

NEW AVENUES FOR DIVERSITY AFTER STUDENTS FOR FAIR ADMISSIONS

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Abstract

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

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This article proceeds in four parts.

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

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

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

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

9 539 U.S. 306 (2003).

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

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

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

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

A. *Gutting the Grutter Precedent*

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

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

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

11 539 U.S. 306.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 *Id.* at 214-215.

20 *Id.* at 215.

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

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

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

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

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

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

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

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

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

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

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

26 *Id.* at 220.

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

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

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

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

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

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

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

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

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

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

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

30 *Id.* at 230.

31 *Id.* at 230-231.

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

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

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

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

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

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

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

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

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

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

II. POSSIBILITIES AND RISKS OF USING THE STUDENT ESSAY LOOPHOLE

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

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

33 438 US 265 (1978).

34 600 U.S. 181 (2023).

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

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

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

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

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

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

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

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

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

39 *Id.* at 231.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45 *Id.*

46 *SFFA v. Harvard*, at 231.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE IMPORTANCE OF AUTHENTIC RACE-NEUTRAL ALTERNATIVES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58 *Id.* at 220.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Q&A went on to say,

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

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

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

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

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

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

69 *Id.*

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

71 *Id.* at 8–9.

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

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

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

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

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

B. Leading Race-neutral Strategies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. *Experience in States*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

99 438 US 265 (1978).

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

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

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

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

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

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

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

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

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

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

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

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

107 See Part III.C.

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

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

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

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

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

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

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

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

112 *Id.* at 256.

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

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

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

3. *Simulations in the Harvard and UNC Litigation*

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

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

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

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

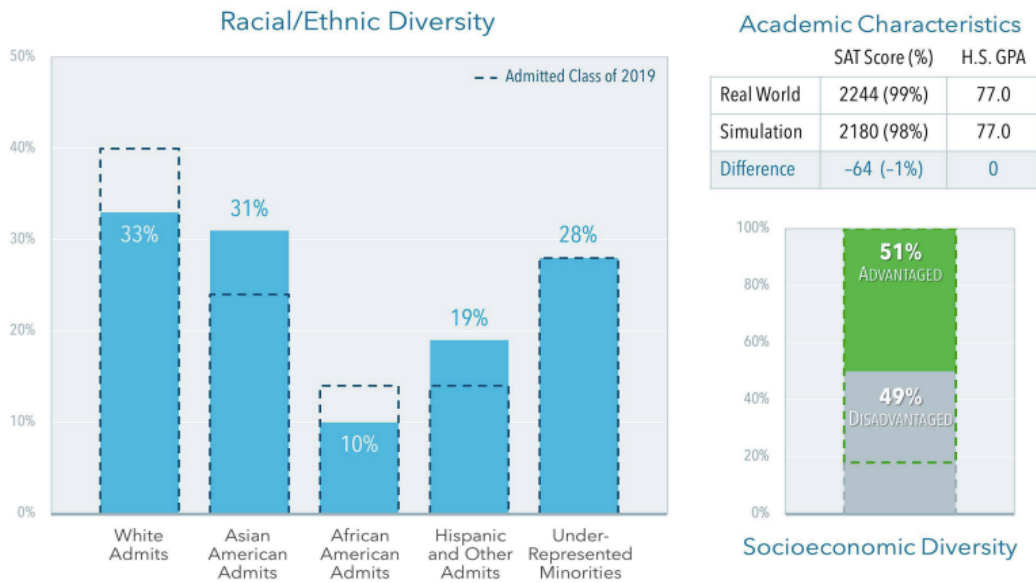
Figure 1. Harvard Admissions Preferences (Classes of 2014-2019)

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

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

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

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

Figure 2. Kahlenberg Simulation 7

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

D. How to Pay for Race-neutral Strategies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

125 Starr, *supra* n. 122.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

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

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

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

147 *Id.*

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

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

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

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

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

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

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

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

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

151 *Id.* at 137.

152 *Id.* at 138.

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

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

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

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

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

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

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