Race and Regulatory Equity

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TABLE OF CONTENTS

INTRODUCTION

As Harvard and universities nationwide redesign their admissions programs after *Students for Fair Admissions v. President & Fellows of Harvard College*[1] they will need to navigate trip wires of regulation.[2]

From the start, President Biden has enacted numerous executive orders promoting racial equity across government, including the Civil Rights Act, Title VI [hereinafter Title VI] expansions in higher education. During his first month in office, President Biden enacted an executive order (January 2021) that seeks across-the-government measures "to advance racial equity and support for

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1. 600 U.S. 181 (2023) [hereinafter *SSFA v. Harvard*].

2. A growing list of universities have dropped the practice voluntarily, including Berkeley, MIT, Amherst, Wesleyan, and Texas A&M. Mansee Khurana, *Colleges are Ending Legacy Admissions to Diversity Campuses Post-Affirmative Action,* NPR (July 29, 2023) https://www.npr.org/2023/07/26/1190123330/naacps-ivory-toldson-discusses-the-investigation-into-harvard-legacy-admissions#:~:text=Hourly%20News-,Colleges%20consider%20ending%20legacy%20admissions%20to%20help%20diversify%20campuses.,new%20measures%20to%20achieve%20diversity. [perma.cc/3ZAV-3ZMC].

underserved communities"[3] and a more general Memorandum on Modernizing Regulatory Review (2021) that contains provisions related to equity.[4] In spring 2023, he issued a more specific order that civil rights agencies shall "comprehensively" and "affirmatively" use their respective civil rights authorities "to prevent and address discrimination and advance equity for all, including to increase effects of civil rights enforcement . . . consistent with applicable law" (February 2023).[5]

To implement these policies, President Biden has called on universities to end the practice of legacy admissions and has tasked the Department of Education with considering whether legacy preferences limit opportunities.[6] In turn, the Department has opened an investigation specifically reviewing Harvard's legacy preferences to see if they violate civil rights laws such as Title VI. These investigations are prompted by what may seem like strange bedfellows: civil rights organizations in a NAACP LDF report (November 2023) and conservative opponents of race-based affirmative action who seem to recognize the difficulty of defending legacy preferences while challenging race-based preferences.[7]

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3. Advancing Racial Equality and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7, 009 (Jan. 25, 2021).

4. Modernizing Regulatory Review, 88 Fed. Reg. 21,879 (Apr. 11, 2023).

5. "Agencies shall comprehensively use their respective civil rights authorities and offices to prevent and address discrimination and advance equity for all, including to increase the effects of civil rights enforcement and to increase public awareness of civil rights principles, consistent with applicable law. Agencies shall consider opportunities to:

(a) further elevate their respective civil rights offices, including by directing that their most senior civil rights officer report to the agency head;

(b) ensure that their respective civil rights offices are consulted on decisions regarding the design, development, acquisition, and use of artificial intelligence and automated systems;

(c) increase coordination, communication, and engagement with community-based organizations and civil rights organizations;

(d) increase the capacity, including staffing capacity, of their respective civil rights offices, in coordination with OMB;

(e) improve accessibility for people with disabilities and improve language access services to ensure that all communities can engage with agencies' respective civil rights offices, including by fully implementing Executive Order 13166 of August 11, 2000 (Improving Access to Services for Persons with Limited English Proficiency); and

(f) ensure that their respective civil rights offices are consulted on decisions regarding the design, development, acquisition, and use of artificial intelligence and automated systems."

Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 10,825 (Feb. 22, 2023). For additional executive orders relating to diversity, equity, and inclusion *see* https://www.commerce.gov/cr/programs-and-services/executive-orders-diversity-equity-inclusion-and-accessibility [perma.cc/9DH4-MZAG].

6. *Secretary Cardona Delivers Keynote on Reimagining College Admissions at Summit on Equal Opportunity in Higher Education*, U.S. DEP'T OF EDUC. (July 26, 2023), https://www.ed.gov/news/speeches/secretary-cardona-delivers-keynote-reimagining-college-admissions-summit-equal-opportunity-higher-education/ [perma.cc/SN4Z-7U88].

7. *Affirmative Action in Higher Education: The Racial Justice Landscape After the* SFFA *Cases*, AMERICAN CIVIL LIBERTIES UNION (October 2023), https://www.aclu.org/wp-content/uploads/2023/10/2023_09_29-Report.pdf [perma.cc/VAL4-ZHQY].

Setting aside for the moment the Constitutional issues and statutory intricacies of the affirmative action lawsuit,[8] what is the proper role of regulatory agencies in implementing equity orders? More specifically, what is their role with regard to higher education admissions, in the post-*SFFA v. Harvard* landscape of racial equity?

