ADMISSIONS AND ACCESS TO HIGHER EDUCATION AFTER SFFA V. HARVARD

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Abstract

In 2023, the Supreme Court sent a seismic shock wave through higher education with its decision in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College. *This decision replaced decades of precedent that had permitted race-conscious admissions with a new requirement of race neutrality. Some universities might overreact to this development, avoiding consideration of any attributes that have their roots in racial diversity or that could contribute to a diverse student body. But the majority opinion describes a race-neutral approach based on individual assessment of valued character traits, even if based on that applicant's experiences inextricably tied to the applicant's race. Coupled with other efforts and policies designed to broaden access to higher education, universities should follow the Supreme Court's race-neutral path, while implementing procedures that require and document decision-making that stays within the new constitutional lines.*

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INTRODUCTION

In 2023, the Supreme Court sent a seismic shock wave through higher education with its decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*Harvard*" or "the *Harvard* decision").[1] *Harvard* replaced decades of precedent that had permitted race-conscious admissions, largely adopting a requirement of race neutrality. Nonetheless, the majority opinion in *Harvard* describes an alternative path toward diversity goals, based on individual assessment of each applicant's experiences and resulting perspectives and character traits, even if based on that applicant's race. Coupled with other efforts and policies designed to broaden access to higher education, universities can continue to seek and support meaningful student diversity, like a football running back who sees a bit of daylight in the middle of an otherwise daunting defensive line.

This article will examine the *Harvard* decision and its implications in the following way. Part I traces Supreme Court jurisprudence permitting carefully limited race-conscious admissions in decisions issued from 1978 through 2016. Section II.A explains the rulings in *Harvard* that signal an abrupt shift in application of equal protection to college admissions,[2] and Section II.B describes the majority opinion's silver lining, a passage that defines a race-neutral assessment of applicants that nonetheless permits valuation of character traits developed as a result of an applicant's race and racial experiences. Part III briefly addresses other legislative or state constitutional provisions that independently prohibit racial preference in admissions. Part IV offers the author's views about application of the *Harvard* decision to actions in higher education beyond admissions. Finally, Part V outlines legally permissible measures that a college or university can undertake to recruit, admit, and retain an excellent student body that will be diverse in several ways that strengthen the educational enterprise. This part also emphasizes the need to adopt procedures that ensure that admissions officials are faithfully implementing the approach approved by the Court and that help protect the school from legal challenges.

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1 600 U.S. 181 (2023). Although this decision struck down the admissions policies of both Harvard College and the University of North Carolina, this article will refer to the decision in shorthand as "the *Harvard* decision" or just "*Harvard*."

2 This article does not address a pending issue about whether the principles of the *Harvard* decision should apply to military academies, or whether our military has an elevated interest in racial diversity as a matter of national security. The Due Process Clause of the Fifth Amendment implicitly obligates the federal government to provide equal protection to the same degree as under the Fourteenth Amendment's Equal Protection Clause. *E.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 215, 227 (1995). Nonetheless, the Supreme Court has not decided whether the military and military academies have an especially compelling interest in diversity as a "national security imperative." *Harvard*, 600 U.S. at 379 (Sotomayor, J., dissenting). The *Harvard* majority opinion "does not address the issue, in light of the potentially distinct interests that military academies may present." 600 U.S. at 213 n.4. As of August 2024, a case presenting this question is currently pending in federal district court, which denied the plaintiff's request for a preliminary injunction against West Point's consideration of race and ethnicity in admissions. SFFA v. U.S. Military Acad. at West Point, 709 F. Supp. 3d 118 (S.D.N.Y. 2024). On February 2, 2024, the Supreme Court denied an application for an injunction pending appeal, noting the underdeveloped record and expressly reserving any view on the merits. SFFA v. U.S. Military Acad. at West Point, 144 S. Ct. 716 (2024).

I. SUPREME COURT JURISPRUDENCE, 1978–2016

Under the Fourteenth Amendment's Equal Protection Clause, a state school's consideration of race in admissions is subject to strict scrutiny, requiring a searching inquiry into whether the school's policy is narrowly tailored to serve a compelling state interest.[3] Moreover, Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin "under any program or activity receiving Federal financial assistance."[4] A Reconstruction Era statute, 42 U.S.C. § 1981, also prohibits racial discrimination in contracting, including in contracts between a private school and its students.[5] The Supreme Court, however, has focused on constitutional analysis, while assuming that these statutes follow the same standard.[6]

A. Regents of University of California v. Bakke (1978)

In *Bakke*, the Supreme Court struck down a University of California medical school's race-based set-aside program, which reserved sixteen out of one hundred seats in the entering class for members of racial minority groups, while allowing all applicants to compete for the remaining eighty-four seats. Eight members of the Court divided evenly and sharply, leaving a lone opinion by Justice Powell to announce a middle position that provided a fifth vote striking down the school's program.[7]

1. The Debate in Bakke

The factions on either side of Justice Powell's position disagreed over the way in which nondiscrimination principles should apply to race-conscious efforts to promote equality. Four Justices rejected even limited consideration of race in college admissions, because they favored a uniformly "colorblind" approach in their application of Title VI:

> [I]t seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government, … The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.[8]

Nearly thirty years later, Justice Roberts summed up this side of the debate with a tautology: "The way to stop discrimination on the basis of race is to stop

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3 Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003).

4 42 U.S.C. § 2000d.

5 Runyon v. McCrary, 427 U.S. 160 (1976).

6 *E.g.*, *Grutter*, 539 U.S. at 343 (2003) (Title VI and § 1981 impose no greater restriction on consideration of race in admissions than do constitutional principles of equal protection); *Gratz v. Bollinger*, 539 U.S. 244, 276, n.23 (2003) (a violation of equal protection under the constitutional also violates Title VI and § 1981); *Harvard*, 600 U.S. 181, 197 n.2 (noting that "no party asks us to reconsider" the proposition in *Gratz* regarding Title VI).

7 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

8 *Id*. at 416 (Justice Stevens, with whom Burger, C.J., Stewart, J., and Rehnquist, J., join, concurring in the judgment in part and dissenting in part).

discriminating on the basis of race."[9]

In contrast, four other Justices in *Bakke* would have approved the medical school's set-aside program,[10] because they interpreted the Fourteenth Amendment to broadly permit voluntary action to redress the continuing effects of a persistent history of discrimination in the United States. In their view, [g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.[11]

In the view of Justice Marshall, a race-conscious approach was necessary to achieve full integration:

> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. … If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.[12]

Nearly two decades later, dissenting in a case addressing affirmative action in federal contracting, Justice Stevens explained the view that equal protection should not require courts to conflate subordination of members of a minority group with race-conscious measures to advance equality:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.
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> ....
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> The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor.[13]

2. Justice Powell's Resolution of the Debate in Bakke

Justice Powell opined that the medical school's set-aside in *Bakke* was unconstitutional because some students were barred from even competing for

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9 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

10 *Bakke*, 438 U.S. at 325 (Opinion of Justices Brennan, White, Marshall, and Blackmun, concurring in the judgment in part and dissenting in part).

11 *Id*. at 325.

12 *Id*. at 401 (separate opinion of Marshall, J.).

13 Adarand Constructors v. Peña, 515 U.S. 200, 243, 245 (1995) (Stevens, J., dissenting).

those seats based on their race.[14] He also warned that the school could not grant racial preferences to redress general societal discrimination the way it could redress its own intentional and adjudicated discrimination.[15] On the other hand, he rejected the position that the Constitution or other federal laws prohibited a state university from all consideration of race in admissions.[16] By invoking a university's interest in academic freedom to define its educational mission, and by characterizing that freedom as a "special concern" of the First Amendment,[17] Justice Powell recognized that a university could have a compelling interest in achieving the benefits of a racially diverse student body.[18] He explained further that a university could implement a program narrowly tailored to that goal with a flexible, holistic admissions program that considered the race of an applicant as one of several factors; that allowed all applicants to individually demonstrate their qualifications, including their potential for contributing to a diverse exchange of perspectives; and that allowed the racial background of an applicant to serve as a positive factor when needed to attain desired diversity.[19] Justice Powell held out Harvard's undergraduate admissions policy as an example of such a lawful approach.[20]

In 1996, the U.S. Court of Appeals for the Fifth Circuit held that Justice Powell's opinion was not binding on it and did not reflect current law.[21] From 2003 until 2023, however, majority holdings of the Supreme Court recognized an approach substantially following that laid out by Powell in *Bakke*.

