

# SECRET ADMISSIONS

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## *Abstract*

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

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## INTRODUCTION

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

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

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

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

3 539 U.S. 306 (2003).

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

5 See *Grutter*, 539 U.S. at 325.

6 *Id.* at 337–39.

7 *Id.* at 339–42.

8 *Id.* at 341.

9 *SFFA*, 600 U.S. 181, 218 (2023).

10 *Id.*

11 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003) (affirming University of Michigan Law School

individualized consideration of various nonacademic factors in addition to academic criteria—was around long before *Grutter*.<sup>12</sup> But the late Justice Sandra Day O'Connor's *Grutter* majority opinion brought significantly more attention to holistic review. *Grutter* upheld the University of Michigan Law School's holistic admissions policy, which considered race on an individualized basis, as one factor among many criteria, and with potentially variable weight for each applicant.<sup>13</sup> Simultaneously, Justice O'Connor's majority opinion in *Gratz v. Bollinger* rejected the University of Michigan College of Literature, Science, and the Arts (LSA) admissions policy, which used race mechanically by giving 20 points on a 150 point scale to all underrepresented minority applicants.<sup>14</sup> And Justice O'Connor also affirmed the Court's 1978 ruling in *Regents of the University of California v. Bakke*, where the Court struck down the University of California, Davis School of Medicine special admissions program which had reserved sixteen seats in a class of one hundred for underrepresented minority applicants.<sup>15</sup>

Justice O'Connor's preference for *Grutter*'s holistic individualized review, along with her rejection of the *Bakke* set-aside and *Gratz* point system, had many consequences. After *Grutter*, if a university wanted to use race-conscious admissions policies, holistic review was not merely an option: it was a constitutional mandate. But although that mandate is now obsolete, holistic review is not. Most selective institutions use some form of holistic review in their admissions processes,<sup>16</sup> and they will continue to do so even without considering race. Flexible, individualized review of applicants, based on a plethora of characteristics, will become even more important in the post-*SFFA* world, as institutions seek to use various other criteria to attain racially diverse student bodies.<sup>17</sup> And this will amplify attention given to

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admissions policy), which involved “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment”). This was the first use of the term “holistic” by the U.S. Supreme Court in an admissions case. Holistic review itself remains intact after *SFFA*. See *SFFA*, 600 U.S. 181, 363 (Sotomayor, J., dissenting) (noting that *SFFA* ruling “leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications”). In this article, I use the terms “holistic review” and “holistic admissions” interchangeably.

12 See *infra* Part I.

13 *Grutter*, 539 U.S. at 334 (“[A] university may consider race or ethnicity only as a ‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” ... In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”).

14 539 U.S. 244 (2003). Technically, the LSA policy was also holistic in part, but not in the way it incorporated race. Use of race in the LSA policy was not flexible or individualized.

15 438 U.S. 265 (1978).

16 Jolene M. Maude & Dale Kirby, *Holistic Admissions in Higher Education: A Systematic Literature Review*, 22 J. HIGHER EDUC. THEORY & POL’Y, 73, 76 (2022) (noting that the College Board’s “[g]uidelines [for holistic admissions] have been adopted by a variety of professional organizations and have been incorporated into the admissions practices of colleges and universities”).

17 See Kelly Dore, *Affirmative Action Is Ending—But Holistic Admissions Can Still Allow Higher Education to Better Reflect Society*, FORTUNE (June 23, 2023), <https://fortune.com/2023/06/30/affirmative-action-end-holistic-admissions-can-still-allow-higher-education-to-better-reflect-society-supreme->

another intriguing feature of holistic admissions policies: their obscure, mysterious nature. Media coverage of *SFFA* often highlighted the lack of transparency in holistic admissions policies.<sup>18</sup> Such obscurity is an inherent feature of a process that affords so much flexibility to admissions reviewers who are essentially instructed to use their own judgments (and biases)<sup>19</sup> in evaluating each individual applicant. How exactly admissions decisions are made through holistic review is perhaps the “best kept secret”<sup>20</sup> in higher education.

In this article, I will explore such *secret admissions*: an ironic term I use to refer to the mysterious nature of holistic review itself—the largely idiosyncratic process by which various criteria are weighed, differently for each applicant, to grant or deny each of them admission.<sup>21</sup> Many applicants know the criteria used in holistic review, which include grades, test scores, extracurricular activities, essays, personal hardships, and letters of recommendations. Universities list such criteria on their websites.<sup>22</sup> However, the way that these criteria are integrated to make decisions is a mystery to most.<sup>23</sup> As part of secret admissions, I focus in particular on the flexible, individualized use of race endorsed by *Grutter*, which obscures the impact

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court-politics-universities/ (“[H]igher education institutions will lean more heavily on holistic admission policies to ensure they meet their diversity, equity, and inclusion goals[.]”); Acuity Insights, *Holistic Admissions Practices On the Rise Following the Repeal of Affirmative Action*, GLOBENEWSWIRE (Oct. 19, 2023), <https://www.globenewswire.com/news-release/2023/10/19/2763299/0/en/Holistic-Admissions-Practices-On-the-Rise-Following-the-Repeal-of-Affirmative-Action.html>.

18 See, e.g., Sara Harberson, *The Truth About ‘Holistic’ College Admissions*, L.A. TIMES (June 9, 2015), <https://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html> (“Without more transparency, holistic admissions can become an excuse for cultural bias to dictate a process that is supposed to open doors.”); Josh Gerstein, *What Is Harvard Trying to Hide?*, POLITICO (Oct. 21, 2018), <https://www.politico.com/magazine/story/2018/10/21/harvard-admissions-affirmative-action-221669/> (“For years, reporters have been trying to get elite universities to be more transparent about their admissions process.”); Victor Liu, *Lack of Transparency Causes Confusion in Admissions Process*, SARATOGA FALCON (Apr. 29, 2019), <https://saratogafalcon.org/content/lack-transparency-causes-confusion-admissions-process/> (“[U]nder a holistic review for admissions, students are generally left in the dark about what admissions offices are looking for.”).

19 I use the term “biases” to reference tendencies to favor or disfavor certain attributes, and to make assumptions about who does and does not possess such attributes. In that vein, biases can yield positive or negative results for any individual applicant in a holistic admissions process. Although bias can be conscious or unconscious, my use of the term generally denotes the latter—“implicit bias.” See generally Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self Esteem, and Stereotypes*, 102 PSYCH. REV. 4 (1995); MAHZARIN BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2016).

20 Diamond D & the Psychotic Neurotics, *Best-Kept Secret, on STUNTS, BLUNTS & HIP HOP* (Chemistry Records 1992).

21 See *infra* Part I. “Secret admissions” refers specifically to the mystery regarding how holistic review works in practice.

22 See, e.g., Harvard College Admissions & Financial Aid, *What admissions criteria do you use?*, <https://college.harvard.edu/admissions> (“There is no formula for gaining admission to Harvard. Academic accomplishment in high school is important, but the Admissions Committee also considers many other criteria, such as community involvement, leadership and distinction in extracurricular activities, and personal qualities and character. We rely on teachers, counselors, and alumni to share information with us about an applicant’s strength of character, their ability to overcome adversity, and other personal qualities.”).

23 See sources cited *supra* note 18; see also *infra* text accompanying notes 75–76.

of race on any individual admissions decision.<sup>24</sup> Justice O'Connor preferred this secrecy, because she believed that it prevented racial stigma and balkanization.<sup>25</sup> But I argue that SFFA took advantage of this obfuscation in its litigation.<sup>26</sup> And in a post-SFFA admissions regime, allegations of the surreptitious, illegal use of race could lead to even more litigation.<sup>27</sup> My article thus examines how the secrecy in holistic review has influenced and been influenced by the consideration of race in admissions, and how all of this may play out in a post-SFFA admissions world. It does so not only by reviewing scholarly and judicial discourse on holistic admissions, but also through personal anecdotes—from conversations about my research on race-conscious admissions policies to stories from my students about their applications to my own experiences serving on admissions committees.

By focusing on secret admissions and its consequences, I do not aim to rebuke holistic review completely or to argue that universities should stop using it altogether. I acknowledge that holistic review has positive attributes. It allows admissions committees to consider talents and potential contributions by applicants that are not readily measured by academic criteria, and it allows individually tailored assessment of applicants' experiences and challenges, all integrated together in a flexible manner. Universities should consider any factors that relate to an applicant's ability to make contributions to their campus activities or to society more generally. Nevertheless, my article serves as a cautionary tale. Because holistic review in admissions is likely here to stay, I aim to illustrate some of the pitfalls that derive from its secretive nature. My hope is that universities take these pitfalls into account when using holistic review and aim to mitigate their potential negative consequences, through transparency and other means.

Part I explains in detail what "holistic" review in admissions means. It looks at the history of admissions policies at American universities, and it gives a basic overview of holistic review. This part illustrates that even scholars with expertise in university admissions view holistic review as an obscure process with little transparency. Part II evaluates this "secret" admissions process more closely. It considers the virtues and vices of having a secretive and obscure process for reviewing applicants, focusing on race-conscious admissions and Justice O'Connor's choice of the *Grutter* plan over the *Gratz* plan and the *Bakke* set-aside. This part shows that Justice O'Connor preferred to make race-conscious admissions policies less visible, and that doing so was consistent with her prior race jurisprudence. It also reviews how scholars and commentators reacted to this preference for obfuscation over transparency. Part III considers how the secretive nature of holistic review facilitated the legal challenge by SFFA. It goes through the SFFA litigation from the early stages, and it delves into how the Supreme Court treated holistic review in its SFFA opinion. This includes the SFFA majority's view that applicants could still discuss racial experiences in their personal essays<sup>28</sup>—a holding that

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24 See *infra* Parts II and III.

25 See *infra* Part II.

26 See *infra* Part III.

27 See *infra* Part IV.

28 SFFA, 600 U.S. 181, 230 (2023). ("Nothing in this opinion should be construed as prohibiting

itself obscures the difference between legal and illegal consideration of race in admissions. Part IV then examines what may happen if opponents of affirmative action think that universities are still using race itself as an admissions factor. It considers accusations that UCLA was doing so in 2008, long after California had banned race-conscious admissions. It delves into the investigation of those accusations. This part also envisions what might happen if such accusations of surreptitious use of race are translated to litigation. Strict scrutiny would not apply to post-*SFFA* litigation of this nature, because universities would have facially race-neutral admissions policies and deny using race. Plaintiffs would have the burden to prove that universities are doing so. Nevertheless, institutions tend to be risk averse. This part also argues that universities may choose to “de-quantify” admissions—to reduce use of numerical scales such as standardized test scores and numerical ratings of holistic criteria—because plaintiffs have used such metrics to illustrate racial differences.<sup>29</sup> In the Conclusion, I call for universities to be more transparent about their holistic admissions policies, not only to avoid legal controversies, but also to promote equity. I also draw upon a personal anecdote—my interaction with a student—to examine how secret admissions may impact applicants themselves—both their access to information and the personal information they may feel compelled to reveal. Holistic admissions will always have pitfalls, but my hope is that universities will make good-faith efforts to address these as best they can.

## I. THE BEST-KEPT SECRET: HOW DOES HOLISTIC REVIEW WORK?

Whenever I talk about my scholarship on affirmative action with laypeople, I am reminded that academia is an elite, rarified bubble. Most Americans, including those who go to college, do not encounter race-conscious admissions policies at all. Most institutions of higher education did not use them even before *SFFA*.<sup>30</sup> And even students who went to selective universities that used race-conscious admissions often did not understand how it worked. Some were not even aware of its existence, even as they applied to college and law school. A few years ago, when I told a group of new law students that my research focused on race and university admissions, their first assumption was I meant invidious racial discrimination. I had to clarify for them that I was *not* claiming that Harvard intentionally discriminated against Black students in its admissions process. Rather, I told them,

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universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”).

29 See *infra* note 221.

30 John Kroger, *The End of Affirmative Action*, INSIDE HIGHER ED (Oct. 30, 2022), <https://www.insidehighered.com/blogs/leadership-higher-education/end-affirmative-action> (“Many higher education institutions have open or close to open admissions, taking virtually all applicants. For these schools, the [SFFA] decision will have no or little impact.”); Chris Quintana, *Supreme Court Weighs Affirmative Action Case, but Most College Admissions Won’t Be Affected*, USA TODAY (Oct. 31, 2022), <https://www.usatoday.com/story/news/education/2022/10/30/college-admissions-affirmative-action-supreme-court/8233859001/> (noting that “Harvard cited surveys that found about 40% of universities consider race to some degree[,]” implying that about 60% do not); Drew Desilver, *A Majority of U.S. Colleges Admit Most Students Who Apply*, PEW RESEARCH CENTER (Apr. 9, 2019), <https://www.pewresearch.org/short-reads/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply/>.

my work focused on defending Harvard's ability to consider an applicant's race when making admissions decisions, in order to benefit underrepresented students of color, including Black students.

Even when they understand I am talking about affirmative action, the first thing laypeople often think is "quota." Numerical set-aside plans are simple enough to understand. They form an initial reference point, and nonlawyers can be forgiven for not knowing that *Bakke* banned such admissions plans.<sup>31</sup> It is also relatively easy to understand a mechanical point system, such as the one rejected in *Gratz*.<sup>32</sup> Both of these plans involve using race as a category alone, where checking a particular box yields the same benefit for all applicants who check it. This is something that laypeople can envision without much difficulty.

However, I get much more puzzled looks when I try to describe the admissions policy at issue in *Grutter*. It is more difficult to comprehend a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment" and "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight[]" in order to "adequately ensure[] that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."<sup>33</sup> Here, checking the box alone does not explain what happens. My sense is that laypeople do have some idea of what I am talking about—that admissions committees consider nonacademic criteria in addition to grades and test scores. But they cannot easily fathom how race factors into such a process in a flexible, individualized manner that treats applicants fairly and equally. They are at a loss for how holistic review works in practice. How does an admissions committee member compare one applicant who played chess with another who played the trombone in the marching band, if both excelled at those activities and were comparable otherwise? If asked to speculate, they may say that a committee member who plays chess would pick the former, while one who plays musical instruments will pick the latter. And similarly, they may speculate that an admissions committee member will favor applicants who share their racial background. But I don't think they really believe that holistic review is so crude or simple. It's just mysterious.

The origins of holistic review itself date back a century. In his 1980 article, "The History of University Admissions," Professor Laurence Veysey discusses five phases of American university admissions.<sup>34</sup> The first two phases noted by Professor Veysey did not involve much if any holistic review.<sup>35</sup> He does note that the initial phase, "the long reign of the individual entrance exam in the old-time

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31 See *supra* note 15 and accompanying text.

