

NOTES

Ensuring Diversity: How to Retain Affirmative Action in Higher Education in a Post-SFFA Landscape

GABRIELLE ARMSTRONG\*

ABSTRACT

*The United States was built on slavery and racial injustice. The systemic racism rooted in the nation's founding continues to prevent Black people from accessing the same advantages as white people, namely in the realms of housing, health, education, and employment. Affirmative action in higher education presents an avenue that may help erase systemic bias by giving certain minorities an edge in college admissions. However, the 2023 Supreme Court decision Students for Fair Admissions, Inc. v. President & Fellows of Harvard College threatens the ability of higher education institutions to use racial affirmative action in their admissions. This Article recommends that higher education institutions take the following three steps to maintain racial diversity on their campuses: (1) continue to incorporate race into the admissions process, namely by encouraging applicants to describe how their lived experiences, including experiences with discrimination or exclusion, shaped their character and leadership; (2) expand socioeconomic-based admissions considerations to address persistent barriers associated with poverty, neighborhood segregation, under-resourced schools, and first-generation status; and (3) end admissions preferences unrelated to individual merit or access, such as legacy preferences, which may undermine institutional commitments to opportunity and fairness.*

TABLE OF CONTENTS

INTRODUCTION . . . . . 60

I. THE PATH AFFIRMATIVE ACTION HAS TAKEN IN HIGHER EDUCATION . . 63

    A. Regents of University of California v. Bakke . . . . . 65

    B. Grutter v. Bollinger . . . . . 66

II. THE IMPACT OF THE SFFA DECISION . . . . . 68

    A. The SFFA Decision . . . . . 69

\* Gabrielle Armstrong is a Texas A&M School of Law 2025 graduate and currently works as a North Carolina Workers' Compensation Associate at MGC Law. This Paper is dedicated to Professor Susan Ayres for her guidance and for inspiring me to write about things that matter. © 2026, Gabrielle Armstrong.

B. *Why Higher Education Institutions Should Continue to Use Affirmative Action.* . . . . . 72

III. HOW HIGHER EDUCATION INSTITUTIONS CAN CONTINUE TO ENSURE RACIAL DIVERSITY. . . . . 76

A. *Incorporate Race into Admissions Processes Wherever Possible* . . . . 77

B. *Employ Class-Based Affirmative Action.* . . . . 82

C. *End Legacy Admissions* . . . . . 84

CONCLUSION. . . . . 86

INTRODUCTION

Even after the abolition of slavery and the adoption of the Thirteenth and Fourteenth Amendments, American courts were slow to recognize and remedy racial injustice, frequently upholding legal regimes and facially neutral structures that entrenched racial hierarchy well into the modern era. Black people were originally disenfranchised through slavery, lack of citizenship, and the inability to vote, and today are still affected by discrepancies in education,<sup>1</sup> wealth,<sup>2</sup> and opportunity.<sup>3</sup> Starting with the adoption of the Reconstruction Amendments in the late 1800s,<sup>4</sup> the federal government has slowly passed initiatives meant to provide equality, such as the signing of Executive Order 10925, providing equal employment opportunities, and Executive Order 11246, allowing affirmative action in federal hiring.<sup>5</sup> Similarly, the Supreme Court has slowly passed down decisions aiming to equalize opportunity and prevent discrimination, as it did in 1944 with *Smith v. Allwright*,<sup>6</sup> in 1954 with *Brown v. Board of Education*,<sup>7</sup> and in 1964 with *Heart of Atlanta Motel, Inc. v. United States*.<sup>8</sup> However, despite remaining gaps in racial equality, any

1. See LEGAL DEF. FUND, AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE RACIAL JUSTICE LANDSCAPE AFTER THE *SFFA* CASES 26 (2023), [https://www.naacpldf.org/wp-content/uploads/2023\\_09\\_29-Report.pdf](https://www.naacpldf.org/wp-content/uploads/2023_09_29-Report.pdf) [<https://perma.cc/645X-6PMB>].

2. Malik Edwards & William A. Darity, *Why Color-Blind Solutions Won't Solve the Racial Wealth Gap: How We Can Overcome the Constitutional Hurdles to Race Conscious Remedies in Addressing the Wealth Gap*, 110 KY. L.J. 769, 773 (2022) (“[R]econstruction was unsuccessful.”); see *infra* Sections IV.B–C.

3. Nancy Zisk, *Students for Fair Admissions v. Harvard: How the United States Supreme Court Reinforced Barriers to Equal Protection While Leaving Open the Possibility of Breaking Down Those Barriers*, 24 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 4–9 (2024).

4. U.S. CONST. amend. XIII, XIV, XV.

5. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961); Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965); see LEGAL DEF. FUND, *supra* note 1, at 9.

6. *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that voting in primary elections must be open to voters of all races).

7. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954) (holding that state-mandated school segregation violates the Equal Protection Clause).

8. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that Title II of the Civil Rights Act of 1964, which prohibited hotels from discriminating against Black guests, was an acceptable exercise of power under the Commerce Clause by Congress).

further efforts to create a more even playing field have been highly scrutinized.<sup>9</sup> Any laws hoping to aid previously disenfranchised groups are now made stricter and narrower, and are often required to ignore the issue of race entirely.<sup>10</sup>

These limitations are exactly what has occurred to affirmative action with the recent Supreme Court ruling in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*.<sup>11</sup> Equal opportunity in education has been a long-standing issue, and, despite handing down plans to implement school desegregation in 1955,<sup>12</sup> the Court could do little to position Black Americans to have the same chance at accessing higher education as their white peers. Although *Brown II* required desegregation to be implemented “with all deliberate speed,”<sup>13</sup> segregation continued for years through racial assignment policies and Jim Crow laws.<sup>14</sup> While historical events such as the Civil Rights Movement, the passing of the Higher Education Act of 1965, and the assassination of Dr. Martin Luther King Jr. in 1968 encouraged many Black students to benefit from higher education,<sup>15</sup> history was already stacked against them.

Affirmative action works to offset decades of exclusion by looking at characteristics of a candidate, such as race and class, to provide opportunities to those who have been historically disadvantaged.<sup>16</sup> While disadvantaged groups may include many racial minorities, such as Latinx people, Native Americans, and Asian Americans,

9. “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.” Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. COLL. UNIV. L. 239, 245 (2023). As one report notes, “decades of litigation rendered a watered-down affirmative action into a barely recognizable descendant of the robust programs of the 1960s and 1970s.” LEGAL DEF. FUND, *supra* note 1, at 12.

10. Edwards & Darity, *supra* note 2, at 774 (noting that, despite the long-term goals of Reconstruction, “the Court has taken steps that would lead us to believe that attempts to address [racial inequality] would be found unconstitutional”); see also Chris Chambers Goodman & Natalie Antounian, *Dismantling the Master’s House: Establishing a New Compelling Interest in Remedying Systemic Discrimination*, 73 HASTINGS L.J. 437, 442-43 (2022) (describing how strict scrutiny requires that even federal programs enacted for a benign purpose must meet a two-prong test of a compelling governmental interest and narrowly tailored means to accomplish it); Olatunde C.A. Johnson, *The Remedial Rationale After SFFA*, 54 SETON HALL L. REV. 1279, 1284-85 (2024) (noting that, “[e]ven when recognizing the problem of racial discrimination, the court has been slow to activate remedies, has read its remedial power narrowly, and has pulled back on remedies even when they have not been fully implemented”).

11. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023).

12. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

13. *Id.* at 301.

14. See, e.g., Nikole Hannah-Jones, *It Was Never About Busing*, N.Y. TIMES (July 12, 2019), <https://www.nytimes.com/2019/07/12/opinion/sunday/it-was-never-about-busing.html> [<https://perma.cc/M4C9-K9XA>] (discussing how segregationists used racial assignment policies, busing, and other methods to subvert school desegregation).

15. LEGAL DEF. FUND, *supra* note 1, at 9 (After the assassination of Dr. Martin Luther King, Jr. in 1968, the attendance of Black students at higher education institutions doubled between 1970 and 1980.).

16. “In contrast to negative action, ‘affirmative action’ refers to ‘the use of policies, legislation, programs, and procedures to improve the educational or employment opportunities of members of certain demographic groups (such as minority groups, women, and older people) as a remedy to the effects of long-standing discrimination against such groups.” Vinay Harpalani, *Bait-and-Switch: How Asian Americans Were Weaponized to Dismantle Affirmative Action*, 71 DRAKE L. REV. 324, 329 (2024). The origin of the term “affirmative action” comes from Kennedy’s Executive Order 10925, requiring government contractors “take affirmative

this Paper will primarily focus on affirmative action as it applies to Black people due to the complex history of slavery and Black people's treatment in America. For decades, Black Americans specifically were systematically disadvantaged and excluded from politics, education, employment, and other opportunities.<sup>17</sup> While the passing of the Fourteenth Amendment in 1866 and the *Brown* decision in 1954 were crucial steps toward remedying this discrimination, there is still much societal work to be done, as racial disparities persist in education.<sup>18</sup> Hundreds of years of disadvantage cannot be undone in a moment, or even years, without decades of fighting to undo the inequality already entrenched in American institutions.<sup>19</sup>

Affirmative action can help undo inequality by allowing marginalized groups such as Black people into spaces of opportunity like higher education.<sup>20</sup> By encouraging more people from marginalized groups to attend higher education institutions, we create diversified classrooms containing varied perspectives, which is essential in creating citizens who are properly equipped to live in a diverse world.<sup>21</sup> Additionally, higher education is often the key to better lives for many young people.<sup>22</sup> Many Black people are trapped in generational poverty, with "Black families . . . over 16 times more likely than white families to experience three generations of poverty."<sup>23</sup> This cycle of poverty requires concentrated efforts to remedy,<sup>24</sup> but ensuring Black

---

action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." Exec. Order No. 10,925, *supra* note 5, at 1977.

17. Zisk, *supra* note 3, at 4-7 (describing structural racism as a "societal web of social, economic, and governmental practices, systems, and policies, that advantages people classified as white and disadvantages those classified as people of color").

18. See, e.g., FRANK HARRIS III & TINA M. KING, ENSURING COLLEGE ACCESS AND SUCCESS FOR BLACK STUDENTS IN HIGHER EDUCATION 10 (2025), [https://collegecampaign.org/wp-content/uploads/2025/04/2025\\_EIABlackStudents\\_FINAL\\_small.pdf](https://collegecampaign.org/wp-content/uploads/2025/04/2025_EIABlackStudents_FINAL_small.pdf) [<https://perma.cc/9QUL-D7WF>] (suggesting that "Black high school students are not supported to graduate at the national average rate," having the second lowest high school graduation rate by race in 2019-2020). Further, "[s]ince fall 2019, Black students' enrollment in postsecondary education has steadily declined by 8.4%, a rate slightly higher than the 6.3% decline for all racial/ethnic groups during the same time frame." *Id.* at 11.

19. "Racism remains one of the most powerful forces in American society—a phenomenon that shapes all corners of our public and private lives." Feingold, *supra* note 9, at 244; see also Edwards & Darity, *supra* note 2, at 770 (establishing how a history of racial discrimination has resulted in a racial wealth gap that the United States government should take accountability for); Goodman & Antounian, *supra* note 10, at 458 (describing how minority populations are systemically underrepresented in educational resources, employment, and other economic opportunities, resulting in "lower standards of living, higher vulnerability to crime, poorer health, and shorter life expectancies").

20. LEGAL DEF. FUND, *supra* note 1, at 9; see Goodman & Antounian, *supra* note 10, at 459-60.

21. "Many schools, as well as the courts, recognize that diversity exposes students to new ideas and ways of thinking, prepares them to live and work with one another in a diverse society, and increases understanding and respect across differences." LEGAL DEF. FUND, *supra* note 1, at 25; see also *infra* note 166 and accompanying text (discussing the impact that having diverse faculty in university classrooms can have on students).

22. See Edwards & Darity, *supra* note 2, at 787; see also Zisk, *supra* note 3, at 8-9 (detailing the effects of unequal education on Black children and how it relates to access to higher education).

23. SCOTT WINSHIP ET AL., LONG SHADOWS: THE BLACK-WHITE GAP IN MULTIGENERATIONAL POVERTY 1 (2021), [https://www.brookings.edu/wp-content/uploads/2021/06/Long-Shadows\\_Final.pdf](https://www.brookings.edu/wp-content/uploads/2021/06/Long-Shadows_Final.pdf) [<https://perma.cc/RLU8-J4JC>].