B. Grutter v. Bollinger and Gratz v. Bollinger (2003)

In *Grutter*, a majority of five Justices embraced Justice Powell's approach in an opinion authored by Justice O'Connor.[22] The Court emphasized that it would be "patently unconstitutional" for a school to admit specified percentages of racial groups for "outright racial balancing."[23] However, the majority approved the admissions policy of the University of Michigan Law School, in which race was one factor in advancing a compelling interest in enhancing the education of all students through racial diversity in its student body.[24] The benefits included helping students learn from classmates' diverse experiences and perspectives; overcoming racial stereotypes that might be held by some students; and preparing

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14 *Bakke*, 438 U.S. at 319–20 (Opinion of Powell, J., announcing the judgment of the Court).

15 *Id*. at 307–10.

16 *Id*. at 272.

17 *Id*. at 312.

18 *Id*. at 312–14.

19 *Id*. at 311–20.

20 *Id*. at 316–18, 321–25.

21 Hopwood v. Texas (Hopwood I), 78 F.3d 932, 944–45 (5th Cir. 1996).

22 Grutter v. Bollinger, 539 U.S. 306 (2003).

23 *Id*. at 330.

24 *Id*. at 325–28.

for practice and leadership in a multiracial, pluralistic society.[25]

Frequently comparing the Michigan Law School's admissions policy favorably with the Harvard undergraduate program touted by Justice Powell in *Bakke*, the *Grutter* majority found the law school's policy to be narrowly tailored to its diversity goals because it used race flexibly as one of several criteria in broad-based, individualized review; it considered any applicant's contributions to diversity on any basis, without allowing race to dominate; and it had considered race-neutral alternatives and found them to be insufficient to achieve critical masses of minority groups.[26] But narrow tailoring also required that race-conscious policies be limited in duration, which could be monitored through sunset provisions and periodic review.[27] Justice O'Connor even expressed the majority's expectation that "racial preferences will no longer be necessary" in any school twenty-five years from then, or by 2028.[28]

In contrast, in *Gratz*, the University of Michigan's undergraduate admissions process was not narrowly tailored to its goal of admitting a diverse student body.[29] In an overly mechanical and categorical manner, the policy added 20 points, out of a maximum of 150, to all applicants with designated racial backgrounds.[30]

The approaches in *Grutter* and *Gratz* held sway for the next two decades.

C. Parents Involved in Community Schools v. Seattle School District No. 1 (2007)

In the *Seattle* case, the Court struck down a school district's plan for assignment of entering students to its ten public high schools.[31] The school district's plan permitted incoming students to rank any number of the high schools in the order of preference, and to gain priority to a requested school if a sibling was already enrolled in that school. In oversubscribed high schools, the next tiebreaker would give priority to applicants whose race would bring the school's racial composition more in line with the demographics of the district, if the school's racial imbalance exceeded ten percent.[32]

Even if achieving diversity could be a compelling state interest in secondary education, *Grutter* had approved consideration of an individual applicant's race only as one of several factors in a broader, holistic assessment of the applicant's potential to help realize the benefits of diversity,[33] "and not simply … to achieve

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25 *Id*. at 329–33; see *also* Charles Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 U.C. Berkeley La Raza L.J. 140 (1995).

26 *Grutter*, 539 U.S. at 334–41.

27 *Id*. at 342.

28 *Id*. at 343.

29 Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

30 *Id*. at 244, 255, 270–74.

31 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 726–32 (2007).

32 *Id*. at 709–12.

33 *Id*. at 722–23.

racial balance."[34] According to the plurality opinion authored by Chief Justice Roberts, the Seattle district's plan was not narrowly tailored to a compelling state interest because it offered "no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts."[35] The plurality also found fault with the Seattle plan's "limited notion of diversity, viewing race exclusively in white/nonwhite terms" and using race in a mechanical way without individualized assessment.[36] Justice Kennedy provided the fifth vote to support the result advanced by the plurality, though not all its reasoning.[37] In a companion case, the Court found similar faults with racial balancing plans in Jefferson County Public Schools in Louisville, Kentucky,[38] which also defined race in binary terms, "black" and "other."[39]

It was beyond debate that a school could voluntarily adopt a race-conscious remedy for its own past intentional discrimination.[40] However, the record showed no such intentional racial segregation in the Seattle district.[41] Although the Jefferson County public schools were previously operating under a federal court's desegregation decree, the court had since dissolved the decree after finding that the segregation had been remedied.[42]

D. Fisher v. University of Texas at Austin (I & II, 2013 and 2016)

After the Fifth Circuit's 1996 decision in *Hopwood*,[43] the University of Texas at Austin ceased considering an applicant's race as a factor supplementing an applicant's entrance test scores and high school academic performance. In place of race, the university considered several factors relating to an applicant's socioeconomic condition, extracurricular and community activities and leadership, and other special circumstances. The Texas legislature also passed the Top Ten Percent Law, which granted admission to the University, and to any public state college, for students in the top ten percent of their class in Texas high schools that complied with minimum standards.[44]

After the Supreme Court's 2003 decision in *Grutter*, the University of Texas resumed race-conscious admissions as a third tier to its program, considering race

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34 *Id*. at 723.

35 *Id*. at 727.

36 *Id*. at 723.

37 *Id*. at 782–98.

38 *Id*. 728–33.

39 *Id*. at 723.

40 *Id*. at 720.

41 *Id*.

42 *Id*. at 720–21.

43 *See supra* note 21 and accompanying text.

44 Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 304–05 (2013) (*Fisher I*).

as one of several factors to achieve the benefits of racial diversity.[45] In 2013, the Supreme Court reversed the Fifth Circuit's decision to uphold the University's post-*Grutter* admissions program.[46] However, the Supreme Court did not rule on the constitutionality of the admissions policy; instead, it reversed and remanded for full application of strict scrutiny after finding that the court of appeals had improperly deferred to the University on the issue of narrow tailoring.[47]

On remand, the court of appeals again approved the University's admissions program.[48] On certiorari, the Supreme Court in 2016 affirmed on the merits.[49] Petitioner had not challenged the Top Ten Percent Plan, which the Court did not assess.[50] In finding that the racial preferences in a holistic review met the requirement of narrow tailoring, the Supreme Court noted that extensive outreach and recruiting efforts, enhanced reliance on socioeconomic status, and continued application of the Top Ten Percent Plan had proved to be insufficient to achieve the desired diversity in the absence of consideration of race.[51]

II. STUDENTS FOR FAIR ADMISSIONS V. HARVARD (2023)

In 2023, the Supreme Court took an abrupt turn on affirmative action in higher education with *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[52] The *Harvard* decision includes six opinions: the majority opinion written Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett; separate concurring opinions by Justices Thomas, Gorsuch, and Kavanaugh; a dissent by Justice Sotomayor joined by Justices Kagan and Jackson; and a dissent by Justice Jackson joined by Justices Sotomayor and Kagan, applying only to a companion case from North Carolina[53] because Justice Jackson had recused herself from the Harvard case, having served on the Board of Overseers at Harvard.[54]

The Court's opinion in *Harvard* soundly rejects the approach applied by courts for the nearly half century since Justice Powell's concurring opinion in 1978 in *Bakke*, upheld in *Grutter* and *Fisher II*. Even though the majority opinion does not explicitly overrule that precedent, Justices on opposite ends of the jurisprudential spectrum, Justices Thomas and Sotomayor, expressed their

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45 *Id*. at 305–06.

46 *Id*. at 315.

47 *Id*. at 312–15.

48 Fisher v. Univ. of Texas Austin, 758 F.3d 633 (5th Cir. 2014).

49 Fisher v. Univ. of Texas at Austin, 579 U.S. 365 (2016) (*Fisher II*).

50 *Id*. at 378.

51 *Id*. at 384–88.

52 600 U.S. 181 (2023).

53 *See* https://supreme.justia.com/cases/federal/us/600/20-1199/ (linking to all opinions).