32 See *supra* note 14 and accompanying text.

33 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

34 Laurence Veysey, *Review: The History of University Admissions*, 8 REVS. AMER. HIST. 115, 116–17 (1980).

35 *Id.*



college, focusing on Greek, Latin, and mathematics[.]”<sup>36</sup> had loopholes that allowed admission “upon conditions” for some privileged applicants and some applicants from “less prominent backgrounds[.]”<sup>37</sup> although these were not common circumstances. The second phase, prompted by increasing student numbers in the late nineteenth century, was the development and initial use of standardized admissions tests.<sup>38</sup> Here, Professor Veysey notes that university admissions also “saw deemphasis of the classic languages as barriers to elite access and, at the same time, the creation of more-standardized yardsticks such as the certification of approved secondary schools (allowing students’ grade records to serve in lieu of any exam)[.]”<sup>39</sup> Thus, although standardized tests were used, they were “no insuperable hurdle” to the admission of legacies, athletes, and other privileged applicants.<sup>40</sup>

It was the third phase beginning in the 1920s, where the process we now call “holistic review” (although not the term itself)<sup>41</sup> began to emerge. Professor Veysey attributes this in large part to anti-Semitism.<sup>42</sup> He describes the newfound “emphasis on ‘character and fitness,’” which resulted in the reduction of Jewish students admitted to elite universities such as Harvard, Yale, and Princeton.<sup>43</sup> At Harvard, character and fitness criteria included “‘five pillars: academic promise, personal qualities, health and athleticism, geographic distribution, and Harvard parentage.”<sup>44</sup> A century later, SFFA would draw on this history to analogize between those earlier practices against Jewish applicants and alleged limits on admission of Asian American students to Harvard today.<sup>45</sup>

Professor Veysey’s fourth phase came in the post–World War II period, when anti-Semitism was less palatable, the G.I. Bill was passed, and the Cold War–driven, “post-Sputnik” need to compete technologically with the Soviet Union resulted in renewed emphasis on “intellectual meritocracy.”<sup>46</sup> He describes this

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36 *Id.* at 116.

37 *Id.* at 116–17.

38 *Id.* at 117.

39 *Id.*

40 *See id.*

41 *Id.* at 117–19. Even Veysey’s 1980 article does not use the term “holistic.” *See generally id.*

42 *Id.* at 118.

43 *Id.* at 117–18.

44 Kristine E. Guillaume, *SFFA Argues Harvard’s ‘Holistic’ Admissions Rooted in Tactics Once Used to Limit Jewish Admits*, HARVARD CRIMSON (June 21, 2018), <https://www.thecrimson.com/article/2018/6/21/holistic-admissions-origin/>.

45 *Id.*

46 Veysey, *supra* note 34, at 119. The need to build up America’s scientific and technological infrastructure also led to changes in U.S. immigration policy, bringing about the influx of educated Asian immigrants from nations such as China and India. *See* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 245–47 (2022). Many of these immigrants and their children became high academic achievers, facilitating the “model minority” stereotype—the notion that Asian Americans attain success through hard work and particular cultural values that other marginalized groups can emulate. This view ignores the vastly different histories of various groups and the different social barriers they face. *Id.* at 245–49. *See also* Mike Hoa Nguyen, *et*

phase as “surprisingly brief”:<sup>47</sup> perhaps it was mostly a recognition of changing U.S. demographics and global concerns of postwar times.<sup>48</sup>

The fifth phase came in the wake of the Civil Rights Movement, which was also spurred on by the Cold War.<sup>49</sup> This was the origin of affirmative action in admissions, with an emphasis on “equality of individual opportunity.”<sup>50</sup> Interestingly, Professor Veysey places *Bakke* in this phase,<sup>51</sup> but he does not discuss “diversity” or “holistic” admissions.<sup>52</sup>

Nevertheless, I would argue that *Bakke* brought about a sixth phase of admissions—one where the educational benefits of diversity became key. Justice Lewis Powell’s opinion in *Bakke* drew upon the academic freedom of universities—“a special concern of the First Amendment[,]” which included “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>53</sup> In this context, Justice Powell approved of the use of race as one “plus” factor, alongside other criteria that could enhance student body diversity.<sup>54</sup>

In their recent, extensive scholarly literature review on holistic admissions,

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*al.*, *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in SFFA v. Harvard*, 48 J. COL. & UNIV. L. 369 (2023). The model minority stereotype also led to backlash against increasing Asian American presence at elite universities in the 1980s, and to allegations of discrimination against Asian Americans in admissions. *See generally* sources cited *infra* note 210. This has all served to pit Asian Americans against other marginalized groups. *Id.* *See also* Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURVEY AM. L. 77, 144–47 (2013) (discussing Asian and South Asian Americans’ political positioning in U.S. racial landscape).

47 Veysey, *supra* note 34, at 119.

48 *Id.* *See also supra* note 46.

49 *See generally* MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2011) (illustrating that federal government supported civil rights to support U.S. foreign policy and mitigate draw of communism’s emphasis on equality).

50 Veysey, *supra* note 34, at 119.

51 *Id.* (“The fifth stage, in which, in explicit atonement for earlier historical sins, academic administrators sought to raise the number of minority entrants by outright discrimination in their favor. Hence *Bakke*.”).

52 As noted earlier, Professor Veysey does not use the term “holistic” anywhere in his article. *See generally id.* He uses the term “diversity” only twice—both in reference to Yale’s policy of seeking “geographic diversity” in the 1940s and 1950s. *See id.* at 121 n.2. Although universities considered “diversity” and used “holistic” review, these terms and concepts were not particularly prominent at the time. Professor Veysey’s article gives us at least a snapshot of how scholars viewed what we now call “holistic” admissions in 1980.

53 *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (*citing Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Professor Steve Sanders has recently argued that courts have begun showing less academic deference to universities, and that *SFFA* reflects this shift. *See* Steven Sanders, *Judges Have Long Deferred to Academe. That’s Changing.*, CHRON. HIGHER ED. (Nov. 6, 2023), <https://www.chronicle.com/article/judges-have-long-been-deferential-to-academe-thats-changing> (arguing that *SFFA* ruling showed “bracing display of skepticism toward the university defendants was also a serious blow to the longstanding doctrine of judicial deference to academic decision-making”).

54 *Bakke*, 438 U.S. at 316–18 (opinion of Powell, J.). *SFFA* might now prompt a seventh phase, where holistic criteria besides race become even more important.

Jolene Maude and Professor Dale Kirby also refer to *Bakke* as the “landmark legal case [that] set the stage for modern day holistic admission.”<sup>55</sup> Justice Powell’s opinion in *Bakke* did not use the term “holistic,”<sup>56</sup> but universities and courts came to use the term to describe the type of admissions plan he endorsed.<sup>57</sup> Justice Powell described Harvard’s admissions policy as a model, noting

[s]uch qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important[] ... [and] ... is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight[] ... [T]he weight attributed to a particular quality may vary from year to year depending upon the “mix” both of the student body and the applicants for the incoming class.<sup>58</sup>

In 2003, *Grutter* brought five votes to Justice Powell’s plurality *Bakke* opinion. Justice O’Connor’s majority opinion referred explicitly to “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”<sup>59</sup> The Court specifically distinguished the *Grutter* (holistic review) plan from the *Gratz* (mechanical point system) plan because the former used race flexibly, in an individualized manner.<sup>60</sup> This was in contrast to the mechanical application of race in the *Gratz* plan, where all minority applicants received exactly the same number of points. Under an admissions policy with holistic review, race is considered alongside other admissions factors, such as those noted above,<sup>61</sup> which could include not only academic criteria, but also socioeconomic status, geography, extracurricular activities, essay scores, personal characteristics, letters of recommendation, and any other components of an individual’s application. Universities can and do inform applicants of the holistic factors they consider

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55 Maude & Kirby, *supra* note 16, at 74.

56 None of the opinions in *Bakke* used the term “holistic.” See generally *Bakke*, 438 U.S. 265.

57 Rodney Smolla, *Fisher v. University of Texas: Who Put the Holes in “Holistic”?*, 9 DUKE J. CONST. L. & PUB. POL’Y 31, 35 (2013).

58 *Bakke*, 438 U.S. at 316–18 (opinion of Powell, J.).

59 *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

60 *Id.* (“Unlike the program at issue in *Gratz v. Bollinger*, *ante*, 539 U.S. 244, 123 S.Ct. 2411, the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity. See *ante*, 539 U.S., at 271–272, 123 S.Ct. 2411, 2003 WL 21434002 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan, which considered race but ‘did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity’). Like the Harvard plan, the Law School’s admissions policy ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’ *Bakke*, *supra*, at 317, 98 S.Ct. 2733 (opinion of Powell, J.).”).

61 See text accompanying *supra* note 58.

in the admissions process. But the weight given to any of these factors can be different for each applicant, based on the discretion of admissions reviewers. And it is this variability in the way that admissions factors are weighted, along with the discretion that reviewers have to use their own judgments (and biases) in weighing each factor, that makes holistic review seem so mysterious in its implementation.

Justice O'Connor's majority opinion in *Grutter*—the Supreme Court's first ruling on race-conscious university admissions to use the term "holistic"<sup>62</sup>—raised the public profile of holistic admissions significantly. Holistic review had resolved a major constitutional dispute, defining how race could be used as a "plus" factor in admissions. Attention to holistic review increased even more,<sup>63</sup> as scholars and commentators have sought to understand how it works and how it incorporates race and other criteria. Yet, even with such attention, the definition of holistic review remains hazy. The College Board itself notes that "no single definition [of holistic review] can fully capture the legitimate variability among colleges and universities that manifest varied missions and admissions aims[.]"<sup>64</sup>

As one starting point, the College Board gives a basic definition of "holistic admissions" as "'a flexible, highly individualized process by which balanced consideration is given to the multiple ways in which applicants may prepare for and demonstrate suitability' as students at a particular institution."<sup>65</sup> It recommends that holistic review in practice should have three features: (1) alignment with an institution's mission; (2) evaluation of both student ability to succeed in the educational curriculum and to make contributions to the academic community; and (3) consideration of "multiple, intersecting factors—academic, non-academic, and contextual—that enter the mix and uniquely combine to define each individual applicant[.]"<sup>66</sup> But beyond the academic measures, what are these "multiple, intersecting factors" and how are they considered?

Maude and Professor Kirby divide nonacademic criteria into two categories:

62 See *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

63 See, e.g., Christopher Rim, *What Colleges Really Mean by "Holistic Review,"* FORBES (Apr. 6, 2023), <https://www.forbes.com/sites/christopherrim/2023/04/06/what-colleges-really-mean-by-holistic-review/?sh=5729d096cc9b> ("The promise of a "holistic review" has become ubiquitous in higher education admissions. ... The language of the "holistic review" signals the fundamental difference in current admissions processes from those of thirty years ago.).

64 Arthur L. Coleman & Jamie Lewis Keith, *Understanding Holistic Review in Higher Education Admissions: Guiding Principles and Model Illustrations*, COLL. BD. (2018), <https://professionals.collegeboard.org/pdf/understanding-holistic-review-he-admissions.pdf>.

65 *Id.* at 4 (quoting *Association of American Medical Colleges, Roadmap to Diversity: Integrating Holistic Review Principles into Medical School Admission Processes* at 5, ASSOC. AM. MED. COLLS. (2010), <https://www.aamc.org/initiatives/holisticreview/resources/>).

66 *Id.* Maude and Professor Kirby define holistic admissions as "an approach to college and university admissions that considers an individual's non-academic attributes and strengths in conjunction with traditional academic metrics." Maude & Kirby, *supra* note 16, at 75. See also Lisa S. Lewis, *Can Greentree University Adopt Holistic Admissions Practices and Still Maintain Status as an Elite Institution?*, 24 J. CASES IN EDUC. LEADERSHIP 126 (2021) ("[H]olistic admissions include consideration of a variety of applicant factors, with the intent of selecting students likely to be academically successful as well as to contribute to the school by bringing their unique selves.").

“experiences” and “attributes.”<sup>67</sup> Experiences are life occurrences that have shaped an applicant’s perspective and/or conferred particular knowledge and skills.<sup>68</sup> These may include extracurricular endeavors such as “community involvement, leadership, professional activities[,]” challenges and hardships that applicants have faced, and obstacles they have overcome.<sup>69</sup> Attributes include “race/ethnicity, and personal qualities, characteristics, abilities, or skills that applicants bring with them to the program.”<sup>70</sup>

The lay public has a much better understanding of academic criteria, because practically everyone with any schooling has been formally evaluated and ranked with grades and standardized test scores. “Nonacademic” and “contextual” factors, on the other hand, seem more opaque: even when we know what they may include (extracurricular activities, personal experiences, etc.), there is no accessible or intuitive ranking scale to understand their role in evaluating applicants. Professors Michael Bastedo and Nicholas Bowman, along with Kristen Glasener and Jandi Kelly, give some basic guidance regarding how admissions committees can consider these various factors.<sup>71</sup> Based on their study, they describe three different types of holistic review: (1) “whole file”—“considering all parts of the application and weighing them together for a result[.]”;<sup>72</sup> (2) “whole person”—“treating the applicant as a unique individual in addition to considering all elements of the file ... [and] evaluat[ing] academic achievements in light of the applicant’s character, personality, or ability to contribute to the community in a unique way[.]”;<sup>73</sup> (3) “whole context”—“consider[ing] all elements of the application and valu[ing] treating applicants as unique individuals ... in the context of the opportunities available in their families, neighborhoods, or high schools[] ... tak[ing] into account ... ongoing hardships, extenuating circumstances, or other contextual factors.”<sup>74</sup>

Nevertheless, Professor Bastedo and colleagues also note that “[a]dmissions officers themselves simply do not have a common definition of holistic review beyond ‘reading the entire file.’”<sup>75</sup> They note that there is “significant confusion among students, parents, and the public about holistic admissions.”<sup>76</sup> Mere articulation of factors considered in holistic review and general statements about how applicant files are reviewed does not significantly mitigate this confusion. The root of mystery surrounding holistic review comes from lack of consistency in its implementation. Each school uses a different type of review system, each

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67 Maude & Kirby, *supra* note 16, at 75.

68 *Id.*

69 *Id.*

70 *Id.* at 74.

71 Michael N. Bastedo et al., *What Are We Talking About When We Talk About Holistic Review? Selective College Admissions and its Effects on Low-SES Students*, 89 J. HIGHER EDUC. 782 (2018).

72 *Id.* at 790.

73 *Id.* at 791.

74 *Id.* at 793.

75 *Id.* at 802.

76 *Id.* at 803.

admissions reviewer has their own subjective biases and manner of weighing various criteria, and each applicant is treated differently and individually for the purpose of weighing these criteria. Holistic review is inherently mysterious because it varies so much from school to school, reviewer to reviewer, and applicant to applicant.

So why then, in the context of a highly charged issue, such as the constitutionality of race-conscious admissions policies, did Justice O'Connor choose the *Grutter* (holistic review) plan over the *Gratz* (mechanical point system) plan? Couldn't the *Gratz* plan also attain racial diversity and do so in a more transparent and comprehensible manner?

## II. WHY SECRET ADMISSIONS? (AND WHY NOT?)

One reason for holistic review is readily apparent. More than any other system, it allows admissions committees to consider, in a flexible manner, a wide variety of factors beyond academic criteria, ranging from other skills and talents to applicants' backgrounds and demonstrated resilience. Most of us would agree that grades and standardized test scores do not fully capture an applicant's potential, either to enrich campus life or to attain academic and professional success. In *Grutter*, Justice O'Connor also noted the benefits of admitting students with different experiences to the educational environment of universities: "'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"<sup>77</sup> She cited various studies illustrating how such diversity leads to better "learning outcomes" and "better prepares students for an increasingly diverse workforce and society[.]"<sup>78</sup> And she tied these benefits to professional settings, noting that "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."<sup>79</sup> Universities could thus seek to enroll a "critical mass" of underrepresented students—enough so that these students wouldn't "feel isolated or like spokespersons for their race."<sup>80</sup> If necessary, they could use race-conscious admissions for that purpose.

But although Justice O'Connor approved of using race to attain the educational benefits of diversity, she did so reluctantly. Her disdain for race-conscious policies was long established, and *Grutter* was the first and only case where she voted to uphold such a policy.<sup>81</sup> Beyond flexible, individualized review, *Grutter* imposed

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77 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

78 *Id.*

79 *Id.* Justice O'Connor also invoked the importance of diversity for national security. *Id.* at 221 ("[H]igh-ranking retired officers' and civilian leaders of the United States military assert that, '[b]ased on [their] decades of experience,' a 'highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security.'").