24. For the relationship between race and generational poverty, especially regarding property and housing, see Dalton Conley, *Getting into the Black: Race, Wealth, and Public Policy*, 114 POL. SCI. Q. 595 (2000). Notably, Conley remarks that "if wealth differences could be rectified by providing equal access in housing

people have access to higher education is an effective and promising way to begin remedying racial injustice.<sup>25</sup> Higher education is a key solution because an advanced degree is associated with higher-paying job opportunities and more stable employment,<sup>26</sup> which can result in a meaningful reduction of poverty rates.<sup>27</sup>

Given education's essential role in addressing racial injustice, affirmative action in higher education is crucial, and activists must find a way to continue ensuring racial diversity in their classes after the *SFFA* ruling.<sup>28</sup> Thus, this Paper will review how to ensure diverse admissions at higher education institutions post-*SFFA*. Part II will explore the background of affirmative action in higher education institutions in America, focusing on the cases *Regents of University of California v. Bakke* and *Grutter v. Bollinger*. Part III will analyze the *SFFA* decision and how it affects the affirmative action landscape. Part III will also argue that diverse academic classes are important to ensure varying perspectives, make education accessible to all groups of people, and remedy social harms and disparities. Part IV will propose solutions to ensure that future academic classes are racially diverse in a landscape that can no longer use race-based affirmative action. It is critical that higher education institutions continue to institute policies that ensure racial diversity through solutions that remain constitutional after *SFFA*. These policies include (1) continuing to incorporate race into the admissions process, namely by encouraging applicants to describe how their lived experiences, including experiences with discrimination or exclusion, shaped their character and leadership; (2) expanding socioeconomic-based admissions considerations to address persistent barriers associated with poverty, neighborhood segregation, under-resourced schools, and first-generation status; and (3) ending admissions preferences unrelated to individual merit or access, such as legacy preferences, which may undermine institutional commitments to opportunity and fairness. Implementing these three solutions collectively will help neutralize the effects of *SFFA*.

## I. THE PATH AFFIRMATIVE ACTION HAS TAKEN IN HIGHER EDUCATION

Affirmative action was created in response to the history of racism and chattel slavery in the United States.<sup>29</sup> Since the first enslaved people were brought to America

---

and credit markets, a policy solution would be clear. But class differences that result from the wealth of one's parents are not so easy to redress." *Id.* at 596.

25. See *infra* Sections IV.B-C (discussing the racial wealth gap and how education can help bridge it).

26. Edwards & Darity, *supra* note 2, at 787.

27. Brad J. Hershebin, Melissa S. Kearney & Luke W. Pardue, *College Attainment, Income Inequality, and Economic Security: A Simulation Exercise* 4 (W.E. UpJohn Inst. for Emp. Rsch., Working Paper No. 20-319, 2020), [https://research.upjohn.org/cgi/viewcontent.cgi?article=1338&context=up\\_workingpapers](https://research.upjohn.org/cgi/viewcontent.cgi?article=1338&context=up_workingpapers) [<https://perma.cc/S88P-E92C>]; see *Jobs: The Surest Way to Fight Poverty and Unlock Prosperity*, WORLD BANK, <https://www.worldbank.org/en/news/immersive-story/2025/04/17/jobs-the-surest-way-to-fight-poverty> [<https://perma.cc/VQD4-CJWA>].

28. "Without additional interventions to holistic admissions processes, relying on [socioeconomic status] alone is unlikely to maintain current levels of racial representation, let alone drive greater representation." JEFF STROHL, EMMA NYHOF, CATHERINE MORRIS & GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, PROGRESS INTERRUPTED: EVALUATING A DECADE OF DEMOGRAPHIC CHANGE AT SELECTIVE AND OPEN-ACCESS INSTITUTIONS PRIOR TO THE END OF RACE-CONSCIOUS AFFIRMATIVE ACTION 53 (2024), [https://cew.georgetown.edu/wp-content/uploads/cew-progress\\_interrupted-2024-fr.pdf](https://cew.georgetown.edu/wp-content/uploads/cew-progress_interrupted-2024-fr.pdf) [<https://perma.cc/E7A7-RG47>].

29. Affirmative action originally focused on "stamping out intentional discrimination in government contracting and employment." LEGAL DEF. FUND, *supra* note 1, at 9-10. While education is separate from

and early settlers displaced Indigenous peoples, white Americans have created power structures to gain political control, social capital, and wealth.<sup>30</sup> White Americans dominated federal political institutions throughout much of the nation's early history, with the first African American U.S. Senator, Hiram Revels, not taking office until 1870.<sup>31</sup> Because Black people have historically had less access to political power, they have had less influence on law-making, creating a disparate effect in how the laws affect them.<sup>32</sup> By ensuring Black people are included in more privileged spaces, including higher education, we can begin to dismantle the effects of unjust laws.<sup>33</sup>

As discussed in the Introduction, advanced degrees can help lift families out of poverty, allowing graduates better job opportunities and power in the community.<sup>34</sup> Therefore, ensuring Black people have access to higher education can help offset the socioeconomic disadvantages created by a legal regime rooted in white supremacy.<sup>35</sup> Equal education efforts began with the monumental decision of *Brown v. Board of Education*, which held that education could not be racially segregated and that the Equal Protection Clause protected Black students from discrimination on the basis of race.<sup>36</sup> Affirmative action began to appear after *Brown*, with Presidents John F. Kennedy and Lyndon B. Johnson both signing executive orders in the 1960s designed to require government contractors to "improve recruitment, hiring, and promotion of members of historically marginalized groups and women."<sup>37</sup> Following these developments announced by the executive branch, the Supreme Court was faced with questions

---

employment, the goal of affirmative action has remained the same: to prevent the long-lasting effects of racism and slavery that America began with. *Id.*

30. "Racism permeates much of American history" and perpetuates racial disparities in hiring, income, workplace safety, public health, and more; it determines who the government chooses to help, what food is available where, and which health issues are deserving of attention. Charles J. Reid Jr., *Pandemic of Inequality: An Introduction to Inequality of Race, Wealth, and Class, Equality of Opportunity*, 14 U. ST. THOMAS J.L. & PUB. POL'Y 1, 1-10 (2020). For a personal account, see Kimberly West-Faulcon, *Affirmative Action After SFFA v. Harvard: The Other Defenses*, 74 SYRACUSE L. REV. 1101, 1102-05 (2024). "Like the five or more generations of their American-born parents, grandparents, great-grandparents, and beyond, my parents were born into an America with federal, state, and local laws that treated them as racial inferiors to [w]hite Americans." *Id.* at 1104; see also Zisk, *supra* note 3, at 4 (noting how it was free slave labor that allowed creation of the White House, the Capitol, Harvard, and Yale).

31. U.S. CONST. amend. XV, § 1; Senate Historical Office, *Hiram Revels: First African American Senator*, U.S. SENATE (Feb. 25, 2020), <https://www.senate.gov/artandhistory/senate-stories/First-African-American-Senator.htm> [<https://perma.cc/T97M-PAWZ>].

32. For example, prior to the passing of the Fair Sentencing Act in 2010, possessing five hundred grams of powder cocaine resulted in a five-year sentence whereas one only needed to possess five grams of crack cocaine for the same sentence, which disparately impacted Black communities. Leadership Conference on Civil & Human Rights, *It's Time to End the Racist and Unjustified Sentencing Disparity Between Crack and Powder Cocaine*, JUST. REFORM RES. (Nov. 30, 2021), <https://civilrights.org/blog/its-time-to-end-the-racist-and-unjustified-sentencing-disparity-between-crack-and-powder-cocaine/> [<https://perma.cc/86YT-P6AK>] (explaining that five grams of crack cocaine once triggered a five-year mandatory minimum, whereas 500 grams of powder cocaine did).

33. See Feingold, *supra* note 9, at 244-45.

34. See *supra* notes 22-27 and accompanying text; see also *infra* Sections IV.B-C (discussing the racial wealth gap, how education can help bridge it, and how legacy admissions perpetuate the racial wealth gap).

35. See Edwards & Darity, *supra* note 2, at 787; LEGAL DEF. FUND, *supra* note 1, at 9.

36. *Brown I*, 347 U.S. 483, 494-95 (1954); LEGAL DEF. FUND, *supra* note 1, at 9.

37. LEGAL DEF. FUND, *supra* note 1, at 9-10. Since these applied only to government contractors, these would not apply to even public schools, which are government entities. However, these Executive Orders still

concerning the constitutionality of actions that institutions took to effectuate the demands of affirmative action, leading to the cases of *Regents of University of California v. Bakke* and *Grutter v. Bollinger*.

#### A. *Regents of University of California v. Bakke*

Since the inception of affirmative action programs, the Supreme Court has limited their power. Two cases have determined the limits of affirmative action in higher education: *Regents of University of California v. Bakke* and *Grutter v. Bollinger*.<sup>38</sup> In *Bakke*, a white applicant to the University of California at Davis's (UC Davis) medical school was denied admission twice<sup>39</sup> and sued on account of UC Davis's admissions policy of holding sixteen spots open for a special program. The members of this program did not have to meet the 2.5 GPA cutoff that other candidates did.<sup>40</sup> The Court emphasized that, "[a]lthough disadvantaged whites applied to the special program in large numbers . . . none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only 'disadvantaged' special applicants who were members of one of the designated minority groups."<sup>41</sup> Thus, the special program only benefited minority applicants and functionally operated as a racial quota.<sup>42</sup>

The Court determined that racial quotas or goals that draw lines "on the basis of race and ethnic status" violate the Fourteenth Amendment's Equal Protection Clause<sup>43</sup> because the Clause must be applied equally to everyone and cannot provide protections to one race and not others.<sup>44</sup> Under this holding, even though the Equal Protection Clause was originally meant to benefit Black people, it cannot be used to allow racial quotas giving preference to Black people.<sup>45</sup> The Court noted that any quotas used to correct previous racial harms must be performed by an authorized government body and cannot harm other applicants.<sup>46</sup>

Despite the Court's ruling against UC Davis's use of racial quotas, the Court held that UC Davis's goal of attaining a diverse student body for the purpose of academic freedom in higher education was constitutional.<sup>47</sup> Academic freedom, the Court stated,

---

shape the landscape of affirmative action and signal the cultural climate surrounding race relations and remedial measures. *See id.*

38. *Id.*

39. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 276-77 (1978).

40. *Id.*

41. *Id.* at 276.

42. *Id.* at 279.

43. *Id.* at 289-91; *see Zisk, supra* note 3, at 10 ("Justice Powell agreed that the medical school's setting aside sixteen seats for applicants of color violates the Fourteenth Amendment . . .").

44. *Bakke*, 438 U.S. at 289-90.

45. *Id.* at 291-93; *see also West-Faulcon, supra* note 30, at 1113-14 ("In *Bakke*, Justice Powell's opinion announcing the judgment of the Court rejected the means of the more strongly race-conscious racial 'quota' through a separate special admissions program at the UC Davis Medical School.").

46. *Bakke*, 438 U.S. at 308-10.

47. *Id.* at 311-13; *see also West-Faulcon, supra* note 30, at 1116-19 (detailing other contexts in which this reasoning has been permitted); Goodman & Antounian, *supra* note 10, at 446 (listing language and reasoning used by the Court establishing non-remedial diversity interests in higher education as compelling); Zisk, *supra* note 3, at 10 (noting that "[t]he one principle the Court did agree on was that a 'State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin'" (quoting *Bakke*, 438 U.S. at 320 (Powell, J., plurality opinion))); Robert

was necessary because the “nation’s future depends upon leaders trained through wide exposure” to the ideas and beliefs of many different types of people.<sup>48</sup> Regardless of its goals, UC Davis’s admissions process was invalidated for not considering each applicant as an individual person.<sup>49</sup> It should be noted, however, that the *Bakke* decision was a plurality in which every Justice wrote separate opinions, which further confused higher education institutions on what law was controlling.<sup>50</sup>

### B. *Grutter v. Bollinger*

Similarly, *Grutter v. Bollinger* considered the admissions process of the University of Michigan Law School (U-M).<sup>51</sup> U-M’s admissions process also strove to prioritize the inclusion of “African-Americans, Hispanics, and Native Americans.”<sup>52</sup> Petitioner Barbara Grutter, a white student denied admission to U-M, claimed her Fourteenth Amendment rights were violated and that she was discriminated against through U-M’s admissions process.<sup>53</sup> She based this claim on the fact that U-M “use[d] race as a ‘predominant’ factor” in their admissions, which gave applicants from certain minority groups “a significantly greater chance of admission than students with similar credentials from disfavored racial groups.”<sup>54</sup>

Although U-M did not use a racial quota by reserving a certain number of spots for minority applicants as UC Davis had in *Bakke*,<sup>55</sup> U-M did *sometimes* consider race as a “determinative factor” in a student’s profile.<sup>56</sup> Because this process was individualized, however, and race was only viewed as *one* factor of many, the Court upheld U-M’s admissions process.<sup>57</sup> Compared to UC Davis, U-M looked at race more holistically, considering it in the context of factors such as travel, overcoming

A. Garda, Students for Fair Admissions *Through the Lens of Interest-Convergence Theory: Reality, Perception, and Fear*, 77 SMU L. REV. 93, 100-02 (2024) (discussing Justice Powell’s explanation for why diversity in higher education is a compelling government interest).

