment, pipeline and pathway programs, data collection, hiring practices, and scholarships and financial aid.¹¹⁶ As postsecondary education professionals try to make sense of a complicated ruling in a sociopolitical context where actors like Ed Blum continue to stoke fear through threats of litigation and other political actors are engaged in coordinated efforts, via proposed or enacted legislation, to ban diversity, equity, and inclusion initiatives at public institutions throughout the country, it may be tempting for universities to default to a place of caution and overcorrect.¹¹⁷ Administrators may respond by weakening or removing racial-equity-oriented policies and programs—such as diversity, equity, and inclusion-related offices, identity-based programs, and diversity-related trainings or curriculum,¹¹⁸—undermining their ability to conduct thoughtful outreach or retention efforts for racially or ethnically minoritized students. During this critical time, universities must ensure their consequential decisions regarding possible changes to policies and programs are based on empirical evidence rather than the political pressures of the moment.

In particular, as universities consider readjusting the personal statement component of their admissions application, there should also be a reimagination of other factors that are not only valuable to admissions, but also aligned with the important role that higher education plays in sustaining the health of our democracy. If we view admissions as an incentive system that rewards actions we value in a multiracial democratic society, universities’ admissions processes should expand the personal score to assess a candidate’s leadership qualities based on the ability to cooperate across racial differences, to give back to marginalized communities, and to disrupt social inequities. This approach would reward students who demonstrate the potential

115 *Id.*

116 Eric Hoover, *SFFA Urges Colleges to Shield ‘Check Box’ Data About Race from Admissions Officers* (July 12, 2023), CHRON. HIGHER EDUC., https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers?sra=true&cid=gen_sign_in.

117 Liliana M. Garces, *Two Cautions for Educators to Consider in the Aftermath of Affirmative Action Decisions* (June 21, 2023), EDUC. TR., <https://edtrust.org/resource/two-cautions-for-educators-to-consider-in-the-aftermath-of-affirmative-action-decisions/>. See also Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. Col. & Univ. L. 239, 266 (2023).

118 As of July 2023, twenty-two states have proposed forty bills proposing to remove diversity, equity, and inclusion (DEI) offices, DEI positions, mandatory DEI statements in hiring, mandatory DEI training, identity-based programs, and/or other activities that may discriminate on the basis of race, color, ethnicity, national origin, sex, or gender identity from public colleges and universities. Drawing from boilerplate templates developed by conservative think tanks Manhattan Institute and Goldwater Institute, bill language cited concerns regarding the “inculcation” of ideology (i.e., Critical Race Theory) and imposing guilt on individuals based on race. The bills were introduced, passed through their respective state legislations, and some were approved by their state governors while the public awaited the U.S. Supreme Court decisions on *SFFA v. Harvard* and *SFFA v. University of North Carolina*. (For further reading, see Adrienne Lu et al., *Anti-DEI Legislation Tracker* (July 14, 2023), CHRON. HIGHER EDUC., https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts?cid=gen_sign_in)

to contribute to these values and, ultimately, represent a benefit to their future university community. Universities may also consider placing more emphasis on students' economic backgrounds, as well as their high school contexts, as these factors correlate with students' academic performance and ultimately, their underrepresentation in higher education.¹¹⁹

C. Higher Education's Renewed Commitment to Racial and Ethnic Diversity

Admissions offices must make new and renewed concrete commitments to address the damage that the Court's decision poses for racial equity by upholding their ethical and legal obligations to foster equity, facilitate access, promote opportunities, and ensure success for students of color.¹²⁰ To this end, they must take proactive measures utilizing a comprehensive array of approaches to secure these objectives. As Justice Sotomayor wrote in her dissent, "diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow." Colleges and universities, irrespective of the Court's ruling, have a responsibility to champion research, policies, and practices aimed at broadening educational access and addressing racial disparities within higher education, in order to guarantee that "the pursuit of racial diversity will go on."¹²¹

This responsibility entails prioritizing initiatives that enhance campus climate and cultivate a stronger sense of inclusivity for students from diverse backgrounds. These efforts encompass academic, cocurricular, and research-based endeavors, among other strategies. These campus-centric actions should be thoughtfully designed to encourage students to express their full identities. Furthermore, institutions of higher learning must persist in, and expand upon, their efforts to reach out to underserved communities and collaborate on initiatives that bolster pathways to and readiness for higher education. While the Court's conclusions in these cases do not reflect the myriad lessons from research illuminating the diverse experiences of Asian Americans, as researchers, we must redouble our efforts to conduct rigorous empirical research that centers racially marginalized communities and that can be used to counter misinformation through legal briefs, op-eds, and various media platforms. This collective endeavor serves the purpose of informing the general public and future legal deliberations regarding racial equity, that without a doubt will continue.

119 See generally Richard D. Kahlenberg, *New Avenues for Diversity After Students for Fair Admissions*, 48 J. COL. & UNIV. L. 283 (2023).

120 See Feingold, *supra* note 117 at 279.

121 *Id.*

IV. CONCLUSION

In conclusion, the Supreme Court's decision to eliminate the use of race-conscious admissions, as outlined in this article, raises profound concerns about the future of racial diversity in higher education. The dissenting voices, particularly those of Justices Sotomayor and Jackson, underscore the importance of considering historical and systemic disparities and emphasizing the benefits of a diverse student body. Moreover, this article and our work as amici underscores the crucial role of social science research in informing legal deliberations. Indeed, the significance of social science, and its notable absence—underscored by the disproportionate influence of misinformation surrounding Asian Americans in the *Harvard* case—raises considerable concerns for the social science community. As scholars delving into these matters, it is imperative for us to redouble our efforts in counteracting intentional misinformation and misrepresentation. Otherwise the potential repercussions of this decision extend beyond admissions, influencing broader discussions on racial equity and the role of universities in fostering an inclusive and representative educational environment. As institutions grapple with the aftermath of this decision, the call for continued research, advocacy, and a reevaluation of admissions criteria becomes crucial in preserving the principles of racial diversity, equity, and inclusion in higher education.

THE ELISION OF CAUSATION IN THE 2023 AFFIRMATIVE ACTION CASES

JONATHAN D. GLATER*

Abstract

In the affirmative action cases decided in 2023, the conservative supermajority on the Supreme Court found unconstitutional the consideration of race in admissions at Harvard College and the University of North Carolina. In reaching this outcome, the Court did not grapple with a critical aspect of standing doctrine: whether the practice complained of was the cause of the harm alleged. This article explores the omission by the justices in the majority, situates it in a pattern of decisions favoring plaintiffs challenging affirmative action efforts, explains why the failure to establish causation is problematic, and identifies undesirable implications of the Court's reasoning and analysis.

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INTRODUCTION

In the 237 pages of the opinion that justices of the Supreme Court produced in the early summer of 2023 to resolve challenges to the consideration of race in the admissions processes at Harvard College (“Harvard”) and the University of North Carolina (“UNC”), the issue of causation received scant attention.¹ The justices laid out dueling visions of history,² of the relevance of statutory rather than constitutional law,³ of the effects of the majority decision on the admissions prospects of students of color,⁴ but they did not address the question of whether the practice challenged by the Plaintiffs—consideration of race as a factor in making admissions decisions—caused the injury of which the Plaintiffs had complained. In their complaint, which laid out a theory of harm that was assessed by two trial courts and one federal appellate panel, the plaintiffs asserted that because the two institutions considered the race of applicants who were members of some racial groups favorably in deciding whom to admit, they intentionally discriminated against applicants who belonged to other racial groups.⁵ In demanding the abolition of this practice known as “affirmative action,”⁶ the Plaintiffs contended that their chances of admission suffered *because* race was a factor in admissions decisions.⁷

The consideration of causation is supposed to be critical to the determination of standing, which is necessary for a claim to be justiciable.⁸ Justiciability, the determination

1 See generally *Students for Fair Admissions v. President and Fellows of Harvard College*, 600 U.S. 181 (2023) (finding consideration of race as an explicit factor in admissions decisions to violate the Equal Protection Clause of the Fourteenth Amendment) [hereinafter, *SFFA*].