I. LEGAL BACKGROUND ON RACE AND REGULATORY EQUITY IN HIGHER EDUCATION

Since the court in *SFFA v. Harvard* found Title VI to be co-extensive with the Equal Protection Clause, the conservative reading of *SFFA* means that colleges would no longer be able to administer race-based preferences under Title VI, even if they have the benign intent of promoting diversity. So long as race-based preferences have an arguably disparate impact on admissions, they will be suspect. But the significance of the decision may go one step further if race neutral policies that ultimately impact the racial composition of student enrollment may also be found to violate civil rights laws. This line of interpretation would mean that race neutral policies that impact the racial composition of student enrollment may also violate civil rights laws—even if they previously would not have violated the Constitution.[9]

For example, class-based or top ten admissions criteria that are facially neutral and yet have the effect of bolstering racial diversity may violate both constitutional law and Title VI—that is, if they have race conscious *ends*, not merely by using race conscious *means*.[10,11]

Where legacy admissions are concerned, the tables turn: schools prohibiting a preference for families who are donors and alumnae may base their decision on the disparate impact of the practice on racial minority students. The legal theory, raised in a lawsuit and an administrative complaint, is usually not that the policies were enacted for intentionally discriminatory purposes —such as favoring white families or disadvantaging minority families—even if white families disproportionately comprise these elite groups disproportionately benefit from legacy

8. For example, Congress is weighing legislation to end legacy admissions, and several states are barring it: California, Colorado, New York, Connecticut, and Massachusetts among others. Michael T. Nietzel, *Colleges Face Mounting Pressure to End Legacy Admissions,* Forbes (Feb 29, 2024) https://www.forbes.com/sites/michaeltnietzel/2024/02/29/colleges-face-mounting-pressure-to-end-legacy-admissions/?sh=1db6c07f6620 [perma.cc/KY6R-EEJP].

9. For more in-depth reflections on the significance of the recent affirmative action cases, *see generally* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233 (2022); Vinay Harpalani, *The Need for an Asian American Supreme Court Justice,* 137 Harv. L. Rev. F. (forthcoming 2024).

10. Sonja Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024). This assumes bolstering racial diversity means increasing Black/Latinx students in proportion to white students. The placement of Asian Americans is more complicated since in some magnet schools they comprise a sizeable group, if not the majority. In these cases, plans that reduce Asian American admissions may violate Title VI.

11. Petition for Writ of Certiorari for Plaintiff-Appellant, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F. 4th 864 (4th Cir. 2023), *cert. denied*, 601 U.S. _ (Feb. 20, 2024) (No. 23-170), https://www.supremecourt.gov/docket/docketfiles/html/public/23-170.html [perma.cc/ZQ4D-QAPE].

admissions. In the post-*SFFA* world of college admissions, legacy admissions may not violate the Constitution's Equal Protection Clause, but they may violate Title VI. They may violate public policy concerns about racial equity, independent of the shifting legal terrain in this area.[12]

Against this context, should the U.S. Department of Education be empowered to decide whether race-based affirmative actions or legacy admissions limit educational opportunity in universities? Here is where arguments against equity regulations seem inapposite. Perhaps in the domains of housing and employment, private rights are directly impacted. But education is a public good, including education in private schools if the schools receive a modicum of public funding (e.g., for federal student loans). In the public domain, it seems appropriate for a federal agency to regulate opportunities. The U.S. Department of Education was founded to enforce desegregation orders after *Brown v. Board of Education*[13] and is expert in implementing civil rights laws in schools. And while they are not themselves part of a political branch or led by an elected leader, they are executive agencies led by a secretary who is politically accountable to the president. While the issue of college admissions is certainly politically significant—this is the kind of issue Congress might want to retain under the strengthening major question doctrine or nondelegation doctrine—Congress is addressing a co-equal branch in the form of the president.

II. SCOPE OF REGULATORY REFORM

The racial equity orders relating to higher education admissions constitute a new battle site in the longer-standing debate over the federal government's role in advancing equality. Within the field of regulation, there are an array of approaches to equality ranging from conservative legal theorists, to neo-liberals, to progressive reformers. Each perspective is described in general terms before being applied to the case study of affirmative action.