54 Rahem D. Hamid & Neil H. Shah, *Inside the Decision: Here's What the Supreme Court Said About Affirmative Action*, Harv. Crimson (June 20, 2023), https://www.thecrimson.com/article/2023/6/30/scotus-affirmative-action-analysis/.

views that the majority effectively did so.[55] The majority cited approvingly to the statements in *Grutter* about the demanding standards for strict scrutiny of racial classifications, but it applied those standards in ways that are starkly inconsistent with *Grutter* and *Fisher II*.[56] In dissent, Justice Sotomayor lamented the majority's rejection of precedent that was advancing a "racially integrated vision of society, in which institutions reflect all sectors of the American public."[57]

Section II.A below describes four grounds on which the majority found constitutional and corresponding statutory infirmities[58] in the admissions policies of Harvard College and the University of North Carolina. It also briefly discusses whether a school could overcome all four objections with adjustments to an admissions program that uses race as a plus factor. Section II.A concludes that such an effort would be futile, and that *Harvard* ends the era of *Grutter*-style affirmative action. Section II.B, however, describes a new path to diversity approved by the *Harvard* majority, based on an individual applicant's racial experience.

A. Four Bases for the Court's Finding of Constitutional Infirmity

The *Harvard* majority objected to the schools' admissions policies on several grounds, which can be divided into four categories: (1) failure to state a compelling state interest in racial diversity, (2) relying on racial classifications that were insufficiently precise to facilitate searching judicial review, (3) harming nonadmitted students in a zero-sum game, and (4) failing to limit the duration of the race-conscious admissions policies.

In the subsections below, this article reviews each of these objections and comments on whether each of them could be overcome with a race-conscious admissions program that is more carefully crafted. If so, the *Harvard* decision does not fully overturn the *Grutter* line of cases but modifies it by requiring schools to proceed more carefully with race-conscious admissions if they hope to meet a newly demanding level of strict scrutiny. On the other hand, if it appears that a school could not possibly meet one or more grounds for the majority's ruling, and if those grounds alone are sufficient to violate equal protection, then the *Harvard* decision should be interpreted to fully abandon *Grutter* and its approval of race as a plus factor in admissions.

1. Compelling State Interest in Racial Diversity

a. Concrete, Measurable Educational Benefits. In Part IV.A of the Court's opinion, the majority explained that the following benefits of diversity claimed by Harvard and the University of North Carolina were too amorphous to permit meaningful judicial scrutiny:

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55 *Harvard*, 600 U.S. at 287 (Thomas, J., concurring); *id*. at 318, 341–42, 357 (Sotomayor, J., dissenting).

56 *Id*. at 211–26.

57 *Id*. at 361; *see also* Richard D. Kahlenberg, *New Avenues for Diversity After Students for Fair Admissions*, 48 J.C. & U.L. 283, 291 n.27 (citing sources for this conclusion).

58 The Court continued its approach of equating the standards for Title VI with the constitutional standards for Equal Protection. See supra note 6 and accompanying text.

> Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." 980 F. 3d, at 173–174. UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." 567 F. Supp. 3d, at 656.[59]

The majority concluded that these benefits were not sufficiently measurable, focused, concrete, and coherent to permit searching judicial review.[60]

These educational goals were consistent with the discussion in *Grutter* about diversifying the student body in higher education to improve the education for all. Diversity does so, states *Grutter*, by fostering a more robust exchange of ideas and perspectives, which better prepares students for participation and leadership in a pluralistic society.[61] A similar set of benefits from a diverse student body were approved in 2016 by the Court in *Fisher II*, which specifically ruled that the goals were sufficiently concrete.[62] The newly demanding and skeptical assessment of a school's interest in diversity thus is the first ground on which the *Harvard* decision appears to depart sharply from precedent, even though not explicitly overruling it. The *Harvard* majority has either increased the burden of establishing that racial diversity is a genuine compelling component of a school's educational mission, or it determined on the facts of *Harvard* that the schools' stated benefits were not narrowly tailored to achieving that compelling interest.[63]

The question remains whether a school could overcome the Court's skepticism by crafting a more compelling statement of its interest in a diverse student body than those advanced by Harvard and the University of North Carolina.[64] One wonders whether a school could improve its statement if it collected several years of surveys from graduating students, attesting to the ways in which their experiences with a racially diverse class enhanced their education and their confidence to practice in

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59 *Harvard*, 600 U.S. at 214.

60 *Id*. at 214–15.

61 Grutter v. Bollinger, 539 U.S. 306, 329–32 (2003).

62 Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 381–82 (2016).

63 I favor the former interpretation. Michael Dorf appears to favor the latter. Michael Dorf, *Race-Neutrality, Baselines, and Ideological Jujitsu After Students for Fair Admissions*, 103 Tex. L. Rev. 269, 285 (2024).

64 *See, e.g.*, Jeffrey Lehman, *Don't Misread SFFA v. Harvard*, Inside Higher Educ. (July 17, 2023), https://www.insidehighered.com/opinion/views/2023/07/17/dontmisread-sffa-v-harvard-opinion# (encouraging universities to meet this challenge); *see also Kimberly West-Faulcon, Affirmative Action After* SFFA v. Harvard: *The Other Defenses*, 74 Syracuse L. Rev. 1101, 1106–25 (2024) (presenting Lehman's views favorably but recommending that universities establish compelling state interests in addition to diversity in view of the *Harvard* opinion's highly skeptical view of the diversity rationale).

a multiracial society. Such an annual survey might support a compelling interest if reports of positive results increased as the student body grew more diverse over time. Perhaps courts could then meaningfully review the school's statement of compelling interest if the school committed to continue its annual survey for as long as it maintained race-conscious admissions.

Without more guidance from the majority, however, it is purely speculative that such an effort would bear fruit with the current Court. For one thing, how could a school establish that the perceived benefits of racial diversity were any greater than the benefits of admitting a diverse class on a basis other than race, such as geographic, previous academic focus, professional experience, or economic status? Justices Thomas and Sotomayor are likely accurate in their assessments that no conceivable statement of the benefits of racial diversity can pass the Court's new requirement that goals be so concrete and measurable that the Court can directly assess the extent to which they have been met.[65] If so, any race-conscious admissions program would fail the first requirement of strict scrutiny: pursuit of a compelling state interest. The remaining subsections in Section II.A help to explain additional grounds for the result in *Harvard*, but this first holding in *Harvard* likely means that the game is already over for the *Grutter* approach of using race as a plus factor in admissions.

b. Stereotyping About Racial Perspectives. Although discussed in a separate section on the opinion, the *Harvard* decision rests partly on a point closely related to the statement of a compelling interest in a racially diverse student body: the principle that racial stereotyping conflicts with core values of equal protection.[66] Twenty years earlier, the *Grutter* majority had credited evidence in the record that racial diversity *breaks down* stereotypes, not only by fostering cross-racial interactions, but also by demonstrating that the views, experiences, and perspectives of members of an ethnic group can enrich the exchange of ideas but are not monolithic.[67] In contrast, the *Harvard* majority found that each school engaged in impermissible stereotyping by assuming that a racially diverse student body would result in a broader exchange of ideas, because it rested on generalizations about the views of members of a racial group.[68] The majority opinion appears to tacitly overturn *Grutter's* analysis about stereotyping.

To avoid this specific objection in the majority opinion, a school can show that it examines each applicant's experiences to assess how that student can add to the diversity and quality of the exchange of ideas in the classroom, rather than engaging in assumptions about how race determines a student's perspectives and ability to enhance the exchange of ideas. As we shall see in Section II.B, such a

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65 *Harvard*, 600 U.S. at 258 (Thomas, J., concurring); *id*. at 366–67 (Sotomayor, J., dissenting); *cf*. Jonathan Feingold, *Affirmative Action After* SFFA, 48 J.C. & U.L. 239, 256–61 (2024) (exploring possible rationales while expressing doubt about whether they would succeed with the current Supreme Court).

66 *Harvard*, 600 U.S. at 221 (citing to and quoting precedent).

67 Grutter v. Bollinger, 539 U.S. 306, 319–20, 333 (2003); *see also Harvard*, 600 U.S. at 364–65 (Sotomayor, J. dissenting) (admitting critical masses of minority students helps dispel stereotypes).

68 *Harvard*, 600 U.S. at 219–20.

showing might do more than help satisfy one standard for strict scrutiny of race-conscious admissions, because the *Harvard* majority appears to view such an examination as a race-*neutral* process.

2. Imprecise Racial Classifications

In various parts of section IV of its opinion, the majority in the *Harvard* decision relied on three additional grounds that arguably all fall within the narrow tailoring requirement of strict scrutiny. At least one of these additional grounds provides further support for the view that the *Harvard* decision effectively overruled precedent, without explicitly stating that it was doing so.