2 For example, Justice Thomas and Justice Brown Jackson offer different views of history in their respective concurrence and dissent. Compare *SFFA*, 600 U.S. at 232 (Thomas, J., concurring) and *SFFA*, 600 U.S. at 385 (Jackson, J., dissenting). See also Stacy Hawkins, *JCUL Special Issue: What’s Next? Diversity in Education After SFFA v. Harvard/UNC: An Introduction to the Special Issue*, 48 J. COL. & UNIV. L. 231, 232 (2023).

3 For example, Chief Justice Roberts and Justice Gorsuch differed in their view of the relevance of the statutory or constitutional basis of the plaintiffs’ claim in the case against Harvard. *SFFA*, 600 U.S. 181, 308 (Gorsuch, J., concurring). (lamenting the reliance on the Equal Protection Clause of the Fourteenth Amendment instead of Title VI of the Civil Rights Act).

4 For example, Justice Brown Jackson emphasizes the real and symbolic effect of prohibiting consideration of race for students who are people of color and for whom that identity matters. *Id.* at 403 (Jackson, J., dissenting).

5 See *Complaint, Students for Fair Admissions v. University of North Carolina*, 2014 WL 6386755 (D. Mass. 2014), at ¶¶ 198–99 (2014) (alleging “intentional” discrimination); see also *Students for Fair Admissions v. President and Fellows of Harvard College*, 2014 WL 6241935 (D. Mass. Nov. 17, 2014), 2, 4, 43 (repeatedly alleging “intentional” discrimination by the defendant).

6 Consideration of race as a means of ensuring opportunity for members of groups historically excluded from educational and other opportunities in the United States took this moniker from an order signed by President John F. Kennedy in 1961. Executive Order 10925, 26 FR 1977 (1961).

7 *Complaint, Students for Fair Admissions v. President and Fellows of Harvard College*, 2014 WL 6241935 at ¶ 7 (D.N.C. 2014) (alleging that “Harvard’s racial preference for each student... equates to a penalty imposed on Asian-American applicants”).

8 See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

that a “case or controversy” exists that the Constitution authorizes a federal court to hear, in turn matters because the threshold determination of whether a federal court has jurisdiction to hear a claim implicates fundamental concerns over the separation of powers: if a court can exercise authority at the whim of members of the judiciary, then the judicial branch can effectively veto actions taken by the legislature or the executive anytime that anyone files a lawsuit over a policy disagreement.⁹ To flout this constitutional constraint on the Court’s jurisdiction is to enable the justices in the majority to serve as a supreme legislature, blocking the will of the democratically elected branches of the government. On the particular facts of these affirmative action cases, the Court’s ruling also may ultimately undermine equity in access to the higher education that the Plaintiffs seek.

If the action that a plaintiff complains of is not the cause of injury, then neither should the defendant be liable for any resulting harm, nor would a remedy that enjoined the defendant’s action make the plaintiff whole. So critical is this intuitively straightforward principle that consideration of causation is proper at the outset of litigation, when determining whether a plaintiff has standing to sue at all. To ascertain whether a plaintiff has standing, courts ask three straightforward and typically noncontroversial questions. First, the plaintiff must allege an “injury in fact” that is “distinct and palpable’ ... as opposed to merely ‘[a]bstract,’ ... and the alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’”¹⁰ Second, there must be causation, which the Supreme Court has described as a “fairly traceable connection between the plaintiff’s injury and the complained-of conduct of the defendant.”¹¹ Finally, the court must find that the remedy sought by a plaintiff would “redress the alleged injury.”¹² The Court has written that this “triad ... constitutes the core of Article III’s case-or-controversy requirement.”¹³

The requirement is not easily enforced, and inconsistent definitions of standing make it vulnerable to manipulation in service of finding a dispute justiciable or not, as scholars have long warned¹⁴: judges may use standing to avoid reaching the merits of a claim, for example.¹⁵ This article builds on the insights of scholars, including Elise Boddie, Michelle Adams, and Girardeau Spann, who have identified courts’ use of standing doctrine to undermine efforts to promote equality of opportunity for people who are members of historically subordinated and excluded groups. An important, additional contribution of this article is the recognition of the doctrinal implications for Asian American plaintiffs who may challenge underrepresentation in selective colleges and universities in the future.

9 Warth v. Seldin, 422 U.S. 490, 500 (1974) (in the absence of standing requirements, “courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions”).

10 Whitmore v. Arkansas, 459 U.S. 149, 155 (1990) (internal citations omitted).

11 Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 103 (1998) (internal citations omitted).

12 *Id.*

13 *Id.*

14 *See infra* Part I.

15 Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977) (observing that “[d]ecisions on questions of standing are concealed decisions on the merits”).

It is difficult to analyze causation within standing in isolation, without also considering the merits of the claim. Causation is also critical in discussion of remedies because the judicial intervention on behalf of a successful plaintiff should properly target the conduct that causes the harm. At the outset, though, it is not obvious how precisely or correctly the plaintiff must identify the connection between the defendant's actions and the injury. The causal connection may be difficult to ascertain, especially at the time of filing a complaint, which occurs necessarily in advance of discovery. While standing as an element of justiciability has received considerable scholarly attention, the specific subelement of causation has garnered less, perhaps for this reason. Perhaps, too, it takes a particular and unusual set of facts—naming the right defendant but blaming the wrong conduct—to make the causation question relevant. In that scenario, if the plaintiff fails to establish a link between an act of the defendant and the harm suffered, it may be that a reviewing court should investigate causation. The task is tricky *ex ante*, when the causal link matters for assessing justiciability.¹⁶

In prior cases involving White applicants' challenges to consideration of race in admissions to selective institutions of higher education, the question of causation received some attention.¹⁷ The question that has arisen is, but for the consideration of race in admissions, would a White plaintiff have been admitted to a particular, selective university? And the answer has mattered in determining whether the remedy of admission by court order, sought by a plaintiff, was appropriate. If the defendant could show that the White applicant would not have been admitted even in the absence of an affirmative action regime, then the lack of a causal link between the targeted admissions practice and the denial of admission would mean that ordering admission was not a proper remedy.¹⁸ But the consideration of causation did not occur in the course of assessment of justiciability: the issue was not addressed in order to decide whether a plaintiff could proceed with a claim at all.

16 For this reason, the Supreme Court has suggested that allegations purporting to establish standing must meet different standards at different stages of the proceeding, clearing a lower bar at the pleading stage and confronting a motion to dismiss but facing a higher bar at the stage of summary judgment, and a higher bar still at the "final" stage. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). However, the unusual facts of the cases challenging use of race in admissions decisions make for a difficult causation analysis at the time of filing; the case also went to trial, meaning that the final resolution of the question of standing based on that analysis could conceivably have come after all evidence was produced.

17 See *infra* note 18 and accompanying text (describing discussion of causation in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). The question of causation in standing analysis is analytically distinct from analysis of the role of wrongful intent to discriminate. That is, in determining whether a policy that has a disparate and adverse effect on members of a particular group violates the law, the Supreme Court has looked at the intention of the policy maker, asking whether the policy was adopted "because of," not merely "in spite of," its adverse effects upon an identifiable group," in order to determine whether the policy was the product of unlawful animus. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). This relates to causation, asking whether the objective of the defendant was to cause the harm complained of, but again, presents a question distinct from that concerning whether the policy, whatever its motives, has a harmful effect.

18 Ordering admission was the outcome in *Regents of the University of California v. Bakke*, in which the Court determined that because the defendant medical school "could not carry its burden of proving that, but for the existence of its unlawful special admissions program, [the plaintiff] would not have been admitted ... [the plaintiff] is entitled to the injunction" mandating his admission. *Bakke*, 438 U.S. at 320.

And because an individual claimant's fate was at issue, causation mattered only in assessing an individual applicant, rather than members of a racial or ethnic group. In the 2023 affirmative action cases, the Defendants' attack on standing was broader, meaning that causation analysis entailed not addressing a specific counterfactual, exploring what would have happened to an individual applicant in the absence of an affirmative action policy, but a general one, attempting to determine what would have happened to Asian American applicants in the absence of such a policy.