A. Conservative Legal Theorists

Conservative legal theorists believe in a modest regulatory state. [14] Many share a commitment to cost-benefit analysis (CBA) and efficiency as constraints on regulation.[15] Their viewpoint might favor deference to state legislatures or universities

12. Ming H. Chen, *We Need to End Legacy Admissions, But Racial Inequality Isn't Going Away,* BOSTON GLOBE (Jan. 13, 2024), https://www.bostonglobe.com/2024/01/13/opinion/we-should-end-legacy-admissions-it-wont-make-up-losing-affirmative-action/ [perma.cc/9SUB-8RRE]. *See also* Fanna Gamal, *What Does Critical Race Theory Teach Us About Non-Reformist Reforms?*, LAW AND POLITICAL ECONOMY PROJECT (Nov. 29, 2023), https://lpeproject.org/blog/crt-non-reformist-reforms/?utm_source=mailpoet&utm_medium=email&utm_campaign=lpe-blog-update [perma.cc/B8VZ-8SLM], *citing* DERRICK BELL, SILENT COVENANTS 4 (Oxford University Press, 2004).

13. 347 U.S. 483 (1954).

14. Jesse Merriam describes a similar "libertarian turn" in conservative legal thought around judicial restraint. Merriam, Legal Conservatism and the Progressive Blame Game, HUMANITAS 72 (2020).

15. *See generally* Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019).

on admissions policies. If regulatory intervention in college admissions is required at all, it is likely to be filtered through the lens of calculating CBA for the cost of tuition, financial aid, recruitment, and retention when evaluating affirmative action plans. The substantive value of diversity cannot compromise procedural value of fairness toward individuals, and a narrow interpretation of equal protection and anti-discrimination might constrain the implementation of executive orders on equity and caution against the using race in higher education admissions.

B. Neo-Liberal Legal Theorists

In contrast, neo-liberal theorists turn to laws and regulations as mechanisms for advancing civil rights. As Lawrence Friedman claimed in *Total Justice*, the American legal character is informed by this liberal faith.[16] Progressives during the New Deal Era and the civil rights era channeled this basic faith into civil rights agencies empowered by statute to fulfill equality ideals.[17]

Within the educational sphere, neo-liberals have focused mostly on substantive equality values. These substantive values can be situated in the broader debate about the proper place and scope of regulation. For neo-liberal theorists steeped in the civil rights movement, the regulatory state is obligated to remedy racial equity. History shows another instance of a landmark court case being followed up by consequential regulatory implementation in the form of the executive order that led to the creation of affirmative action in the bowels of the Office of Management and Budget (OMB) during the Nixon administration.[18]

This neo-liberal perspective on regulation and its benefits might be applied to modern universities in several ways, among them their commitment to diversity cast in the immediate educational benefits in the classroom and long-term benefits to society. The Biden administration seeks to calculate costs and benefits in a way that emphasizes distributional effects. The conservatives focus on CBA and efficiency-equity debates as the measuring stick for the legitimacy of regulation views CBA as operationalized in OMB Circular A-4 to be a safeguard against intrusions on private rights that may result from such redistribution. In the view of Kennerly Davis, CBA is being weakened under reform efforts from "radical progressives."[19] In contrast to the normative claim, Professors Cecot and Hahn

16. LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (Russell Sage Foundation, 1985).

17. *See e.g.*, R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX (The Brookings Institution, 2018); R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING THE WELFARE STATE (The Brookings Institution, 1994); CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION (Harvard Univ. Press, 1990).

18. 34 C.F.R. § 12985 (1969). *See also* JOHN DAVIS SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION (Univ. Chi. Press, 1996); Hugh Davis Graham, *The Origins of Affirmative Action: Civil Rights and the Regulatory State*, *in* 523 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCE AND SOCIAL SCIENCE (1992).

19. Virginia's former deputy attorney general J. Kennerly Davis Jr writes in an essay for the Federalist Society, "Is it lawful to use regulation to achieve equality?" that using regulatory review to advance substantive programs is inappropriate because it restricts property rights of regulated entities and forcibly reallocates private resources. John Kennerly Davis, *Is It Lawful to Use Regulatory Impact Analysis to Achieve Equity?*, THE FEDERALIST SOCIETY (Sep. 18, 2023), https://fedsoc.org/commentary/fedsoc-blog/is-it-lawful-to-use-regulatory-impact-analysis-to-achieve-equity [perma.cc/S95M-URWN].

make an empirical claim that most of the time, CBA does not yield measurable disparities by demographic groups, suggesting that agencies will have a difficult time operationalizing distributional equity in a manner that agencies can credibly implement.[20] Some of these changes are captured in the revised Circular A-4 that was adopted in November 2023 to correct long-standing criticisms that CBA gives too much weight to easily quantifiable factors and fails to credit qualitative benefits such as justice and equity for historically disadvantaged groups.[21] Some of the alleged inequities are borne out in economic analysis showing that discrimination is inefficient and harms the market place as much as the discriminated against minority.[22]

The measure of CBA is acute for affirmative action given the fixed number of seats in a college class, which positions higher education admissions as a site of contestation with seemingly clear winners and losers. However, educational benefits can be understated by focusing too much on admissions and not enough on higher education as an institution that opens doors to future earnings and upward mobility. These redistributive effects can be significant. The benefits associated with admitting racial minorities and lower-income individuals to schools that serve as gateways to future job opportunities and professional networks may be significant. Students with less means may cost more to recruit for the university than more privileged students in tuition dollars—especially as compared to students from families who are well-established as a result of their legacy status—and they may be more expensive to retain. However, federal student loans offset the cost of tuition to universities, and elite universities (where the most heated affirmative action disputes are playing out) draw on college endowments to provide scholarships. CBA is not as simple as calculating immediate institutional output in tuition and scholarships.