80 *Id.* at 319.

81 Justice O'Connor wrote numerous opinions that struck down race-conscious policies in various contexts. *See, e.g.,* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (O'Connor, J., concurring) (invalidating "layoff provision" that gave preference to minority teachers even with less seniority); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating City of Richmond's

many other limitations on the use of race. Justice O'Connor made it clear that universities should prefer race-neutral alternatives to attain diversity, and that they had to phase out use of race eventually.<sup>82</sup> *Grutter* also included an aspirational statement that they may be able to do so within 25 years.<sup>83</sup>

Because of her disdain for using race, Justice O'Connor viewed secrecy itself as a virtue when doing so. She chose the *Grutter* plan over the *Gratz* plan partly on that basis. Professor Heather Gerken characterized both Justice Powell's approach in *Bakke* and Justice O'Connor's view in *Grutter* as "something akin to a 'don't ask, don't tell' approach to race-conscious decisionmaking: use race, but don't be obvious about it."<sup>84</sup> Justice O'Connor disliked race-conscious policies because she believed they were divisive and stigmatizing. Her prior race jurisprudence indicated a particular concern for stigma and stereotyping. In *City of Richmond v. J.A. Croson Co.*, she described the harm of government racial classifications:

Classifications based on race carry a danger of stigmatic harm ... they may in fact promote notions of racial inferiority and lead to a politics of racial hostility ... reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth[.]<sup>85</sup>

Justice O'Connor was particularly concerned with the message sent by government action. In her dissenting opinion in *Metro Broadcasting, Inc. v. FCC*, she noted that "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, but the ... Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."<sup>86</sup> She reiterated this view in *Shaw v. Reno*, emphasizing that "[r]

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minority set-aside contracting program); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (rejecting North Carolina's congressional redistricting plan on ground that it relied too much on racial classifications). Justice O'Connor dissented in the few cases prior to *Grutter* where the Court upheld race-conscious policies. See *U.S. v. Paradise*, 480 U.S. 149 (1987) (O'Connor, J., dissenting) (dissenting from Court's ruling that upheld "one-black-for-one-white promotion requirement"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (O'Connor, J., dissenting) (dissenting from Court's ruling that upheld race-conscious policies of the Federal Communications Commission).

82 *Grutter*, 539 U.S. at 342 (noting "all governmental use of race must have a logical end point[] ... and ... [un]iversities ... should draw on the most promising aspects of ... race-neutral alternatives as they develop").

83 *Id.* at 343 (noting "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today").

84 Heather Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007). See also Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123, 134 (2023) ("[Holistic] processes of admission are impenetrable to the outside spectator. They are, following *Grutter*, impenetrable by design. Their highly pluralist decision criteria, their lack of recorded explanations of individual decisions, and their use of multilevel procedures with multimember votes all make it impossible to know how decisionmakers weigh different candidates against each other. The point is to obscure the reasons that any particular candidate was admitted, especially as it relates to race, ethnicity, and other such diversity criteria.").

85 488 U.S. at 494 (quoting *Univ. of Calif. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of J. Powell)).

86 497 U.S. at 602 (1990) (O'Connor, J., dissenting).

acial classifications ... pose the risk of lasting harm to our society ... [because] ... [t]hey reinforce the belief ... that individuals should be judged by the color of their skin."<sup>87</sup> She also expressed the concern that government use of race may "balkanize us into competing racial factions."<sup>88</sup>

In evaluating Justice O'Connor's majority opinion in *Shaw*, Professors Richard Pildes and Richard Niemi define an "expressive harm" as a harm "that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."<sup>89</sup> They argue that Justice O'Connor's constitutional jurisprudence shows "a general attentiveness to the expressive dimensions of public action."<sup>90</sup> The meaning conveyed by public action must respect "relevant public values."<sup>91</sup> Because Justice O'Connor viewed racial classifications as harmful, she thought that if the government had to use them, they should remain obscure and out of the public view. That is one reason why she opted for the *Grutter* plan over the *Gratz* plan: she believed the former involved less racial stigma and stereotyping of individuals and groups.<sup>92</sup> Justice O'Connor thought the harm of race-conscious policies was attenuated when embedded within holistic review, because the use of race was less obvious, particularly on the level of individual applicants. In the *Grutter* plan, every individual was treated differently, and all members of a group did not receive the same benefit. Holistic review does not reveal whether race mattered a little bit, a lot, or not at all for the admission of any given applicant.<sup>93</sup> And Justice O'Connor valued such a process

87 509 U.S. 630, 657 (1993) (striking down North Carolina's congressional redistricting plan); see also *id.* at 643 ("[A]n explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs.").

88 *Id.* at 657 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions[.]"). See also Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1299 (2011) ("Justice O'Connor interprets equal protection so as to promote social cohesion and to avoid racial arrangements that balkanize and threaten social cohesion. Concern with balkanization thus supplies affirmative reason to allow affirmative action and to limit it[.]").

89 Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 *MICH. L. REV.* 483, 506–07 (1993). Professors Pildes and Niemi also elaborate that such an expressive "harm is not concrete to particular individuals," but rather "lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values." *Id.* at 507. Professors Pildes and Niemi argue that Justice O'Connor's *Shaw* opinion is based on her view that "the state ... impermissibly endorsed too dominant a role for race[.]". *Id.* at 509. They note that her belief "might rest on the intrinsic ground that the endorsement is wrong, in and of itself," or "on the instrumental ground that this state endorsement threatens to reshape social perceptions along similar lines." *Id.*

90 *Id.* at 520 n.123.

91 *Id.* at 507.

92 See Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 *U. PA. J. CONST. L.* 463, 485–95 (2012) (discussing how *Grutter* fit into Justice O'Connor's prior race jurisprudence).

93 See *id.* at 493 ("A holistic admissions process—which includes individualized review, considers race in a flexible manner, and uses diversity factors other than race—is necessary to yield a critical mass that includes diversity within racial groups. By definition, achieving such within-group diversity reduces stigmatic harm, because it requires admissions committees to consider factors



not only because of its flexibility, but also because of its secrecy. As Professor Michelle Adams noted, the *Grutter* majority “was more concerned with how the Law School’s application process actually appeared and the message that it sent to the public than with its impact on any particular white applicant[] ... the message communicated by the governmental action was paramount.”<sup>94</sup> In a sense, that message seemed contradictory: universities can admit to using race but must simultaneously obscure how race is used.

Some scholars have supported this view and argued in favor of more obscure race-conscious admissions policies, based on the potential for negative public reaction to explicit use of race. Twenty years before *Grutter*, the late Professor Paul Mishkin contended that “less explicitly numerical systems” of admissions minimize the stigmatization of underrepresented students as beneficiaries of separate privileges.<sup>95</sup> Professor Mishkin asserted that

The description of race as simply “another factor” among a lot of others considered in seeking diversity tends to minimize the sense that minority students are separate and different and the recipients of special dispensations; the use of more explicitly separate and structured systems might have the opposite effect.<sup>96</sup>

Similarly, Daniel Sabbagh has argued that the “very nature of what may be conceived as the ultimate goal of affirmative action ... the deracialization of American society ... would make it counterproductive to fully disclose that policy’s most distinctive and most contentious features”<sup>97</sup> and that the Supreme Court has “made a significant, yet underappreciated, contribution ... [by] ... minimizing the visibility and distinctiveness of race-based affirmative action.”<sup>98</sup>

More broadly, Professors Jack Balkin and Reva Siegel have contended that “[l]aws dismantling status hierarchies cannot redistribute opportunities to subordinate groups too transparently” because doing so may generate backlash.<sup>99</sup> Professors Balkin and Siegel note that subordinate groups have often made gains

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besides race and to treat applicants of the same race differently based on non-racial factors.”).

94 See Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 TUL. L. REV. 1941, 1953 (2004).

95 See Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 928 (1983) (“The indirectness of the less explicitly numerical systems may have significant advantages, not so much in terms of the processes of consideration as in the felt impact of their operation over time.”).

96 *Id.* Ironically, Professor Mishkin also represented the Regents of the University of California in *Bakke*, where he argued in favor of the “more explicitly separate and structured” University of California Davis School of Medicine set-aside plan. See *In Memoriam Paul Mishkin*, <https://senate.universityofcalifornia.edu/files/inmemoriam/html/pauljmishkin.html> (last visited Jan.15, 2024)

97 See Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411, 412 (2003). Sabbagh viewed those contentious features as affirmative action’s “nonmeritocratic component and the extent to which some ... programs take race into account[.]” *Id.*

98 *Id.*

99 Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020* 105 (Jack M. Balkin & Reva B. Siegel eds., 2009).

through doctrines and policies that benefited dominant groups as well, thus obscuring any relative redistribution.<sup>100</sup> Because *Grutter's* endorsement of holistic review also emphasized consideration of factors besides race, one can envision and accurately describe the *Grutter* plan as potentially beneficial to applicants of all racial backgrounds.

But there are also scholars who have critiqued the choice of the *Grutter* holistic admissions plan over the *Gratz* point plan. And those critiques have largely dealt with the issue of secrecy. Professor Cristina Rodriguez argued that embedding race within individualized, holistic review is actually antithetical to the values that Justice O'Connor espoused:

[I]ndividualized consideration is ultimately more likely to thwart the long-term objectives of reducing the salience of race in our society and eliminating race-based stereotyping[] ... [because] ... [i]ndividualized consideration demands that officials prioritize among members of a racial group according to race-related criteria, whereas mechanical decision making simply demands recognition of the existence of broad categories and the membership of certain individuals in those categories, based on individual self-identification[] ... individualized consideration give[s] state officials power to define the content of a racial category, and it is that process of definition, not the taking of race into account in and of itself, that undermines the integrity of the individual [.]<sup>101</sup>

Professor Rodriguez also contended that while flexible, holistic, individualized review may be less stigmatizing to applicants than an explicit point system, it is doubtful that this difference has any significant effect on public perception of race-conscious policies.<sup>102</sup> And if holistic admissions policies are more likely to prompt litigation, which leads to negative public sentiment, then they may actually be more stigmatizing in the long run.<sup>103</sup>

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100 *Id.*

101 Cristina M. Rodríguez, *Against Individualized Consideration*, 83 *IND. L.J.* 1405, 1406 (2008).

102 *Id.* at 1416 (expressing “skeptical[ism] that individualized consideration has any meaningful effect on the general population’s perceptions of minorities in a world with affirmative action, or that permitting an admissions office to obfuscate its precise use of race actually diminishes the resentment affirmative action engenders”).

103 *But see* Balkin & Siegal, *supra* note 99, at 105 (arguing that efforts to redistribute resources to subordinated groups often require obfuscation to be politically viable). Professor Yuvraj Joshi has argued that “perhaps the most powerful critique” of using race in more indirect and obscure ways is that doing so “impedes the pursuit of racial justice.” Yuvraj Joshi, *Racial Indirection*, 52 *U.C. DAVIS L. REV.* 2495, 2539 (2019). Professor Joshi is not specifically focused on the secrecy inherent in holistic review, but that is part of his analysis. His article examines “racial indirection”: “practices that produce racially disproportionate results without the overt use of race ... includ[ing] practices that employ racial categories in subtle and partial ways as well as those that rely on ostensibly “neutral” factors and considerations to produce racial impact.” *Id.* at 2497–98. As Professor Joshi notes, many social justice advocates believe that direct and explicit race-conscious policies and conversations about race are necessary to achieve racial equity and justice. *Id.* at 2540. One could critique Justice O’Connor’s choice in *Grutter* on grounds that obfuscation of race serves to reduce perceptions of its salience and to minimize the acknowledgement of racism.

Other legal scholars have also criticized the Court's preference for more secretive race-conscious admissions policies. Professor Cass Sunstein called *Grutter* a "puzzling and probably indefensible conclusion[,]” contending that “[i]t is hardly clear that the Constitution should be taken to require a procedure that sacrifices transparency, predictability, and equal treatment[.]”<sup>104</sup> Professor David Crump argued that the *Gratz* plan could be viewed as “constitutionally superior” because the *Grutter* plan gave universities “unlimited discretion” and obscured the use of race.<sup>105</sup> In contrast, the holistic review required by *Grutter* resisted any straightforward analysis of weight that could be accorded to race, whether it be at the group level (set-aside seats) or the individual level (number of points).<sup>106</sup>

This lack of attention to the weight given to race has also led scholars to critique *Grutter*. Professor Ian Ayres and Sidney Foster criticized *Grutter* for its “fail[ure] to offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not.”<sup>107</sup> Although they noted the difficulty of assessing weight given to race in a holistic review process,<sup>108</sup> Professors Ayers and Foster contended that the *Grutter* holistic admissions system gave more weight to race than the *Gratz* point system.<sup>109</sup> *Grutter*'s language did suggest limitations on the weight that could be given to race: it could not be a “predominant factor” in admissions, nor could it “unduly burden” any groups.<sup>110</sup> But *Grutter* did not give guidance on how to determine when race is a predominant factor or when it unduly burdens any group.

The dissenting Justices in *Grutter* viewed holistic admissions and individualized review as a cover for unconstitutional “race preferences,” no different from the set-asides proscribed in *Bakke*. Chief Justice William Rehnquist called the University of Michigan Law School's admissions policy “a naked effort to achieve racial balancing.”<sup>111</sup> Similarly, the late Justice Scalia's dissent referred to it as “a sham to cover a scheme of racially proportionate admissions.”<sup>112</sup> And Justice Anthony Kennedy, whose dissent approved of using race “as one modest factor among

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104 Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1902 (2006).

105 David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 528–29 (2004) (“One can argue that the undergraduate Michigan program at issue in *Gratz*, involving a fixed-point system, should have been regarded as constitutionally superior to the unlimited discretion model in *Grutter* . . . . At least in such a system the invidious exercise of discretion has been structured, confined, and checked . . . . The point system . . . . should instead have been preferred because it makes the racial remedy visible . . . .”).

106 See Harpalani, *supra* note 92, at 528–30.

107 Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 558 (2007).

108 *Id.* at 583 (“It is difficult to quantify the burdens of racial preferences and even more difficult to quantify government interests in nonremedial affirmative action.”).

109 *Id.* at 534 (concluding that “the Law School gave more weight to race than the College.”).

110 *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003). See also Harpalani, *supra* note 92, at 528–29.

111 *Grutter*, 539 U.S. at 379 (Rehnquist, CJ, dissenting)

112 *Id.* at 347. (Scalia, J., dissenting).

many others,”<sup>113</sup> found that “the Law School ... mask[s] its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.”<sup>114</sup> The *Grutter* dissenters thus saw holistic review as a cover for the same activity that the majority (and *Bakke*) deemed unconstitutional.