In concrete terms, as analyses of the Supreme Court majority's decision in the affirmative action cases have observed, the failure to explore the relationship between consideration of race and the alleged disparate exclusion of Asian and Asian American applicants for admission means that barring the consideration of race may not produce the desired greater representation via a fairer admissions regime.¹⁹ More precisely, if the Defendant colleges discriminated against applicants of Asian descent in some other way, they can continue to engage in whatever practices have that adverse effect in the wake of the Supreme Court's decision. This possibility should be frustrating and disturbing on its own, but is more so given the majority's extended attack on the harm that race discrimination causes: were discrimination the evil the Justices wished to fight, perhaps they would at least take pains to ensure that their aim was true.

Of course, the attacks on admissions at Harvard and UNC did not seek only to vindicate the interests of Asian American applicants and were always intended to end affirmative action benefiting members of historically excluded racial and ethnic groups: Blacks and Latinos.²⁰ From a cynical perspective, the majority's decision to elide causation is an unsurprising result of the Justices' determination to get to a particular outcome in the case, regardless of the missing elements of justiciability on behalf of the Plaintiffs.²¹ Some scholars have already argued that the Court has for decades applied standing doctrine differently depending on the racial identity of the plaintiff²²; these critiques are described in more detail

19 See, e.g., Jerry Kang, *Ending Affirmative Action Does Nothing to End Discrimination Against Asian Americans*, THE CONVERSATION (Aug. 3, 2023), <https://theconversation.com/ending-affirmative-action-does-nothing-to-end-discrimination-against-asian-americans-209647> (arguing that "it's simply erroneous to think that the Supreme Court struck down discrimination against Asian Americans since none was ever found"); Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative Action Case*, NEW YORKER (Mar. 23, 2023), <https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case> (identifying "complicated questions about how we define racial discrimination—if white applicants are implicitly favored over Asian American ones, is it right to place the blame for that on race-conscious affirmative action?"); Jonathan P. Feingold, *How Affirmative Action Myths Mask White Bonus*, 107 CAL. L. REV. 707 (2019) (disaggregating two often-conflated "dimensions of SFFA's suit: (1) a rather generic attack on Harvard's affirmative action policy, and (2) the more specific claim that Harvard intentionally discriminates against Asian Americans").

20 See Kang, *supra* note 19 (describing the effort to identify Asian American plaintiffs for strategic reasons in the litigation).

21 It is well established that the plaintiff bears the burden of establishing all three elements of standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103–04 (1998).

22 See, e.g., Elise Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297 (2015) (arguing that courts "presume" harm to White plaintiffs in so-called reverse discrimination cases and thereby effectively presume, rather than question, standing); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995) (arguing that the Supreme Court's finding of standing for White

below.²³ Perhaps the elision of causation in these cases simultaneously delineates the weakness of the analysis of the majority and offers a cautionary tale of the risk of deviating from methods of analysis enshrined in well-established doctrine, or should provide such a tale if remedying the harm alleged were the goal of the proceeding. But the consequences are different in this context.

In the challenge to admissions practices at Harvard and UNC, the Asian American applicants on whose behalf suits were filed were in the same position as White applicants. Like White applicants, Asian American applicants could argue that their chances of admission were harmed by the consideration of race favorably in considering Black and Latinx applicants. If Asian American applicants wish to challenge disparate results of admissions procedures in the future, after the Court's resolution of the two affirmative action cases, they will need to present evidence of intentional discrimination that they did not need when challenging the explicit use of race. There is a certain irony to this, because the outcome of the lawsuit in which lawyers representing Asian American applicants argued that their clients were disadvantaged relative to Black and Latinx applicants is that Asian American applicants alleging race discrimination in the future will find themselves doctrinally in the same disadvantaged position as those Black and Latinx applicants.²⁴ Put slightly differently, underrepresentation of Asian Americans in a postaffirmative action admissions environment may be accepted by a reviewing court as the constitutionally permitted product of a race-neutral process. To counter that narrative, lawyers for those future, Asian American plaintiffs likely will argue that selective colleges and universities continued to do what the Court forbade – considering race – without explicitly acknowledging the practice. Indeed, if in the immediate future the numbers of admitted Black and Latinx students do not fall, or the numbers of Asian American and/or White students do not rise, lawsuits making that claim are all but certain.

The willingness of the majority to overlook causation offers hints of the devastating reasoning the conservative Justices will deploy when considering challenges to other race-conscious policies in the near future. When consideration of race *at all* is constitutionally prohibited,²⁵ then it does not matter whether the challenged practice *actually* operates to exclude or whether elimination of that practice will afford any benefit to the challengers; rather, consideration of race violates the Fourteenth Amendment regardless of whether anyone is harmed by

plaintiffs who challenge affirmative action is at a minimum inconsistent with standing doctrine and that the Court's racially disparate treatment itself would not survive judicial scrutiny, were such scrutiny available).

23 See *infra* Part I.

24 Mario Barnes and Erwin Chemerinsky have detailed the doctrinal challenge confronting minority plaintiffs challenging facially neutral practices that result in their disproportionate exclusion. Mario Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine*, 43 CONN. L. REV. 1059, 1080–83 (2011).

25 As Jonathan Feingold points out in his contribution to this volume, this is the consequence of equating Jim Crow segregation and race-conscious admissions countering the lasting effects of that segregation. Jonathan Feingold, *Affirmative Action After SFFA*, 48 J. COL. & UNIV. L. 239, 245 (2023).

it. Such a rule obviates the need for finding standing entirely.²⁶ The implications go further: in the wake of the decisions in these two cases, if the numbers of Black and Latinx students do not decline, a reviewing court may well presume that the universities have persisted in taking race into account in an effort to maintain Black and Latinx enrollments. Even if the criteria for admissions are race-neutral, if pursuit of a diverse class is a conscious objective, that motivation may doom whatever policy or practice is used. And while the underrepresentation of members of historically excluded groups—again, Black people and Latinx people—may not in itself raise constitutional red flags for the Court, inclusion of members of those same groups will.

This article explores the significance and consequences of the elision of causation in the two opinions striking down consideration of race in admissions decisions at Harvard and UNC. The article identifies the doctrinal step the courts have taken—or, more precisely, failed to take—in these cases, incompletely applying standing doctrine in order both to adjudicate the claims and to ignore the possibility that a defendant might simultaneously engage in constitutionally protected affirmative action *and* illegal race discrimination.²⁷ This argument does not accept that the Plaintiffs' statistical evidence established unlawful discrimination, to be clear; the point of the argument is that *even if* that statistical evidence conclusively established discrimination against Asian American applicants, in the absence of a causal connection, such discrimination would not impugn the Defendants' affirmative action admissions policies.²⁸

Part I briefly explores scholarly work on standing in the context of challenges to race-based affirmative action. Part II provides the background on the assessment of causation in prior cases challenging the consideration of race in admissions. Part III examines the theories of causation in the Harvard litigation in particular, which included some discussion of standing only in the trial court. The final, substantive part warns of the effects of the majority's decision for future cases involving allegations of discrimination on the basis of race, including claims by Asian American plaintiffs challenging continued discrimination even after their successful attack on policies and practices explicitly aimed at providing more opportunity to members of historically excluded groups. Part V provides a brief conclusion.

26 Although some of the justices might well support a rule prohibiting consideration of race always and absolutely. Justice Thomas writes in the case against Harvard that “under our Constitution, race is irrelevant.” *SFFA*, 600 U.S. at 276 (Thomas, J., concurring).

27 The elision of causation creates what Jonathan P. Feingold accurately describes as the “illusion that one must choose between defending affirmative action and holding Harvard accountable for its alleged anti-Asian bias.” Feingold, *How Affirmative Action Myths Mask White Bonus*, *supra* note 19 at 710.

28 In addition to the findings made against Plaintiffs by the District Court and affirmed by the First Circuit, more than 1200 scholars argued convincingly in an *amicus* brief that the evidence presented by the plaintiffs did *not* establish discrimination against Asian American applicants to Harvard. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 203 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023); see also Brief of 1,241 Social Scientists and Scholars on College Access, Asian American Studies, and Race as *Amici Curiae* in Support of Respondent, *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 20-1199. See generally Mike Hoa Nguyen et al., *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in SFFA v. Harvard*, 48 J. COL. & UNIV. L. 369 (2023).