Stepping back from higher education policy to consider the generalized scope of regulatory reform, the government regulators who have taken the helm for Biden's equity initiatives are largely law professors in Office of Information and

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20. Caroline Cecot, *Efficiency and Equity in Regulation*, 76 VANDERBILT L. REV. 361 (2023) (addressing normative question of how equity concerns should instead be incorporated into administrative decision making by exploring false binary of efficiency and equity); Caroline Cecot & Robert W. Hahn, *Incorporating Equity and Justice Concerns in Regulation*, GEORGE MASON UNIVERSITY FACULTY PAPERS (Apr. 2022) (finding only 20% calculate either cost or benefit (Energy Department and EPA), with small differences in outcomes between presidents). Cecot's and Rahman's data-gathering goals might align with progressive reforms, but they differ as to whether the barrier is lack of data and resources to conduct CBA, as opposed to a lack of political will to reform CBA methods toward equity-oriented ends.

21. OFF. OF MGMT. & BUDGET, OMB CIRCULAR NO. A-4 (Nov. 9, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf [perma.cc/DD9S-ULF3].

22. *See generally* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (Univ. Chi. Press, 2d ed. 1971).

Regulatory Affairs (OIRA).[23] They offer a moderated approach to change that utilizes existing institutions rather than overhauling them. For example, K. Sabeel Rahman sets out to describe "structural change" in the administrative state by focusing on the governance back-end.[24] The structural dimension of his project speaks to the ambition of system-level policy coordination directed at dismantling inequality and disparities of power. This can be accomplished with data collection and analysis among other ways.

For example, Rahman describes Executive Order 13985 and the Equitable Data working group. The working group called for agencies to develop more disaggregated forms of data collection and building capacity to conduct more robust equity analysis of programs and policies.[25] According to its report, the working group seeks to update standard policies and best practices for categorizing and measuring race and ethnicity in several ways.[26]

First, the effort to collect more and better data contrasts with past initiatives to prohibit schools and government agencies to collect racial data. Assessing progressing toward equity goals involves data-gathering about equity. Barring schools from collecting this information in admissions applications, as some have suggested may be needed to demonstrate race neutrality post-*SFFA*, would erase the baseline for measuring progress. The prohibition would be reminiscent of the racial privacy initiative, California's Proposition 54, that was put forward by affirmative action opponent Ward Connerly.[27] Proposition 54 was billed as the "son

23. *The American Prospect* features a collection of essays on OIRA reforms under the Biden Administration. *See e.g.,* Robert Kuttner, *A Revolution in Cost-Benefit Analysis,* THE AMERICAN PROSPECT (Apr. 11, 2023), https://prospect.org/day-one-agenda/2023-04-11-revolution-cost-benefit-rules-oira/ [perma.cc/C5XD-B3N4]; Rajeh D. Nayak & Todd N. Tucker, *OIRA 2.0: Using OIRA for Progressive Regulation,* THE AMERICAN PROSPECT (Apr. 24, 2020), https://prospect.org/day-one-agenda/using-oira-for-progressive-regulation/ [perma.cc/QY7Z-EVW2]. *But cf.* Kalen Pruss, *It's Time for OIRA to Go,* THE AMERICAN PROSPECT (Apr. 24, 2020), https://prospect.org/day-one-agenda/its-time-for-oira-to-go/ [perma.cc/H89R-JWPZ].

24. K. Sabeel Rahman, *Structural Change and the Administrative State*, at 22, 33 (2024), available at https://isps.yale.edu/sites/default/files/files/Rahman-APEX-panel-draft-2-1-24-revised.pdf (defining back-end governing as analysis, data, and staffing).]

25. A VISION FOR EQUITABLE DATA: RECOMMENDATIONS FROM THE EQUITABLE DATA WORKING GROUP (2021), https://www.whitehouse.gov/wp-content/uploads/2022/04/eo13985-vision-for-equitable-data.pdf [perma.cc/42M6-N4DW].