Even the late Justice Ruth Bader Ginsburg and Justice David Souter, who voted in favor of the *Grutter* holistic admissions policy, nevertheless seemed to critique it and to extoll some of the virtues of the *Gratz* point system. In her *Gratz* dissent, Justice Ginsburg wrote that “[i]f honesty is the best policy, surely ... [an] ... accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”<sup>115</sup> Similarly, Justice Souter wrote that “[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball.”<sup>116</sup>

The Court’s preference for *Grutter*’s holistic review over the *Bakke* set-aside plan and the *Gratz* point system made race-conscious admissions policies more nuanced and flexible, but also made it harder to evaluate their constitutionality. If either of those other plans had been upheld, then universities and prospective litigants would know more precisely how race had been used and how much it was weighted in admissions. They could use those guideposts to assess the constitutionality of admissions policies before litigation. For example, had the Justices upheld the set-aside plan at issue in *Bakke*, universities and courts would have notice that setting aside 16% or so of seats for underrepresented students was constitutional. Similarly, if the Court had affirmed the point system in *Gratz*, then 20 points on a 150-point scale (13.3% or so) would have modeled an acceptable weight on race in the admissions process. But there were no such guideposts in *Grutter* to tell whether race-conscious admissions policies are unduly burdening any group, or whether race has become a predominant factor in admissions. And this lack of clarity could only lead to more controversy and litigation.

### III. LITIGATING SECRET ADMISSIONS I: HOW *GRUTTER* LED TO *SFFA*

Twenty years ago, when *Grutter* was first decided, two legal giants from opposite ends of the ideological spectrum foresaw the barrage of lawsuits to come. The late Justice Antonin Scalia—champion of conservative activists and nemesis of progressives—stated so in his *Grutter* dissent. Justice Scalia lamented that the *Grutter* decision “seems perversely designed to prolong the controversy and the litigation.”<sup>117</sup> Although Scalia would have struck down affirmative action altogether, he intimated “even a clear anticonstitutional holding that racial

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113 *Id.* at 392–93 (Kennedy, J., dissenting).

114 *Id.* at 389.

115 *See Gratz v. Bollinger*, 539 U.S. 244, 304–05 (2003) (Ginsburg, J., dissenting).

116 *Id.* at 298 (Souter, J., dissenting). *See also* Salib & Krishnamurthi, *supra* note 84, at 125 (contending that under *Grutter*’s regime, “before *SFFA*, most colleges’ affirmative action programs were quasi-legal at best; that colleges knew this; and that they compensated by intentionally obscuring the programs’ inner workings”).

117 *Grutter*, 539 U.S. at 348 (2003) (Scalia, J., dissenting).

preferences in state educational institutions are OK” would have been better than the *Grutter* majority’s insistence on revisiting the issue.<sup>118</sup> In ironic agreement with Justice Scalia was the late Professor Derrick Bell—founder of Critical Race Theory, and long revered by social justice advocates for his scholarship and activism.<sup>119</sup> Professor Bell criticized *Grutter* for its reliance on diversity rather than racial justice as the basis to uphold affirmative action.<sup>120</sup> Professor Bell thought of the diversity rationale as a “distraction” and referred to *Grutter* as a “litigation-prompting” decision that would make it hard to distinguish victory from defeat.<sup>121</sup>

Professor Bell and Justice Scalia proved to be prophetic. Beyond serving as a blueprint on how to implement race-conscious admissions policies, one can readily see *Grutter* as a guideline for how to bring legal challenges against such policies. Justice O’Connor’s proposition that race-conscious admissions must have an end point was an invitation for further lawsuits.<sup>122</sup> Litigants could readily argue that the time had come when universities could attain sufficient diversity without using race-conscious policies. And because strict scrutiny applies to all racial classifications,<sup>123</sup> universities bore the burden to show that their race-conscious admissions policies were necessary and complied with all of *Grutter*’s other requirements.<sup>124</sup>

118 *Id.* Justice Scalia laid out what he thought future lawsuits might look like. *Id.* at 348–49 (“Some future lawsuits will presumably focus on whether the discriminatory scheme in question contains enough evaluation of the applicant ‘as an individual,’ ... and sufficiently avoids ‘separate admissions tracks,’ ... to fall under *Grutter* rather than *Gratz*. Some will focus on whether a university has gone beyond the bounds of a “‘good faith effort’” and has so zealously pursued its ‘critical mass’ as to make it an unconstitutional de facto quota system, rather than merely “‘a permissible goal.’” ... Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. ... Still other suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity that immunize the discriminatory scheme in *Grutter*. ... And still other suits may claim that the institution’s racial preferences have gone below or above the mystical *Grutter*-approved ‘critical mass.’ Finally, litigation can be expected on behalf of minority groups intentionally short changed in the institution’s composition of its generic minority ‘critical mass.’”). To one extent or another, all these issues did come up in the *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) [hereinafter *Fisher I*] and *SFFA*, 600 U.S. 181 (2023) litigations.

119 See DERRICK BELL OFFICIAL WEBSITE, <https://professorderrickbell.com/> (last visited Jan. 16, 2024); Vinay Harpalani, *From Roach Powder to Radical Humanism: Professor Derrick Bell’s “Critical” Constitutional Pedagogy*, 36 SEATTLE UNIV. L. REV. xxiii (2013).

120 Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003).

121 *Id.* at 1631.

122 *Grutter*, 539 U.S. at 342 (noting “all governmental use of race must have a logical end point[] ... and ... [un]iversities ... should draw on the most promising aspects of ... race-neutral alternatives as they develop”); *id.* at 343 (noting “expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today”).

123 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

124 *Fisher I*, 570 U.S. 297 (2013), the first post-*Grutter* lawsuit involving race-conscious university admissions, highlighted another vague aspect of *Grutter*: the notion of critical mass. The *Fisher* Plaintiffs questioned whether the University of Texas at Austin (UTA) needed to use a race-conscious admissions policy to attain a critical mass of underrepresented students and the educational benefits of diversity. *Id.* But as Justice Kennedy’s majority opinion noted in *Fisher v. University of Texas at Austin*, 579 U.S. 365, 377–78 (2016) [hereinafter *Fisher II*], UTA’s admissions plan was “sui generis”

In this context, the SFFA plaintiffs took full advantage of the obscurity of holistic review. This was particularly apparent in *SFFA v. Harvard*, the case which received the most media attention. Here, SFFA argued that that holistic review masked intentional discrimination and implicit bias<sup>125</sup> against Asian Americans. Harvard's complex and mysterious holistic review process allowed SFFA to entangle two claims: (1) Harvard discriminates against Asian Americans in favor of White applicants; and (2) Harvard's holistic admissions policy does not meet *Grutter's* narrow tailoring criteria.<sup>126</sup> In its Complaint, SFFA asserted,

Harvard has a history of using the rubric of “holistic” admissions in general, and ... to limit the admission of Jewish applicants and other minority groups. Indeed, Harvard is using the same pretextual excuses to justify its disparate treatment of Asian Americans that it used to deny that it was discriminating against Jewish applicants in the past.<sup>127</sup>

SFFA also argued that Harvard used race as more than a “plus” factor,<sup>128</sup> and it put forth complex statistical models to support this argument. It contended that “Statistical evidence reveals that Harvard uses “holistic” admissions to disguise the fact that it holds Asian Americans to a far higher standard than other students and essentially forces them to compete against each other for admission.”<sup>129</sup> In these ways, holistic review—with its complexity and mysteriousness—was at the center of SFFA's claims.

Although Harvard prevailed at the District Court for the Eastern District of Massachusetts, Judge Allison Burroughs was critical of Harvard's personal rating score—part of the holistic review process that assesses various “qualities

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because much of UTA's admitted class came through the race-neutral Top Ten Percent Law.

As President Rodney Smolla noted, holistic admissions were prominent in the *Fisher I* oral argument, as UTA attempted to explain why it needed to use holistic review to attain a critical mass of Black and Hispanic students. See Smolla, *supra* note 57, at 41, 45. Holistic admissions also came into play for the Plaintiff's argument that race was too small of a factor in UTA's admissions policy to be useful in attaining educational benefits of diversity. *Id.* at 384. This argument relied on the unknown weight of race, but it was rejected by the Court. *Id.* at 384–85 (“[I]t is not a failure of narrow tailoring for the impact of racial consideration to be minor. ... [This] should be a hallmark of narrow tailoring, not evidence of unconstitutionality.”). The *Fisher* Court ultimately upheld UTA's admissions policy. *Id.*

125 For more discussion of implicit bias, see sources cited *supra* note 19.

126 Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, UNIV. OF PITTSBURGH, CTR. CIV. RTS. & RACIAL JUSTICE, <https://www.civilrights.pitt.edu/asian-americans-and-bait-and-switch-attack-affirmative-action-vinay-harpalani>.

127 Complaint at ¶ 437, *Students for Fair Admissions v. President and Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), 2014 WL 6241935. *Id.* at ¶ 35 (“The ‘Harvard [admissions] Plan’ itself—and the concept of an admissions system based on a “holistic” review of applicants instead of admission based on academic qualifications—was formulated for the specific purpose of discriminating against disfavored minority groups.”). See also *supra* notes 41–45 and accompanying text.

128 *Id.* at ¶ 457.

129 *Id.* at ¶ 5. See also generally *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 141 (D. Mass. 2019), *overruled*, 600 U.S. 181 (2023)).

of character.”<sup>130</sup> She noted that “the disparity between white and Asian American applicants’ personal ratings has not been fully and satisfactorily explained.”<sup>131</sup> She further noted that “[i]t is ... possible, although unsupported by any direct evidence ... that ... implicit biases [ ] disadvantaged Asian American applicants in the personal rating relative to white applicants[,]”<sup>132</sup> and she suggested that Harvard’s admissions reviewers might benefit from implicit bias training.<sup>133</sup>

On appeal to the U.S. Court of Appeals for the First Circuit, SFFA seized on this suggestion. It argued that Harvard bore the burden to explain differences between White and Asian American applicants’ personal ratings scores.<sup>134</sup> And while the First Circuit rejected this argument and affirmed the district court ruling, SFFA’s argument again highlighted the possibility that holistic review can mask discrimination and bias. SFFA was still able to ground its appeal to the U.S. Supreme Court in the obscurity of holistic review. It argued that Harvard penalizes Asian Americans,<sup>135</sup> that it uses race as more than a plus factor,<sup>136</sup> and that it engages in “racial balancing.”<sup>137</sup> Ironically, while SFFA raised the dubious history of holistic admissions and claimed that it served to mask discrimination, the Plaintiffs did not rebuke holistic review itself. At oral argument, UNC Counsel Patrick Strawbridge actually stated that “there’s nothing wrong with holistic ... review[,]”<sup>138</sup> even though the crux of SFFA’s argument was that holistic review covered up racial discrimination.

With its current supermajority of conservative Justices, the Court was bound to outlaw race-conscious admissions policies. Chief Justice Roberts’s *SFFA* majority opinion held that Harvard and UNC had not defined their diversity-related goals well enough to constitute a compelling interest,<sup>139</sup> and had not shown how race-conscious admissions would allow it to meet those allegedly ill-defined goals.<sup>140</sup> The Court also found that admissions are a zero-sum game where it is unacceptable

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130 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 141 (D. Mass. 2019), *overruled*, 600 U.S. 181 (2023)). (“The personal rating criteria ... encourage admissions officers to consider ‘qualities of character’ such as ‘courage in the face of seemingly insurmountable obstacles, ‘leadership’ ‘maturity,’ ‘genuineness, selflessness[,] humility,’ ‘resiliency,’ ‘judgment,’ ‘citizenship,’ and ‘spirit and camaraderie with peers.’”).

131 *Id.* at 171.

132 *Id.*

133 *Id.* at 204.

134 Brief of Appellant Students for Fair Admissions, Inc. at 27, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020) (No. 19-2005) (arguing that “because the district could not rule out “overt discrimination or implicit bias at work to the disadvantage of Asian American applicants[,] Harvard had not satisfied this burden”).

135 See Brief for Petitioner at 72, *SFFA*, 600 U.S. 181 (2023).

136 *Id.* at 77.

137 *Id.* at 75.

138 Transcript of Oral Argument at 60, *Students for Fair Admissions v. President and Fellows of Harvard College* (No. 20-707).

139 *SFFA v. President and Fellows of Harvard College*, 600 U.S. 181, 215 (2023).

140 *Id.*

to use race in a manner that lowers the percentage of any group<sup>141</sup>—a holding that effectively overturned *Grutter*.<sup>142</sup>

The concurrences by Justices Thomas and Gorsuch drew upon SFFA's arguments about holistic review. Justice Thomas noted that "Harvard's 'holistic' admissions policy began in the 1920s when it was developed to exclude Jews."<sup>143</sup> Drawing from SFFA's argument, Justice Gorsuch stated:

SFFA observes that, in the 1920s, Harvard began moving away from "test scores" and toward "plac[ing] greater emphasis on character, fitness, and other subjective criteria." ... Harvard made this move, SFFA asserts, because President A. Lawrence Lowell and other university leaders had become "alarmed by the growing number of Jewish students who were testing in," and they sought some way to cap the number of Jewish students without "'stat[ing] frankly'" that they were "'directly excluding all [Jews] beyond a certain percentage.'" ... SFFA contends that Harvard's current "holistic" approach to admissions works similarly to disguise the school's efforts to assemble classes with a particular racial composition—and, in particular, to limit the number of Asian Americans it admits.<sup>144</sup>

Justice Gorsuch also referenced the lack of clarity about how much weight is given to race in a holistic admissions process: "[T]he parties debate *how much* of a role race plays in admissions at Harvard and UNC[] ... when making admissions decisions in 'holistic' review of each applicant."<sup>145</sup>

But it was the dissents by Justices Sotomayor and Jackson that most illustrated how significant holistic review was to the *SFFA* cases. The dissenting opinions went into much detail, describing the workings of holistic review at length.<sup>146</sup> Justices Sotomayor explained thoroughly that race can be "considered as one factor of many in the context of holistic review" if "that use is 'contextual and does

141 *Id.* at 218-19 ("College admissions are zero-sum" because percentages add up to 100: an advantage that increases the percentage of one group will necessarily decrease the percentage of another.").

142 *See* text accompanying *supra* notes 3-10.

143 *SFFA*, 600 U.S. 181, 257 (Thomas, J., concurring).

144 *Id.* at 298 (Gorsuch, J., concurring).

145 *Id.* Well before *SFFA*, during the *Fisher* litigation, President Smolla contended that

Affirmative action in admissions in American higher education may be on its way out in part because the ideal of a genuinely holistic approach to admissions has not been matched by the realities of admissions programs in practice at many universities. As with so many human enterprises, the reality on the ground is not as pure or pleasing as the lofty ideal considered as an abstraction. The walk does not entirely match the talk. That dissonance has contributed to a gap in trust and credibility between many of the leading institutions in higher education and leaders in American politics, culture, and, most critically for legal purposes, the judiciary.

Smolla, *supra* note 57, at 64-65.

146 Of the forty-eight references to "holistic" in the *SFFA* opinions, forty-three were in the dissents. *SFFA*, 600 U.S. 181 at 318, 384 .



not operate as a mechanical plus factor.”<sup>147</sup> She described Harvard’s admissions process in detail:

[I]t involves six different application components. Those components include interviews with alumni and admissions officers, as well as consideration of a whole range of information, such as grades, test scores, recommendation letters, and personal essays, by several committees. ... Consistent with that “individualized, holistic review process,” admissions officers may, but need not, consider a student’s self-reported racial identity when assigning overall ratings. ... To choose among those highly qualified candidates, Harvard considers “plus factors,” which can help “tip an applicant into Harvard’s admitted class.” ... To diversify its class, Harvard awards “tips” for a variety of reasons, including geographic factors, socioeconomic status, ethnicity, and race. ... Consistent with the Court’s precedents, Harvard properly “considers race as part of a holistic review process,” “values all types of diversity,” “does not consider race exclusively,” and “does not award a fixed amount of points to applicants because of their race.”<sup>148</sup>

Justice Jackson also delved into the fray, describing the complexities of UNC’s admissions process:<sup>149</sup>

UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information. But applicants are *not* required to submit demographic information like gender and race. UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: “academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria.” Drawing on those 40 criteria, a UNC staff member ... would consider, with respect to each, his “engagement outside the classroom; persistence of commitment; demonstrated capacity for leadership; contributions to family, school, and community; work history; [and his] unique or unusual interests.” Relevant, too, would be his “relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; [and his] status as child or step-child of Carolina alumni.” The list goes on. The process is holistic, through and through.<sup>150</sup>

After describing this complex process, Justice Jackson herself poses the

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147 *Id.* at 346 (Sotomayor, J., dissenting).