As its second major conclusion in the case, the Court found fatal imprecision in the following racial and ethnic classifications, employed by the universities to meet the goal of diversifying the student body: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American."[69] The majority characterized these categories variously as "overbroad," "underinclusive," "opaque," and "arbitrary or undefined."[70] As examples, the majority noted the significant racial and ethnic diversity within the expansive classification of "Asian," the "arbitrary or undefined" classification of "Hispanic," and the difficulty of assigning students from Middle-Eastern countries to one of the named racial classifications.[71] The majority rejected the schools' guides to racial diversity, even though the schools employed categories borrowed from the federal Office of Management and Budget (OMB),[72] and though admissions officers could still evaluate each applicant's background and experiences on a more granular basis.[73]

This analysis of narrow tailoring departs from that in previous cases. *Grutter* and *Fisher II*, for example, did not dwell on each university's general references to race or ethnicity, such as African American and Hispanic. Instead, their approach to narrow tailoring focused on factors such as whether a school had considered alternative race-neutral policies and had validly rejected them as inadequate to achieve the school's goals, requirements that were met in *Grutter* and *Fisher II*.[74]

If it is still possible to state a compelling interest in a racially diverse student body,[75] a school might be able to overcome the majority's objection to popular racial classifications by refraining from explicitly using and defining those classifications. An admissions policy could refer more generally to one of several relevant factors as "the extent to which each applicant's unique racial or ethnic background and

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69 *Harvard*, 600 U.S. at 216.

70 *Id*. at 216–17.

71 *Id*. at 216.

72 *See* https://nces.ed.gov/ipeds/report-your-data/race-ethnicity-definitions.

73 *See Harvard*, 600 U.S. at 375–76 (Sotomayor, J., dissenting) (referring to Harvard's recognition and placement of value on the diverse backgrounds and experiences of applicants within the non-monolithic category of Asian applicants).

74 *See supra* notes 26 and 51 and accompanying text.

75 *See supra* Section II.A.1.a.

related experiences can enrich the exchange of ideas and perspectives or otherwise enhance the educational experience for all students."

Alternatively, a school might take a hint from the definition of race ascribed to the 1866 Civil Rights Act, part of which is now 42 U.S.C § 1981, which bars racial discrimination in contracting.[76] That Reconstruction Era Act is "closely related" to the Fourteenth Amendment, because that Amendment was adopted in 1868 partly to supplement the Thirteenth Amendment in providing constitutional support for the 1866 Act, which in turn was reenacted in 1870 to cement its relationship to both Amendments.[77] The Supreme Court has interpreted § 1981 to define race in terms of numerous and relatively narrow ethnic lines of ancestry that Congress had in mind when adopting the 1866 Act.[78] By following that approach, a school's admissions policy could formally recognize numerous variations within the broad racial and ethnic classifications borrowed by universities from the federal OMB. Again, however, a satisfactory definition of racial diversity would not authorize race-conscious admissions in the absence of a compelling state interest.

3. Zero-Sum Game

The *Harvard* majority also broke new ground by emphasizing the nature of admissions as a zero-sum game. According to the majority, whenever an applicant's race was a tipping point resulting in admission, it necessarily excluded an applicant from another racial group, thus operating as a negative factor primarily against Asian American and White students.[79] Theoretically, a school *might* avoid that conclusion by expanding its student body beyond what its target would be in the absence of a diversity goal. Even if that would answer the Court's objection, however, many colleges and most graduate programs would quickly reach limits to their ability to expand on-site education.

The *Grutter* majority recognized that the means chosen to diversify a student body cannot "unduly harm members any racial group,"[80] such as by completely excluding them from consideration for a given seat, as would be the case in a quota system or set-aside. But it was acceptable in *Grutter* to use race in a flexible manner in a holistic assessment in which race might supply the tipping point when comparing applicants, so long as the assessment included consideration of other kinds of diversity aside from race, in which all applicants could compete for a given seat.[81] The *Harvard* decision arguably overturns this precedent by apparently finding that any admission decision in which race operates as a tipping point impermissibly harms members of other races.

It is difficult to identify a way to overcome this objection, at least for graduate programs that have no capacity to increase the number of students served. As

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76 *Supra* note 5 and accompanying text.

77 Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 721–22 (1989).

78 St. Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

79 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 218–19 (2023).

80 Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

81 *Id.*

much as any other conclusion in the majority opinion, the zero-sum grounding of *Harvard* may erect a total bar against ever using race as a tipping point that changes the demographics of the student body.

4. Time Limit on Affirmative Action

Finally, the *Harvard* decision found fault with the absence of a termination date for the two race-conscious admissions programs.[82] Even periodic review by a school was insufficient in the absence of an end point.[83] The requirement of a "logical end point" for each program is consistent with precedent.[84] If it were possible to meet the *Harvard* majority's other objections to race-conscious admissions, *Grutter* states that schools can satisfy this durational requirement with "sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[85]

Grutter additionally suggested a time when Justice O'Connor expected that race-conscious admissions programs would be unnecessary: twenty-five years after the *Grutter* decision, 2028.[86] Justice Kavanaugh appears to treat that reference to twenty-five years not as a general hope or prediction but as "an outer limit to race-based affirmative action in higher education."[87] Nothing in the Court's majority opinions, however, would preclude a school from demonstrating that progress toward meaningfully diverse representation in its student body will require affirmative action to continue beyond 2028.

5. Conclusions from Harvard

Subsections II.A.2 and II.A.4 above argue that two of the *Harvard* decision's objections to the schools' race-conscious admissions programs might be cured with some careful adjustments if a college hoped to preserve *Grutter*-style race-conscious programs. On the other hand, as discussed in Subsections II.A.1.a and II.A.3, it is difficult to imagine ways to (1) satisfy the majority's newly demanding requirements regarding articulation of suitably concrete and measurable benefits of diversity to establish a compelling state interest; or (2) allay its concerns about the zero-sum nature of admissions, which it believes would cause a race-conscious admission to impermissibly harm rejected applicants. On these bases, at least, it is entirely reasonable to view the *Harvard* decision as implicitly overruling *Grutter* and *Fisher II*. The *Harvard* majority opinion signals the end of race in the abstract as a factor in admissions.

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82 *Harvard*, 600 U.S. at 221–26.

83 *Id.* at 225.

84 *See Grutter*, 539 U.S. at 342.

85 *Id*.

86 *Id*. at 343.

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

B. Diversity in Admissions Approved in the Harvard Decision

Although *Harvard* rejects *Grutter's* approach to race-conscious admissions,[88] the majority nonetheless ends its opinion with its recognition of a broad conception of an applicant's merit, including in ways related to racial experience. In section VI of its opinion, the majority left the door open for universities to assess qualities such as an individual applicant's character, motivation, or resilience based on that applicant's experiences, even if related to the applicant's race: "[N]othing 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."[89]

Still, a university cannot indirectly engage in preference based simply on membership in a racial group, such as by using a personal statement to identify an applicant's race and then give weight to race itself:[90]

> A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university.[91]

The *Harvard* majority is inviting schools to give weight to relevant racial experiences presented by an individual applicant, rather than to make generalized assumptions about the experiences, perspectives, or traits of members of a racial group. Through individualized review of each applicant's experiences and resulting qualities, schools can achieve truly meaningful diversity,[92] often related to an applicant's racial identity and experience. For example, an applicant's race-related experiences might have created the occasion or necessity to overcome obstacles, demonstrate courage and resilience, assume positions of leadership, or find inspiration and motivation.

Ironically, Harvard University's undergraduate admissions program at the time of *Bakke*, held out by Justice Powell as an example of a policy that satisfied strict scrutiny, includes a statement consistent with assessing an applicant's race-related experience and resulting character traits. The final sentence of that admissions policy, which Justice Powell appended to his opinion in *Bakke*, states that "the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it."[93]

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88 *See supra* notes 55–57 and accompanying text.

89 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 230 (2023). (section VI of the majority opinion).

90 *Id*.

91 *Id*. at 230–31.

92 *See* Steven A. Ramirez, *Students for Fair Admissions: Affirming Affirmative Action and Shapeshifting Towards Cognitive Diversity?*, 47 Seattle U. L. Rev. 1281, 1314 (2024) ("the benefits this process will yield could prove far more powerful because, in the end embracing cultural diversity requires authenticity").