26. *See* Karin Orvis, *Initial Proposals for Revising Federal Race and Ethnicity Standards*, OMB BLOG. (Jan. 26, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/01/26/initial-proposals-for-revising-the-federal-race-and-ethnicity-standards/ [perma.cc/8PE6-R4LQ]; *see also* Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards, 88 Fed. Reg. 5375 (Jan. 27, 2023), https://www.federalregister.gov/documents/2023/01/27/2023-01635/initial-proposals-for-updating-ombs-race-and-ethnicity-statistical-standards [perma.cc/3JDM-CBE4]; *U.S. Office of Management and Budget Interagency Technical Working Group on Race and Ethnicity Standards*, OFFICE OF MGMT. & BUDGET (Apr. 27, 2023), https://spd15revision.gov/[perma.cc/NM9B-D8SC].

27. Proposition 54: *Classification by Race, Ethnicity, Color, or National Origin*, CALIFORNIA LEGISLATIVE ANALYST'S OFFICE (Aug. 11, 2003), https://lao.ca.gov/ballot/2003/54_10_2003.htm [perma.cc/S7MH-GG4T]. *See* Richa Amar, *Unequal Protection and the Racial Privacy Initiative*, 52 UCLA L. REV. 1279, 1280–85 (2005); *see also* Norimitsu Onishi, *A Racial Awakening in France, Where Race Is a Taboo Topic*, N.Y TIMES at A9 (July 18, 2020); Abby LaBreck, *Color-Blind: Examining France's Approach to Race Policy*, HARV. INT'L REV. (Feb. 1, 2021), https://hir.harvard.edu/color-blind-frances-approach-to-race [perma.cc/R4GX-EC47].

of Proposition 209" and was defeated in 2003. Had it passed, it would have crippled affirmative action in California colleges twenty-five years before *SFFA v. Harvard*, because overinterpreting *SFFA* limits on the use of race could leave schools unable to assess the effects of admissions policies and diversity, equity, and inclusion (DEI) programs. It could also frustrate accountability for Title VI compliance.

Second, the way that data is collected and analyzed matters to subsequent policy making. Since the 1970s, race and ethnicity have been considered distinct questions for the census and other government programs.[28] The working group's recommendation to ask a consolidated question about Hispanic identity that can be rolled up and aggregated may be good for Latinx individuals, who are currently counted as ethnically Hispanic but racially either white or black in way that dilutes their size and cohesion.[29] The census bureau also took the working group's recommendation to add Middle Eastern and Northern African (MENA) as a racial category separate.[30] Doing so captures "changing migration patterns" and resulting new forms of discrimination.[31] Beyond counting heads, one of the governing principles for the working group is that "race and ethnicity are sociopolitical constructs."[32] This definition of race maintains a focus on Black descendants of slaves, while adapting to current social contexts of discrimination.[33]

The institutionalist perspective of neoliberals focuses on legal institutions, bureaucratic procedures, and data gathering—the stuff of lawyers and political scientists. They believe that the regulatory state insufficiently advances educational equity, that CBA is anti-regulatory, and that formal institutions embed racism. They are a far cry from the straw man of swashbuckling progressives that legal conservatives depict.

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28. For more on race and the census, *see* MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS (Stan, Univ. Press, 2000). Conservatives sought more recently to intervene in *Dep't of Com. v. N.Y.*, 139 S. Ct. 2551 (2019) (holding that the question of whether an agency could inquire into a person's citizenship status on the 2020 census questionnaire was a reviewable action under the Administrative Procedure Act).

29. Revisions to OMB's Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, available at https://www.federalregister.gov/documents/2024/03/29/2024-06469/revisions-to-ombs-statistical-policy-directive-no-15-standards-for-maintaining-collecting-and [https://perma.cc/56WV-B8FY] (summarized in Hansi Lo Wang, *New 'Latino' and Middle Eastern or North African' Checkboxes Proposed for U.S. Forms,* NPR (April. 7, 2023), available at https://www.npr.org/2023/01/26/1151608403/mena-race-categories-us-census-middle-eastern-latino-hispanic [https://perma.cc/75CL-QPP7].)

30. *Id.*

31. *See* Hansi Lo Wang, New 'Latino' and Middle Eastern or North African' Checkboxes Proposed for U.S. Forms, NPR (April. 7, 2023), available at https://www.npr.org/2023/01/26/1151608403/mena-race-categories-us-census-middle-eastern-latino-hispanic [https://perma.cc/75CL-QPP7].

32. Revisions to OMB's Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity, available at https://www.federalregister.gov/documents/2024/03/29/2024-06469/revisions-to-ombs-statistical-policy-directive-no-15-standards-for-maintaining-collecting-and [https://perma.cc/56WV-B8FY].