148 *Id.*

149 Justice Jackson recused herself from *SFFA v. Harvard*, because she had served on Harvard’s Board of Overseers. Nate Raymond, *U.S. Supreme Court Pick Jackson to Recuse from Harvard Race Case*, REUTERS (Mar. 23, 2022), <https://www.reuters.com/legal/government/us-supreme-court-pick-jackson-recuse-harvard-race-case-2022-03-23/>.

150 *SFFA*, 600 U.S. 181 at 398-99 (Jackson, J., dissenting).

operant question: “So where does race come in?”<sup>151</sup> She spends the next four pages explaining this.<sup>152</sup>

Why these long explanations? Justice Jackson notes how the Plaintiffs’ case was built on mischaracterizing holistic review: “what SFFA caricatures [UNC’s admissions process] as an unfair race-based preference cashes out, in a holistic system[.]”<sup>153</sup> It seems that Justices Sotomayor and Jackson became in tune with the overall litigation strategy here and recognized that holistic review was the cover for all SFFA’s and the majority’s assertions of discrimination. Secret admissions allowed SFFA to make its main contentions even more readily, and Justices Sotomayor and Jackson sought to demystify holistic review and the use of race within it.

Oddly enough, Chief Justice Roberts’s majority opinion did give one nod to the use of race within a holistic admissions process. While universities cannot consider race itself, they can consider the impact of race on individual applicants through the same components of holistic review admissions committees already use.<sup>154</sup> The majority states that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”<sup>155</sup> Some college counseling firms saw this as a “loophole,” contending that while the “race box”

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151 *Id.*

152 *Id.* at 399-402 (“According to UNC’s admissions-policy document, reviewers may also consider ‘the race or ethnicity of any student’ (if that information is provided) in light of UNC’s interest in diversity. ... And, yes, ‘the race or ethnicity of any student may—or may not—receive a “plus” in the evaluation process depending on the individual circumstances revealed in the student’s application.’ ... [T]o be crystal clear: Every student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. ... [A] plus is never automatically awarded, never considered in numerical terms, and never automatically results in an offer of admission. ... [E]very applicant is also eligible for a diversity-linked plus (beyond race) more generally. [D]iversity broadly, including ‘socioeconomic status, first-generation college status ... political beliefs, religious beliefs ... diversity of thoughts, experiences, ideas, and talents.’ ... When an applicant chooses to disclose his or her race, UNC treats that aspect of identity on par with other aspects of applicants’ identity that affect who they are (just like, say, where one grew up, or medical challenges one has faced). ... And race is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there. ... A reader of today’s majority opinion could be forgiven for misunderstanding how UNC’s program really works, or for missing that, under UNC’s holistic review process, a White student could receive a diversity plus while a Black student might not. ... UNC has concluded that ... understanding the full person[] ... means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant’s race-linked experience bears on his capacity and merit. ... So, to repeat: UNC’s program permits, but does not require ... admissions officers to [to consider race and race-linked experiences]. ... Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that every applicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual’s resilience and likelihood of enhancing the UNC campus. ... Furthermore, and importantly, the fact that UNC’s holistic process ensures a full accounting makes it far from clear that any particular applicant of color will finish ahead of any particular nonminority applicant.”).

153 *Id.* at 401.

154 *Id.* at 230.

155 *Id.*

cannot be considered, the “story” about race will matter a lot.<sup>156</sup> Colleges and universities have designed their essay prompts around the majority’s statement.<sup>157</sup> Sarah Lawrence College actually quoted Chief Justice Roberts’s opinion in one of its essay prompts and asked applicants to “[d]raw[] upon examples from your life, a quality of your character, and/or a unique ability you possess, [to] describe how you believe your goals for a college education might be impacted, influenced, or affected by the Court’s [SFFA] decision.”<sup>158</sup>

However, Chief Justice Roberts insisted this “loophole” does not allow consideration of race itself. Rather, it allows consideration of individual characteristics—not unlike those assessed by Harvard’s personal rating score<sup>159</sup>—that are merely manifested through racial experiences. The majority gives examples:

A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.<sup>160</sup>

The Chief Justice asserted that “universities may not simply establish through application essays or other means the regime we hold unlawful today.”<sup>161</sup> He noted that “what cannot be done directly cannot be done indirectly”<sup>162</sup> in the “shadows.”<sup>163</sup> Justice Sotomayor also seemed quite skeptical about the consideration of racial experiences through essays, calling it a “false promise” and “nothing but an attempt to

156 See, e.g., Jordan Weissmann, *How John Roberts Remade the College Application Essay*, SEMAFOR (June 29, 2023), <https://www.semafor.com/article/06/29/2023/supreme-court-affirmative-action-decision-essays> (“It’s a huge loophole,” Brian Taylor, managing partner at Ivy Coach, told Semafor. “Will the Common App likely ban the race box on applications? Yes. But colleges are going to find ways around that race box. It’s going to be more about the story.”).

157 See, e.g., Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your ‘Identity’*, N.Y. TIMES (Aug. 18, 2023), <https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html> (“A review of the essay prompts used this year by more than two dozen highly selective colleges reveals that schools are using words and phrases like ‘identity’ and ‘life experience,’ and are probing aspects of a student’s upbringing and background that have, in the words of a Harvard prompt, ‘shaped who you are.’ That’s a big change from last year, when the questions were a little dutiful, a little humdrum—asking about books read, summers spent, volunteering done.”); Sarah Bernstein, *US Colleges Refashion Student Essay Prompts After ban on Affirmative Action*, REUTERS (Aug. 1, 2023), <https://www.reuters.com/world/us/us-colleges-refashion-student-essay-prompts-after-ban-affirmative-action-2023-08-01/> (noting that “students applying to Emory University in Atlanta this fall will get new essay prompts aimed at teasing out details about their cultural backgrounds”).

158 See Sarah Lawrence College, *First Year Applicants*, <https://www.sarahlawrence.edu/admission/apply/first-year.html#acc-312-essays>.

159 See *supra* note 130.

160 SFFA, 600 U.S. 181 at 231.

161 *Id.*

162 *Id.*

163 *Id.*

put lipstick on a pig.”<sup>164</sup>

But the distinction between the admissions regime that the *SFFA* majority endorses and the one it outlaws is far from clear. It may be even more vague than all the features of *Grutter* noted earlier. The only aspect missing now is the one that made race a little easier to see—the box where applicants can designate their race. Without that box, race becomes even more obscure on applications. If universities continue to use holistic review, what is to stop them from using not just essays that discuss race, but also race itself discerned from those essays?<sup>165</sup>

#### IV. LITIGATING SECRET ADMISSIONS II?: “WINKS, NODS, AND DISGUISES”

Although Chief Justice Roberts warned universities about using race surreptitiously, what happens in the “shadows” is bound to be an issue. In the context of holistic review, the *SFFA* majority’s nod to discussion of race in essays brings to mind Justice Ginsburg’s dissents in *Gratz* and *Fisher v. University of Texas at Austin (Fisher I)*. In *Fisher I*, Justice Ginsburg opined that “[a]s for holistic review, if universities cannot explicitly include race as a factor, many may ‘resort to camouflage’ to ‘maintain their minority enrollment.’”<sup>166</sup> Specifically, she noted that universities might use names to assess ethnicity,<sup>167</sup> “encourage applicants to write of their cultural traditions in [their] essays[,] ... [to] highlight the minority group associations to which they belong[,]”<sup>168</sup> and use other indirect means.<sup>169</sup> In fact, all of these are components of holistic review that can reveal an applicant’s race. And as Justice Ginsburg suggested in her *Gratz* dissent, admissions committees who are particularly motivated to maintain racial diversity could resort to the “winks,

164 *Id.* at 363 (Sotomayor, J., dissenting).

165 Cf. Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 800 (2015) (“A holistic admissions plan inherently considers race, even if there is no explicit ‘plus’ factor allowed, because race can come into play through other holistic factors that are considered.”); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146 (2008) (exploring unconscious racial biases in admissions and raising “the question of whether race can in fact be eliminated from admissions processes”); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management At UC-Berkeley, UT-Austin, and UW-Madison*, 32 L. & SOC. INQUIRY 985, 1015 (2007) (“[T]he line between race-based and race-blind policy making can be quite blurry.”).

166 *Fisher v. Univ. of Texas*, 570 U.S. 297, 335-36. (Ginsburg, J., dissenting).

167 See Roland G. Fryer & Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. ECON. 767 (2004); *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003).

168 See *Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting) (“One can reasonably anticipate ... that colleges and universities will seek to maintain their minority enrollment ... whether or not they can do so in full candor through adoption of affirmative action plans. ... Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language. Seeking to improve their chances for admission, applicants may highlight the minority group associations to which they belong, or the Hispanic surnames of their mothers or grandparents. In turn, teachers’ recommendations may emphasize who a student is as much as what he or she has accomplished[.]”).

169 See sources cited in notes 165-166.

nods, and disguises” to do so.<sup>170</sup>

There have been accusations of such “winks, nods, and disguises” in the past. In 1996, the state of California enacted a popular referendum, amending its constitution to ban race-conscious policies, including the use of race in admissions.<sup>171</sup> Since the ban went into effect in 1998—two decades before the SFFA cases—California’s public universities have not been allowed to use race as a factor in admissions.

Nevertheless, in 2008, two faculty members at the University of California at Los Angeles (UCLA), Professor Tim Groseclose (now of George Mason University) and Professor Richard Sander (of UCLA School of Law), accused UCLA of surreptitiously using race in its undergraduate holistic admissions process and thus defying California’s constitutional ban.<sup>172</sup> Specifically, Professors Groseclose and Sander accused admissions committee members of using personal statements and other information on applications to determine the race of applicants, and then employing this knowledge to benefit African American applicants. Some years later, each of them wrote books discussing these allegations.<sup>173</sup>

Professor Sander went into the history of admissions policies in the University of California (UC) system. Prior to 2001, the main path for California high school students to gain acceptance to the UC system was to attain “a combination of high school grades and standardized test scores that put them in the top eighth,

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170 See *Gratz*, 539 U.S. at 304–05 (Ginsburg, J., dissenting); see also *id.* at 298 (Souter, J., dissenting) (lamenting that admissions would “become an exercise in which the winners are the ones who hide the ball”).

171 CAL. CONST. art. 1, § 31(a) (“The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

172 See TIM GROSECLOSE, REPORT ON SUSPECTED MALFEASANCE IN UCLA ADMISSIONS AND THE ACCOMPANYING COVER-UP (2008) (on file with author); Richard Sander, *The Consideration of Race in UCLA Undergraduate Admissions*, Oct. 20, 2012 (on file with author). See also Scott Jaschik, *Is ‘Holistic Admissions’ a Cover for Helping Black Applicants?*, INSIDE HIGHER ED (Sept. 2, 2008), <http://www.insidehighered.com/news/2008/09/02/ucla>; Alexia Boyarsky, *Findings by Law Professor Suggest That UCLA Admissions May Be Violating Prop 209*, DAILY BRUIN (Oct. 23, 2012), [HTTP://DAILYBRUIN.COM/2012/10/23/FINDINGS-BY-LAW-PROFESSOR-SUGGEST-THAT-UCLA-ADMISSIONS-MAY-BE-VIOLATING-PROP-209/](http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209/). Professors Groseclose and Sander were not the first to make accusations of racial bias in the UC system. See Lipson, *supra* note 165, at 1015 (noting that former UC Board of Regents member and noted race-conscious admissions opponent “Ward Connerly . . . put forth and later partially retracted accusations that the admissions officials at UC-Berkeley were ‘slipping’ race in through the back door via individual assessment (e.g., by preferring applicants from school districts that are predominantly African American or Hispanic, by preferring applicants with names that are predominantly African American or Hispanic, and/or by preferring applicants who identify or give clues that they are African American or Hispanic in their personal statements.”)

173 See TIMOTHY GROSECLOSE, CHEATING: AN INSIDER’S REPORT ON THE USE OF RACE IN ADMISSIONS AT UCLA (2014); RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 169–70 (2012) (contending that as of 2012, “the University of California system is still, formally race-neutral, but in practice it has come very close to a form of racial proportionality . . . neither voters nor state officials can end university racial preferences by a single stroke”).

academically, of California high school seniors.”<sup>174</sup> A significant percentage of applicants were admitted based on academic criteria alone.<sup>175</sup> There were “special admission” programs designed to boost enrollment of underrepresented groups, but these were much less effective after California’s constitutional ban on race-conscious policies went into effect in 1998.<sup>176</sup> In 2001, the UC Regents adopted the “Eligibility in the Local Context [EIC]” plan, which “specified that students whose UC-adjusted grades put them in the top 4% of their high school classes would be UC-eligible.”<sup>177</sup> EIC was expected to boost admission of Black and Latina/o students from highly segregated schools where achievement was generally lower.<sup>178</sup> It did increase the numbers significantly at many of the UC undergraduate campuses, but there was only a modest effect at the two flagship campuses—UC Berkeley and UCLA.<sup>179</sup>

Foreshadowing Chief Justice Roberts in *SFFA*, the University of California (UC) system began using admissions essays more widely, along with consideration of other nonacademic criteria.<sup>180</sup> Here, applicants could discuss life experiences and hardships and the ways they could contribute to diversity.<sup>181</sup> Through some of these application components, applicants could readily reveal their racial backgrounds. In 2002, Professor Sander noted that UC Berkeley adopted a holistic admissions policy, which considered all applicant characteristics, including “personal quality” indices that measured factors such as “socioeconomic status, hardships overcome, writing ability, and extracurricular activities.”<sup>182</sup> Proponents of the holistic policy thought it would boost enrollment of underrepresented applicants who were strong on nonacademic criteria.<sup>183</sup> Opponents thought it could become a cover for illegal use of race, ascertained through personal essays or other information on applications.<sup>184</sup> However, the policy had little effect on enrollment of Black and Latina/o students at UC Berkeley.<sup>185</sup>

UCLA also adopted a holistic admissions policy for the entering class of fall 2007.<sup>186</sup> In contrast to UC Berkeley, there was a dramatic increase in Black student

174 Sander, *supra* note 172, at 3.

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.* at 3–4.

181 *Id.* at 3.

182 *Id.*

183 *Id.*

184 *Id.* at 3–4.

185 *Id.* at 4 (“Berkeley’s holistic system went forward, but it is not clear that it had the effects predicted by either its supporters or its critics. African-American and Hispanic freshman admissions did not change much.”).

186 *Id.*

enrollment at UCLA.<sup>187</sup> From 1995 to 1997, UCLA enrolled over two hundred new Black students each year. In 1998, the first year that California's constitutional ban on affirmative action went into effect, this number dipped to less than 150. New Black student enrollment at UCLA fluctuated over the next decade, but it never went significantly over 150, and in 2006, it was at a low of about 100. But for both 2007 and 2008, new Black student enrollment doubled to over 200.<sup>188</sup>

This increase prompted Professors Groseclose and Sander to raise the possibility that admissions officers were covertly using race itself as a criterion. Professor Sander contended that "[h]olistic admissions by itself did not add anything to African-American admissions at UCLA; rather, it provided a cover for illegal discrimination by UCLA's admissions office."<sup>189</sup> Professor Sander claimed that the secretive nature of holistic review served to obscure the use of race in the admissions process.