I. THE MALLEABILITY OF STANDING

The vulnerability of standing doctrine to manipulation has been recognized and criticized for decades. Scholars have noted the appeal of a neutral-sounding tool, resting on easily articulated principles, to avoid either resolving difficult or controversial disputes or taking on cases in which prior decisions might mandate a result that an arbiter disfavors. Judges may also find standing where prior doctrine would not have allowed it, in order to reach the merits in cases brought by plaintiffs ideologically aligned with their views.²⁹ Gene R. Nichol Jr., put it succinctly in a 1985 article: “As the doctrine presently exists, standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values.”³⁰ Critics at various points have decried standing decisions deemed too permissive, which raise concerns that the judicial branch is empowering itself to undermine the coequal branches of government,³¹ or too restrictive, which raise concerns that the doctrine has closed the courts to certain classes of plaintiffs.³²

The underlying concern of critics of the “incoheren[ce]” of standing doctrine³³ is the result of the difficulty of disentangling standing from the core, or merits, of the case. For example, in deciding that Black parents lacked standing to challenge the failure of the Internal Revenue Service to deny tax-favored status to private schools that discriminated on the basis of race, the Supreme Court majority in *Allen v. Wright* focused on the absence of direct injury suffered by the plaintiffs whose children might not have been affected by the private schools’ allegedly discriminatory conduct at all.³⁴ “The diminished ability of [plaintiffs’] children to receive a desegregated education would be fairly traceable to unlawful [Internal Revenue Service] grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents’ communities for withdrawal of those exemptions to make an appreciable difference in public school integration,” Justice O’Connor wrote for the majority in 1984.³⁵ In other words, the futility of a remedy at the end of a case determined the jurisdiction of the Court at the outset. The contrast to the standing analysis in the affirmative action cases decided in 2023, in which the majority *assumed* that ending an affirmative action policy would lead to admission of more members of

29 Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 640–41 (2006).

30 Gene R. Nichol, *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635, 658 (1985).

31 *Id.* at 650.

32 Michelle Adams, *Causation, Constitutional Principles, and the Jurisprudential Legacy of the Warren Court*, 59 WASH. & LEE L. REV. 1173, 1175–76 (2002) (arguing that “in the standing analysis, the Court [has] focuse[d] on the lack of a direct causal relationship between the injury and the conduct sufficient to create a judicially cognizable claim” in order to prevent the claim).

33 William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988).

34 468 U.S. 737, 758 (1984).

35 *Id.*

the plaintiff class, is striking but consistent with the treatment of justiciability in several prior cases involving challenges to affirmative action.³⁶

This was the argument by Girardeau Spann in a 1995 article that argued the Court's standing decisions were "racially suspicious,"³⁷ in that the justices were more likely to recognize the standing of a White plaintiff challenging a race-conscious policy than that of a non-White plaintiff challenging a facially neutral policy with disparate effects. Spann writes that the "Supreme Court's tendency has been to grant standing if the plaintiff was white or was challenging a practice alleged to have adversely affected the interests of the white majority... [while] [o]n the other hand, it has tended to deny standing if the plaintiff was a member of a racial minority group or was challenging a practice that was alleged to have adversely affected the interests of a racial minority group."³⁸ Elise Boddie has taken the critique further, identifying an "innocence paradigm" that "assumes that whites are necessarily harmed by considerations of race that benefit racial minorities."³⁹

Boddie's analysis of the way in which doctrine favors claims of discrimination by White plaintiffs challenging affirmative action regardless of demonstrated injury, while burdening plaintiffs who are people of color challenging traditional discrimination with the obligation to establish hostile animus, illustrates the effect of the Supreme Court's malleable and inconsistent treatment of standing. The explicit use of race as a factor in admissions decisions relieves a plaintiff of the burden of showing that a defendant's consideration of an applicant's race actually caused harm, and a majority of the Court now appears to view consideration of race as sufficient in itself to prove harm.⁴⁰ The Court's—and the lower courts'—approach to the Plaintiffs' standing in the 2023 affirmative action cases are further examples of the phenomenon that Boddie has identified. But the more recent cases raise additional concerns, too, because of their adverse effect on the putative Plaintiffs this time around, who were not White. Having exploited the doctrinal favoritism bestowed on White plaintiffs in order to undo affirmative action, Asian American applicants to selective colleges and universities who may find they continue to be underrepresented will have to navigate the more difficult doctrinal terrain that has confronted Black and Latinx plaintiffs invoking the Equal Protection Clause; Asian American plaintiffs will now be worse off if they seek to challenge admissions practices in the future.

36 In *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016), for example, the claim of the plaintiff, who challenged race-conscious admissions at the University of Texas at Austin, reached the Supreme Court twice even though she graduated from another institution in the meantime. Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. TIMES, Oct. 10, 2012, at A1.

37 Spann, *supra* note 22, at 1423.

38 *Id.* at 1461–62.

39 Boddie, *supra* note 22, at 301.

40 Justice Thomas voiced this view—to which he has adhered - in a terse dissent in the first of *Fisher's* two trips to the Supreme Court. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 315 (2013) (Thomas, J., dissenting) (asserting that a "State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause").

The current affirmative action cases, decided in the context of other cases in which the standing of the plaintiffs received widespread criticism, may illustrate that the standing doctrine is indeed neutral, in that an arbiter can use it to block disfavored claims or enable favored ones. The neutrality of the doctrinal tool does not, of course, mean that the application of the doctrine is neutral. The critical perspectives on standing voiced by Boddie and Spann, as well as other critiques of the Court's treatment of affirmative action generally,⁴¹ suggest that the failure to analyze elements of the standing doctrine in the 2023 affirmative action cases is not anomalous and not limited to this historical moment, but is rather a consistent tactic to undermine policies and practices intended to benefit members of historically subordinated groups and maintain the privileged position of members of historically advantaged groups.

II. THE ROLE OF CAUSATION

In prior cases involving challenges to race-conscious admissions regimes, the Court has only glancingly attended to the question of causation. As California Supreme Court Justice Goodwin Liu pointed out in an article written more than twenty years prior to the Court's 2023 affirmative action decisions, this is an odd omission: while "minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action...[,] that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action."⁴² Liu dubbed this the "causation fallacy."⁴³ And the same logic applies to the plaintiffs who are of Asian descent, recruited as a tactic in an ongoing campaign⁴⁴ to obtain a ruling forbidding consideration of race in admissions. Admissions rates may differ for applicants who are members of different racial groups without much affecting

41 See, e.g., Barnes & Chemerinsky, *supra* note 24, at 1081 (observing that the "combination of the tiers of scrutiny and the requirement for a discriminatory purpose combine to immunize from judicial review countless government actions which create great social inequalities").

42 Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002).

43 *Id.* Liu explains that this fallacy is the result of a simple error—or perhaps misunderstanding—of arithmetic: "At its core, the fallacy erroneously conflates the magnitude of affirmative action's instrumental benefit to minority applicants, which is large, with the magnitude of its instrumental cost to white applicants, which is small." *Id.* at 1048.

44 One activist, Edward Blum, orchestrated the challenges to affirmative action policies in 2023 and a decade earlier, in the *Fisher* litigation. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done*, N.Y. TIMES (July 8, 2023), <https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html>. Blum made clear his strategy in the 2023 cases rested on Asian American plaintiffs, in order to challenge affirmative action. Sandhya Dirks, *Affirmative Action Divided Asian Americans and Other People of Color. Here's How*, NAT'L PUB. RADIO (July 2, 2023), <https://www.npr.org/2023/07/02/1183981097/affirmative-action-asian-americans-poc>. And Blum shows no signs of slowing his assault on race-conscious policies intended to advance opportunity for those historically denied it: after the Supreme Court resolution of the cases against Harvard and UNC in 2023, Blum's nonprofit threatened or filed lawsuits against several law firms, targeting their efforts to promote diversity in their ranks. Julian Mark & Taylor Telford, *Conservatives Are Suing Law Firms over Diversity Efforts. It's Working*, WASH. POST (Dec. 9, 2023), <https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/>.

overall representation of each group in the pool of admitted students, Kimberly West-Faulcon explained in a 2017 article looking at the state of the anti-affirmative action campaign at that moment.⁴⁵

It is the first case to challenge consideration of race in higher education admissions, *Regents of the University of California v. Bakke*,⁴⁶ that includes a degree of analysis of the issue of causation—but not in the context of determining the plaintiff’s standing to sue. In that case a majority of the Court agreed that the medical school at the University of California, Davis, improperly took race into account in deciding whom to admit, and the defendant sought an order compelling his admission. Consequently the Justices briefly addressed the question of whether the university had proven that the plaintiff would not have been admitted regardless of the consideration of race in admissions. Because the university “conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted[,] ... respondent is entitled to the injunction” compelling his admission.⁴⁷ But no analysis of causation occurred as an element of standing at the outset. Critically, then, even in *Bakke* the Court did not have to examine the stages of the medical school’s admissions process to confirm that the source of the plaintiff’s injury was the consideration of race that he challenged. And the inattention to the causation element of standing here is consistent with the arguments by Spann and Boddie discussed above, contending that the Court presumes injury when a White plaintiff challenges a race-conscious measure intended to protect opportunity for beneficiaries who are not White.