33. *See id.*

C. Progressive (Non-Reformist) Reforms

The focus of progressives, some of whom identify as "non-reformist reformers," is on the root causes of inequity. For a starting definition, Amna Akbar describes non-reformist reforms as a framework for reconceiving reform: not as an end goal but as an ongoing struggle to reconstitute the terms of life, death, and democracy.[34] Kimberlé Crenshaw did not use the exact same terminology as Akbar, but Crenshaw similarly grappled with the duality of using law to advance liberal ends —presumably liberal legal reforms are reformist reforms—saying "liberal legal reform signals the ongoing ideological struggle in which the occasional winners harness the moral, coercive, consensual power of the law."[35] Her point is that institutional responses may challenge the dominant order in a radical way, but only if the institution can nimbly reconstitute its existing set of relations in the face of the challenge.

Some examples of root cause reforms for racial inequity in higher education include a focus on residential segregation and housing discrimination, the inequities of school finance for K-12 education, and the dangers of racial capitalism in corporate behavior and governance practices.[36] The treatment for the economic disparities they diagnose involve structural changes. For example, some describe "regulatory reparations visions" that seek to explicitly redress past racial harms by way of economic remuneration, going beyond the cures of litigation and legislation.[37]

These more sweeping structural reforms are what Davis describes as the "fringe of socialists" now infecting "establishment politics."[38] While some of Davis' concerns may be the product of his own normative preferences, they reveal what is at stake in a broader debate over the proper role of regulation in mandating equity. Conservatives such as Davis believe that "[r]egulation should implement consensus goals and not rework the balance of social policy in domains where there is contestation about the meaning of fairness to all individuals, including those who are not racial minorities."[39] Neo-liberal legal scholars and more radical reformers have been engaged in lively conversation about whether efforts directed at institutional change and higher education institutions are sufficiently reformist, as compared to more ambitious "non-reformist reforms."

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34. Amna A. Ackbar, *Non-Reformist Reforms and Struggles Over Life, Death, and Democracy,* 132 YALE L.J. 2360 (2023); Amna A. Ackbar, *A Horizon Beyond Legalism: On Non-Reformist Reforms*, LAW AND POLITICAL ECON. PROJECT (Nov. 13, 2023), https://lpeproject.org/blog/a-horizon-beyond-legalism-on-non-reformist-reforms/[perma.cc/7CWY-U43N].

35. Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988). Ruth Wilson Gilmore describes non-reformist reforms as "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization." RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (Univ. Cal. Press, 2007).

36. For another example relating to public health, see Kristen Underhill & Olatunde C.A. Johnson, *Vaccination Equity by Design*, 131 YALE L.J. 53 (2021).

37. Vanessa Zboreak, *Regulatory Reparations*, 14 ELON L. REV. 215, 217 (2022) (describing potential for equity provisions to create a baseline for measuring remedial efforts within agencies but noting need for mandates to take specific actions or implement recommendations).

38. *Id.*

39. Davis, *supra*, note 26.

III. PROGRESSIVE, NEO-LIBERAL, AND CONSERVATIVE APPROACHES TO LEGACY ADMISSIONS

These three views hold purchase for educational equity and legacy admissions as well.

FIGURE 1.

Application of regulatory frameworks to affirmative action and legacy admissions post-*SFFA v. Harvard*

	SFFA v. Harvard	Progressive	Non-Reformist	"Conservatives"
Compliance with Title VI requires race-based affirmative action	Racial diversity is not compelling interest per se, criteria must be race neutral and narrowly tailored	Overcoming racial adversity can support college goals, if race neutral/holistic means used to achieve it. CBA favors LT benefits of diversity?	Racial equity begins with K-12 pipeline programs, recruitment, retention for diverse students (eg DEI, financial aid). Use equitable data to improve?	Racial diversity is not compelling interest per se. Race neutral criteria required for narrow tailoring. CBA disfavors AA, equitable data?
Compliance with Title VI forbids legacy admissions	Disparate impact on minority students without intent is not impermissible	Disparate impact on minority students without intent can be impermissible. CBA disfavors legacy if it limits LT benefits diversity	Equity requires dismantling intergenerational wealth and privilege by ending legacy admissions. Use zip codes?	No clear legal mandate, no clear political opposition but CBA probably disfavors legacy.

As the chart suggests, after *SFFA v. Harvard,* conservatives might find that using affirmative action to comply with Title VI's racial diversity value is not a compelling interest per se; nothing less than race neutral criteria might be considered for narrow tailoring. Some conservatives might focus on fundamental efforts to bolster private schools and parental rights.[40] Others might focus more narrowly on admissions policies, D.E.I. programs, and curricular reforms.