48. *Bakke*, 438 U.S. at 313-14. “This resulted in diversity becoming the compelling state interest in affirmative action in the education context as opposed to historical discrimination.” Edwards & Darity, *supra* note 2, at 776.

49. *Bakke*, 438 U.S. at 320.

50. Justice Powell announced the judgment of the Court and filed an opinion with Justices Brennan, White, Marshall, and Blackmun partially joining. *Id.* at 267. Justices Brennan, White, Marshall, and Blackmun filed an opinion concurring in the judgment in part and dissenting in part, with Justices White, Marshall, and Blackmun also filing separate opinions. *Id.* at 267-68. Justice Stevens filed an opinion concurring in the judgment in part and dissenting in part, which Chief Justice Burger and Justices Stewart and Rehnquist joined. *Id.* “The plurality opinion in *Bakke* resulted in [a] clear split as to how race-conscious remedies should be used in the remedial context.” Edwards & Darity, *supra* note 2, at 775.

51. *Grutter v. Bollinger*, 539 U.S. 306, 311-12 (2003); *see also* West-Faulcon, *supra* note 30, at 1119 (noting how U-M was successful in using the diversity defense for its law school but not undergraduate admissions in *Grutter*); Harpalani, *supra* note 16, at 330-31 (comparing the responses of the Court to U-M’s undergraduate and law school admission policies).

52. *Grutter*, 539 U.S. at 316.

53. *Id.* at 316-17; *see also* Garda, *supra* note 47, at 102 (describing briefly the background of the *Grutter* case).

54. *Grutter*, 539 U.S. at 317.

55. *Id.* at 318.

56. *Id.* at 319; *see also* Harpalani, *supra* note 16, at 330 (stating that U-M “assessed race flexibly as one factor of many in each individual’s application”); Zisk, *supra* note 3, at 11-12 (describing how U-M considered race in their law school admissions process).

57. *Grutter*, 539 U.S. at 343.

hardship, and multilingualism.<sup>58</sup> U-M also considered implementing race-neutral methods into its admissions process, such as lottery systems or “decreasing the emphasis [on test scores] for *all* applicants.”<sup>59</sup> Overall, although U-M’s admissions process considered race as a plus factor for individuals, the process was sufficiently individualized and avoided running afoul of the Court’s requirement that non-minority applicants not be harmed.<sup>60</sup>

The Supreme Court also held in *Grutter* that affirmative action in higher education institutions must be “limited in time,” thereby assuring the nation that affirmative action is only a temporary means to remedy past harms.<sup>61</sup> Most explicitly, the Court wrote that it expected that, in twenty-five years’ time, affirmative action in higher education institutions would no longer be necessary.<sup>62</sup> Given that *Grutter* was written in 2003, this means the Court expected that higher education institutions would no longer need affirmative action by 2028. Yet in 2025, Black Americans are still underrepresented in higher education institutions.<sup>63</sup> Hindsight demonstrates that the Supreme Court’s expectation was unrealistic. Notwithstanding the restraints on achieving racial diversity via affirmative action, it is important that higher education institutions still consider racial diversity in their incoming classes.<sup>64</sup>

U-M’s reasoning for considering race as a factor paralleled UC Davis’s in *Bakke* in that it was “to enhance classroom discussion and the educational experience both inside and outside the classroom.”<sup>65</sup> Similarly, the Court in both cases determined that the correct standard for racial classifications was strict scrutiny, which requires

58. *Id.* at 338.

59. *Id.* at 340.

60. *Id.* at 341; *see also* Harpalani, *supra* note 16, at 330 (describing how *Grutter* upheld U-M’s admission process).

61. *Grutter*, 539 U.S. at 343; *see also* Harpalani, *supra* note 16, at 331 (noting how the Court expressed the need to restrict race-conscious admissions policies by making them time-limited).

62. *Grutter*, 539 U.S. at 343. O’Connor wrote this for the majority opinion in which Stevens, Souter, Ginsburg, and Breyer joined; Scalia and Thomas concurred in part and dissented in part; and Rehnquist and Kennedy each dissented. *Id.* at 310; *see also* Harpalani, *supra* note 16, at 331 (discussing O’Connor’s majority opinion stating that by 2028, race-conscious policies would no longer be necessary); Garda, *supra* note 47, at 115 (describing how the Court justified limiting affirmative action by length of time and how the need for it would eventually be eliminated).

63. Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Mar. 17, 2025), <https://educationdata.org/college-enrollment-statistics> [<https://perma.cc/78WB-GBXY>]; *see also* West-Faulcon, *supra* note 30, at 1166-68 (documenting with statistics how attacks on affirmative action have had a negative impact of minority attendance at California state universities); Mark J. Drozdowski, *Declining Diversity at Top Colleges: What’s Going On?*, BEST COLLS. (Sept. 14, 2024), <https://www.bestcolleges.com/declining-diversity-at-top-colleges-whats-going-on/> [<https://perma.cc/MMJ7-9YWG>] (compiling data from top universities such as MIT, Brown, Penn, and Harvard showing that the Class of 2028 is markedly less diverse than previous classes); STROHL, NYHOF, & MORRIS, *supra* note 28, at 24 (describing how the number of white students in universities still far surpasses their share of the population and that Black students are still underrepresented at universities).

64. Regarding law schools, “[w]ithout race-conscious admissions policies, some scholars have suggested that more than 78% of African American applicants will be rejected from every law school to which they apply.” Nathan L. Bennett Fleming, *After Affirmative Action: Contextual Admissions and the Future of African American Law School Enrollment*, 76 OKLA. L. REV. 629, 638 (2024).

65. *Grutter*, 539 U.S. at 319; *see also* Zisk, *supra* note 3, at 12 (discussing U-M’s policy goals of producing diverse and academically outstanding graduates). Compare to the Court’s similar statement in *Bakke* that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978).

the interest of diversity to be “compelling” and the admissions process to be “narrowly tailored.”<sup>66</sup> Here, the Court held that diversity in higher educational settings is a compelling interest because it permits cross-racial understanding, combats stereotyping, encourages spirited discussion, and prepares students for the workforce.<sup>67</sup> In contrast, racial quotas do not meet the Court’s narrowly tailored requirement because they “insulate each category of applicants with certain desired qualifications from competition with all other applicants.”<sup>68</sup> Therefore, racial quotas may not be used to achieve diversity in education, even though diversity in education is recognized as a compelling interest.<sup>69</sup>

*Bakke* and *Grutter* set affirmative action in higher education on its current trajectory.<sup>70</sup> While diversity in higher education was accepted as a compelling reason to employ race as a factor in admissions decisions, it could not be achieved through quotas, and universities were required to consider each applicant as an individual to comply with the Fourteenth Amendment.<sup>71</sup>

## II. THE IMPACT OF THE *SFFA* DECISION

The latest Supreme Court case on affirmative action, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, has impacted the course of affirmative action in higher education institutions in America, but not as drastically as some sources have lamented.<sup>72</sup> Although the Court decided that race cannot be considered

66. *Grutter*, 539 U.S. at 326; see also West-Faulcon, *supra* note 30, at 1112 (identifying the strict scrutiny means-end test as the one the Court applied both before and after *SFFA*); Feingold, *supra* note 9, at 267, 271 (explaining that Harvard and UNC had to overcome strict scrutiny because their admissions process used racial classifications); Fleming, *supra* note 64, at 637 (describing when strict scrutiny must be applied to admissions criteria affecting the racial outcome of the admitted class); Zisk, *supra* note 3, at 19 (referencing the applicability and purpose of the strict scrutiny standard in *Grutter*, *Fisher*, and *SFFA*).

67. *Grutter*, 539 U.S. at 330.

68. *Id.* at 334 (quoting *Bakke*, 438 U.S. at 315).

69. *Id.*

70. A third case often cited as being instrumental in affirmative action law is *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297 (2013), and its follow-up decision, *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365 (2016). The Court held that race may be considered among other factors so long as the admissions program did so in a way that was “narrowly tailored.” *Fisher II*, 579 U.S. at 377-88; see *Fisher I*, 570 U.S. at 297-99, 308-10; see also LEGAL DEF. FUND, *supra* note 1, at 10-12 (describing how *Fisher I* and *Fisher II* allowed undergraduate institutions to consider race in admissions and discussed the model minority myth); West-Faulcon, *supra* note 30, at 1114, 1119 (noting that the “weakly race-conscious” admissions process in *Fisher II* was ruled constitutional); Harpalani, *supra* note 16, at 331 (mentioning that *Fisher I* contemplated the definition of “critical mass” of diverse students); Goodman & Antounian, *supra* note 10, at 447, 450-51, 467 (discussing the higher burden required in *Fisher II* and the fact that Justices Sotomayor and Breyer argued intermediate scrutiny should apply in *Fisher I*); Zisk, *supra* note 3, at 13-16 (detailing how *Fisher I* and *Fisher II* gave more deference to school admissions decisions); Garda, *supra* note 47, at 105-06 (drawing distinctions between the earlier *Bakke* and *Grutter* cases and the later *Fisher* cases in that the *Fisher* cases noted a minority benefit from diversity and discussed the specific interest of Asian Americans).

71. *Grutter*, 539 U.S. at 334.

72. See, e.g., Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023, at 19:52 ET), <https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision> [<https://perma.cc/GZB4-ZGZ7>]. “[*SFFA*] signaled the end of affirmative action in higher education.” Fleming, *supra* note 64, at 629. “The *SFFA* Court, without saying so expressly, definitively ended affirmative action in University admissions.” Garda, *supra* note 47, at 112. The Legal Defense Fund also reports that “the Supreme Court has upended almost five decades of precedent.” LEGAL DEF. FUND, *THE SUPREME COURT’S AFFIRMATIVE ACTION DECISION: WHAT YOU NEED TO KNOW: SFFA V. HARVARD II SFFA V. UNC 2*, <https://www.naacpldf.org/wp-content/uploads/Affirmative-Action-What-You-Need-To-Know-2023-06-1.pdf> [<https://perma.cc/Q5BS-T9SQ>]. However, other scholars note that

in admissions by itself, the decision left open avenues for race to be considered holistically as part of the admissions process, namely as it relates to background, character, adversity, culture, and experiences.<sup>73</sup>

### A. The SFFA Decision

The question posed in *SFFA* was whether institutions of higher education may consider race as a factor in admissions decisions consistent with the Equal Protection Clause and, where applicable, Title VI.<sup>74</sup> In the Harvard admissions process, applicants were scored in categories for “academics, extracurriculars, athletics, school support, personal, and overall.”<sup>75</sup> The “overall” category allowed first reviewers to consider the applicant’s race in their score.<sup>76</sup> The results of these first reviews were then analyzed by regional admissions subcommittees, which convened for three to five days and made acceptance recommendations to the main admissions committee, colloquially called the “full committee.”<sup>77</sup> The forty-member full committee discussed these recommendations and was permitted to consider each applicant’s race in order to prevent a “dramatic drop-off in minority admissions from the prior class.”<sup>78</sup> Lastly, after the class was selected, the racial composition was discussed, and the final class was selected by dropping students in a process called “the lop.”<sup>79</sup> The lop again considered race in addition to legacy status, recruited athlete status, and financial aid eligibility.<sup>80</sup> At this stage, “race [was] a determinative tip for a significant percentage of all admitted African American and Hispanic applicants.”<sup>81</sup>

Similar to Harvard’s process, the UNC admissions process allowed reviewers to add a “plus,” or an overall bonus point, to an applicant’s profile for being an underrepresented minority.<sup>82</sup> Admissions committee members who reviewed initial recommendations also

---

*SFFA* “maintains . . . the diversity defense for race affirmative action recognized by the *Bakke-Grutter-Fisher* precedent for the past four decades.” West-Faulcon, *supra* note 30, at 1108, 1120-22; *see also* Feingold, *supra* note 9, at 241, 249 (noting that many universities have already had to modify race-related policies and that the *SFFA* opinion is “surprisingly narrow,” leaving many tools open for universities to use); Zisk, *supra* note 3, at 17 (“It is important to note that the [C]ourt did not explicitly overrule *Grutter* or *Fisher*, leaving open the possibility for race-conscious actions to comport with equal protection.”).

73. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 230-31 (2023).

74. *Id.* at 190-91; *see also* Fleming, *supra* note 64, at 676 (discussing the Court’s main holding that the admissions programs violated the Equal Protection Clause); Garda, *supra* note 47, at 95 (noting the *SFFA* case “involved challenges to the race-conscious admission policies at the University of North Carolina under the Equal Protection Clause and at Harvard University under Title VI of the Civil Rights Act of 1964”).

75. *SFFA*, 600 U.S. at 194; *see also* Fleming, *supra* note 64, at 671-72 (explaining the four categories Harvard initially used for its admissions process).

76. *SFFA*, 600 U.S. at 194.

77. *Id.*

78. *Id.*

79. *Id.* at 195.

80. *Id.*; *see also* LEGAL DEF. FUND, *supra* note 1, at 14 (listing many of the different factors Harvard considered in the admissions process); Fleming, *supra* note 64, at 673 (describing the process Harvard used to determine admission, including how information about race was used).

81. *SFFA*, 600 U.S. at 195 (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F.Supp.3d 126, 178 (D. Mass. 2019)).

82. *Id.* at 196; *see also* LEGAL DEF. FUND, *supra* note 1, at 16 (discussing the over 40 criteria considered in the UNC admissions process and “plus” factor for race); Fleming, *supra* note 64, at 674-75 (describing the process UNC used to determine admissions, including the eight major areas candidate criteria was organized into).

considered race, giving applicants who were not white or Asian American a plus.<sup>83</sup> UNC's consideration of Asian Americans as not minorities in need of favor in admissions is significant because some of the individuals the plaintiff represented were Asian American students who were rejected from Harvard and Asian American high schoolers intending to apply to Harvard plus their parents.<sup>84</sup> Thus, part of the original complaint was that Harvard's admissions reviewers discriminated against Asian Americans, which was reflected in UNC's failure to give Asian Americans favor in admissions.<sup>85</sup>

The entity bringing suit, Students for Fair Admissions, is a non-profit focused on eliminating race and ethnicity from university admissions.<sup>86</sup> Students for Fair Admissions argued that UNC and Harvard's admissions processes violated both the Fourteenth Amendment's Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>87</sup> The *SFFA* decision noted that the Fourteenth Amendment was passed in the wake of the Civil War,<sup>88</sup> and that the "core purpose" of the Equal Protection Clause was to "do away with all governmentally imposed discrimination based on race."<sup>89</sup> While this aim took a while to be embraced,<sup>90</sup> the Court listed only two reasons for government race-based discrimination that are compelling enough to pass strict scrutiny: (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" and (2) "avoiding imminent and serious risks to human safety in prisons."<sup>91</sup> So long as these interests are narrowly tailored, they satisfy strict scrutiny.<sup>92</sup>

The Court in *SFFA* focused on the Fourteenth Amendment and declared that both Harvard and UNC's admissions processes did not comply with the Equal Protection Clause.<sup>93</sup> The Court reasoned that admissions processes must "comply with strict scrutiny . . . [must] never use race as a stereotype or negative, and—at some point—

83. *SFFA*, 600 U.S. at 196-97; see also LEGAL DEF. FUND, *supra* note 1, at 16 ("SFFA alleged that UNC impermissibly used race as more than a 'plus' factor . . ."); Fleming, *supra* note 64, at 674-75 (describing the several factors UNC used in applicant evaluations, including personal qualities).

84. Harpalani, *supra* note 16, at 332.

85. *Id.* at 334. Harvard officials characterized Asian American applicants as "being quiet/shy, science/math oriented, and hard workers" or "extraordinarily gifted in math with the opposite extreme in English." Complaint at ¶¶ 246-48, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F.Supp.3d 126 (D. Mass. 2019) (No. 14-cv-14176), 2014 WL 6241935.

86. *About*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> [<https://perma.cc/QD99-WJKN>] (last visited Dec. 30, 2025); see also West-Faulcon, *supra* note 30, at 1132-33 (characterizing SFFA's goal as "institut[ing] an unprecedented rule that inclusion-motivated attention to race is automatically illegal under any circumstance without any case-by-case determination").

87. *SFFA*, 600 U.S. at 198. Since UNC is a public state school, SFFA was able to sue them under the Fourteenth Amendment, which applies to federal actions. West-Faulcon, *supra* note 30, at 1109. However, SFFA sued both schools for violating the Civil Rights Act, which applies to private action as well. *Id.*

88. *SFFA*, 600 U.S. at 201.

89. *Id.* at 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

90. "Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. . . . By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal." *Id.* at 202-03.

91. *Id.* at 207; see also West-Faulcon, *supra* note 30, at 1125-26 (quoting *SFFA* opinion about examples of "compelling" interests); Zisk, *supra* note 3, at 18 (listing examples of "compelling" interests).

92. *SFFA*, 600 U.S. at 207.

93. *Id.* at 213; see also Fleming, *supra* note 64, at 631 (discussing the holding of *SFFA*); Zisk, *supra* note 3, at 19 ("Applying the strict scrutiny standard to the procedures followed by UNC and Harvard . . . the Court concluded that both plans had 'fallen short.'").

they must end.”<sup>94</sup> In practice, that means a sufficiently concrete and measurable interest as well as means that are narrowly tailored to that interest with a logical endpoint. The interests that Harvard and UNC proffered as motivation for their race-based admissions criteria focused on preparing leaders and graduates, providing diverse training and ideas, and enhancing education and understanding.<sup>95</sup> The Court found the universities’ stated interests immeasurable as framed and insufficiently tied to the operation of their specific policies.<sup>96</sup> Further, it found that Harvard and UNC did not explicitly delineate how their admissions processes aligned with these goals.<sup>97</sup> The Court ultimately ruled that the racial categories used by the schools were arbitrary and inconsistent,<sup>98</sup> violated requirements of never being negative and not employing stereotypes,<sup>99</sup> and had no logical endpoint.<sup>100</sup> The Court also cited an analysis indicating that Harvard’s use of race reduced the number of admitted Asian American applicants by 11.1%, highlighting the admissions process’s impermissible racial balancing that resulted in penalties to certain minorities.<sup>101</sup>

The Court emphasized the zero-sum nature of selective admissions: awarding a preference to one applicant can operate as a penalty to another, which in this case manifests itself as giving preferential treatment to Black students, ultimately leaving less room for white or Asian American students.<sup>102</sup> The Court rejected any admissions bias based on the expectation that applicants will think a certain way because of race, characterizing that as stereotyping.<sup>103</sup> According to the Court, including minority students to create diverse viewpoints is also problematic because it employs the assumption that these minority students will hold expected minority viewpoints.<sup>104</sup> Ultimately, as the Court held in *Bakke* and *Grutter*, schools cannot admit students based on “race for race’s sake.”<sup>105</sup>

As the Court did in *Grutter* with U-M’s admissions process, the Court also took issue with the fact that Harvard and UNC’s admissions processes considering race had no “logical end point.”<sup>106</sup> The Court argued that a “logical end point” was required because the temporariness of racial preference was “the reason the Court

94. *SFFA*, 600 U.S. at 213.

95. *Id.* at 214.

96. *Id.* at 214-15; *see also* Zisk, *supra* note 3, at 18 (noting that the Court found Harvard’s goals to be elusive and unable to be subjected to meaningful judicial review); Garda, *supra* note 47, at 114 (discussing the Court’s opinion on Harvard and UNC’s diversity interests and their insufficient coherency for judicial review).

97. *SFFA*, 600 U.S. at 215; *see also* LEGAL DEF. FUND, *supra* note 1, at 19 (noting that the Court found Harvard and UNC’s racial categories to be imprecise and overbroad); Harpalani, *supra* note 16, at 341 (“[B]y ruling that Harvard’s diversity goals were too vague and not adequately tied to its use of race, it left little or no room for affirmative action.”); Garda, *supra* note 47, at 116 (explaining why the Court held that the schools’ means failed to have a meaningful connection to its goals, which is a standard analysis for strict scrutiny).

98. *SFFA*, 600 U.S. at 216-17.

99. *Id.* at 218; *see* Feingold, *supra* note 9, at 260-61; LEGAL DEF. FUND, *supra* note 1, at 21.

100. *SFFA*, 600 U.S. at 221; *see* LEGAL DEF. FUND, *supra* note 1, at 21.

101. *SFFA*, 600 U.S. at 218.

102. *Id.* at 218-19.

103. *Id.* at 219-20.

104. *Id.* at 219-20; *see* LEGAL DEF. FUND, *supra* note 1, at 21.

105. *SFFA*, 600 U.S. at 219-20.

106. *Id.* at 221; *see* LEGAL DEF. FUND, *supra* note 1, at 21; Garda, *supra* note 47, at 115.

was willing to dispense temporarily with the Constitution's unambiguous guarantee of protection."<sup>107</sup> While Harvard argued, among other items, that the end point should be when "there is 'meaningful representation and meaningful diversity' on college campuses," the Court stated that "'outright racial balancing' is 'patently unconstitutional'" and that this goal would require that race always be relevant to maintain diversity.<sup>108</sup> As noted by the Court, a continuing goal with no clear endpoint would fail strict scrutiny because it would be impossible to determine when the compelling interest had been met.<sup>109</sup>

Ultimately, the Court held that Harvard and UNC's policies (1) were insufficiently measurable, (2) risked operating as negatives for other groups, (3) relied on stereotypes, and (4) lacked a logical endpoint.<sup>110</sup> The Court explained that universities may still consider "an applicant's account of how race has shaped their life experiences, including discrimination or inspiration, insofar as those experiences relate to the applicant's character, goals, or demonstrated qualities."<sup>111</sup> For example, evaluators may credit evidence of perseverance tied to a student's personal experiences with racial discrimination when it demonstrates character or leadership. This means higher education institutions may still consider race, but only through the lens of an applicant's overall non-racialized attributes and the impact their race has had on their lives.

The *SFFA* decision narrows the permissible scope of race-related considerations in admissions, requiring universities to reassess and refine diversity-related policies and practices to ensure compliance with the Equal Protection Clause and Title VI. They may not consider race for its own sake or add points or "plusses" to an applicant's profile based on race.<sup>112</sup> While this may cause some schools to have to revamp their admissions processes, higher education institutions can take active steps to ensure racial diversity in their programs regardless of *SFFA*. Further, *SFFA* still allows admissions teams to consider race in a candidate's larger profile and in essays discussing the candidate's background.

### *B. Why Higher Education Institutions Should Continue to Use Affirmative Action*

While the Supreme Court has affirmed that diversity for the sake of creating better education is a compelling interest,<sup>113</sup> there are other reasons that racial diversity

107. *SFFA*, 600 U.S. at 212.

108. *Id.* at 223.

109. *Id.* at 212, 215-16.

110. *Id.* at 230; see also West-Faulcon, *supra* note 30, at 1127-28 (discussing the reasons UNC and Harvard's admissions processes failed strict scrutiny); Fleming, *supra* note 64, at 676-77 (noting that the programs failed strict scrutiny analysis because their diversity goals were not measurable enough, were not sufficiently connected to admissions policies, involved racial stereotyping, and were not time limited).

111. *SFFA*, 600 U.S. at 230; see also Feingold, *supra* note 9, at 266-67 (discussing how universities may still consider how race or racism has affected a student's life and drawing a distinction between "personal race/ism" and racial classifications); LEGAL DEF. FUND, *supra* note 1, at 21-22 (noting that an individualized consideration of a student's experience with race, culture, or heritage in their application is still permitted); Fleming, *supra* note 64, at 678 (emphasizing that factors that are related to race but race-neutral are distinguishable from treatment based on race); Garda, *supra* note 47, at 117-18 (explaining that admissions officers can consider an applicant's race-related experiences, culture, and heritage, so long as they do not use it to manipulate overall racial composition).

112. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291-93 (1978); *Gutter v. Bollinger*, 539 U.S. 306, 309, 334 (2003); *SFFA*, 600 U.S. at 220.

113. *Bakke*, 438 U.S. at 312-13.

should be prioritized in higher education institutions: namely, remedying systemic racism in America and providing opportunities to Black people that may help them break cycles of generational poverty.<sup>114</sup> One argument in *Bakke* was that admitting more minority students to medical and law schools can create more equal and diverse healthcare and legal aid in the future, providing better care for minority populations at large and improving society as a whole.<sup>115</sup> Other Court-sanctioned justifications for affirmative action in higher education institutions include allowing institutions to remedy their own past discrimination,<sup>116</sup> ensuring compliance with Title VI of the Civil Rights Act and its regulations,<sup>117</sup> and maintaining diversity in military academies, which have distinct interests tied to national security.<sup>118</sup>

It is an unfortunate truth that many higher education institutions need to remedy their own histories of racism.<sup>119</sup> Notably, both the University of North Carolina (UNC) and Harvard University were historically pro-slavery institutions.<sup>120</sup> Harvard enslaved people to serve its presidents, professors, and students,<sup>121</sup> while UNC formally barred Black students from attending its law school until 1955, even after *Brown v. Board of Education* had already been decided.<sup>122</sup> Thus, although the affirmative action programs at both UNC and Harvard ultimately failed to withstand constitutional muster, these programs may have been put in place in part to remediate each institution's own legacy of racial discrimination.<sup>123</sup>

Affirmative action also works to create fair appraisal and combat inherent preferences for white applicants. Because white people have controlled politics in America since its founding,<sup>124</sup> they have established what behavior is acceptable in

114. See *infra* Sections IV.B-C for further discussion on the racial wealth gap and why education can help bridge it.

115. *Bakke*, 438 U.S. at 310.

116. See *infra* notes 119-23 and accompanying text.

117. West-Faulcon, *supra* note 30, at 1156-58. "Title VI prohibits colleges and universities from engaging in intentional disparate treatment racial discrimination against African Americans and other non [w]hite students." *Id.* at 1161. For more on Title VI compliance, see Feingold, *supra* note 9, at 279-82; LEGAL DEF. FUND, *supra* note 1, at 24-25. Feingold also provides justifications of remediation, serving more diverse communities, "more quantifiable diversity," and fair appraisal. Feingold, *supra* note 9, at 249-66.

118. Regarding military academies, the Court noted that, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training." *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

119. Stephen Smith & Kate Ellis, *Shackled Legacy*, APM REPORTS (Sept. 4, 2017), <https://www.apmreports.org/episode/2017/09/04/shackled-legacy> [<https://perma.cc/CY32-XF34>] (documenting that many elite universities were built, run, or funded through slavery, including Harvard, Columbia, Princeton, Yale, and UVA).

120. West-Faulcon, *supra* note 30, at 1151-52.

121. Lydialyle Gibson, *Harvard's Ties to Slavery*, HARV. MAG. (June 6, 2022), <https://www.harvardmagazine.com/2022/06/jhj-harvard-slavery-ties> [<https://perma.cc/Q6GQ-AV2B>].

122. Feingold, *supra* note 9, at 253-55.

123. Unfortunately, this goal was "never well-theorized or utilized beyond the elite higher education context" and the *SFFA* decision "adds very little to the doctrinal scope of the 'remedial rationale.'" Johnson, *supra* note 10, at 1280.

124. See *supra* notes 1-3 and accompanying text.

society.<sup>125</sup> Consequently, in many spaces—including college admissions—white applicants have been better equipped to meet established expectations and criteria.<sup>126</sup> This advantage is reflected in grades and standardized test scores, which remain central determining factors in college admissions decisions.<sup>127</sup> A 2021 study showed that, in one school district, “the average [w]hite student scores 0.6 grade levels above the national average, while the average Black student scores one grade level below average.”<sup>128</sup> This is because standardized test scores and school performance are a result of a student’s wealth, school placement, and family support,<sup>129</sup> which studies have shown are less accessible to Black students on average due to racial inequality in America.<sup>130</sup>

---

125. See *supra* notes 29-32 and accompanying text. One example of this is language. Because white people make up the majority of the educated elite, the English dialect they primarily use—Standard American English (SAE)—is considered “‘better’ or ‘correct’ while other varieties are [perceived as] error-ridden versions of the standard language,” causing them to be stigmatized. The ideology that one standard language is correct (SAE) and others (like AAVE) are not is “closely tied to attitudes about race and ethnicity and have the potential to act as the cover justification for discrimination” against people of other racial or ethnic groups. John Hellermann et al., *Welcoming Historically Under-Represented Groups in Higher Education Through Awareness of Standard English Ideology*, 15 EDUC. SCIS. 1, 2 (2025); see also Alyssa Powell, *The Switch: Understanding the Perception of African American Linguistic Repertoires* 6 (May 9, 2023) (M.A. thesis, The City University of New York) (on file with CUNY Academic Works) (explaining that many AAVE speakers learn early on to adjust their language because if they “continue to use AAVE in settings that require standard English, they may experience mistreatment, setbacks, and difficulties such as not getting a job, not getting into certain levels of higher education, [or] being discriminated against”).

126. One study identifies that “one reason for students dropping out of college or not even enrolling in higher education in the first place may be attitudes (real or perceived) toward the languages and dialects of these (potential) college students.” Hellermann, *supra* note 125, at 1. Ibram X. Kendi has pointed out that “standardized tests arrived right on time, in every period, with new theories and measures to justify racial hierarchy.” Deborah Blum, *Born of Eugenics, Can Standardized Testing Escape Its Past?*, UNDARK (Dec. 14, 2022), <https://race.undark.org/articles/born-of-eugenics-can-standardized-testing-escape-its-past> [<https://perma.cc/QZB6-6WFM>].

127. “Research has shown that students who come to school using languages and linguistic varieties other than SAE do not have the same rate of success as students who do.” Hellermann, *supra* note 125, at 3; see also West-Faulcon, *supra* note 30, at 1138-39 (referencing footnote 43 of the *Bakke* opinion and Justice Powell’s acknowledgement of cultural bias in standardized tests); Feingold, *supra* note 9, at 262 (arguing that “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 [w]hite applicants”).

128. Sean F. Reardon, *What Explains White-Black Differences in Average Test Scores?*, EDUC. OPPORTUNITY PROJECT AT STAN. UNIV. (Sept. 2019), <https://edopportunity.org/discoveries/white-black-differences-scores/> [<https://perma.cc/Q2SG-GLTC>]. An older study shows that, in America, the average Black student scores below 75% of white students on the majority of standardized tests. Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: Why It Persists and What Can Be Done*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/the-black-white-test-score-gap-why-it-persists-and-what-can-be-done/> [<https://perma.cc/M22S-CYXW>].

129. See Blum, *supra* note 126 (reporting that “what standardized tests do an excellent job of measuring, many experts say, is a student’s economic class, as well as the resources available to them, the resources invested in their schools, and even the time and money they’ve been able to put into preparing for the tests”); Feingold, *supra* note 9, at 265.

130. MAX ALTMAN, S. EDUC. FOUND., *MILES TO GO: THE STATE OF EDUCATION FOR BLACK STUDENTS IN AMERICA* 7 (2024), <https://southerneducation.org/wp-content/uploads/miles-to-go-report-final.pdf> [<https://perma.cc/EY7G-KKPE>] (explaining that educational outcome disparities “reflect systemic issues within education such as inequitable access to resources and funding, disciplinary practices, and access to quality curriculum and teaching—as well as issues outside of education, including poverty and food insecurity, geography and neighborhood resourcing, the criminal justice system, and the workforce and child-care systems”); see also *infra* Section IV.B (discussing the racial wealth gap and how education can help bridge it).

This is often due to concentrations of Black students in low-income areas,<sup>131</sup> a result of housing segregation systemically created by redlining, the federal subsidization of white-only neighborhoods, and the denial of mortgages to Black buyers in the 1930s.<sup>132</sup>

Additionally, standardized testing favors the cultural knowledge of white students over that of Black or Latinx students.<sup>133</sup> Standardized testing asks students not only about formal academic terms but also “informal vocabulary words that reflect[] a comparatively affluent culture.”<sup>134</sup> Because racial inequality has resulted in fewer Black students having the opportunity to engage with affluent culture,<sup>135</sup> Black students are less likely to be familiar with informal vocabulary from that culture and are thus less likely to get questions using those terms correct.<sup>136</sup> This results in students from affluent and often white communities receiving higher test scores.<sup>137</sup> Schools then rely on these test scores as a “race-neutral” metric in admissions even though the results are not race-neutral and do not fairly reflect the abilities of Black students. The result is that universities that do not consider applicant race will “systemically undervalue the existing academic talent and potential of students of color,” creating the need for affirmative action in higher education.<sup>138</sup>

Because affirmative action levels the playing field, prioritizing racial diversity in higher education admissions is essential. In fact, incoming undergraduate classes are already being affected by the heightened attention the Court is giving to race in higher education admissions.<sup>139</sup> In the year immediately following the 2023 *SFFA* ruling, some higher education institutions had already reported lower rates of racial

131. Despite efforts, schools remain segregated by “race and socioeconomic status.” ALTMAN, *supra* note 130, at 13. “Research shows that racial and economic segregation of students is often accompanied by inequitable resource allocation and fewer educational opportunities for students of color. . . . In 2018 . . . Districts with the highest percentages of students of color received about 13% less funding per student.” *Id.* at 17.

132. Bruce Mitchell, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NAT’L CMTY. REINVESTMENT COAL. (Mar. 20, 2018), <https://nrcr.org/holc/> [<https://perma.cc/ZZ4T-JAQQ>]; Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017, at 12:47 ET), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [<https://perma.cc/LJW9-3WAZ>]; *Racial Inequities in Housing*, OPPORTUNITY STARTS AT HOME, <https://www.opportunityhome.org/resources/racial-equity-housing/> [<https://perma.cc/7H2N-8CY7>] (last visited Apr. 1, 2026).

133. Experts agree that “some of the longstanding differences in test scores are cultural, and that this won’t likely change until the culture itself changes.” Blum, *supra* note 126.

134. Because of this, researchers have concluded that “SAT items do function differently for the African-American and [w]hite subgroups in the verbal test.” *Id.*

135. See *supra* notes 130-32 and accompanying text.

136. For example, one SAT question introduced in the 1980s asks students to select the most similar analogy to “Runner: Marathon” from the following options: “A. Envoy: Embassy[,] B. Martyr: Massacre[,] C. Oarsman: Regatta[,] D. Horse: Stable.” If a student has never engaged with rowing, which is a hobby of more affluent families, they are unlikely to understand or select the correct answer, “C.” Blum, *supra* note 126.

137. See *supra* notes 126-29 and accompanying text.

138. Feingold, *supra* note 9, at 262-66. Justice Powell also recognized this issue in *Bakke*. *Id.* at 263-64; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978); see also Fleming, *supra* note 64, at 633-34 (pointing out that inequality exists under so-called meritocracies because it reflects pre-existing disparities in socioeconomic opportunity).

139. Garda, *supra* note 47, at 120 (“[O]verwhelming authority shows that the *SFFA* decision will make student bodies less diverse.”). Shaun Harper, University of Southern California’s Race and Equity Center Director, stated, “This is just the first year. If both public and private colleges don’t step up and take the legally permissible actions they can to boost diversity, it will get worse.” Liam Knox, *An Early Look at Diversity Post-Affirmative Action*, INSIDE HIGHER ED (Sept. 6, 2024), <https://www.insidehighered.com/news/admissions/traditional-age/>

diversity for the 2024 admitted class of students:<sup>140</sup> MIT enrolled fifteen percent fewer Black and Hispanic students;<sup>141</sup> UNC enrolled five percent fewer “Black, Indigenous, and people of color students;”<sup>142</sup> Amherst College enrolled four percent and eight percent fewer Black and Hispanic students, respectively;<sup>143</sup> and Tufts University enrolled three percent fewer Black students.<sup>144</sup>

This data is not entirely conclusive, however, as several other higher education institutions, such as the University of Virginia, Duke, and Yale, have managed to maintain or increase racial diversity.<sup>145</sup> Importantly, these institutions incorporated some of the aforementioned means, including new financial aid programs, recruitment initiatives for low income students, and the monitoring of legacy preferences to protect their racial diversity.<sup>146</sup> These schools’ success in maintaining their racial diversity post-*SFFA* demonstrates the importance of using the following remaining legal methods to ensure racially diverse classes.