In *Fisher*, a White plaintiff challenged consideration of race in a fraction of admissions decisions at the University of Texas at Austin that were not subject to the Top Ten Percent Plan.⁴⁸ The litigation dragged on for several years and the plaintiff attended and graduated from another institution before the case reached the Court for the second and final time.⁴⁹ When she was denied admission, the

45 Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590, 639 (2017) (explaining that “even when a university’s racial affirmative action policy is sufficiently robust to admit African Americans (or Latinos) at higher rates than whites and Asian Americans (such as the 58.5 percent African American rate for public universities and the 31.0 percent African American rate for private universities), the higher African American selection rate has little effect on the admission chances of white and Asian American applicants because of the comparatively small number of African American (or Latino) applicants and admits”). This mode of analysis presupposes that rates of admissions within groups are the proper indicator of equality, a supposition in need of a normative justification, Issa Kohler-Hausmann has noted. Issa Kohler-Hausmann, *What’s the Point of Parity? Harvard, Groupness, and the Equal Protection Clause*, 115 NW. U. L. REV. ONLINE 1, 20 (2020).

46 438 U.S. 265 (1978).

47 *Id.* In a footnote, Justice Powell elaborated, writing that “there is no question as to the sole reason for respondent’s rejection—purposeful racial discrimination in the form of the special admissions program.” *Id.* at n.54. Consequently there was no need to try construct a counterfactual to determine what might have happened in the absence of the race-conscious admissions regime. Powell concluded, “Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result.” *Id.* at 410.

48 *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 373-374 (2016).

49 *Id.* at 379.

admissions process had been in place for only three years,⁵⁰ providing relatively little data to assess the likelihood that the plaintiff would have been admitted but for the consideration of race. The plaintiff did not challenge the Top Ten Percent Plan,⁵¹ the component of the university's admissions program that did not take race into account, and as a result, the majority observed, the "record ... [was] almost devoid of information about the students who secured admission to the University through the Plan," making the determination of whether Abigail Fisher would have been admitted exceedingly difficult.⁵² Even "[i]f the Court were to remand, ... further factfinding would be limited to a narrow 3-year sample, review of which might yield little insight," the majority continued.⁵³ The Court ultimately upheld the consideration of race, hewing to the reasoning in a pair of opinions approving race conscious admissions in 2003.

In those two opinions, *Grutter v. Bollinger*⁵⁴ and *Gratz v. Bollinger*,⁵⁵ the Court did not deeply investigate causation, instead weighing the constitutional question of the ability to take race into account at all rather than the question of whether the practice harmed the plaintiffs. In *Grutter*, a majority upheld the consideration of race in the context of a law school's individualized review of each applicant for admission; in *Gratz*, a majority rejected the consideration of race in the context of an undergraduate program's more "mechanical" admissions program.⁵⁶ However, upon remand, the question of whether an injunction should issue requiring the admission of the plaintiffs who challenged the undergraduate admissions program did not come up; the issue was attorneys' fees.⁵⁷

The prior affirmative action cases, then, did not prompt the Court to address the possibility that the explicit and formal consideration of race was not the reason that a plaintiff was denied admission. It is far from clear that a majority of the Court would even care to do so; the conservative justices have endorsed instead a "right to compete" theory of injury which posits the *consideration* of race as the harm in itself.⁵⁸ The Court has treated the explicit consideration of race alone as

50 *Id.* The University of Texas operated a hybrid system, with most of the class admitted through the "Ten Percent Plan" that provided slots in entering classes to Texas high school graduates in the top tenth of their class, and a fraction admitted through the program that took into account race. *Id.*

51 The "Ten Percent Plan" guaranteed admission to Texas high school students who graduated in the top tenth of their class. *See* Fisher, 579 U.S. at 372 (describing the Top Ten Percent Plan). The state adopted the plan in the wake of a Fifth Circuit Court of Appeals ruling in 1996 that outlawed consideration of race in college admissions in that jurisdiction until the Supreme Court approved affirmative action in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

52 Fisher, 579 U.S. at 378.

53 *Id.*

54 539 U.S. 306 (2003).

55 539 U.S. 244 (2003).

56 *Id.* at 280.

57 *Gratz v. Bollinger*, 353 F.Supp.2d 929, 932 (E.D. Mich. 2005).

58 Jonathan Feingold has concisely explained the development of this understanding of the injury in affirmative action cases, which has "satisf[ie]d standing and causation requirements even where a plaintiff fails to 'affirmatively establish that he would receive the benefit in question if race

the harm: this deprived the plaintiff of equal opportunity to compete.⁵⁹ This is the mechanism Boddie criticizes because it favors plaintiffs challenging affirmative action that considers race but does not aid victims of traditional and informal race discrimination. It is nevertheless not surprising that no court considered the question of causation: a defense strategy that contended that some other motive, potentially illicit in itself, led to discrimination, would be unlikely to result in a finding of no liability. The plaintiffs could have argued that regardless of consideration of race in pursuit of diversity, the university discriminated against applicants of Asian descent. That possibility raises others, all intriguing: the Court could have found, based on analysis of any potential injury to Asian and Asian American applicants, that the constitutionality of consideration of race was not at issue because some other policy or practice caused underrepresentation of Asian Americans in admitted classes. The trial court noted the role of special consideration for athletes and children of alumni in admissions, which could contribute to such underrepresentation, but concluded that Harvard's use of these "tips" to certain applicants was "to promote the institution and [was] unrelated to the racial composition of those applicant groups."⁶⁰ The conservative supermajority on the Court did not pull this thread.

III. THE PLAINTIFFS' THEORIES OF CAUSATION

The complaints against Harvard and UNC conclusively characterized the consideration of race in admissions at the two Defendant institutions as intentional discrimination against Asian American applicants. The plaintiffs repeatedly asserted that "Harvard intentionally discriminates against Asian Americans,"⁶¹ that "statistical evidence establishes that Harvard is intentionally discriminating against Asian Americans,"⁶² bringing to bear brute rhetorical force in the absence of compelling evidence of actual racial animus.⁶³ The complaint against UNC contained substantially similar, conclusory assertions.⁶⁴ But this was not a claim

were not considered.'" Jonathan P. Feingold, *Equal Protection Design Defects*, 91 *TEMPLE L. REV.* 513, 525 (2019) (quoting *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999)).

59 Professor Boddie explains this reasoning, with roots in the facts of the affirmative action program targeted in *Bakke*; see Boddie, *supra* note 22, at 362-63 (noting that the claimed "harm was the inability to compete on an equal footing" (internal quotation omitted)).

60 *Students for Fair Admissions v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126, 142 (D. Mass. 2019). Of course, given the demographic characteristics of children of alumni, for example, these "tips" could have disparate effects along the lines of race.

61 Complaint, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, *supra* note 5, at ¶ 200.

62 *Id.* at ¶ 205.

63 There are similar assertions repeated in the Complaint. See, e.g., *id.* at ¶¶ 223, 238 and 427. Vinay Harpalani has observed that "[f]or the past four decades, conservative activists have sought to link affirmative action that benefits Black, Latina/o, and Native Americans with negative action that discriminates against Asian Americans," and that the 2023 cases represent the "culmination of that strategy: they represent a broad racial project that can pit different minority groups against each other." Vinay Harpalani, *Asian Americans, Racial Stereotypes, and University Admissions*, 102 *B.U. L. REV.* 233, 323-24 (2022).