Neo-liberal reformers would focus their remedies on the legacy of *Brown v. Board of Education*'s desegregation edict in K-12 schools.[41] Acknowledging that

40. Combating Race and Sex Stereotyping, 85 Fed. Reg. 60, 683 (Sept. 28, 2020). *See also* Ashlyn Myers, *From Banned Books to Forbidden Therapies: Culture-War Legislation Explained*, THE STATEHOUSE FILE (Mar. 3, 2023), https://www.thestatehousefile.com/politics/from-banned-books-to-forbidden-therapies-culture-war-legislation-explained/article_7607be18-ba16-11ed-a0ce-d39a0d630b49.html [perma.cc/8RX2-PNS3]; Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools,* PEN AM. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/[perma.cc/H2T3-87MC].

41. Derrick Bell called *Brown* no more than one chapter in a "long-running racial melodrama." A failed attempt to resolve the contradiction "between the freedom and justice for all that America proclaimed, and the subordination by race permitted by our highest law." DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (Oxford Univ. Press, 2004).

the affirmative action debate comes 18 years too late, liberal reformers would use law and institutions within the prevailing governance system to tackle entrenched privilege. To them, education is not only about costs and benefits. It is a site for articulating pro-equality and anti-discrimination public values. That is why *Brown v. Board of Education's* approbation of the stigma associated with state-mandated segregation—that is, discrimination with the imprimatur of the state—has held special purchase in civil rights and equality. *Brown* challenged the institutional order during the civil rights era. The subsequent implementation of *Brown's* legacy has been modest as, over time, the federal government's strategies for countering discrimination have themselves become the institutional order. They may not go as far as non-reformist challenges to the prevailing economic, political, and social order with their faith in strategies for legal change, but they may share some of the disappointments.

In this way, liberals and progressives may converge on challenging the institutional order through the ending of legacy admissions, or the practice of a university admitting the relatives (usually children) of alumnae. Why does ending legacy admissions matter so much to reformers? On the numbers, studies by economist Raj Chetty and his collaborators at Harvard, published in the National Bureau of Economic Research and Education Reform Now, show that three-quarters of research universities and nearly all liberal arts colleges use legacy preferences.[42] Within a range of test scores, being a legacy at many universities raises an applicant's changes of admission by twenty percent. Legacy admissions are the largest factor contributing to an over-representation of high-income families at Ivy Plus colleges. Once enrolled, attending an Ivy-Plus college triples a students' chances of obtaining jobs at prestigious firms and substantially increases their chances of earning in the top 1%. Essentially, legacy admissions amount to affirmative action for the rich and already privileged.

The legal claim filed by civil rights attorneys in a complaint to the U.S. Department of Education, Office for Civil Rights (OCR) challenging legacy admissions, arises in logical steps. Racial preferences violate Title VI of the Civil Rights Act.[43] More than 70% of legacy admits are white. While whiteness is not necessarily the purpose for legacy admission (discriminatory intent), the civil rights attorneys suggest that the effect disproportionately impacts white applicants (disparate impact, which is colorable under civil rights statutes). Thus, ending legacy admissions can free up spaces for more disadvantaged students,

42. Raj Chetty, et al, *Diversifying Society's Leaders*? *The Determinants and Causal Effects of Admission to Highly Selective Private Colleges,* NAT'L BUREAU OF ECON. RSCH. (July 2023), https://www.nber.org/papers/w31492 [perma.cc/BK89-Q29K]; James Murphy, *The Future of Fair Admissions*, EDUC. REFORM NOW (2022), https://edreformnow.org/wp-content/uploads/2022/10/The-Future-of-Fair-Admissions-Legacy-Preferences.pdf [perma.cc/RB3Z-V9Z9].

43. *Federal Civil Rights Complaint Challenges Harvard's Legacy Admissions*, LAWS. FOR C.R., https://lawyersforcivilrights.org/our-impact/education/federal-civil-rights-complaint-challenges-harvards-legacy-admissions/ [perma.cc/W2ZQ-C22S].

including racial minorities who will no longer get a boost without affirmative action. OCR agrees enough to be pursuing the investigation into legacy admissions at Harvard under this theory of Title VI.[44] To them, the case against legacy admissions rests on a claim to reciprocity: if admission preferences can no longer be given on the basis of race, neither should they be given on the basis of relationships marked by wealth and privilege.

This is where progressives want more. The practice of fortifying advantages for the privileged is not equitable as a structural matter, even if it may seem fair individually. Most universities say legacy admissions ensure alumnae donations and boost student matriculation. However, there is a history of colleges using legacy admissions as a way to maintain the status quo and as a backdoor strategy to limit newcomers: Jewish people, racial minorities, and immigrants.

