

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

An Introduction to the Special Issue

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

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1 600 U.S. 181 (2023).

2 *Id.* at 214.

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

4 *Id.* at 230.

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

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

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

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

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

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

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

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

10 438 U.S. 265.

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

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

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

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

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

13 See Kahlenberg, *infra* at 294.

14 *Id.* at 288.

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

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

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

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

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

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

18 See *id.* at 374.

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

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

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

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

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

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

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

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

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

25 *Id.* at 411.

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

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

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

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

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

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

29 See Kahlenberg, *infra* at 298.

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

31 See Harpalani, *infra* at 357.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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