64 See, e.g., Complaint, *Students for Fair Admissions v. University of North Carolina*, *supra*

that by itself necessarily established that the formal consideration of race in admissions caused exclusion of Asian American applicants.⁶⁵ The Court has not indulged in this distinction in its jurisprudence on affirmative action, instead finding that the use of the classification at all is sufficient to justify legal challenge.

At the outset, neither case alleged that the Defendants set out to depress the number of students of Asian descent admitted at each institution because they harbored racial animus against those students.⁶⁶ That is, the “intent” to discriminate asserted by the Plaintiffs was manifest in the consideration of race at all—in the desire to help members of some racial and ethnic groups, the Defendant necessarily disadvantaged members of other groups; this is the formulation the Chief Justice articulated in the majority opinion. Chief Justice Roberts wrote in his opinion for the majority that “[c]ollege admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.”⁶⁷ Such a theory of liability considerably eases, if it does not eliminate, the need to find an injury in fact, caused by the conduct complained of, in order to find federal jurisdiction—but only in favor of certain Plaintiffs.

The Plaintiffs cited statistical evidence in arguing that Harvard illegally and unconstitutionally discriminated against Asian American applicants.⁶⁸ The complaint summarizes research by various scholars and the Harvard *Crimson* finding, for example, that odds of admission at selective institutions were lower for Asian American applicants,⁶⁹ that Asian Americans disproportionately received higher standardized test scores than did members of other racial or ethnic groups,⁷⁰ and that the number of admitted Asian American students followed a pattern similar

note 5, at ¶¶ 148, 154 and 198 (each alleging “intentional” discrimination by the defendant).

65 That is because really, the plaintiffs make two claims, as Jonathan Feingold has noted. *See* Feingold, *supra* note 19, at 709 (arguing that “by viewing this as a case that is all about affirmative action, common accounts tend to conflate two discrete dimensions of SFFA’s suit: (1) a rather generic attack on Harvard’s affirmative action policy, and (2) the more specific claim that Harvard intentionally discriminates against Asian Americans”).

66 Although the plaintiffs alluded to Harvard’s history of exclusion of Jewish applicants, which was driven by animus. *See, e.g.*, Complaint, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, *supra* note 5 at ¶ 5 (arguing that “Harvard is using racial classifications to engage in the same brand of invidious discrimination against Asian Americans that it formerly used to limit the number of Jewish students in its student body”). On appeal, Students for Fair Admissions expressly argued that hostile animus was not necessary and consideration of race alone, in the interest of benefiting members of some racial and ethnic groups, constituted prohibited discrimination against members of other racial and ethnic groups. Reply Brief of Appellant, Students for Fair Admissions v. President and Fellows of Harvard College, 2020 WL 3047921, at *15-16 (1st Cir., June 5, 2020), (arguing that the category of prohibited, “intentional discrimination” includes “any racial classification that appears on the face of a policy, ‘even if not based on any underlying malevolence’” (quoting *AT&T Corp. v. Hulteen*, 556 U.S. 701, 711 (2009))).

67 *SFFA*, 600 U.S. at 218.

68 Although the plaintiffs did argue that there was “no reason to doubt that Harvard is one” of the colleges included in a study that they cited showing disparities in rates of admissions. Complaint, Students for Fair Admissions v. President and Fellows of Harvard College, *supra* note 5 at ¶ 221.

69 *Id.* at ¶ 207.

70 *Id.* at ¶ 216.

to that of Jewish students during years when Harvard sought to depress the number of Jewish students on campus.⁷¹ Though the evidence relied upon was circumstantial, the claim of the plaintiffs was clearly stated: “No non-discriminatory factor justifies the gross disparity in Asian American admissions relative to their presence in Harvard’s applicant pool.”⁷² In doctrinal terms, the Plaintiffs asserted that this evidence constituted proof of intentional discrimination—even if driven by the goal of promoting access for Black and Latinx applicants rather than invidious animus⁷³—because that data supported no other explanation.

Evidence gathered over the course of trial contributed to a more specific theory of anti-Asian bias at Harvard—one unrelated to explicit consideration of race in the context of the college’s affirmative action policy.⁷⁴ As the Plaintiff argued in its briefing to the First Circuit, “[t]here is significant record evidence that being Asian American has a negative effect on an applicant’s personal rating,” which is a significant factor in the determination of whether an applicant receives an offer of admission.⁷⁵ The admissions process relies on readers who review application materials and give each applicant an “overall rating; four profile ratings: (1) academic, (2) extracurricular, (3) athletic, and (4) personal.”⁷⁶ The personal rating “reflects the admissions officer’s assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities,” which include qualities like “integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit.”⁷⁷ The trial court found that Harvard’s admissions process involved monitoring of the demographics of the admitted class and attention to the representation of specific groups, but the court wrote that race had “no specified value in the admissions process and is never viewed as a negative attribute.”⁷⁸ The Plaintiffs argued, in contrast, that Asian American applicants’ identity consistently correlated with lower personal ratings.⁷⁹

71 *Id.* at ¶ 226.

72 *Id.* at ¶ 229.

73 The plaintiffs make this point most clearly in briefing to a panel of the the First Circuit Court of Appeals, arguing that it does not matter whether “discrimination” is the result of “conscious animus”; it can still be intentional for doctrinal purposes. Brief of Appellant, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 2020 WL 882260, at 39 (1st Cir. Feb. 20, 2020).

74 This is not surprising: discovery produced data and made possible expert analyses of data that both sides to the dispute could use, but that was not available at the outset of litigation.

75 Brief of Appellant, *Students for Fair Admissions v. President and Fellows of Harvard College*, 2020 WL 882260, at *27 (1st Cir. Feb. 20, 2020).

76 *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126, 140 (D. Mass. 2019).

77 *Id.* at 141. After the lawsuit was filed, Harvard overhauled its process to state explicitly that race should not be considered in assigning the personal rating. *Id.*

78 *Id.* at 147.

79 *Id.* at 169. However, the trial court concluded that “[a]ny causal relationship between Asian American identity and the personal rating must therefore have been sufficiently subtle to go unnoticed by numerous considerate, diligent, and intelligent admissions officers who were immersed in the admissions process.” *Id.*

More specifically, SFFA argued that the data on admissions showed that “systematically... African Americans and Hispanics have better personal qualities than other racial groups”⁸⁰ and that White applicants received higher personal rating scores than Asian applicants. It made sense to focus on the difference between personal ratings given to White applicants and those given applicants of Asian descent, if the personal rating was the mechanism by which the formal consideration of race worked. But the formal consideration of race in the effort to help applicants who were Black and Latinx would not explain why White applicants would receive higher scores than applicants of Asian descent. This pattern, not described in these terms by the Plaintiffs, suggests that the formal consideration of race is *not* the cause of any possible disadvantage to Asian applicants relative to White applicants. It would only—and unconstitutionally, in the view of the Plaintiffs—disadvantage Asian applicants relative to Black and Latinx applicants. The clear implication is, any disparity suffered by Asian American applicants *relative to White applicants* was the result of something else, namely, implicit bias.⁸¹

The conservative majority on the Supreme Court did not pick up the implicit bias theory in finding that the formal consideration of race violated the equal protection clause of the Fourteenth Amendment. The Justices did not take on the potentially complex facts of the case—beyond the difficult parsing of causes of any alleged injury to Asian American applicants, there is the sophistication of the dueling statistical analyses of Harvard’s admissions data, which this article will not grapple with. The majority did not develop the Plaintiffs’ argument that implicit bias or explicit consideration of race in an affirmative action program could constitute racial animus. Nor did the lengthy dissents disaggregate in this way. Given the stakes, the choice to focus on the constitutional question of whether race can be considered in admissions at all makes obvious sense. But to ignore the slightly more subtle issue posed by the facts of the case against Harvard will have consequences, to which the next Part will turn.