### III. HOW HIGHER EDUCATION INSTITUTIONS CAN CONTINUE TO ENSURE RACIAL DIVERSITY

While the *SFFA* decision provides new language and guardrails to ensure that admissions processes still comply with the Fourteenth Amendment, it aligns with—

---

2024/09/06/early-look-racial-diversity-post-affirmative-action [https://perma.cc/8XHV-YPYY]; see STROHL, NYHOF & MORRIS, *supra* note 28, at 52-55.

140. Knox, *supra* note 139. The University of Virginia saw a 1.4% decrease in Black and Asian American students, but a 1.4% increase in Hispanic students; Duke’s Black and Hispanic student population rose 1%; and Yale’s proportion of Black students remained the same as the year before, but their Hispanic student population increased 1%. *Id.*

141. Compared to the class of 2027, the MIT class of 2028 has 10% fewer Black students and 5% fewer Hispanic and Latino students. Anemona Hartocollis & Stephanie Saul, *At M.I.T., Black and Latino Enrollment Drops Sharply After Affirmative Action Ban*, N.Y. TIMES (Aug. 21, 2024), <https://www.nytimes.com/2024/08/21/us/mit-black-latino-enrollment-affirmative-action.html> [https://perma.cc/R8AN-5LL5].

142. Knox, *supra* note 139. Compared to the class of 2027, the UNC class of 2028 has 2.7% fewer Black students and 0.7% fewer Hispanic and Latino students. Cameron Hayes Fardy, *Percentage of Black, Hispanic Students in First-Year Class Drops*, CAROLINA ALUMNI REV. (Sept. 6, 2024), <https://alumni.unc.edu/news/percentage-of-black-hispanic-students-in-first-year-class-drops/> [https://perma.cc/A5W8-C47N].

143. Anemona Hartocollis & Stephanie Saul, *At 2 Elite Colleges, Shifts in Racial Makeup After Affirmative Action Ban*, N.Y. TIMES (Aug. 30, 2024), <https://www.nytimes.com/2024/08/30/us/black-enrollment-affirmative-action-amherst-tufts-uva.html> [https://perma.cc/WTZ3-7HCE].

144. *Id.*

145. Knox, *supra* note 139.

146. *Id.* (explaining that Duke and the University of Virginia “announced an ambitious new financial aid program and recruitment initiative for low-income students” in their respective states); see also Liam Knox, *Is Financial Aid the New Affirmative Action?*, INSIDE HIGHER ED (Apr. 22, 2024), <https://www.insidehighered.com/news/admissions/traditional-age/2024/04/22/wealthy-colleges-boost-financial-aid-post-affirmative> [https://perma.cc/F2GM-WLFS] (detailing how a multitude of both public and private universities have focused on maintaining socioeconomic diversity through financial aid initiatives in the wake of *SFFA*). Princeton University established an Ad Hoc Committee to determine how to maintain racial diversity rates post-*SFFA*, with one recommendation being “to extend recent increases in the socioeconomic diversity of the undergraduate student body, with a focus on attracting and enrolling more students from low-income, middle-income, and upper middle-income families” and another to “monitor the use of its legacy preference to ensure that it is fully consistent with the University’s mission . . . [of] socioeconomic diversity.” PRINCETON UNIV., REPORT OF THE AD HOC COMMITTEE ON UNDERGRADUATE ADMISSION POLICY 3, 5 (2024), <https://www.princeton.edu/sites/default/files/documents/2024/03/ad-hoc-committee-undergraduate-admission-031424.pdf> [https://perma.cc/MRK8-8H8H].

rather than overturns—the *Bakke* and *Grutter* decisions’ requirement that each applicant be assessed as an individual.<sup>147</sup> Both *Bakke* and *Grutter* established the prohibition of using racial quotas or plus factors,<sup>148</sup> and *SFFA* maintained these principles while expanding them to clarify that affirmative action cannot be applied in a way that disadvantages other applicants<sup>149</sup> and that minorities cannot be expected to hold the same viewpoints.<sup>150</sup> Importantly, none of these decisions forbid the consideration of race in the admissions process entirely. Instead, they delineate the protocols that may be put in place to promote educational diversity. Although *SFFA* restricts the use of race in admissions, this Paper argues that higher education institutions can and should adopt race-conscious approaches across recruitment, retention, and admissions, alongside class-based affirmative action and the elimination of legacy preferences.

### A. Incorporate Race into Admissions Processes Wherever Possible

There are still many ways higher education institutions can meaningfully incorporate race into the admissions process.<sup>151</sup> These methods can span the entire admissions process—from recruitment to retention and applications.<sup>152</sup> The Legal Defense Fund has identified ways higher education institutions can recruit and retain students of color even after *SFFA*, including advertising themselves as a safe space through outreach and recruitment; providing support to Black students on campus through affinity groups; showing a commitment to diversity by employing and contracting diverse faculty and staff; and clearly communicating their stances on shifting federal policies affecting K-12 selective admissions, diversity, equity, and inclusion (DEI) programs, or Critical Race Theory (CRT).<sup>153</sup> Although admissions criteria and decision-making have the most direct influence on which students are accepted, the steps taken before and after those admissions decisions can have just as much impact on the makeup of a student body.<sup>154</sup> Moreover, the same programs that attract Black students also encourage them to want to remain once enrolled.<sup>155</sup> To understand how higher education institutions can create and retain more racially diverse classes, this Section will first look at proactive steps they can take to attract and retain Black students and then discuss how application criteria can be used to prioritize racial diversity, including using data to track class makeup.

---

147. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

148. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291-93 (1978); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 220 (2023).

149. *SFFA*, 600 U.S. at 186.

150. *Id.*

151. See generally Feingold, *supra* note 9 (discussing the impact of *SFFA* upon racially-conscious admissions and options for universities to still incorporate race in their admissions process post-*SFFA*). “The coming years will require creativity and initiative from those who desire to achieve the compelling benefits of diversity at their higher education institutions.” Fleming, *supra* note 64, at 698.

152. LEGAL DEF. FUND, *supra* note 72, at 2.

153. *Id.* at 2.

154. LEGAL DEF. FUND, *supra* note 1, at 22-23.

155. *Id.* at 30.

The admissions process starts with recruitment. Outreach and recruitment involve targeting specific student populations and selecting particular geographic areas in which to advertise and conduct visits.<sup>156</sup> If schools only prioritize wealthy areas or places lacking racial diversity, they cannot expect their applicants to be very diverse.<sup>157</sup> Thus, schools must provide a range of recruitment opportunities to a variety of geographic areas in order to attract a more diverse student body. This can include recruiters going to high schools in nearby underrepresented communities to create relationships with students and raise awareness of their institution's opportunities.<sup>158</sup> Having diverse groups of alumni attend these events or host their own outreach events can also show recruits that people of all backgrounds have found community and success on campus.<sup>159</sup> Lastly, providing non-traditional and virtual recruitment events allows students who do not live near an institution or who cannot afford to attend in-person events to learn about what a school has to offer.<sup>160</sup>

When considering whether and where to attend college, Black students may look at what support is provided on campus and whether current Black students are motivated to stay at that institution. On campus, Black affinity groups provide essential support to Black students, playing a pivotal role in student retention and academic success. Affinity groups encompass not only the clubs and organizations represented on campus, but also the groups that schools actively support and align themselves with, such as sororities and fraternities.<sup>161</sup> By offering Black fraternities and sororities, higher education institutions can attract more Black students and demonstrate increased college completion rates among Black students by providing social connections and a support system.<sup>162</sup> Other steps to attract and retain Black students include implementing mental health services, assistance programs, medical care, healthy dining options, safety net policies, free speech policies, fair teaching methods, and diverse clubs and organizations.<sup>163</sup> If students see

---

156. It also includes "[b]uilding relationships and pipelines with [schools]," "[d]eveloping pre-college programs," "[p]roviding . . . non-traditional recruitment opportunities," "[i]nvesting resources to reach and support historically underrepresented groups," "[f]ormalizing opportunities for current students to represent [the higher education institution]," and "[e]xpanding efforts that engage families in the recruitment process." *Id.* at 29; see STROHL, NYHOF & MORRIS, *supra* note 28, at 54.

157. Lori Ann Campbell & Robert L. Kaufman, *Racial Differences in Household Wealth: Beyond Black and White*, 24 RSCH. SOC. STRATIFICATION & MOBILITY 131, 135-36 (2006) ("Both Hispanics and Asians are concentrated in a handful of states and are more likely than non-Hispanic Whites to reside in metropolitan areas. Although 70% of all Hispanics lived in just four states in 1990, California, Texas, New York, and Florida, their clustering varies by origin groups. . . . Asians are similarly concentrated, with 60% living in the West. Blacks are somewhat less geographically concentrated; over half live in the South with another 40% evenly split between the midwest and northeast, but just 9% in the west." (internal citations omitted)).

158. LEGAL DEF. FUND, *supra* note 1, at 29.

159. *Id.*

160. *Id.*

161. See Andre Perry & Rodney Sampson, *Rapper Boosie Badazz Can Be a Bridge to Getting Black Men into College*, THE HECHINGER REP. (Jan. 22, 2020), <https://hechingerreport.org/black-fraternities-and-sororities-can-attract-black-students-to-college/> [<https://perma.cc/7NHC-PRNK>].

162. *Id.*; see Charles R. Smith, *Examining Persistence: The Influence of Joining of Pan-Hellenic Black Greek Letter Organizations on African-American Male Students Attending Predominantly White Institutions* (May 2019) (Ed.D dissertation, The College of William & Mary) (on file with William & Mary ScholarWorks).

163. LEGAL DEF. FUND, *supra* note 1, at 30-31.

that a college campus has resources that allow them to receive help, remain healthy, and have their voice heard on campus, they will be far more likely to enroll, attend classes, focus on their studies, build community, and succeed, encouraging more Black students to attend the university.<sup>164</sup>

The demographic composition of a school's faculty and staff can also profoundly influence Black students' impression of and experience on campus, affecting their decision to enroll or stay. This includes who the school hires and works with to facilitate classroom instruction, campus operations, athletics, and extracurricular activities.<sup>165</sup> When higher education institutions have more faculty and staff of color, student success increases, and students from all backgrounds are benefited by engaging with people from other cultures.<sup>166</sup>

In their external communications, schools should approach contentious topics concerning K-12 admissions, DEI, and CRT with intentionality and transparency. Prospective students should closely scrutinize how schools react to debates and changing policies surrounding DEI and CRT to determine an institution's ongoing commitment to racial diversity.<sup>167</sup> While DEI and CRT have been controversial topics, schools should maintain efforts to promote diversity, even if formal DEI programs are discontinued.<sup>168</sup> Unfortunately, Students for Fair Admissions is already planning on bringing cases to attack "recruitment and retention practices, tracking and analyzing racial outcomes, and any program under the banner of 'diversity, equity, and inclusion' (DEI)." <sup>169</sup> However, it will likely be years before these reach the Supreme Court and are decided.

Proclaiming equality-oriented values and assessing the racial impact of institutional actions is also important for creating spaces in which Black students feel

164. *Id.*

165. *Id.* at 30 (encouraging the hiring and retention of underrepresented faculty, including in tenure track positions).

166. "When Black and Latino college students learn from Black and Latino faculty, they are more likely to complete college, in no small part because Black and Latino faculty members can serve as strong mentors and role models to students of color, promote persistence toward a degree, and help create a more inclusive campus climate. But the benefits of faculty diversity aren't limited to students of color. Engaging with racially and culturally diverse faculty fosters greater understanding and respect for others, inspires creativity, enhances problem-solving skills, and ultimately prepares students from all backgrounds to become good global citizens and successful workers in the increasingly diverse and multicultural world in which we live." JINANN BITAR, GABRIEL MONTAGUE & LAUREN ILANO, FACULTY DIVERSITY AND STUDENT SUCCESS GO HAND IN HAND, SO WHY ARE UNIVERSITY FACULTIES SO WHITE? 3 (2022), [https://edtrust.org/wp-content/uploads/2014/09/Faculty\\_Diversity\\_Report\\_FINAL-3.pdf](https://edtrust.org/wp-content/uploads/2014/09/Faculty_Diversity_Report_FINAL-3.pdf) [<https://perma.cc/GB8B-ZSZ3>].