Consequently, UCLA commissioned the late Professor Robert Mare of the sociology department to conduct an independent review of the University's undergraduate holistic admissions process.<sup>190</sup> Professor Mare used data from the fall 2007 and fall 2008 admissions cycles.<sup>191</sup> His report also laid out the pathways to admission, factors considered in holistic review, and ratings scales for UCLA's undergraduate holistic admissions process. His investigation gives one model for assessing post-*SFFA* accusations that universities are still using race itself as an admissions factor, rather than personal qualities tied to racial experiences.

In its various phases and components, the admissions process reviewed by Professor Mare considered a plethora of factors to determine which applicants would be admitted, including grades, difficulty of classes taken, standardized test scores, extracurricular activities, school and community involvement, contribution to family income (if working), academic enrichment activities (which could also be work) socioeconomic status, and other challenges and "limits to academic achievement."<sup>192</sup> Based on holistic assessment of these criteria, applicants were rated by admissions reviewers on a quantitative scale: "1 (emphatically recommend for admission ...), 2 (strongly recommend for admission ...), 2.5 (recommend for admission), 3 (acceptable for admission ...), 4 (qualified ...), 5 (recommend deny ...)."<sup>193</sup>

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187 See *BLACK BRUIN HISTORY AT UCLA*, <https://newsletter.alumni.ucla.edu/connect/2021/feb/black-bruin-history/default.htm> (last visited Jan. 17, 2024) (giving new enrollment numbers of Black students at UCLA for each year from 1995 to 2015).

188 *Id.* Although the number of new admitted Black students at UCLA dropped slightly below 200 in 2009 and 2010, it was above 200 from 2011-2013 and exceeded 250 in 2014 and 2015. *Id.* In 2021, after implementing increased recruitment efforts and other activities, UCLA enrolled 346 new Black students. Janell Ross, *The 'Infamous 96' Know Firsthand What Happens When Affirmative Action Is Banned*, TIME, July 1, 2023, <https://time.com/6291241/affirmative-action-infamous-96-ucla-supreme-court/#:~:text=In%202021%20there%20were%201%2C185,slightly%20lower%20than%20UCLA's%20figures..>)

189 Sander, *supra* note 172, at 1.

190 ROBERT D. MARE, *HOLISTIC REVIEW IN FRESHMAN ADMISSIONS AT UCLA*, UCLA Comm. on Undergraduate Admissions & Rel. with Schools (CUARS) (Jan. 2012) (on file with author).

191 *Id.* at 11.

192 *Id.* at 1-2.

193 *Id.* at 22.

UCLA had a number of pathways to admission, most of which employed holistic review to varying degrees.<sup>194</sup> “Regular Review” admittees came from general holistic ratings on a numerical scale, scored by one or two application reviewers.<sup>195</sup> “Athletic Admission” involved a separate admissions committee, and while athletes might submit regular applications, they were reviewed differently.<sup>196</sup> “Final Review” generally involved applicants who had received discrepant scores during Regular Review and were referred for further consideration.<sup>197</sup> “Supplemental Review” was for applicants referred by readers during Regular Review because those readers “believe that they cannot score the applicant on the basis of the information contained in the application or if they believe that the applicant deserves special consideration because of personal circumstances reflected in the application.”<sup>198</sup> More information, such as letters of recommendation and updates about academic performance and personal circumstances, was solicited from applicants submitted for Supplemental Review.<sup>199</sup> “School Review” was for a “small number of applicants ... based on special circumstances that surround their high schools”: for example, if an applicant had strong academic credentials but did not stand out because they went to a school that had many academically strong students.<sup>200</sup>

Professor Mare’s review found that

1. Relative to the applicant pool, White, East Asian American, and South Asian American applicants were more represented among admitted students than Black, Latina/o, and Southeast Asian applicants, due principally to disparities during Regular Review;<sup>201</sup>
2. Black and Latina/o applicants were disproportionately represented in Supplemental Review;
3. For “holistic read scores” during Supplemental Review and Final Review, Black applicants were rated “somewhat more favorabl[y]” and East and South Asian American applicants were rated “somewhat less favorabl[y]” than other applicants who were “otherwise similar in academic qualifications, personal characteristics, and measured challenges and hardships;”<sup>202</sup>
4. When controlling for racial differences in all other applicant characteristics, “Whites, African Americans, and Latinos are overrepresented among those admitted and Asian American applicants are underrepresented.”<sup>203</sup>

194 *Id.* at 22–25.

195 *Id.* at 22.

196 *Id.* at 23.

197 *Id.* at 24.

198 *Id.*

199 *Id.* at 24–25.

200 *Id.* at 25.

201 *Id.* at 3.

202 *Id.* Mare used the term “North Asian” to combine students of East Asian (Chinese, Japanese, Korean, Mongolian) and South Asian (Indian, Pakistani, Bangladeshi, Sri Lankan, Maldivian) descent.

203 *Id.*



On this last finding, Mare further noted that for Black and Latina/o applicants, this effect occurs primarily in Final and Supplemental Review, and that the “disadvantages of Asian applicants occur, with varying magnitudes, throughout the admissions process.”<sup>204</sup>

Professor Mare’s overall conclusion was that “[S]ome disparities in outcomes ... favor some groups and disfavor others among applicants who are otherwise similar on their measured characteristics. Whether these disparities are considered small or large is a normative, policy issue—not a scientific one.<sup>205</sup> Despite the ambivalent conclusion by Professor Mare, UCLA itself stated that “Mare’s report found no evidence of bias in UCLA’s admissions process[,]”<sup>206</sup> that the differences reported by Mare “ar[ose] almost exclusively in supplemental review, a step ... that is intended to give additional attention to atypical applicants[,]”<sup>207</sup> and that “those ... differences can be explained by the nuances and context of the applicant’s experience[.]”<sup>208</sup>

Although this matter did not go further, the type of controversy that occurred at UCLA could well happen again. Opponents of affirmative action are bound to accuse universities of using race surreptitiously. But it will be difficult to separate impermissible use of race itself from the permissible consideration of racialized experiences in applicants essays referenced by Chief Justice Roberts in the *SFFA* majority opinion.<sup>209</sup> And as the controversy at UCLA suggests, admissions committees or individual admissions reviewers could still use race illegally—or at least be accused of doing so.<sup>210</sup> Justice Ginsburg’s comment about “winks, nods, and disguises” suggested as much, and Justice Souter also warned in his *Gratz* dissent that equal protection could very well “become an exercise in which the

204 *Id.* See also *id.* at 76 (“In 2007, as in 2008, African American, Latino, and Southeast Asian applicants are underrepresented in the admission cohort, whereas Whites and North Asians are overrepresented. Once the differences in the measured characteristics of the groups are taken into account, the net advantages shift to Whites, Blacks, and Latinos, whereas both Asian groups experience a net disadvantage.”). See also *id.* at 3 (“Among otherwise equivalent applicants, Whites, African Americans, and Latinos are overrepresented among those admitted and Asian American applicants are underrepresented.”)

205 *Id.* at 4.

206 Ricardo Vazquez, *Independent Report Confirms UCLA Admissions Process Working as Intended by Faculty*, UCLA OFFICE OF MEDIA RELATIONS, <http://newsroom.ucla.edu/stories/independent-report-confirms-ucla-234132>. Conversely, Professor Sander argued that Mare’s report supported his findings. See David Leonhardt, *Race, ‘Holistic Admissions’ and U.C.L.A.*, N.Y. TIMES, Oct. 13, 2012, <https://archive.nytimes.com/economix.blogs.nytimes.com/2012/10/13/race-holistic-admissions-and-u-c-l-a/> (last visited Jan. 17, 2024), (“Intriguingly, both Mr. Sander and U.C.L.A. argue that the Mare report is consistent with their findings.”).

207 *Id.*

208 *Id.*

209 See text accompanying *supra* notes 154–61.

210 Even before *SFFA*, there were many allegations that universities were intentionally discriminating against Asian Americans. See DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN PACIFIC AMERICANS AND RACIAL POLITICS* 64–83 (1998); Vinay Harpalani, *The Supreme Court, 2022 Term—Response: The Need for an Asian American Supreme Court Justice*, 137 HARV. L. REV. F. 23, 30–31 (2023). The Department of Education Office of Civil Rights (OCR) actually found that UCLA had discriminated against five students of Asian descent in 1987 and 1988. Harpalani, *supra* note 46 at 272. OCR ordered UCLA to admit those students. *Id.*

winner are the ones who hide the ball.”<sup>211</sup> Some might even view this action as a morally justified act of “civil disobedience.”<sup>212</sup>

If such accusations are widespread and taken seriously, they may well prompt investigation and litigation. And controversies about the impermissible use of race in a post-*SFFA* regime would be even messier than under the *Grutter* regime. Universities would not admit to direct and explicit use of race—as they did in *Bakke*, *Gratz*, *Grutter*, *Fisher*, and the *SFFA* cases—because now, doing so would be to admit they are violating the law. Plaintiffs would thus face another well-known obstacle if they filed a post-*SFFA* case accusing universities of using race directly in admissions: the intent doctrine. Facially race-neutral policies that merely have a disparate impact on different racial groups do not violate the Fourteenth Amendment.<sup>213</sup> The Equal Protection Clause only applies to the intentional use of race by government actors.<sup>214</sup>

211 *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting).

212 See Salib & Krishnamurthi, *supra* note 84, at 149 (“[O]ne could think of noncompliance as a kind of civil disobedience. Under this frame, universities accept that the Supreme Court’s interpretation of Title VI and the Constitution is coextensive with the law. But they believe that the law itself is immoral, sufficiently so to justify breaking it.”). Professors Salib and Krishnamurthi discuss several other justifications that universities could use to defy Supreme Court precedent. *Id.* at 149-52. They note that “anti-judicial-supremacist thinking has lately become fashionable among a surprisingly wide variety of legal thinkers[,]” across the ideological spectrum, including Professors Ryan Doerfler, Samuel Moyn, Nikolas Bowie, Daphna Renan, Michael Stokes Paulsen, and William Baude. *Id.* at 150. They also contend that

Colleges might justify post-*SFFA* affirmative action to themselves on grounds of legal incoherence[] ... if they ... had to obscure those policies for fear of capricious liability, then the fault was with the Court for writing such a bad opinion. ... [T]he Court held that colleges may continue to favor students who, among other things, overcame racial discrimination. Such features of an applicant are, at a minimum, highly correlated with racial/ethnic background. Indeed, they might be so highly correlated as to be coextensive. There simply might not be any Black applicants to Harvard who, by Harvard’s lights, have not faced and overcome anti-Black racism. How, then, should the diligent judicial supremacist Director of Admissions ensure compliance with *SFFA* among her staff? How could she be sure that they were acting on desiderata merely coextensive with race, rather than on race itself? ... Should she police admissions staff who slip and use the old, functionally identical criteria? Interrogate them to identify their true internal conceptual schema? Fire them if she suspects they have the wrong one? Or should she instead perhaps conclude that drawing these distinctions is a bit like counting angels on pinheads, and ignore them? ... [S]he might feel justified in moving forward without much change, declining to record the details of admissions decisions, and placing any applicable blame on the Court for issuing yet another mysterious holding on affirmative action. *Id.* at 151-52.

Professors Salib and Krishnamurthi do not endorse any of the above propositions. Rather, they note that “[e]ach seems at least somewhat plausible to us, but we take no position on their ultimate validity.” *Id.* at 149.

213 See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (noting that U.S. Supreme Court has “not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another”); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (holding that the Equal Protection Clause protects only against discrimination that occurs “because of, not merely in spite of, its adverse effects upon an identifiable group”).

214 The intent doctrine most likely also applies to Title VI of the Civil Rights Act of 1964, which reaches private universities. In past cases, the Supreme Court has stated that standards for violating

In past cases challenging affirmative action in admissions, universities admitted to using race-conscious policies, so strict scrutiny automatically attached. This placed a high burden on universities: they had to show that their policies were narrowly tailored to a compelling state interest. But now, universities will contend they are only using facially race-neutral admissions policies. In post-*SFFA* litigation, plaintiffs would bear the burden to prove that universities are being disingenuous and intentionally using race.<sup>215</sup>

How would they do so? Unless there was direct, smoking gun evidence that a university used race impermissibly for admissions decisions, plaintiffs would have to rely on statistical evidence. In the cases before *SFFA*, such evidence served not to demonstrate that universities were using race (they admitted doing so legally), but rather to approximate and highlight the weight given to race in the admissions process. For example, in both *Bakke* and *Grutter*, the Plaintiffs submitted data showing disparities in grades and test scores between admitted underrepresented and nonunderrepresented students.<sup>216</sup> The *Grutter* Plaintiffs used this evidence

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Title VI of the Civil Rights Act of 1964 are the same as for the Equal Protection Clause. See *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (noting “that § 601 [of Title VI] ‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment’”) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (opinion of J. Powell)). In his *SFFA* concurrence, Justice Neil Gorsuch opined that Title VI is stricter than the Equal Protection Clause and proscribes all racial classifications. *SFFA*, 600 U.S. 181 at 308 (2023) (Gorsuch, J. concurring) (“Under Title VI, it is always unlawful to discriminate among persons even in part because of race, color, or national origin.”). But Justice Gorsuch was referring to intentional racial classifications. Also, in *Guardians Association v. Civil Service Commission of City of New York*, only two Justices opined that Title VI does not require any proof of discriminatory intent. See 463 U.S. 582, 584 n.2 (1983) (“Justice [Thurgood] Marshall would hold that, under Title VI itself, proof of disparate impact discrimination is all that is necessary. . . . I [Justice Byron White] agree with Justice Marshall that discriminatory animus is not an essential element of a violation of Title VI.”). Four Justices (Chief Justice Warren Berger and Justices Sandra Day O’Connor, Lewis Powell, William Rehnquist) held unequivocally that Title VI required proof of discriminatory intent, while Justices Harry Blackmun, William Brennan, and John Paul Stevens found that “although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate impact standard are valid.” *Id.* Although it is possible that the Court could recognize disparate impact liability under Title VI, that is highly unlikely in my view—especially with the current Justices. *But cf.* Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. COL. & UNIV. L. 239, 60-61 (2023) (arguing that U.S. Department of Education and Department of Justice regulations for implementing Title VI do “include a provision that prohibits universities from employing admissions criteria that disproportionately and unjustifiably exclude students of color.”) See generally also Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PENN. L. REV. 1075, 1145–55 (2009) (discussing Title VI interpretation and implementation).

215 It is possible that this burden could change if the Supreme Court grants cert and rules on *Coalition for TJ v. Fairfax, County School Board*. In this case, the District Court for the Eastern District of Virginia ruled that the newly implemented race-neutral admissions policy for Thomas Jefferson High School for Science and Technology, a public magnet high school, violated the Equal Protection Clause because it had a disparate impact on the admission of Asian American students and was motivated by racial animus. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809. However, this ruling was overturned on appeal. *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023).