93 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (opinion of Powell, J.).

The approach set forth in section VI of the *Harvard* majority opinion does more than satisfy Justice Powell's view in *Bakke* regarding the requirements of strict scrutiny as applied to college admissions. This approach is race-neutral because it focuses on the desired character traits and will value such qualities in *any* applicant, whether based on racial experiences or on experiences unrelated to the applicant's race. If so, that approach should not trigger strict scrutiny in the first place.[94]

III. OTHER LAWS PROHIBITING RACIAL PREFERENCES IN ADMISSIONS

A. Title VI of the 1964 Civil Rights Act and 42 U.S.C. § 1981

Recall that four Justices took the position in *Bakke* that Title VI, which applies to both public and private programs that accept federal assistance, requires a colorblind approach.[95] *Grutter* rejected this position by approving carefully limited race-conscious decisions in college admissions under the Equal Protection Clause and by ruling that a program lawful under Equal Protection was also lawful under Title VI and 42 U.S.C. section 1981.[96] In *Harvard*, the Court undermined *Grutter*'s approval of limited race-conscious admissions, but it maintained the tie between constitutional and statutory requirements by noting that no party had asked the Court to reconsider its previous rulings and assumptions that a violation of equal protection would also violate Title VI.[97]

The Court likely will continue to view the reach of Title VI and § 1981 to parallel that of the Equal Protection Clause,[98] so that all now require a race-neutral approach in admissions. Consequently, it is noteworthy that the *Harvard* majority appears to have advanced what it deemed to be a race-neutral approach when it approved assessment of an applicant's character traits, even when those valued traits arose out of race-based experiences.[99]

B. State Constitutional Amendments

Some schools have been following the equivalent of the *Harvard* decision's requirements for many years because nine states have adopted state laws forbidding

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94 *See, e.g.*, *infra* notes 110–13 and accompanying text; Ramirez, *supra* note 92, at 1313.

95 *See supra* note 8 and accompanying text.

96 Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

97 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 197 n.2 (2023).

98 Concurring in the *Harvard* decision, Justice Gorsuch, joined by Justice Thomas, urged the Court to "correct course" on Title VI, *Harvard*, 600 U.S. at 310 (Gorsuch, J. concurring), by explicitly holding that Title VI flatly prohibits race-conscious preference, *id*. at 287–310. Accordingly, they might be arguing that the statutory and constitutional analyses should diverge, so that Title VI would prohibit a race-conscious practice that managed to survive constitutional strict scrutiny. *See generally* Dorf, *supra* note 63 (discussing various interpretations of race neutrality under the Equal Protection Clause). Any such debate, however, should not affect the recommendations in this article, which assume a carefully structured race-neutral approach.

99 *See supra* Section II.B (analyzing *Harvard*, 600 U.S. at 230–31).

racial preferences in public education.[100] In 2010, Arizona Proposition 107, for example, added the following section to the Arizona Constitution:

> A. This state shall not grant preferential treatment to or discriminate against any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education or public contracting.
>
> ....
>
> F. For the purposes of this section, "state" includes this state, a city, town or county, a public university, including the university of Arizona, Arizona state university and northern Arizona university, a community college district, a school district, a special district or any other political subdivision in this state.[101]

California was the first state to adopt such a measure, Proposition 209, in 1996.[102] A study released in 2024 concludes that these "[s]tate-level bans decrease racial diversity by 17 percent and that Black and Hispanic students account for nearly all of this decline."[103] The *Harvard* decision has now nationalized these state bans on racial preferences, as applied to college admissions.

If a state law essentially requires a race-neutral approach, then one can strongly argue that the *Harvard* majority's conclusions should inform a state court's interpretation of the state law. The state law would prohibit *Grutter*-style use of race as a plus factor. However, it should permit a school to value an applicant's character traits, such as resilience, motivation, or leadership, including those shaped by an applicant's race and racial experiences, because the *Harvard* majority endorsed such assessment while requiring race neutrality.[104] Indeed, a state law that operated otherwise would discriminate against an applicant with desired character traits simply because the applicant's race had played a role in shaping those traits.

IV. *HARVARD'S* REACH AND QUESTIONS IT LEAVES OPEN

This part offers some brainstorming about issues not specifically addressed in the *Harvard* decision. Any predictions about future Supreme Court treatment of these issues are only educated guesses.

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100 *E.g.*, Stephanie Saul, *9 States Have Banned Affirmative Action. Here's What That Looks Like*, N.Y. Times (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-ban-states.html.

101 Ariz. Const. art. 2, § 36.

102 Cal. Const. art. I, § 31 (1996) (prohibiting preferences based on race, sex, color, ethnicity, or national origin in state or local employment, education, or contracting).

103 Richard R.W. Brooks et al., *Racial Diversity and Affirmative Action in American Law Schools*, Nw. Pub. L. Res. Paper No. 23-50, pg. 3 (Oct. 30, 2024), https://ssrn.com/abstract=4494741 (studying diversity before and after bans in twelve states but stating that some schools could gain in diversity after a national ban, such as the *Harvard* decision).

104 *See supra* Section II.B.

A. Undergraduate Admissions Based on Geography, Socioeconomic Status, and Status as First Generation to Attend Higher Education

Because of inequities in funding of public schools, secondary schools in low-income communities might not offer the same array of advance placement courses or other academic resources that would allow students to develop a record and perform on entrance exams in a way that competes effectively with students from well-funded schools.[105] Moreover, in the absence of parents who attended higher education institutions, or highly educated role models within their social circles, even well-qualified students from low-income communities might fail to consider higher education as a realistic goal. Consequently, highly intelligent and resilient students from a poorly funded school might fall through cracks in the admissions process even if they earned good grades in high school. Moreover, due to a history of housing segregation and discriminatory obstacles to wealth creation,[106] students of color are disproportionately represented in low-income communities and poorly resourced schools.[107]

To avoid missing highly talented students from underprivileged backgrounds, and to attain a degree of geographic diversity, a school could admit a certain percentage of top students from all high schools in an area, or it could at least place that cohort in a category of applicants who will receive special consideration of individual qualities and accomplishments.[108]

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105 *See generally* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 334–35 (2023) (Sotomayor, J., dissenting) (referring to unequal school funding resting on property taxes, and citing to Justice Marshall's dissent in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 72–86 (1973)); *Tax Equity Now NY v. City of New York*, 241 N.E.3d 103 (N.Y. 2024) (finding the complaint sufficiently pleads a cause of action against the city for inequities in its property tax system to the detriment of lower-income property owners).

106 *E.g.*, Charles R. Calleros, *A Quick Critique of the Common Law of Contracts and Capitalism*, 53 U. Pac. L. Rev. 706 (2022) 707–08 nn.15–17 (citing to sources discussing redlining, racial discrimination by government officials in farm loans and by banks in mortgage loans, and racial discrimination in property appraisals).

107 *Harvard*, 600 U.S. at 334–35 (Sotomayor, J., dissenting) (underrepresented students are more likely to live in poverty and attend poorly resourced schools); *Tax Equity Now NY, supra* note 105, at 119–23 (finding well-pleaded allegations that, due to racial segregation in New York City, the city's tax system violated federal law by having a disparate impact on lower-income residents in majority-minority neighborhoods); John Rogers Et Al., Univ. Cal. All Campus Consortium On Research For Diversity & Univ. Cal. Los Angeles Inst. For Democracy, Educ., & Access, California Educational Opportunity Report 2006: Roadblocks To College 1 (2006), http://www.edopp.org (inadequate funding of K-12 schools in California disproportionately affect schools "with high concentrations of students of color, many of whom are poor or learning the English language;" Carlos Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation*, Wash. Ctr. Equitable Growth (June 2020), https://www.dropbox.com/scl/fi/4anobmg09igz1o5dp6396/Troup Howard JMP-Current.pdf?rlkey=zlqannrfogmfd2nby0ozm37d8&dl=1 (based on data for 118,000,000 homes throughout the United States, finding that local governments impose a disproportionately high property tax burden on Black and Hispanic residents).

108 *See, e.g.*, Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 370–72 (2016) (*Fisher II*) (by state legislation, top ten percent of students from a Texas high school could enroll in any public university in the state).