167. See LEGAL DEF. FUND, *supra* note 1, at 30 (encouraging campuses to provide a healthy climate in every part of campus by "pushing back against attempts to stifle speech and campus life most central to the college experiences of students of color").

168. Mary Ellen Flannery, *Anti-DEI Laws Take Aim at Students of Color and LGBTQ+ Students*, NAT'L EDUC. ASS'N: NEATODAY (Feb. 14, 2024), <https://www.nea.org/nea-today/all-news-articles/anti-dei-laws-take-aim-students-color-and-lgbtq-students> [<https://perma.cc/CN8D-TPHR>].

169. Feingold, *supra* note 9, at 247. DEI and affirmative action critics hope to implement rules subjecting to strict scrutiny even facially neutral selection processes if they result in an increase of underrepresented students and that was the higher education institution's goal. *Id.* at 247 n.50. It is unclear how a higher education institution's goals would be proven. "Race-neutral approaches to achieving diversity may be at issue in the next line of legal attacks related to racial diversity and admissions . . ." Fleming, *supra* note 64, at 696. "Race-neutral practices designed to create diverse student environments will also be subject to legal attack." Garda, *supra* note 47, at 121-22.

welcomed and safe.<sup>170</sup> This includes how a school responds to cultural events, new federal policies, and emergencies such as the 2020 COVID-19 pandemic.<sup>171</sup> Additionally, schools should make clear to all students their values, policies, and goals regarding racial diversity and encourage all students on campus to support their peers and communicate that racism and discrimination will not be tolerated.<sup>172</sup> If schools create a safer and more welcoming environment for Black students, more Black students will be inclined to apply, increasing the number of Black applicants and, so long as the admissions process is not skewed in favor of white applicants, the number of Black students accepted.

As discussed by the Supreme Court in *SFFA*, higher education institutions can still consider a student's race in their application, but only in more tangential contexts, such as a candidate's background, experience, struggles, and lifestyle.<sup>173</sup> Additionally, one scholar shared that higher education institutions can still "consider a student's personal experiences with race and racism."<sup>174</sup> Considering that these stories are often told through applicant essays, higher education institutions should provide essays or open-ended, short-answer questions that allow applicants an opportunity to share their background and experiences. While many higher education institutions already include such questions in their applications, adding more open-ended questions or weighting these questions more heavily can help increase diversity in admissions.<sup>175</sup> Including specific questions about how a candidate's background has affected their life encourages applicants to share their stories while not inquiring specifically about the candidate's race.<sup>176</sup>

170. See Feingold, *supra* note 9, at 276-77.

171. Events such as the murder of George Floyd and BLM riots present opportunities for higher education institutions to either respond to, or ignore, the concerns of their students. Matt Barnum & Kalyn Belsha, *Protests, Donations, Lesson Plans: How the Education World Is Responding to George Floyd's Killing*, CHALKBEAT (June 2, 2020, at 19:21 ET), <https://www.chalkbeat.org/2020/6/2/21278591/education-schools-george-floyd-racism/> [<https://perma.cc/TJZ8-GQR8>]. The COVID-19 pandemic disproportionately affected Black people, allowing schools an opportunity to outreach to Black students by enacting policies. See Reid, *supra* note 30, at 5-6, 18-19 (describing how Black people died of COVID-19 in disproportionate numbers partly due to poverty and health inequalities).

172. "Colleges should . . . create clearly stated policies and procedures to help the campus community confront and resolve incidents of racial/ethnic harassment and discrimination. These policies and procedures should include formal processes for resolving conflicts or disputes that involve representatives from all members of the campus community." Jessie Hernandez-Reyes, *Creating Positive College Campus Racial Climates for Students of Color*, EDTRUST (Oct. 17, 2023), <https://edtrust.org/rti/college-campus-racial-climates-2/> [<https://perma.cc/5AAR-RYT2>].

173. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 230-31 (2023); LEGAL DEF. FUND, *supra* note 1, at 5.

174. Feingold, *supra* note 9, at 266-70.

175. "For more than 50 years now, universities both private and public have evaluated essays for a range of qualities including leadership capacity, creativity, service to the community, and ability to overcome hardship, as part of their admissions decisions. . . . And while the prompts remained unchanged following [*SFFA*], which formally excluded race as a factor in admissions, universities began to read them for the role of race, ethnicity, and other identities in students' profiles. In these and many other ways, the essay has only gained value as a way for students to explain the important ways their experiences and identities have shaped their academic profiles." Sarah Stroller, *How the College Application Essay Became So Important*, TIME (July 11, 2024, at 08:00 ET), <https://time.com/6995064/college-admission-application-essay-history/> [<https://perma.cc/Z2KX-TH3D>].

176. LEGAL DEF. FUND, *supra* note 1, at 21.

Higher education institutions may also “employ colorblind criteria to promote racial diversity” and admit more applicants with criteria often held by Black students.<sup>177</sup> Because colorblind criteria do not discriminate on the basis of race, they do not have to meet strict scrutiny. This can be helpful because an opponent of an admissions committee’s use of colorblind criteria must show that the committee “adopted that specific policy with ‘an impermissible racial purpose,’” which is a “near-insurmountable burden,” partially because “facially neutral policies enjoy substantial deference.”<sup>178</sup> Such colorblind criteria can allow schools to avoid looking at race entirely while still looking at other data that typically correlates with race and diversity. This includes cultural history, first generation status, geographic location, and languages spoken.<sup>179</sup> Because higher education institutions predominantly admit white, monolingual, English-speaking students from wealthy areas, admitting students from geographic areas that are historically underrepresented in the college community and from diverse cultural and linguistic backgrounds would likely increase the number of racially diverse students admitted.<sup>180</sup>

However, colorblind criteria alone are unlikely to ensure diverse admissions because these criteria fail to fully consider the history of racism in higher education institution admissions.<sup>181</sup> To further ensure diverse classes, universities should also monitor the racial makeup of their incoming class and adjust criteria preferences accordingly. For instance, if a university sees that relying on extracurriculars is causing a certain race to be underrepresented in an incoming class, it can change the weight of such criteria mid-cycle to alter its class makeup in a race-neutral fashion.<sup>182</sup> Race is a data point of candidates that is allowed to be known and shared even after *SFFA*, and tracking this data and its relation to different colorblind criteria is another way higher education institutions can ensure a diverse class.<sup>183</sup>

---

177. Feingold, *supra* note 9, at 270-76. As Feingold defines it, colorblind criteria includes “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.” *Id.* at 266 (emphasis in original).

178. *Id.* at 267.

179. LEGAL DEF. FUND, *supra* note 1, at 26-29.

180. *Id.* at 26; T. Liam Murphy, *Scrutinizing Legacy Admissions: Applying Tiers of Scrutiny to Legacy Preference Policies in University Admissions*, 22 U. PA. J. CONST. L. 315, 315-16 (2019); Hellermann, *supra* note 125, at 3.

181. “Color-blindness still results in racialized results” and “[c]olor-blind Constitutionalism is proudly ahistorical and acontextual.” Edwards & Darity, *supra* note 2, at 771, 784. “[R]ace neutrality can thwart remediation and further exacerbate the issue of continuing discrimination.” Goodman & Antounian, *supra* note 10, at 459. “Without consideration of race, student body diversity will suffer.” Zisk, *supra* note 3, at 23. *But see* Fleming, *supra* note 64, at 635 (arguing that the United Kingdom’s race-blind, contextual admissions practices “has successfully allowed a nuanced evaluation of not only test scores and grades but also disparities in advantage and opportunity”).

182. Feingold, *supra* note 9, at 275-76; *see also* LEGAL DEF. FUND, *supra* note 1, at 28 (describing the barriers to access associated with overreliance on extracurricular activities in college admissions).

183. “Nothing prohibits a university [from] obtaining, knowing, or other wise learning about” “racial identity information and . . . personal race/ism information.” Feingold, *supra* note 9, at 268-69; *see also* LEGAL DEF. FUND, *supra* note 1, at 26 (encouraging universities to “track[] and collect[] racial demographic

Previously discussed case law demonstrates that there are “rules” for incorporating race into admissions. Most importantly, race must never be employed as a stereotype or a negative.<sup>184</sup> Ensuring that affirmative action does not operate as a negative can be difficult because the Court characterizes acceptance in competitive college admissions as necessarily excluding another candidate, regardless of which applicants are accepted.<sup>185</sup> Additionally, higher education institutions cannot use racial quotas in their admissions or use admissions criteria in a way that results in a marked decrease in another race, such as what Harvard and UNC’s criteria did to Asian Americans.<sup>186</sup> Furthermore, higher education institutions must avoid treating minorities as stereotypes and must avoid admitting minority applicants solely based on race or with the expectation that those applicants hold the same viewpoints as other members of their community.<sup>187</sup>

With admissions being the most directly influential on class makeup, there is hope the Court will decline to interfere with race-based recruiting or retention processes.<sup>188</sup>

### *B. Employ Class-Based Affirmative Action*

In order to ensure racial diversity in future classes, higher education institutions should also expand their socioeconomic-based admissions considerations to address persistent barriers associated with poverty, neighborhood segregation, under-resourced schools, and first-generation status. This can be done by employing more class-based affirmative action.<sup>189</sup> Like the colorblind criteria discussed above, class-based affirmative action is facially race-neutral, but instead of focusing on the attributes of an individual candidate, it seeks to admit more candidates from a disadvantaged group and provide more resources to that group on the basis of need. Class-based affirmative action will also help Black students specifically as they are currently overrepresented in lower socioeconomic classes due to the racial wealth gap, which is “over a trillion dollars and shows no signs of closing.”<sup>190</sup> This racial wealth gap is so pronounced that “[B]lack households hold less than seven cents on the dollar compared to white households.”<sup>191</sup> If higher education institutions recognize this

---

data throughout the admissions process to ensure unfair policies and practices are not disadvantaging or unduly excluding historically marginalized and underrepresented students”).

184. Feingold, *supra* note 9, at 257.

185. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (SFFA)*, 600 U.S. 181, 218-19 (2023) (treating selective admissions as a zero-sum process in which consideration of race confers a benefit that necessarily operates as a disadvantage to other applicants).

186. *Id.*

187. The Court in *SFFA* noted that it has “long held that universities may not operate their admissions programs on the ‘belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’” *Id.* at 219.

188. “The upshot is that under prevailing doctrine, facially neutral efforts to achieve racial diversity raise no constitutional concern.” Feingold, *supra* note 9, at 274. “Race-neutral efforts to increase diversity remain constitutional.” LEGAL DEF. FUND, *supra* note 1, at 22. “Despite efforts by SFFA . . . the Court has not outlawed the intentional pursuit of racial diversity by higher education institutes.” Fleming, *supra* note 64, at 694. It would therefore take a reversal/overturning of the current line of affirmative action cases to take away these options.

189. Some schools have already realized this, with schools such as Dartmouth College, Vanderbilt University, University of Virginia, University of North Carolina, and Duke University combatting the *SFFA* decision by offering more financial aid. See Knox, *supra* note 139; see also STROHL, NYHOF & MORRIS, *supra* note 28, at 44-47 (describing how tuition disproportionately affects racial and ethnic minority students).

190. Edwards & Darity, *supra* note 2, at 770.

191. *Id.*

disparity and use class-based affirmative action, they can increase the number of Black students admitted to their schools.

The effect of race on wealth cannot be ignored, even within race groups: for instance, Black people with lighter-skin have accumulated more wealth than Black people with darker skin.<sup>192</sup> One study shows that by age 35, “lighter-skin Black people hold about 50 percent of [w]hite people’s . . . financial assets” while “medium- and darker-skin Black people hold about 27 and 21 percent, respectively.”<sup>193</sup> This may be because whiteness provides more opportunities in America, and light skin is seen as a “component of whiteness,” providing lighter-skinned Black people with more opportunities than darker-skinned Black people.<sup>194</sup>

While the Fourteenth Amendment prohibits showing preference to one race over another,<sup>195</sup> remedying this vast wealth gap likely cannot be done in a race-neutral fashion.<sup>196</sup> Because American historical events such as slavery and Jim Crow laws allowed white Americans to collect wealth and political power, white people remain wealthier on average, with white households holding eighty percent of America’s wealth in 2021.<sup>197</sup> In order to include more Black people in its admissions process, universities should include more candidates from lower socioeconomic brackets. A study released in 2023 reported that, “for applicants with the same SAT or ACT score, children from families in the top one percent were thirty-four percent more likely to be admitted than the average applicant, and those from the top 0.1 percent were more than twice as likely to get in.”<sup>198</sup>

Further, the middle class often gets left out of many important financial initiatives, leaving this substantial group to fend for themselves.<sup>199</sup> While all racial groups can be found across economic classes, Black people are represented more in the lower and middle economic class than white people. In 2022, forty-five percent of Black people were in the lower economic class and forty-six percent were in the middle economic

192. Alexander Adames, *The Cumulative Effects of Colorism: Race, Wealth, and Skin Tone*, 102 SOC. FORCES 539, 549-52 (2023).