216 See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277 n.7 (1978) (comparing Plaintiff Alan Bakke’s GPA and MCAT scores with those of all admitted applicants and those admitted via the special admissions program); see *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 838 (E.D. Mich. 2001), *overruled by Grutter v. Bollinger*, 539 U.S. 306 (2003) (Plaintiffs’ expert witness concluding that “that

to support their claim that the University of Michigan Law School was using a de facto quota system in violation of *Bakke*—an argument rejected by the *Grutter* majority.<sup>217</sup> And SFFA employed complex statistical models of holistic review processes, incorporating not only academic criteria, but a variety of factors that go into a holistic admissions process.<sup>218</sup> Through such models, SFFA contended that Harvard and UNC used race as more than just a plus factor for underrepresented applicants.

But in the post-*SFFA* world, universities would deny using facially race-conscious policies. Plaintiffs would have to use statistical evidence to establish intentional use of race itself—in the mix of admissions committees' consideration of essays about racialized experiences and other factors incorporated in holistic review, including socioeconomic status, personal hardship, geographic criteria, and other factors.<sup>219</sup> And the Supreme Court has set a high bar for statistical evidence itself to prove intent. When alleging intentional use of race, plaintiffs would have to show that academic and other differences between admitted applicants of different racial groups are “unexplainable on grounds other than race.”<sup>220</sup> Their ability to do so would depend on the magnitude of these differences,<sup>221</sup> in relation to the total

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[a]ll the graphs comparing Native American, African American, Mexican American, and Puerto Rican applicants to Caucasian American applicants show wide separation indicating a much higher probability of acceptance for the particular ethnic group at a given selection index value.”). *But see* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002) (cited in *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (“In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.”).

217 *Grutter*, 539 U.S. at 335–36 (“The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota.”).

218 *See supra* notes 128-129 and accompanying text.

219 *See supra* Part I.

220 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”); *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (“[S]tatistical proof normally must present a ‘stark’ pattern to be accepted as the sole proof of discriminatory intent under the Constitution.”). The *McCleskey* majority opinion also gave examples of such “stark pattern[s].” *Id.* n.12 (“*Gomillion v. Lightfoot*, 364 U. S. 339 (1960), and *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), are examples of those rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation. In *Gomillion*, a state legislature violated the Fifteenth Amendment by altering the boundaries of a particular city ‘from a square to an uncouth twenty-eight-sided figure.’ 364 U.S. at 364 U. S. 340. The alterations excluded 395 of 400 black voters without excluding a single white voter. In *Yick Wo*, an ordinance prohibited operation of 310 laundries that were housed in wooden buildings, but allowed such laundries to resume operations if the operator secured a permit from the government. When laundry operators applied for permits to resume operation, all but one of the white applicants received permits, but none of the over 200 Chinese applicants was successful. In those cases, the Court found the statistical disparities ‘to warrant and require,’ *Yick Wo v. Hopkins*, *supra*, at 118 U. S. 373, a ‘conclusion [that was] irresistible, tantamount for all practical purposes to a mathematical demonstration,’ *Gomillion v. Lightfoot*, *supra*, at 364 U. S. 341, that the State acted with a discriminatory purpose.”).

221 Professors Salib and Krishnamurthi contend that *Washington v. Davis* and *McCleskey v. Kemp* will prevent plaintiffs from prevailing in challenges where intentional use of race has to be proven. *See* Salib & Krishnamurthi, *supra* note 84, at 123, 126, 136-37, 152-53. They further argue that “the result in

of applicants to the academic program and the other admissions criteria that were considered.<sup>222</sup> Courts would have to evaluate statistical differences between racial groups and determine if they form “a ‘stark’ pattern”<sup>223</sup> that is “unexplainable on grounds other than race.”<sup>224</sup>

Rather than inviting more lawsuits however, universities are likely to be risk averse.<sup>225</sup> What has already been happening, and what I suspect may continue in

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*SFFA* need have no impact at all: colleges will still be able to operate affirmative action programs as they have been, with only very minor changes.” *Id.* at 152. But the degree to which universities have used race can appear to be quite stark. In their study of 7410 accepted applicants at several selective private higher education institutions, Professor Thomas Espenshade and Alexandria Walton Radford found that for Fall 1997, using White admitted applicants as a baseline, race-related admissions plus factors were equivalent to 310 points (out of 1600 total) on the SAT for Black admittees and 130 points for Hispanic admittees, while Asian admittees outscored Whites by 140 points. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* 92–93 (2009). At Harvard itself, for the classes admitted from 1995 to 2013, “Asian-Americans admitted to Harvard earned an average SAT score of 767 across all sections. ... [W]hite admits earned an average score of 745 across all sections, Hispanic-American admits earned an average of 718, Native-American and Native-Hawaiian admits an average of 712, and African-American admits an average of 704.” Sheri S. Avi-Yonah & Molly C. McCafferty, *Asian-American Harvard Admits Earned Highest Average SAT Score of Any Racial Group From 1995 to 2013*, HARVARD CRIMSON (Oct. 22, 2018), <https://www.thecrimson.com/article/2018/10/22/asian-american-admit-sat-scores/>. Also, Professors Peter Arcidiacono, Josh Kinsler, and Tyler Ransom report average SAT scores by race for students admitted to Harvard for the Class of 2017: White = 1492; Asian American = 1536; African American = 1434; Hispanic = 1454; Native American = 1450. Peter Arcidiacono, Josh Kinsler, & Tyler Ransom, *Recruit to Reject? Harvard and African American Applicants*, 88 ECON. EDUC. REV. 1, 5 (2022). The authors also found that “[a]n African American applicant [to Harvard] who scored above a 740 on the SAT math was 4.46 times as likely to be admitted as a similar-scoring Asian American applicant for the Class of 2009 and was 4.65 times as likely to be admitted for the Class of 2016.” *Id.* at 2. Nevertheless, many race-neutral facets of Harvard’s admissions process disadvantage Asian Americans. See Harpalani, *The Need for an Asian American Supreme Court Justice*, *supra* note 210, at 37–38 (noting that Asian Americans have lowest representation of any racial groups among “athletes, legacy applicants, applicants on the Dean’s Interest List [primarily relatives of donors], and children of faculty or staff[.]”). See also generally Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590 (2017); Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

As with *SFFA*, litigants would employ statistical models to argue whether or not such difference among racial groups demonstrate intentional discrimination, and courts would make the final determination.

222 See Sander & Taylor, *supra* note 173, at 158 (“For many small programs ... [t]he number of students was so small, and the criteria for selection so selective, that outside investigators could not easily detect racial discrimination. For larger programs, such as law schools or business schools, that would obviously be more difficult.”).

223 *McCleskey*, 481 U.S. 279, 293. See also *supra* note 220.

224 *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264. See also *supra* note 220.

225 One example of this risk aversion is the removal of check boxes for racial categories from applications. See Anemona Hartocollis, *Colleges Will Be Able to Hide a Student’s Race on Admissions Applications*, N.Y. TIMES (May 26, 2023), <https://www.nytimes.com/2023/05/26/us/college-admissions-race-common-app.html> (noting that “the Common App has made a pre-emptive move on what is known as the ‘race box’ ... colleges will be able to hide the information in those boxes from their own admissions teams”); Pericles Lewis & Jeremiah Quinlan, *An Update on Yale College’s Response to the Supreme Court Ruling on Race in Admissions*, YALE COLLEGE (Sept. 7, 2023), <https://yalecollege.yale.edu/get-know-yale-college/office-dean/messages-dean/update-yale-colleges-response-supreme-court-ruling> (“Reviewers will not have access to applicants’ self-identified race and/or ethnicity, and admissions officers involved in selection will not have access to aggregate data on the racial or ethnic

various forms, is the “de-quantification” of admissions. Universities could reduce the use of numerical scales and criteria and rely more on unquantified judgments of admissions committees as part of holistic review. This would reduce the amount of statistical data that potential plaintiffs could use to claim that universities are intentionally using race.

The reduced use of standardized college entrance exams is one example of such de-quantification. For well over a decade now, universities have been making such exams optional for admission, or eliminating their consideration altogether.<sup>226</sup> This has occurred for various reasons, including removal of what some perceive as a barrier to the admission of underrepresented groups,<sup>227</sup> desire to emphasize other holistic attributes in the admissions process, and the difficulty of test administration during the COVID-19 pandemic.<sup>228</sup> For the fall 2023 cycle, over 80% of four-year undergraduate institutions had either made submission of standardized test scores optional or eliminated their usage altogether.<sup>229</sup> In the past, such test scores

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composition of the pool of applicants or admitted students.”).

226 See Kevin Carey, *The SATs Are: a) Dying; b) Already Dead; c) Alive and Well; d) Here Forever*, VOX (May 2, 2023), <https://www.vox.com/23700778/sat-act-standardized-tests-college-high-school>.

227 See, e.g., Richard V. Reeves & Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, BROOKINGS INST. (Feb. 1, 2017), <https://www.brookings.edu/articles/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/> ([I]nequalities in SAT score distribution reflect and reinforce racial inequalities across generations.”); Aaron W. Hughley, *Why Standardized Testing Is Not Essential in College Admissions*, 517 COUNTERPOINTS: COLLEGES AT THE CROSSROADS: TAKING SIDES ON CONTESTED ISSUES 329, 339 (2018) (“[S]tandardized tests designed to level the playing field are perpetuating the social order by making it much more difficult for those from low-income families to effectively compete with their wealthier counterparts.”). *But see* Natalia Mehlman Petrzela, *The SAT Is a Better Measure of Wealth than Aptitude. We Should Still Keep It, Though*, MSNBC (Nov. 2, 2023), <https://www.msnbc.com/opinion/msnbc-opinion/sat-test-harvard-study-rca121948> (“It is this promise of the SAT to counterbalance an opaque and unfair system—to democratize college admissions—what explains why marginalized groups often advocated for such exams. Jews in the 1930s, for example, knew a high SAT score would make it harder for universities to exclude them based on their accent, public school education or failure to meet a deliberately nebulous criterion of ‘character.’ Today, Asian American advocates make similar arguments, and some have pointed out that the push to de-emphasize testing and academics just happens to come as their performance threatens the status of white students. Ironically, eliminating standardized assessments reopens the door to all sorts of ambiguous ‘qualitative’ measures that serve to disadvantage kids in the same, difficult-to-detect ways that the old boys’ network of yore did. Such a shift will only ensure that students who have legacy connections, extracurricular opportunities and in-depth recommendations written by guidance counselors at well-resourced schools have an even greater advantage.”).

*See also* Lyn Letukas, *Nine Facts About the SAT That Might Surprise You*, COLL. BD. RSCH. (2015), <https://files.eric.ed.gov/fulltext/ED562751.pdf> (critiquing notion that “[t]he SAT is biased against minorities”).

228 See Carey, *supra* note 226.

229 Michael T. Nietzel, *More Than 80% Of Four-Year Colleges Won’t Require Standardized Tests For Fall 2023 Admissions*, FORBES (Nov. 15, 2022), <https://www.forbes.com/sites/michaelt Nietzel/2022/11/15/more-than-80-of-four-year-colleges-wont-require-standardized-tests-for-fall-2023-admissions/?sh=334b318a7fb9>. The Massachusetts Institute of Technology (MIT) has gone against this trend and reinstated its standardized college entrance exam requirement. See Eric Levenson, *MIT Will Once Again Require Applicants to Take the SAT or ACT, Bucking Anti-test Movement*, CNN (Mar. 29, 2022), <https://www.insidehighered.com/admissions/views/2022/05/09/why-mit-was-right-reinstate-sat-opinion>; Les Perelman, *MIT and the Reinstatement of the SAT*, INSIDE HIGHER ED (May 8,

have also been used by antiaffirmative action plaintiffs to establish the magnitude of race-conscious policies and their burden on some racial groups.<sup>230</sup> And now in a post-SFFA world, universities seeking to avoid lawsuits alleging the use of race now have even more incentive to eliminate use of standardized entrance exams.<sup>231</sup>

If the use of standardized tests declines, universities may rely more on another quantified measure—high school grades—to make admissions decisions. However, because they are not standardized across schools, it is harder to use grades to compare applicants. And high school grade inflation has compounded that problem.<sup>232</sup> The 2019 National Assessment of Educational Progress High School Transcript Study (NAEP-HSTS) reported that, adjusting GPAs to a 4.0 scale, the average overall high school GPA across the nation rose from 2.68 in 1990 to 3.11 in 2019.<sup>233</sup> Moreover, the average high school GPA for academic courses rose from 2.54 to 2.98,<sup>234</sup> and grades for every type of high school course showed a statistically significant increase in the last thirty years.<sup>235</sup> And this trend has tended to benefit “students from wealthier (and whiter) high schools than average”<sup>236</sup>—thus exacerbating inequities between more privileged and less privileged students.<sup>237</sup> There is also evidence that the correlation between grades and standardized test scores has decreased over time—particularly after the COVID-19 pandemic.<sup>238</sup>

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2022), <https://www.insidehighered.com/admissions/views/2022/05/09/why-mit-was-right-reinstate-sat-opinion>.

230 See *supra* note 216.

231 The elimination of standardized entrance exams itself has led to legal and political controversies, with Asian Americans often at the center. See generally Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759 (2022).

232 See Fred Hess, *High School Grade Inflation Is s Problem. Getting Rid of the SAT Would Make It Worse*, FORBES (Mar. 30, 2022), <https://www.forbes.com/sites/frederickhess/2022/03/30/high-school-grade-inflation-is-a-problem-getting-rid-of-the-sat-would-make-it-worse/?sh=1fb1ca3aae7a>; Tim Donahue, *If Everyone Gets an A, No One Gets an A*, N.Y. TIMES (Oct. 23, 2023), [https://www.nytimes.com/2023/10/23/opinion/grade-inflation-high-school.html?unlocked\\_article\\_code=1.Bk0.gIpw.fwUnL.UNJzWt&smid=url-share](https://www.nytimes.com/2023/10/23/opinion/grade-inflation-high-school.html?unlocked_article_code=1.Bk0.gIpw.fwUnL.UNJzWt&smid=url-share).

233 See 2019 NAEP High School Transcript Study (HSTS) Results, [https://www.nationsreportcard.gov/hstsreport/#coursetaking\\_1\\_0\\_el](https://www.nationsreportcard.gov/hstsreport/#coursetaking_1_0_el) (last visited Jan. 18, 2024).

234 *Id.*

235 *Id.* Another study indicated that from the graduating class of 1998 to that of 2016, the average high school GPA of students who enroll in four-year colleges increased from 3.27 to 3.38. Scott Jaschik, *High School Grades: Higher and Higher*, INSIDE HIGHER ED (July 16, 2017), <https://www.insidehighered.com/admissions/article/2017/07/17/study-finds-notable-increase-grades-high-schools-nationally>. Additionally, “the proportion of students with A averages (including A-minus and A-plus) increased from 38.9 percent of the graduating class of 1998 to 47 percent of the graduating class of 2016.” *Id.*

236 *Id.*

237 *Id.* (“High schools ‘most prone to grade inflation are the resourced schools[.]’ ‘the ones with the highest level of affluence.’ For those at high schools without resources, generally with lower GPAs, grade inflation elsewhere ‘puts them at a disadvantage in the college admissions process.’”).

238 See Dan Goldhaber & Maia Goodman Young, *Course Grades as a Signal of Student Achievement: Evidence on Grade Inflation Before and After COVID-19* at 9, CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RSCH. (Nov. 2023), <https://caldercenter.org/sites/default/files/CALDER%20Brief%2035-1123.pdf> (noting that in Washington State middle and high schools, “w]e find modest increases in student grades in the decade before the pandemic that accelerated (consistent with state guidance)

With the reduced value of grades to compare applicants and the potential phase-out of standardized entrance exams,<sup>239</sup> universities may rely even more on holistic review of nonacademic criteria.