The Top Ten Percent Plan in Texas was neither challenged nor adjudicated in *Fisher II*.[109] In 2023, however, in *Coalition for TJ v. Fairfax Cnty. Sch. Bd.*,[110] the U.S. Court of Appeals for the Fourth Circuit approved an elite public high school's policy of allocating seats in the incoming class, for the students from participating public middle schools, equal to 1.5% of the eighth-grade students in each middle school.[111] The Fourth Circuit applied a rational basis standard of review, rather than strict scrutiny for race-based classifications.[112] Reversing findings by the trial court, a divided panel of the Fourth Circuit found that the high school was *not* motivated by discriminatory intent, such as an intent to achieve racial balancing.[113] Instead, the high school's board lawfully "intended to improve the overall socioeconomic and geographic diversity of the student body," even if it was aware that its race-neutral classification was correlated with race and would have a secondary effect of increasing racial diversity.[114]

The Supreme Court denied the Coalition's petition for certiorari.[115] Joined by Justice Thomas, Justice Alito dissented from the denial of certiorari, stating that he was inclined to "wipe the [Fourth Circuit's] decision off the books."[116] Justice Alito reasoned that the history of the board's development of the policy and the policy's adverse effect on Asian American students supported the trial court's finding of discriminatory intent.[117]

A denial of certiorari does not amount to a decision on the merits of the Fourth Circuit's decision.[118] Nonetheless, the opinions in the case suggest that the percentage approach taken in *Fisher* and in *TJ* can survive a constitutional challenge as a race-neutral program, so long as the program avoids the *Harvard* decision's objection to "indirect" but intentional racial preferences.[119] To avoid the objections in *TJ* from the trial court and from the dissenters on the Fourth Circuit and in the Supreme

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109 *Id*. at 378.

110 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, 218 L.Ed.2d, 712024 WL 674659 (U.S. S. Ct. Feb. 20, 2024).

111 *Id*. at 875, 878-79.

112 *Id*. at 887.

113 *Id*. at 883–86.

114 *Id*. at 886.

115 Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170, 218 L. Ed. 2d 71, 2024 WL 674659 (U.S. S. Ct. Feb. 20, 2024) (denying petition for writ of certiorari).

116 *Id*. at *5 (Alito, J. dissenting).

117 *Id*., at *2–5.

118 *E.g.*, State of Md. v. Baltimore Radio Show, 338 U.S. 912, 919 (1950).

119 *See supra* notes 90–91 and accompanying text (discussing indirect race-conscious actions; *see also* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 365–66 (2023) (Sotomayor, J., dissenting) (consistent with positions in Petitioner's brief, majority decision does not disallow consideration of race-neutral criteria such as socioeconomic status, first-generation college status, fluency in multiple languages); *see also* Kahlenberg, *supra* note 57, at 301–05 (discussing indications in the *Harvard* decision that a majority of the Supreme Court would approve of admissions that value socioeconomic disadvantage, geographic diversity, and first-generation status).

Court's denial of certiorari, the legislative history of an admissions program should reveal a genuine interest in finding and admitting highly qualified but otherwise overlooked students from geographically diverse feeder schools, including underfunded ones, for reasons aside from race. Such a motivation should pave the way for a lower level of constitutional review even if the admissions officers gladly recognize that increased racial diversity will likely be an incidental benefit.[120]

The same should be true of a university's policy of directly targeting low-income and first-generation students for recruitment and for special consideration for admission. So long as the admissions officers genuinely seek diversity in terms of those race-neutral characteristics and implement their policies with that motivation, they should be able to defend their policies even if the diversity they achieve also increases racial representation correlated with low-income and first-generation status.

B. Outreach to Potential Applicants

Outreach to potential applicants arguably is distinguishable from the race-conscious admissions programs found unconstitutional in the *Harvard* decision, because outreach is not a zero-sum game, at least not to the same degree as choosing one student over another for a single available admission slot.[121] Special outreach programs targeting students of color will constitute only one part of more general outreach directed to qualified potential applicants of all races.

In analyzing whether the *Harvard* majority would recognize a meaningful distinction between race-conscious outreach and race-conscious admissions, it may be instructive to review California case law interpreting California's Proposition 209, which in 1996 banned preferences by state schools in that state.[122] In *Hi Voltage Wire Works, Inc. v. City of San Jose*,[123] the California Supreme Court found that a city violated the state constitution's ban on race and gender preferences when the city required bidders for public projects to give individualized notice of the project to at least four subcontractors primarily owned and managed by women or minorities ["WBEs" and "MBEs,"], but not requiring such specific outreach to other subcontractors.[124] While concurring with this holding, Justice George noted that the state law would *not* ban a city policy requiring prime contractors "to engage in reasonable, good faith outreach to all types of subcontractor enterprises in a community like the outreach program upheld by this court prior to the adoption of Proposition 209 in *Domar Electric, Inc. v. City of Los Angeles*."[125] *Domar* approved

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120 For a thorough discussion of the uncertain constitutionality of various purposes and motivations that might accompany practices that are race-neutral on their face, *see* Dorf, *supra* note 63.

121 *Compare supra* note 79 and accompanying text (*Harvard* majority describes admissions as zero sum).

122 *See supra* note 102 and accompanying text.

123 24 Cal. 4th 537 (2000).

124 *Id*. at 559–70.

125 *Id*. at 597 (George, J., concurring and dissenting) (citing Domar Electric, Inc. v. City of Los Angeles, 9 Cal. 4th 161 (1994) (In Bank)). *Domar* approved a city policy requiring bidders for city contracts "to take all reasonable steps to ensure that all available business enterprises, including local

a city policy requiring bidders for city contracts "to take all reasonable steps to ensure that all available business enterprises, including local MBEs and WBEs, have an equal opportunity to compete for and participate in city contracts."[126]

We can imagine a university engaging in general outreach to all potential applicants who view its website or printed brochures, participate in guided tours of the campus, or meet with university representatives in open visits to high school campuses (or college campuses for recruitment to graduate programs). If the university supplemented general outreach programs with ones targeting students of color, such as by hosting a special informational and mentoring session on campus for invited students of color, it is unclear whether that race-conscious outreach effort would amount to a preference banned by Proposition 209 or the Equal Protection Clause under the *Harvard* decision. A school that provides additional and valuable guidance to prospective students of color should be ready to respond to a charge that doing so provides an exclusive benefit to some students based on race.

As one possible response, the university could argue that supplementary outreach programming arguably would be consistent with the policy approved in *Domar* and touted by Justice George in *Hi Voltage* if barriers to information or expectations about access to higher education are generally greater for students of color. If so, "reasonable" efforts to reach prospective students of color would include programming that is supplemental to the general outreach that is reasonable and effective for the general student population. Stated differently, special outreach might not even count as preferential if it is simply part of a calibrated effort to reach various audiences to the same degree and effect.

In 2009, in *American Civil Rights Foundation v. Berkeley Unified School District*,[127] a California court of appeal arguably stretched well beyond Justice George's dictum, finding that California's constitutional ban on racial preferences was not violated[128] when a school district assigned students to schools without regard to each individual student's race but partly on the basis of their residence within geographic areas ranked by a combination of three factors: average household income in the area, average education level of adults in the area, and percentage of students in the area who are students of color.[129] The District used these factors to assign students from designated geographic areas, so as "to approximate the racial and socioeconomic diversity of the geographic attendance zone as a whole."[130]

Whether applied to admissions, special recruiting programs, or other higher education benefits, the court of appeal's decision in *Berkeley* suggests that a school

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MBEs and WBEs, have an equal opportunity to compete for and participate in city contracts. *Id*. at 166.

126 *Domar*, 9 Cal. 4th at 166.

127 172 Cal. App. 4th 207 (2009), *review denied*, No. S172258, 2009 CAL. LEXIS 6661 (U.S. S. Ct., June 10, 2009).

128 *Id*. at 211.

129 *Id*. at 211–13.