193. *Id.* at 549.

194. *Id.* at 542. For instance, slaveowners “often preferred to have lighter-skin Black people working as house servants as opposed to field servants because they were seen as more presentable to their [w]hite house guests than darker-skin Black people. This preferential treatment provided lighter-skin Black people with the opportunity to acquire greater literacy, [w]hite customs, and trade skills.” *Id.*

195. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978).

196. Edwards & Darity, *supra* note 2, at 771-73.

197. Briana Sullivan, Donald Hays & Neil Bennett, *Households with a White, Non-Hispanic Housholder Were Ten Times Wealthier than Those with a Black Householder in 2021*, U.S. CENSUS BUREAU (Apr. 23, 2024), <https://www.census.gov/library/stories/2024/04/wealth-by-race.html> [<https://perma.cc/T8N7-T8YL>].

198. Aatish Bhatia, Claire Cain Miller & Josh Katz, *Study of Elite College Admissions Data Suggests Being Very Rich Is Its Own Qualification*, N.Y. TIMES: THE UPSHOT (July 24, 2023), <https://www.nytimes.com/interactive/2023/07/24/upshot/ivy-league-elite-college-admissions.html> [<https://perma.cc/4K2P-EJCZ>]. Additionally, in 2017, “38 colleges had more students from the top 1% than the bottom 60.” Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours.*, N.Y. TIMES: THE UPSHOT (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> [<https://perma.cc/5EMV-CD35>].

199. See Knox, *supra* note 146.

class, leaving only nine percent in the upper economic class.<sup>200</sup> In contrast, in the same year, only twenty-four percent of white people were in the lower economic class, fifty-five percent were in the middle economic class, and twenty-one percent were in the upper economic class.<sup>201</sup> Therefore, by focusing on admitting more candidates from lower socioeconomic classes and providing more financial aid to those candidates, higher education institutions will inadvertently admit more Black candidates, which can help combat generational poverty.<sup>202</sup>

For any racial group, “median household wealth increases as the head of household obtains higher levels of education.”<sup>203</sup> In 2023, median lifetime earnings for high school degree holders were \$1.69 million for white people and \$1.36 million for Black people; for professional degree holders, this amount jumped to \$4.88 million for white people and \$3.71 million for Black people.<sup>204</sup> By providing individuals from lower socioeconomic classes with more educational opportunities, higher education institutions can help facilitate racial equality, especially if they are employing this tactic with the permitted considerations discussed above.<sup>205</sup>

### C. End Legacy Admissions

Lastly, higher education institutions should end admissions preferences unrelated to individual merit or access, such as legacy admissions, which may undermine institutional commitments to opportunity and fairness.<sup>206</sup> Legacy admissions programs seek to admit students with family members who also attended that institution.<sup>207</sup> By and large, legacy admissions only benefit white, wealthy, Protestant applicants

200. Rakesh Kochhar, *The State of the American Middle Class: Who Is in It and Key Trends from 1970 to 2023*, PEW RSCH. CTR. (May 31, 2024), <https://www.pewresearch.org/race-and-ethnicity/2024/05/31/the-state-of-the-american-middle-class/> [https://perma.cc/RZD6-CPFG].

201. *Id.*

202. As part of its effort to respond to the *SFFA* decision and maintain racial diversity, Princeton University established an Ad Hoc Committee that recommended that Princeton “be even more aggressive in its efforts to extend recent increases in the socioeconomic diversity of the undergraduate student body, with a focus on attracting and enrolling more students from low-income, middle-income, and upper middle-income families,” showing their belief that reaching lower income students can combat lack of diversity. PRINCETON UNIV., *supra* note 146, at 3.

203. Edwards & Darity, *supra* note 2, at 787.

204. Blake Decker, *Financial Impact of Educational Attainment by Race/Ethnicity*, TEX. A&M UNIV. SYS.: DATA SCI., at fig. 1 (Sept. 15, 2023), <https://www.tamus.edu/data-science/2023/09/15/financial-impact-of-educational-attainment-by-race-ethnicity/> [https://perma.cc/Z7YK-BTTV].

205. It is important higher education institutions increase financial aid while also employing other tactics. See Knox, *supra* note 146 (Richard Kahlenberg, director of the Progressive Policy Institute’s American Identity Project, said in an interview, “If you increase financial aid without changing your admissions policies, the payoff in terms of economic and racial diversity is not nearly as great.”).

206. See, e.g., PRINCETON UNIV., *supra* note 146, at 5 (explaining that Princeton University’s Ad Hoc Committee also recommends Princeton monitor their use of legacy preference; however, while they caution against expanding it, they argue for its “continued, limited use” because “the legacy preference affects so few students” and their alumni is “increasingly diverse in terms of race and ethnicity”).

207. Shane LaGessee, *Legacy Admissions: What It Is and Why Colleges Are Reconsidering It*, U.S. NEWS: EDUC. (July 21, 2023, at 15:24), <https://www.usnews.com/higher-education/articles/legacy-admissions-what-it-is-and-why-colleges-are-reconsidering-it> [https://perma.cc/9THW-ARF5].

who are typically from the top one percent of America's wealth.<sup>208</sup> Furthermore, family legacy admissions from 2000–2020 made up fifteen to forty percent of Ivy League Admissions.<sup>209</sup> These admits are primarily white. For example, seventy percent of all legacy applicants to Harvard in 2019 were white.<sup>210</sup> If forty percent of an Ivy League class is legacy admits, and seventy percent of those admits are white, then twenty-eight percent of the class is already reserved for white students. If this is true for the Harvard class of 2028, which admitted 1,970 students,<sup>211</sup> then 551 students in the class of 2028 are white legacy admits. Reserving 551 of 1,970 spots for white students at Harvard is far more than reserving 16 of 100 spots for minorities at UC Davis in the *Bakke* case.<sup>212</sup>

While legacy programs seek to maintain familial ties, create loyalty to a single institution, and encourage donations from those families, these programs reinforce the admission of traditional applicants and candidates from families who have been in power for generations.<sup>213</sup> Because the traditional applicant is white and from a higher income household, legacy applicants rarely include Black people.<sup>214</sup> In 2002, Texas A&M's legacy preference admitted 321 white people but “only three African-Americans and twenty-five Hispanics,” or twenty-eight minorities, an almost 12:1 difference.<sup>215</sup> Even as the potential for legacy admissions to benefit non-white students grows as graduating classes become more diverse, it is likely to be decades before legacy admissions shift from favoring white to non-white students.<sup>216</sup> It is thus more beneficial to end this program now and focus on implementing admissions policies that actually support candidates who need it.<sup>217</sup> Higher education institutions have the power to be “vehicle[s] for social and economic mobility” due to their ability to provide greater opportunities and connections to students.<sup>218</sup>

208. Murphy, *supra* note 180, at 315–16; Allan Ornstein, *Wealth, Legacy and College Admission*, 56 SOC'Y 335, 338 (2019). “Legacy preferences . . . undoubtedly benefit [w]hite applicants.” Garda, *supra* note 47, at 154.

209. Ornstein, *supra* note 208, at 338.

210. Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26316, 2019).

211. *A Brief Profile of the Class of 2028*, HARV. COLL.: ADMISSIONS & FIN. AID, <https://college.harvard.edu/admissions/admissions-statistics> [<https://perma.cc/X7WS-8UVR>] (last visited Nov. 7, 2025).

212. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978).

213. Ornstein, *supra* note 208, at 338; Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U.L. REV. 1375, 1376–78 (2006).

214. Larson, *supra* note 213, at 1378; Arcidiacono, Kinsler & Ransom, *supra* note 210, at 34.

215. Larson, *supra* note 213, at 1378.

216. Even the National Bureau of Economic Research acknowledges that “it is widely accepted that legacy preferences will tend to benefit white applicants relative to other racial groups.” Arcidiacono, Kinsler & Ransom, *supra* note 210, at 2. Given the hundreds of years of preference given to white applicants and the way legacy preferences were designed to keep institutional power within (white) families, it is for the foreseeable future that legacy programs will primarily only benefit white candidates. See Murphy, *supra* note 180, at 331 (explaining that the racial and ethnic pool of legacy students reflects that of past student generations, which have been disproportionately white).

217. Such admissions policies might include financial aid programs for low-income applicants or programs that favor candidates with unique cultural or linguistic backgrounds. See *supra* Sections IV.A–B for a discussion on examples of what such admissions policies might look like.

218. Murphy, *supra* note 180, at 316.

However, this vehicle is stranded on the road if institutions keep giving preference to wealthy white applicants instead of people from low-income backgrounds who would benefit from opportunities for social mobility.

The relevance of legacy admissions to *SFFA* should not be overlooked, as Harvard is historically one of, if not the most, prestigious higher education institutions, with twenty-three times more rich students than poor students attending the university.<sup>219</sup> Because only nine percent of Black people are in the upper class, the group of “rich students” surveyed likely includes very few Black students.<sup>220</sup> Indeed, only three percent of students at the top 146 universities come from the bottom twenty-five percent of economic households.<sup>221</sup> Because thirty percent more Black people than white people are in the lower and middle economic classes, this bottom twenty-five percent is likely to include more Black people.<sup>222</sup>

While legacy admissions admit more white students than Black students, this racial discrimination is currently permitted because it is facially race-neutral. However, the practical implications of this policy are that it continues to have severe discriminatory effects. Scholars even argue that legacy programs may in the future fail to pass strict scrutiny because they discriminate based on ancestry or race without a compelling government interest.<sup>223</sup> Another scholar argues that legacy preferences violate the Constitution’s prohibition on titles of nobility due to making classifications based on ancestry or race.<sup>224</sup> These arguments weigh in favor of eliminating legacy admissions as they show legacy admissions are outdated and primarily function to maintain historical power dynamics.

### CONCLUSION

Providing higher education opportunities to Black people can help advance equality in society in many ways, specifically by correcting past overt racism,<sup>225</sup> providing better education to all students,<sup>226</sup> giving community and support to Black students,<sup>227</sup> and closing the racial wealth gap.<sup>228</sup> Because white people have historically wielded disproportionate power within the institutions that set educational and admission norms,<sup>229</sup> institutional decision makers have designed and maintained admissions criteria that systematically favor white candidates.<sup>230</sup> Thus, consideration of race in admissions does not operate as a “preference” but as a means of counteracting structural advantages embedded in existing admissions criteria.<sup>231</sup> While *Bakke*

---

219. *Id.* at 317.

220. Kochhar, *supra* note 200.

221. Ornstein, *supra* note 208, at 338.

222. Kochhar, *supra* note 200.

223. Murphy, *supra* note 180, at 320-31, 336-38.

224. See Larson, *supra* note 213, at 1377-79.

225. See *supra* notes 119-23 and accompanying text.

226. See *supra* note 166 and accompanying text.

227. See *supra* notes 161-66 and accompanying text.

228. See *supra* Section IV.B.

229. See *supra* notes 1-3 and accompanying text.

230. See *supra* notes 126-30 and accompanying text.

231. See *supra* notes 127-38 and accompanying text.

and *Grutter* set the path for affirmative action in higher education, prohibiting quotas and “plusses” for minority applications,<sup>232</sup> *SFFA* has continued down that path, despite the concern from some scholars and news outlets that it ended affirmative action.<sup>233</sup> *SFFA* ruled that race cannot be considered for race’s sake,<sup>234</sup> that higher education institutions cannot exclusively admit one racial group to the exclusion of another racial group,<sup>235</sup> and that minorities cannot be expected to hold stereotypical viewpoints.<sup>236</sup> However, because racial diversity in classrooms is essential,<sup>237</sup> higher education institutions must continue to focus on racial diversity in admissions and can do so by considering race in a candidate’s background and holistic profile, employing class-based affirmative action, and ending legacy admissions.

---

232. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291-93 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 309, 334 (2003).

233. *See supra* note 72 and accompanying text.

234. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 220 (2023).

235. *Id.* at 218.

236. *Id.* at 219-20.

237. *See supra* Section III.B.