Ending legacy admissions is probably legal and it may seem fair as a normative matter. But it will not restore racial equity or promote racial diversity. Many of the children of elite college alumnae have enjoyed other types of privilege and will still get in—privilege is not so easily wrested from the wealthy and powerful—so that changing the world one regulation at a time will not dramatically change racial demographics on college campuses. Experts in the court record for the *SFFA* lawsuit estimated that eliminating legacy admissions would increase the number of racial minorities if affirmative action were retained, but those same experts say it would not offset the decrease in affirmative action from eliminating affirmative action.[45] It will definitely not alter the terrain in a way that is satisfying to either conservative lawyers who are pushing to end all race conscious preferences or progressives and civil rights attorneys who are pushing to end legacy preferences. On both sides, equity is not merely about getting into college. It's about wielding power in society after graduation: in workplaces, in politics, and in other societal domains. That's why the challenge to college admissions practices is part of a broader conversation about ending race-conscious policies in so many domains – high school magnet programs, venture capital, and the military[46] – and about regulation itself.

CONCLUSION

Recent and future affirmative action lawsuits will test the bounds of regulatory approaches to race and equality. In this short essay, I've raised two questions that require further consideration:

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44. Alexander v. Sandoval, 532 U.S. 275 (2001) (preserving agencies' ability to investigate evidence of disparate impact under Title VI).

45. Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, NAT'L BUREAU OF ECON. RSCH. (2019), https://www.nber.org/system/files/working_papers/w26316/w26316.pdf [https://perma.cc/V9PF-SKV9].

46. Liam Knox, *A New Legal Blitz on Affirmative Action*, INSIDE HIGHER EDUCATION (Sept. 20, 2023), https://www.insidehighered.com/news/admissions/traditional-age/2023/09/20/affirmative-action-lawsuits-return-vengeance [https://perma.cc/2JE2-7DMM].

1. To what extent do modern social and political developments (Black Lives Matter to *SFFA v. Harvard)* unsettle the prevailing regulatory order around racial equity? How do race-based and legacy admissions map onto other "battle sites" over the government's role in advancing equity, including D.E.I. in workplaces, private investment, and the military?

2. Who should decide how to prioritize competing values encompassed in federal regulation and substantive laws: schools, the executive branch, legislatures, or courts?

These questions speak to the "moral turn in administrative law" that recasts procedural dimensions of regulation such as equity, efficiency, and fairness into substantive debate.[47]

Whatever happens with affirmative action and legacy admissions in higher education, there is surely a lot at stake for race and regulatory equity. The government bureaucrats and law professors contributing to an emerging, intellectual movement seek to go beyond incremental policy tweaks and reformist reforms.[48] The defining characteristic of their movement is pursuing equity in ways that challenge the prevailing order. This vision transforms the understanding of institutional approaches to race and regulatory equity to be a pragmatic choice—a starting point—rather than the end goal. The regulatory equity efforts represent an instantiation of long-awaited progressive aspirations in the highest order of government that challenge the prevailing order around race.[49] For the sake of good government, it is preferable for regulatory agencies to work out the details of how to pursue equity on a small scale, as opposed to making their own sweeping policy changes unsupported by the tools of the governance back-end: CBA, equitable data gathering, and improved evidence. Sweeping policy is the business of Congress, which lacks the regulatory expertise to sort out the fine-grained details of policy implementation.

In schools and universities, it is not yet known whether institutions will aggressively or modestly implement a newly-pronounced set of public norms around racial equality. The redefinition of racial equity as an abiding concern of regulation presents new parameters for the age-old debate over regulating race.

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47. The use of "moral turn" comes from Jodi Short, *Legalizing the Politics of Care: The Search for the Moral Foundations of Administrative Law*, ADMINISTRATIVE LAW JOTWELL, Sep. 30, 2022, available at https://adlaw.jotwell.com/legalizing-the-politics-of-care-the-search-for-the-moral-foundations-of-administrative-law/ [https://adlaw.jotwell.com/legalizing-the-politics-of-care-the-search-for-the-moral-foundations-of-administrative-law/].

48. Karl Klare, *What Non-Reformist Reforms Meant to Us*, LAW AND POLITICAL ECONOMY PROJECT (Nov. 15, 2023), https://lpeproject.org/blog/what-non-reformist-reforms-meant-to-us/https://perma.cc/2S2K-CXMF.

49. Among other administrative law scholars who have specified these ambitions for the administrative state are Blake Emerson, *Public Care in Public Law: Structure, Procedure, and Purpose,* 16 HARV. L. & POL'Y REV. 35 (2021) and Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE JOURNAL ON REGULATION (July 30, 2020), https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah/ [https://perma.cc/U49T-37Y6]; Bijal Shah, *Administrative Subordination*, UNIV. CHI. L. REV. (forthcoming 2024).