130 *Id*. at 213–14.

could consider the racial demographics of a prospective student's neighborhood as one of several factors in allocating benefits, while arguably remaining race-neutral with respect to each individual student's race. A college that remains ready to test the limits of *Hi Voltage* and *Harvard* in litigation might be willing to experiment with some version of this approach. However, the statement of the District's goal in *Berkeley* likely would violate federal law after *Harvard* because it included an intent to increase racial diversity and further to accomplish racial balancing.[131] With that stated intent, the *Berkeley* approach could well be viewed by the *Harvard* majority as an "indirect" means of accomplishing what its opinion forbids.[132]

Colleges and universities will be on firmer ground if they expend special efforts and resources to recruit applicants, regardless of race, from low-income and geographically diverse communities, or students who are first in their families to attend higher education. If valued in their own right and not as a marker for race, those categories should qualify as race-neutral.[133] If a college genuinely desires to attract students from low-income, geographically diverse, or first-generation communities, without regard to each student's race, and if it sees the need for special efforts to reach those students, its special efforts should meet the standards of both the *Berkeley* and *Harvard* decisions, even if those populations necessarily include a significant percentage of students of color. In other words, the college must genuinely proceed with the purpose of increasing geographic and socioeconomic diversity, without aiming for racial diversity, even though these efforts might bring secondary benefits of increased racial diversity.

Moreover, universities should bear no legal risk in attempting to correct misperceptions held by students of color that the *Harvard* decision signals that those students are less welcome to apply for and participate in higher education. Universities can and should advertise their existing racial diversity and climate for diversity, make it clear that members of all races are welcome on campus and encouraged to apply, and provide assurances that students of all races and backgrounds will have ample opportunity in the application process to demonstrate their potential and drive for success in their studies.[134]

C. Recruiting Newly Admitted Students

After a school has offered admission to students, it will endeavor to persuade them to enroll, with some of those efforts directed broadly to all newly admitted students. Here, the same principles should apply as discussed in the immediately preceding section for recruiting potential applicants: special attention to some newly admitted students, including those with socioeconomic disadvantage or first-generation status, can be implemented in a race-neutral fashion.

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131 *See supra* notes 23 and 34, and accompanying text.

132 *See supra* note 90 and accompanying text.

133 *See supra* notes 90–94 and accompanying text.

134 *See* Feingold, *supra* note 65, at 276–78 (discussing ways in which universities may proclaim their values and views, including welcoming racial diversity and committing to racial inclusion).

Moreover, a college can spark conversations between newly admitted students and current students, staff, or community members in a way that responds credibly to the questions and concerns of a broadly diverse student population. For example imagine a law school with fifty student organizations, a wide variety of externships offered for credit, and special curricular offerings or concentrations, ranging from clinical programs to a certificate in Federal Indian Law. The law school could publish a web page with links to each of these student organizations and curricular programs, with each linked page listing student, faculty, staff, or community contacts. A newly admitted student who is interested in international law could contact a student officer of the International Law Society to ask probing questions about the school's curriculum, professors, and externships relating to international law.

In addition to such curricular questions, a second admitted student, who is interested in the mission of the Black Law Students Association (BLSA), might contact an officer of that student organization about the atmosphere on campus and in the community for racial minorities, opportunities for pro bono work in the community, and availability of mentoring programs within the school and legal community. This contact with a current student might lead to further conversations with a faculty member or an active member of the local Black Bar Association (BBA). Nothing in this system requires the newly admitted student, the BLSA officer, the faculty member, or the member of the BBA to be Black or any other race; all those groups are open to members of all races, and members of all races could be committed to actively advancing each group's mission. So long as the newly admitted student is directed to those best positioned to answer the student's questions and to recruit the student to the school, this system of identifying contacts remains race neutral, even if a very high proportion of those identified in this second example are Black.

D. Financial Aid or Other Assistance

Although applying its standards to admissions, the *Harvard* decision refers more broadly to "a benefit to a student,"[135] so we can expect that the Court would apply the same standards to a school's grant of financial aid or other forms of valuable assistance to students. As communicated by its Education Departments Office for Civil Rights President Trump's administration has thoroughly embraced that view, threatening denial of federal funding to schools that "distribute benefits or burdens based on race."[136] Consequently, if a private party funds a scholarship

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135 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 230 (2023).

136 *See, e.g.*, Liam Knox, *Ed Department: DEI Violates Civil Rights Law*, Inside Higher Ed. (Feb. 15, 2025), https://www.insidehighered.com/news/diversity/race-ethnicity/2025/02/15/trump-admin-threatens-rescind-federal-funds-over-dei (reporting on U.S. Dept. Educ. Off. for Civ. Rights, *Dear Colleague Letter*, 2 (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf). The Department of Education provided further guidance on its position in Dept. Educ. Off. for Civ. Rights, *Frequently Asked Questions*, (Feb. 28, 2025), https://www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf (hereafter, Dept. Educ., *FAQ*). President Trump wasted no time with his anti-DEI actions: on the first two days of his second term, he signed executive orders banning DEI efforts in the military and federal government, E.O. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025), and making it official U.S. policy to recognize male and female

and then depends on the school to select a recipient and award the scholarship, the school presumably must do so on a race-neutral basis such as outlined in the *Harvard* decision.

Many universities or colleges also offer academic support programs. Some forms of academic assistance, such as access to helpful librarians or writing centers, will be available to all students. But other benefits, such as regular tutoring that is free of cost to the student but funded by the school, might be sufficiently costly or scarce that it is available only to selected students most in need of academic support. The *Harvard* decision's requirement of race neutrality likely would apply to such a tangible benefit. Moreover, such academic support ought not to be allocated by race for other reasons, including avoidance of race-based stereotyping and stigmatization. Scarce academic support resources can always be allocated by GPA after the first semester, or a combination of high school or college GPA and entrance test scores prior to grades in the school providing the support.

On the other hand, a purely private party or for-profit entity, such as a law firm, should be able to directly award financial aid, run pipeline programs, or provide other assistance to students on any basis it chooses, including race, so long as the private entity and student do not form a contract that triggers 42 U.S.C. § 1981,[137] and so long as the private party does not act jointly with a state school or one covered by Title VI.[138] So long as a school did not participate in the private entity's selection of a beneficiary of its support, a school presumably can accept tuition payments from the student without regard to the student's private source of the funds or the criteria for receiving it from a private source.

E. Private Firm Internships

Hiring by a private firm—not acting jointly with a college or university—is regulated by Title VII of the Civil Rights Act of 1964[139] and the 1866 Civil Rights Act,[140]

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as the only sexes or genders, E.O. 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025); *see* Stephanie Lai et al., *A Rundown of Trump's Executive Actions*, Fin. Rev. (Jan. 21, 2025), https://www.afr.com/world/north-america/a-rundown-of-trump-s-executive-actions-20250121-p5l66m.

137 *See supra* notes 5–6 and accompanying text; *see also* Am. All. for Equal Rts. v. Fearless Fund Mgmt., 103 F.4th 765, 775–76, 779–80 (11th Cir. 2024) (ordering preliminary injunction against funding competition open exclusively to business entities owed by Black women because contest ended with a contractual relationship to which § 1981 applies).

138 The line between school involvement and purely private assistance likely can be informed by cases addressing whether the actions of private and governmental entities are so jointly executed or otherwise closely intertwined that they constitute state action for purposes of the Fourteenth Amendment or action under the color of state law under 42 U.S.C. § 1983. *See, e.g.*, Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001) (Entwinement between public high school and nominally private athletic organization supported findings of state action and action under color of state law.). Even in the absence of state action, certain nonprofit entities, including private schools, must maintain a racially nondiscriminatory policy to qualify for tax-exempt status. Rev. Rul. 71–447, 1971–2 C.B. 230 (1971).

139 42 U.S.C § 2000e to 2000e-17.

140 42 U.S.C. § 1981 (prohibiting racial discrimination in contracting).

with exceptions for firms not meeting Title VII's minimum size requirement.[141] Assuming an employment relationship in a paid summer clerkship or a paid semester-long internship, the circumstances in which Title VII would permit a private firm to engage in race-conscious selection of students for the position are rare and beyond the scope of this article.[142]

However, the *Harvard* decision should inform our analysis of selection criteria when a private firm works jointly with a college or university[143] to select interns for supervised work and training in a curricular offering for credit, or when that arrangement constitutes a contractual relationship triggering § 1981.[144] After *Harvard*, such programs must be race-neutral, although they can seek diversity in the other ways described in this part. Firms presumably can give special consideration to low-income students, first-generation law students, or students who have experiences—including those related to their race—that demonstrate special qualities such as exceptional leadership, inspiration or other motivation, and resilience in overcoming challenges.

In such an internship, a law firm might seek to provide valuable experience, feedback, and mentoring to students who are bright and promising but whose

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141 42 U.S.C § 2000e(b) (statute applies to employers "engaged in an industry affecting commerce" and regularly employing at least fifteen employees, with some additional exclusions).