None of the questions about the reasons why Harvard’s admitted classes consisted of the students that they did played a role in the analysis by the trial court judge of whether the Plaintiffs had standing, which Harvard forced when asking the court to dismiss the complaint. Rather, the analysis by the judge, Allison D. Burroughs, focused on whether the association that had brought the suit, SFFA, could assert that it had suffered an injury that was sufficiently “concrete and particularized” to satisfy the first element of the three-part standing test described in prior Supreme Court cases. This is so, even though the judge notes⁸² that standing

80 Brief of Appellant, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, 2020 WL 882260 (1st Cir. Feb. 20, 2020) at 32.

81 The alternative theory that the plaintiffs advanced, and which both the trial court and a panel of the First Circuit Court of Appeals rejected, was “implicit bias,” driven by stereotypes and cognitive reactions not the result of either intentional thought or conscious animus against people of Asian descent. *Id.* at 39.

82 See Memorandum and Order Denying Motion to Dismiss, *Students for Fair Admissions v. President and Fellows of Harvard College*, 14-cv-14176-ADB, 4 [hereinafter Order] (observing that “[a] Article III standing requires that three conditions be satisfied”).

requires satisfaction of all three elements discussed above.⁸³ The judge's discussion then addressed whether the *association* had standing derivatively, if it alleged that any of its members "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."⁸⁴ Yet the court did not evaluate whether each or any member of SFFA could satisfy the three-part standing test, perhaps because the judge concluded that explicit consideration of race in itself conferred standing on any challenger. Having concluded that the association could have standing and that the individuals whom it represented did in fact wish the association to vindicate their interests, the court noted that "SFFA has submitted declarations of certain members whom it specifically identifies for standing purposes," and then concluded its analysis.⁸⁵

To be fair, the trial court judge had a very good reason not to attempt a more nuanced analysis of the three elements of standing: no party to the litigation demanded it.⁸⁶ As Jonathan P. Feingold has argued, "[B]oth SFFA and Harvard benefit when the public conflates SFFA's discrimination claim with its broader assault on affirmative action."⁸⁷ For Harvard, to argue that the practice targeted by the plaintiffs was not the cause of the injury alleged would be to concede that there was an injury, and that would be inconsistent with an effort both to avoid liability and to preserve race-conscious admissions practices.⁸⁸ Indeed, Feingold points out, Harvard could burnish its image as a champion of social justice by losing in court with its defense of affirmative action, emerging from litigation without attaining a victory for the broad policy but also without suffering a

83 See *supra* notes 10–13 and accompanying text.

84 *Warth v. Seldin*, 422 U.S. 490, 511 (1975). This is the language relied upon by the trial court. *Order*, *supra* note 82.

85 *Order*, *supra* note 82, at 17; see also *id.* at 14 ("SFFA has provided the affidavits of a subset of its members, referred to as Standing Members, which demonstrate that at least some of these individuals, the rejected applicants, would have standing to sue on their own.").

86 The parties did hold extensive sidebar discussions with the judge over admissions of evidence that could have indicated bias on the part of Harvard officials and the presiding judge. Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative-Action Case*, *NEW YORKER* (Mar. 23, 2023), <https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case>. But as Jeannie Suk Gersen noted after the decision, "sealed sidebars and court hearings obscured private understandings between officials from Harvard and the federal government, who shared a joke about racial stereotyping, and between judge and litigants, who agreed to keep hidden a discussion of alleged judicial bias."

87 Feingold, *How Affirmative Action Myths Mask White Bonus*, *supra* note 19 at 711.

88 As Feingold puts it,

By acquiescing to an affirmative action narrative, Harvard can present itself as the valiant defender of race-conscious admissions and, by extension, racial equality more broadly. This, in turn, blunts the force of SFFA's more potent charge that Harvard intentionally suppresses Asian admission to preserve White market share--a decidedly "bad look" for an institution committed to racial equality. It also deflects attention from other sites within Harvard's admissions regime that, although not challenged by SFFA, reproduce race and class privilege by conferring unearned benefits upon the wealthy and the connected.

Id.

finding of unlawful discrimination against Asian Americans.⁸⁹ For SFFA, even to recognize the possibility that race-conscious admissions practices might not be the cause of injury to the plaintiffs that it claimed to represent would be at odds with the organization's stated goal of abolishing consideration of race entirely. Yet it is troubling to contemplate that because of these clear and entirely explicable interests, any injury to Asian American applicants to Harvard might persist after the Supreme Court's decision, as a result of other, unchanged admissions practices. And should any of those applicants attempt to challenge the surviving practices that have a disparate and adverse impact, it will be more difficult to mount a successful challenge, as the next part illustrates.

IV. IMPLICATIONS OF THE ELISION OF CAUSATION

The elision of causation in the analysis by the courts hearing the affirmative action cases in 2023 matters for at least four different reasons. First and perhaps most immediately, there are implications for future plaintiffs alleging discrimination in the context of admissions at selective institutions of higher education and potentially in other contexts as well. Second, the incomplete application of long-standing principles of standing in these cases adds to instability of established doctrine in ways that give the Court more discretion to permit thin claims to proceed to adjudication. Third, the decisions here have substantive effects on applicants to selective colleges and universities. Fourth, the reasoning of the conservative supermajority undermines a possible national conversation about how higher education should be allocated by suggesting that admissions without affirmative action will produce fairer results. This part elaborates on each of these concerns, then sketches possibilities for efforts to promote equity in access to higher education notwithstanding the Supreme Court's recent decisions.

A. *Shifting the Analysis of Discrimination*

Consider the two different paths confronting differently situated, future plaintiffs who allege that a selective college has engaged in unlawful discrimination on the basis of race in its admissions practices. Those plaintiffs who are members of historically excluded groups—Black and Latinx applicants—must find evidence that a defendant's facially neutral conduct, which did not involve explicit consideration of race, was intentional.⁹⁰ This evidence will be difficult to come by, not least because of the even greater incentive to obscure admissions practices and rationales after the resolution of the affirmative action cases:⁹¹ no admissions officer will want to create evidence of intentional consideration of race for fear of litigation. Vinay Harpalani describes the resulting "secret admissions" process in his contribution

89 Jonathan P. Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 143, 185 (2023).

90 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

91 Peter Arcidiacono et al., *Affirmative Action, Transparency, and the SFFA v. Harvard Case*, 87 U. CHI. L. REV. ONLINE 119, 125–26 (2020) (describing how universities in the United States "have obfuscated their admissions criteria as they relate to race" in response to Supreme Court decisions addressing consideration of race in that setting).

to this volume, which argues for transparency in admissions decisions.⁹² The critical observation is that plaintiffs challenging affirmative action face an easier doctrinal path because the challenged policy plainly and explicitly invokes race; the plaintiff challenging traditional race discrimination must present evidence that the intentional consideration of race led to injury.

On the other hand, White applicants, concerned that a selective college or university has discriminated against them, may enjoy a shortcut: they may be able to point to prior explicit consideration of race in admissions and argue that, perhaps for the most noble of reasons, the defendant institution continues to consider race in favor of members of historically underrepresented groups. That is, the fact that the college previously considered race in an affirmative action program could be used as evidence of intent, to assert that the college is engaged in the same, now definitively unconstitutional practice. It is not difficult to imagine a complaint charging that the defendant institution attempted to do covertly what the Supreme Court held unconstitutional when done overtly.⁹³ Indeed, if the numbers of Black and Latinx applicants admitted to selective institutions do not decline in the wake of the 2023 decisions, such litigation seems certain.⁹⁴ In this way, inequality consistent with the results of past, explicitly racist policies and practices persists, protected by the facially neutral principle of colorblindness endorsed by the Supreme Court. And after the 2023 decisions, potential Asian American plaintiffs seeking to redress the unresolved sources of their underrepresentation confront the same challenges that face Black and Latinx applicants, needing to find evidence of intentional discrimination in an opaque admissions regime. While the litigation against affirmative action made doctrinal allies of White and Asian American challengers hoping to achieve greater access to selective higher education, its end may put Asian Americans in the same position as Black and Latinx applicants.