But nonacademic factors in holistic review are also quantified at some universities. Such factors have been used in investigation and litigation. Harvard's personal rating score is one example that featured prominently in the *SFFA* litigation, with the Plaintiffs arguing that it demonstrated discrimination against Asian Americans.<sup>240</sup> Professor Groseclose's allegations that UCLA was using race to make admissions decisions employed socioeconomic data such as family income.<sup>241</sup> And Professor Mare's analysis of UCLA's admissions policy was based on "holistic read scores."<sup>242</sup>

Unlike standardized tests and GPAs though, quantification is not an integral feature of holistic review itself. I have served on admissions committees at two law schools that used holistic review as part of a selective admissions process. At both of these law schools, many applicants were admitted automatically via academic criteria (undergraduate GPA and standardized test scores). However, the admissions director referred for committee review those applicants with academic criteria "on the bubble" or those having potential character and fitness issues or other special circumstances.<sup>243</sup> The admissions committees at these law schools had access to applicants' academic records, personal essays, letters of recommendation, and other components of holistic review. But at neither law school did we assign quantitative scores to any of these components, or to the applicants we reviewed. We simply discussed their applications individually at committee meetings and then voted on whether to accept, deny, or wait-list each applicant.

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after the pandemic's onset. ... We also see evidence, again especially in math, that the relationship between grades and test scores has diminished over time. These results are descriptive and do not illustrate the degree to which grading standards might vary across contexts, such as school system type, pandemic-related closures, or across student subgroups and test achievement level."); *Id.* at 2 ("Following the pandemic, grades returned to pre-pandemic averages in most subjects. But test achievement is far below its prepandemic levels—including in Washington State ... hence we might expect a greater divergence between the grades students receive and their standardized test scores."). See also Evie Blad, *Students' Grades May Not Signal Actual Achievement, Study Cautions*, EDUC. WK. (Nov. 10, 2023), <https://www.edweek.org/leadership/students-grades-may-not-signal-actual-achievement-study-cautions/2023/11> (noting "concerns that the pandemic led to grade inflation, which misleads parents about just how much their kids have learned").

239 See Jaschik, *supra* note 235.

240 See *supra* notes 130–31 and accompanying text.

241 See Groseclose, *supra* note 172.

242 See *supra* notes 201–205 and accompanying text.

243 Renée Ferrell, Director of Admissions, Financial Aid, & MSL Program at University of New Mexico School of Law, told me that "[a]t many law schools, all files are reviewed by one or more admissions officers and only sent to faculty admissions committees in extreme cases (such as for character and fitness review). This is intended to limit the biases that impact a file's decision, though I could argue it really just applies a consistent bias (my bias as opposed to various faculty biases) to all applicants." Email from Renée Ferrell, Dir. of Admissions, Fin. Aid, & MSL Program to Vinay Harpalani, Professor of Law & Don L. & Mabel F. Dickason Endowed Chair in Law, Univ. of N.M. Sch. of Law (Nov. 21, 2023, 12:09 MST) (on file with author).



Elite universities are in a different position: they receive far more competitive applications than they can accept for a given class. Those institutions employ holistic review for practically all of their applicants, and they often have quantitative ranking systems for various components of applications.<sup>244</sup> But it may not be necessary to use such quantitative rankings. After *Gratz* and *Grutter*, “institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems[.]”<sup>245</sup> While it may be more administratively cumbersome,<sup>246</sup> universities could adjust their holistic assessments of applicants to be less quantitative or to produce less data that could be used in litigation. If they do so, the result would be even more secret admissions.

## V. CONCLUSION: SECRET ADMISSIONS FOR THE APPLICANT

In this article, I have examined the secrecy of holistic review in admissions, along with many of its consequences. While holistic review has many benefits, its obscure nature contributes to lack of public understanding regarding admissions, invites litigation to challenge admissions policies, and facilitates the potential for subterfuge through surreptitious use of race. As universities continue to use holistic review in the post-*SFFA* era, they should also strive to be as transparent as possible about their admissions processes. Although Justice O’Connor and others believed that opaqueness would help avoid controversy around race-conscious admissions, the opposite has proven to be true.

Transparency is also better for equity among applicants. Opaqueness undermines the very purpose of holistic review—it thwarts diversity by giving more advantages to the most privileged applicants<sup>247</sup> who can hire college counseling services to guide them.<sup>248</sup> In their review of holistic admissions, Bastedo and colleagues lament that

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244 See, e.g., *SFFA*, 600 U.S. 181, 194-96 (2023) (describing admissions process at Harvard and at University of North Carolina at Chapel Hill).

245 See Harpalani, *supra* note 92, at 532 n.309. See also *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (“Respondents contend that ‘[t]he volume of applications and the presentation of applicant information make it impractical for [undergraduate admissions] to use the . . . admissions system’ upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”)

246 Cf. Jeffrey Selingo, *The Cynical Reason College Applications Are Surging*, N.Y. TIMES (Mar. 16, 2023), <https://www.nytimes.com/2023/03/16/opinion/college-admissions-common-app.html> (“Application inflation is most acute at the nation’s brand-name and top-ranked public and private colleges, whose application numbers have ticked up 32 percent since 2020, according to the Common App. Since nearly all these selective colleges promise that applicants will get a holistic review, not one based only on grades or a test score (if submitted), their admissions staffs are under pressure to wade through a rising pile of applications—with their essays, recommendations and laundry lists of activities—in the same amount of time as before.”).

247 Bastedo et al., *supra* note 71, at 802.

248 See Michael T. Nietzel, *Academic Influence’s New Consumer Guide to College Admissions Coaches*, FORBES (June 6, 2021), <https://www.forbes.com/sites/michaelt Nietzel/2021/06/06/academic-influences-new-consumer-guide-to-college-admissions-coaches/?sh=2b392e9478a7> (“[T]he use of college admissions consultants . . . adds one more advantage easily purchased by the wealthy but largely unavailable to poor families, extending the privileges that well-to-do families already enjoy when it comes to college admissions.”); Josh Moody, *What to Look for When Hiring a College Consultant*, U.S. NEWS (Apr. 4,

exacerbated information asymmetries in admissions knowledge between wealthy and poor students[,] ... undermatching of low-income students[,] ... [and] ... forms of gaming and manipulation ... are all facilitated by the ambiguity and seeming arbitrariness in college admissions decisions[.]<sup>249</sup>

My own experience talking with students illustrates how less privileged students don't have access to information about holistic review. I conclude this Article by recounting a personal anecdote that illustrates two of the pitfalls of holistic review for applicants—particularly those who are less privileged. This anecdote involves a former student of mine, who I will call Raaz.<sup>250</sup>

Raaz became comfortable talking to me after taking one of my classes. In our conversations, she shared with me the adversity she encountered during her journey to law school. She is a woman of color who grew up in poverty: her family was on welfare, and she was eligible for free lunch throughout her childhood. She and her siblings were raised by a single mother, and as the oldest child, she took on a lot of family responsibilities. During high school, she worked nights at a fast-food restaurant to help pay her family's bills. She married in her late teens and had a full-time job right out of high school. After taking classes part-time and online, she graduated from college in her late twenties, while still holding a full-time job and raising her family. Her job sometimes involved working with lawyers, and she admired what they did and the respect they garnered, which eventually motivated her to apply to law school.

In her late thirties, Raaz, now divorced after an abusive relationship, finally determined it was time. But she still worked long hours, and although her children were almost adults, she was quite involved in their lives. She took the LSAT cold, without any practice exams: she didn't even know what sections were on it. All she knew was that she wanted to be a lawyer and needed to take this test to go to law

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2019), <https://www.usnews.com/education/best-colleges/articles/2019-04-04/what-to-look-for-when-hiring-a-college-consultant> (“According to [Independent Educational Consulting Association] data, the average hourly fee for a consultant in 2017 was \$200. A quarter of consultants charge more than \$200 per hour while 15 percent charge less. Comprehensive package fees can range from a low of \$850 up to a high of \$10,000.”); Francesca Maglione & Paulina Cachero, *Ultra-Rich Buy Ultra-Luxury Counseling to Get Kids into Harvard*, BLOOMBERG (Sept. 15, 2023), <https://www.bloomberg.com/news/articles/2023-09-15/wealthy-parents-are-spending-750-000-to-get-kids-into-harvard-yale?embedded-checkout=true> (noting that \$750,000 is college counseling service Command Education's “going rate for advice on landing a coveted spot in the Ivy League for students who want to start college prep in the 7th grade”).

249 Bastedo et al., *supra* note 71, at 802. Renée Ferrell also had insights about how less privileged applicants attempt to gain access to information: “Increasingly, students aren't looking to the professional consultants, but are turning to these public forums [such as Reddit threads]. They'll list their test scores, GPA, work experience, and maybe a few other factors. Then they ask other people (who have nothing to do with admissions) their chances of admission. ... These forums are most often dedicated to the elite institutions.” Email of Renée Ferrell, *supra* note 243. Needless to say, this yields lower quality advice for less privileged applicants.

250 “Raaz” is a pseudonym that means “secret” in Hindi. See English translation of ‘रज़’, <https://www.collinsdictionary.com/dictionary/hindi-english/%E0%A4%B0%E0%A4%BE%E0%A4%9C%E0%A4%BC> (last visited Jan. 18, 2024). I have altered some of the facts to keep this person's identity anonymous. Nevertheless, the incidents and experiences I describe are real, with only nominal alterations that do not affect the spirit of my commentary.

school. She gave no other thought to the LSAT: it was just another thing she had to do—another hurdle to jump over.<sup>251</sup> She saved money to pay the testing fee, signed up for the test, and showed up on Saturday morning to take it.

In the midst of applying to law school, Raaz had no idea about holistic admissions. She did not consult anyone about her application, merely filling it out one evening. She thought her personal statement should just tell why she was interested in becoming a lawyer, in very basic terms, so that law school admissions committees would take her seriously. Nowhere on her application did she indicate any of the hardships she went through and the challenges she overcame. It did not occur to her that law schools would consider any of these things. She certainly did not know that there is an entire profession of admissions counselors devoted to helping privileged students in elite circles polish their admissions essays, choose and lay out their extracurricular activities, and take other measures to make their applications look impressive to admissions committees.<sup>252</sup> Nevertheless, she was accepted to law school and was very successful, both as a student and in her subsequent legal career.

But perhaps even more telling is the second pitfall I saw when talking with Raaz. When I explained to Raaz that highlighting her personal story and resilience could help her in the future, she wanted no part of it. She did not want to share her personal challenges and struggles in an application or interview. She told me that what I called “resilience” was what she thought of as “the grace of God,” not an academic or professional credential. Growing up, Raaz was taught that resilience meant not making excuses—that talking about her struggles was a sign of weakness, or at least that it could be seen as such. In her mind, it was her achievements that should matter, not the life obstacles she had to overcome to attain them.

Additionally, overcoming challenges and showing resilience had often been very traumatic for Raaz. She and I had become close enough that she was willing to share her experiences with me, but not with people she did not know or trust. The thought of doing so seemed embarrassing to her. Later, when Raaz asked me to write a letter of recommendation for her, we revisited the conversation. I offered to include some of the challenges she overcame in my letter and to discuss her resilience. But Raaz was very clear that she did not want me to share any of this information. Even when I reiterated that it could augment her application, Raaz was adamant that I just write about her academic performance and my interactions with her. She had indeed done well in my classes, and I respected her wishes when I wrote the letter. It is understandable that she did not want her struggles to be on display for others to evaluate, even if that would have helped her application.<sup>253</sup>

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251 It was actually kind of refreshing for me to hear Raaz’s account here, given the obsession that applicants to elite law schools have with scoring high on the LSAT.

252 See *supra* note 248.

253 There have been many occasions where students have given me permission to write about their resilience in facing life challenges. Nevertheless, others have shared Raaz’s perspective, which I believe is common enough that universities should take it seriously. See also Feingold, *supra* note 214 at 270 note 184.

All of this has implications for the so-called essay loophole in Chief Justice Roberts's *SFFA* majority opinion. Christopher Rim, CEO of the college consulting firm Command Education, put it well: "If colleges place greater emphasis on the essay in a post-affirmative action admissions landscape, students will face all the more pressure to share their racial trauma, describing and justifying their lived experience for the (predominantly white) eyes of admissions officers."<sup>254</sup> The irony here is that applicants who might benefit most from writing essays about their experiences with discrimination, overcoming challenges, and resilience may not want to write about such experiences and may actually want to hide these experiences, much less bring attention to them in an essay.<sup>255</sup>

Indeed, universities may be able to mitigate many of the pitfalls I have mentioned. They can take measures to avoid litigation, to inform the public more about holistic review, and to make admissions counseling more available to applicants from less privileged backgrounds. For all of these pitfalls, transparency can be part of the cure. But when considering the adversity faced by applicants, transparency becomes the dilemma. Universities need to be sensitive to the fact that holistic review, for all of its benefits, may compel some applicants to make admissions about their backgrounds that they would rather keep secret.<sup>256</sup>

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254 Christopher Rim, *Why the Common App College Essay Can't Be an Affirmative Action Loophole*, FORBES (July 18, 2023), <https://www.forbes.com/sites/christopherrim/2023/07/18/why-the-common-app-college-essay-cant-be-an-affirmative-action-loophole/?sh=3b471f8174c7>

255 See Elijah Megginson, *When I Applied to College, I Didn't Want to 'Sell My Pain'*, N.Y. TIMES (May 9, 2021), [HTTPS://WWW.NYTIMES.COM/2021/05/09/OPINION/COLLEGE-ADMISSIONS-ESSAYS-TRAUMA.HTML](https://www.nytimes.com/2021/05/09/opinion/college-admissions-essays-trauma.html) ("As I kept rewriting my personal statement, it kept sounding clichéd. It was my authentic experience, but I felt that trauma overwhelmed my drafts. I didn't want to be a victim anymore. I didn't want to promote that narrative. I wanted college to be a new beginning for me."); Crimson Editorial Board, *College Essays and the Trauma Sweetspot*, HARVARD CRIMSON (Oct. 21, 2022), <https://www.thecrimson.com/article/2022/10/21/editorial-college-admissions-essay/> ("For students who have experienced genuine adversity, ... pressure to package adversity into a palatable narrative can be toxic. The essay risks commodifying hardship, rendering genuinely soul-molding experiences like suffering recurrent homelessness or having orphaned grandparents into shiny narrative baubles to melt down into a Harvard degree. It can make applicants, accepted or not, feel like their admissions outcomes are tied to their most vulnerable experiences. The worst thing that ever happened to you was simply not enough, or alternatively, it was more than enough, and now you get to struggle with traumatized-imposter syndrome."); Claire Hodgdon, *College Essays and Trauma: Students Are Being Pushed to Write About Their Worst Experiences*, TEEN VOGUE (Sept. 21, 2023), <https://www.teenvogue.com/story/college-essays-trauma-students> ("Trauma should not be a deciding factor in college admissions. Students should not need traumatic experiences in their past in order to be competitive applicants, nor should they feel forced to disclose anything that they may have gone through. Pain should not be the avenue through which students must represent themselves. ... At its worst, college essays force high school students to search through their personal experiences for a trauma they think they can sell.").

256 This dilemma occurs whenever hardship and demonstrated resilience is a criterion in any selective process. The best universities can do here is to make sure applicants have various options for essay topics, such that they can avoid revealing personal stories that they would rather not reveal. It is also important to provide sufficient mental health resources at all levels, so that individuals who face trauma are not haunted by it and may come to the point where they can discuss it more openly if they want to.