B. Erosion of Standing Doctrine

The failure to confirm a causal connection between the race-conscious admissions practice targeted by the plaintiffs in the *SFFA* cases and the harm allegedly suffered by Asian American applicants will affect future plaintiffs. The resolution of these affirmative action cases demonstrates yet again that two of the three elements long accepted as components of standing analysis in other contexts do not matter here. This mechanism intended to ensure justiciability and thereby preserve the separation of powers—preventing courts from using ideologically

92 Vinay Harpalani, *Secret Admissions*, 48 J. COL. & UNIV. L. 325, 365 (2023).

93 Indeed, Chief Justice Roberts may have previewed this argument in his opinion for the majority when he cited *Cummings v. Missouri*, writing that “‘what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,’ and the prohibition against racial discrimination is ‘levelled at the thing, not the name.’” *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 230 (2023) (quoting *Cummings v. Missouri*, 71 U.S. 277, 325 (1867)). See also Harpalani, *Secret Admissions*, *supra* note 92 at 352.

94 Indeed, within weeks of the Supreme Court’s decision, SFFA sent a warning email to 150 colleges and universities, outlining a series of demands to eliminate consideration of race from every aspect of the admissions process. Scott Jaschik, *The Demands of Students for Fair Admissions*, INSIDE HIGHER ED (July 13, 2023), <https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions>.

motivated claims by preferred plaintiffs to undo the work of the legislature—will be that much weaker. The conservative supermajority on the Court may accept tenuous theories of standing, perhaps resting on highly contingent and uncertain assertions of harm, in order to assist plaintiffs pursuing objectives of a shared ideology or even a bare partisan, political advantage.⁹⁵

A formalist might at least hope for consistency and that the conservative Justices would feel constrained to entertain claims regardless of ideology. But the Justices might not believe themselves so constrained by a “hobgoblin of little minds.”⁹⁶ Given their willingness to depart from decades-old precedent that permitted consideration of race in college admissions in pursuit of a particular objective, it is not difficult to imagine that the majority on the Court could distinguish the standing argument of a plaintiff that the Justices considered an ideological ally from the same sort of argument by an ideological opponent.

C. *Perpetuating Inequality in Selective Higher Education—and Beyond*

The resolution of the 2023 affirmative action cases will have substantive effects on students in subsequent admissions cycles. The implication of Chief Justice Roberts’s characterization of admissions as a zero-sum game is that the number of Black and Latinx students admitted should indeed fall; presumably, were there a causal connection between the explicit consideration of race in an affirmative action policy, the number of Asian American students admitted would go up. If that pattern does not manifest, litigation challenging admissions practices seems guaranteed, as noted above.⁹⁷ And whether it manifests or not, the shift away from promoting access to members of historically excluded groups in the admissions process is likely to contribute to racialized resentment of selective colleges and universities, if the number of students who are members of historically excluded groups declines.

If selective colleges and universities do allow the demographic characteristics of their classes to change in the ways that the conservative justices anticipate, there will be other consequences, too. Less diversity on elite campuses will mean less representation in classrooms of experiences beyond the most privileged slice of the population.⁹⁸ Less representation in turn means fewer opportunities for students of widely differing backgrounds to interact, empathize, learn, and grow from and with one another. Less representation, justified by the abandonment of

95 In the student debt decision released shortly prior to the affirmative action decisions, the Court appears to have accepted just such a tenuous theory of standing, finding that a Republican state attorney general had standing to sue on behalf of a state-created corporation to block a signature policy initiative of a Democratic administration—even though the state would not necessarily suffer any injury as a result of the policy. *Biden v. Nebraska*, 600 U.S. ___, 143 S.Ct. 2355, 2386 (2023) (Kagan, J., dissenting).

96 RALPH WALDO EMERSON, *SELF-RELIANCE* (1841).

97 See *supra* Part IV.A (describing likelihood of this additional litigation).

98 Philip Lee, *Rejecting Honorary Whiteness Asian Americans and the Attack on Race-Conscious Admissions*, 70 EMORY L.J. 1475, 1493 (2021) (describing the effects of adoption of a “colorblind” model of admissions to selective institutions).

consideration of race in admissions, also reinforces a particular racial hierarchy, with White and Asian American students at the top and Black and Latinx students at the bottom. The most selective institutions of higher education may admit classes that include fewer Black and Latinx students, a pattern that outsiders and even students on such elite campuses themselves may come to see as natural and inevitable rather than as a construct of law and social structures. Those Black and Latinx students may in turn attend less selective, less prestigious, and less well-endowed institutions that send fewer graduates into the ranks of the national elite. The seductive story will be that affirmative action constituted social engineering and its abolition marks a return to a pure merit system—never mind that there has never been such a pure meritocracy. Modifications to admissions standards may be more difficult to change if they are accepted as neutral and objective, despite their disparate effects: the process may be accepted as fair. And if elite institutions' graduates are less diverse, the leadership of business, cultural, and political institutions they disproportionately flock to will be less diverse, too.⁹⁹

The distribution of students across institutions is also likely to shift, with Black and Latinx students overrepresented at colleges and universities (or other programs of higher education) that are less selective. These less elite institutions typically have lower completion rates and may have fewer financial resources to offer aid to students who need it, meaning that those disproportionately Black and Latinx students may have to borrow more.¹⁰⁰ Those worse outcomes, higher debt burdens, and racial disparities in postgraduate compensation in turn work together to undermine the promise of financial security and socioeconomic mobility that access to higher education is supposed to confer.¹⁰¹ The lower benefit of the investment in higher education reinforces preexisting societal inequality, something policies promoting access to higher education have long aimed to counter.

D. Pursuit of Higher Education Opportunity

There are counternarratives and arguments in favor of promoting fairness in access to higher education opportunity, especially at the state level. In California, for example, concern over out-of-state residents taking spots in the state's prized three-tiered higher education system can work to promote opportunities for in-state applicants, and the population of the state is increasingly diverse in all dimensions. In discussing caps on out-of-state enrollment, lawmakers have noted the importance of having an undergraduate population that resembles the population of the state as a whole. Of course, out-of-state students pay more for their education in the state, so efforts to shape who is enrolled should take into account the fiscal consequences. Another, concrete policy step is a shift away from so-called merit aid and toward need-based aid. Both of these steps are possible at the state level, perhaps relying

99 Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 TUL. L. REV. 1, 6 (2021).

100 Dalié Jiménez and Jonathan D. Glater, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 136-137 (2020).

101 Rachel F. Moran, *Diversity's Distractions Revisited: The Case of Latinx in Higher Education*, 73 S.C. L. REV. 579, 614 (2022).

on state constitutional provisions.¹⁰²

However, there is no model of a fair admissions regime to be derived from past practices. Although the implication of the Plaintiffs' argument is that but for consideration of race, admissions regimes at selective colleges and universities are inoffensive, the status quo ante—prior to adoption of any form of race-based affirmative action—was race-based exclusion; we have no ideal to serve as a benchmark for assessing whether any particular admissions regime is more or less fair.¹⁰³ There is no ready allocation system to apply to the precious resource that is elite higher education. Conversations about whom to prioritize and how are inevitably fraught, and yet such a difficult political process might be the necessary step to move past a paradigm that perpetuates exclusion and inequality. Determining how to allocate the educational experience offered by selective institutions of higher education requires first some discussion of the purposes that these colleges and universities should serve; but that question is beyond the scope of this article.

V. CONCLUSION

This article has argued that the courts that heard the challenge to consideration of race in admissions at Harvard College and the University of North Carolina failed to consider a key aspect of the Plaintiffs' claim: that the practice complained of caused the injury they alleged. Such analysis is called for under established doctrine to verify standing or the right to proceed with a lawsuit. The omission, which may prove to have muddled that doctrine, enabled the Supreme Court to reach the merits of the cases against the two institutions of higher education and strike down their affirmative action policies as unconstitutional. This elision of causation means that the possibility persists of discrimination against Asian American applicants to Harvard, notwithstanding the termination of policies intended to promote access to the college for members of historically groups. The Court's opinion suggests continued hostility to efforts to promote racial equity and little concern for precedent. For advocates of racial equity in higher education, paths around the courts may hold the best opportunities, until the composition of the Court changes.

102 Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 854–55 (2022).

103 In other work, I have suggested that if we accept an equal distribution of ability and intellect across racial lines, then a fair selection regime should produce admitted classes that resemble the applicant pool. Jonathan D. Glater, *Pandemic Possibilities: Rethinking Measures of Merit*, 69 UCLA L. REV. DISC. 48, 71 (2021).