142 For general standards, *see, e.g., United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (approving affirmative action plan using race-conscious training and placement to redress prior racial exclusion in the workforce); EEOC Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. §§ 1608.1, 1608.3 (2024) (finding or admission of discrimination not required to justify appropriate affirmative action); *see also* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616 (1987) (applying *Weber*'s test to validate local government affirmative action plan to promote women to positions from which they had traditionally been excluded); *compare* Ricci v. DeStefano, 557 U.S. 557, 585 (2009) (Under Title VII, a city's racial discrimination against some candidates for promotion was not justified as a means of voluntary compliance to avoid liability for the perceived unlawful disparate impact of an examination, unless it had a "strong basis in evidence" for that perception.)

For the most part, "affirmative action" in hiring has meant engaging in outreach and taking other affirmative steps to ensure nondiscrimination and equal opportunity. For example, since issued by President Lyndon Johnson, E.O. 11246, 30 Fed. Reg. 12319 (1965), has required government contractors to "take affirmative action" to ensure nondiscrimination in employment, E.O. 11246 § 202(1), and and to provide data to the Secretary of Labor on their employment practices, id. at § 202(5). In his second term, President Trump replaced this long-standing executive order with one requiring that government contractors certify that they do not engage in DEI practices that violate federal antidiscrimination laws. E.O. 17143 § 3(b)(i)&(ii)(B), 90 Fed. Reg. 8633 (Jan. 21, 2025); *see* Isabel Gottlieb, *Trump's DEI Order Creates Dilemma for Federal Contractors*, Bloomberg Law News (Feb. 13, 2025), https://news.bloomberglaw.com/in-house-counsel/trumps-dei-order-creates-dilemma-for-federal-contractors. Although the new requirement presumably does no more than require contractors to continue to abide by antidiscrimination laws, by referring to DEI without further defining it, the new order could induce risk-averse contractors to drop all activity relating to diversity, including lawful outreach. *Id*. President Trump also sought to influence enforcement of antidiscrimination laws by firing two Democratic members of the EEOC prior to expiration of their terms. Rebecca Klar, *Trump Fires Two EEOC Democratic Commissioners in Rare Move*, Bloomberg Law News (Jan. 28, 2025), https://news.bloomberglaw.com/daily-labor-report/trump-fires-eeoc-democratic-commissioner-jocelyn-samuels.

143 *See supra* note 138.

144 *See supra* notes 5, 6, and 137.

access to such benefits has been limited by their circumstances. For example, low-income students who of necessity worked twenty hours each week during college might have earned good grades but lacked the time to polish their writing on assigned papers or to fully absorb feedback provided by their professors. Other students, though bright and industrious, might have been a step behind in their research and writing skills throughout K-12 and college because they attended underfunded primary and secondary schools, which incidentally are frequently found in communities of color.[145] Students in those circumstances might derive the most benefit from an internship designed to provide feedback and mentoring.

Firms can ask applicants to include a personal statement with their materials, just as an admissions committee would, to permit assessment of factors approved in section VI of the *Harvard* decision. In many cases, one would expect the most deserving students to be diverse in a variety of ways, including racially, with some disadvantaged white students meeting the criteria.

Again, a firm or its members may donate benefits—such as financial aid, coaching, or mentoring—in a race-conscious manner, if it acts independently of a school and so long as the relationship with the beneficiary is not contractual.[146]

F. DEI, Including Programs Designed to Support Existing Racial Diversity

Before the *Harvard* decision upended nearly a half century of precedent, campus policies to advance diversity, equity, and inclusion (DEI) began with efforts to achieve diversity through affirmative action in admissions, including race-conscious policies. But the equity and inclusion in DEI has also encompassed curricular, staff, and student organization programs to help maintain a campus that welcomes and supports a diverse community, which will inevitably include students who are adjusting to a very different environment and feel insecure about whether they belong in the college or university. After all, the school has a strong interest in maximizing retention and student well-being while fostering intellectual growth.

Unfortunately for these efforts, the *Harvard* decision not only altered permissible selection criteria for admission and other university benefits, it helped to spur a more general backlash against a wide range of DEI policies and programming on campuses in the United States, resulting in anti-DEI legislation in several states,[147]

145 *Supra* notes 105 and 107.

146 *See supra* notes 137–38 and accompanying text.

147 *See, e.g.*, Erin Gretzinger *et al.*, *Tracking Higher Ed's Dismantling of DEI*, Chron. Higher Educ., https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei (last accessed March 6, 2025) (comprehensive tracking of anti-DEI legislation and changes in university policies). Legislation in some states even restricts the kinds of topics that can be taught in schools, raising First Amendment issues. *See, e.g.*, Complaint in *Simon v. Ivey* (N.D. Ala., Jan. 14, 2025), https://www.naacpldf.org/wp-content/uploads/Final-Complaint-Simon-v.-Ivey102.pdf (alleging constitutional defects in Alabama legislation that prohibits the teaching of "divisive concepts"); Complaint in Austin v. Lamb, Case 1:25-cv-00016-MW-MJF (U.S. Dist. Ct. N.D. Fla., Jan. 16, 2025), https://storage.courtlistener.com/recap/gov.uscourts.flnd.529138/gov.uscourts.flnd.529138.1.0.pdf (alleging Florida ban on funding for advocacy of DEI or political advocacy on campus is unconstitutionally vague and viewpoint discriminatory).

and a threat from the Trump administration to withhold federal funding from schools that engage in race-conscious programming, activities, and assignment of benefits or burdens.[148]

When such governmental restrictions apply to programming open to all students, and especially if they object to the content or viewpoint of the programming, they are subject to challenge under the First Amendment.[149] Until litigation clarifies the legal limits of such restrictions, however, threats to withdraw funding will likely have a chilling effect that leads many schools to err on the side of caution. Nonetheless, nothing in the *Harvard* decision imposes a legal impediment to supportive DEI programming that is open to all students.

To avoid stoking division and stereotypically typecasting racial minorities as uniformly and exclusively needing support, and to avoid legal challenges based on the *Harvard* decision's stated disapproval of any race-conscious benefit, a school can offer programming and services that foster inclusion, engagement, and a sense of community and belonging to any and all students who seek it.[150] Even a program or activity exploring or celebrating an ethnic culture, open to all, can be educational, enlightening, and community-building for all. A variety of such programming can do more than create a sense of belonging based on shared cultural backgrounds; it can also foster communication, interaction, collaboration, increased knowledge and understanding, and a *display* of mutual respect and civility between members of diverse groups.[151]

1. Diversity Presents Challenges as Well as Benefits

Assuming that a university enrolls diverse classes in a manner consistent with the *Harvard* decision, it has additional interests in facilitating student collaboration in a common academic enterprise. That enterprise should encourage a robust exchange of a diverse range of ideas and perspectives while maintaining safe and nondiscriminatory educational opportunities for all. At times, tensions between these two values can spark a crisis on campus, requiring administrators to protect free speech voiced in the proper forum while maintaining full and safe access to educational programs.[152]

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148 *See supra* note 136.

149 *See supra* note 147 (citing to complaints in two cases).

150 In the wake of the *Harvard* decision and the backlash against DEI, for example, many of the universities reacting to the backlash have changed the name of DEI programs or offices to ones that appear to reflect a goal of advancing belonging, inclusion, welcoming, and success for all students. *See* Gretzinger, supra note 147.

151 *See* Charles R. Calleros, *Conflict, Apology, and Reconciliation at Arizona State University: A Second Case Study in Hateful Speech*, 27 Cumb. L. Rev. 91, 98–99 (1997) (describing a university program designed to spur such interchange); *see also* Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After R.A.V. v. City of St. Paul: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 Utah L. Rev. 1205, 1221–30, 1289–1301, 1312–13 (1992) (describing several incidents of offensive speech to which the university responded by fostering support, discussion, debate, and a civil exchange of views within relevant communities).

152 Many universities faced this challenge during Pro-Palestinian protests following the October 2023 attack by Hamas in Israel, and Israel's war against Hamas in Gaza in response. *See, e.g.*, Nicholas Fandos

Before a crisis erupts, universities can implement programming to help foster harmonious relations amid a lively exchange of ideas along a broad spectrum of viewpoints. Such programming can educate students about the university's support for legally protected free speech while also encouraging students to relate to one another with mutual respect and civility.[153] This encouragement can extend to helping students appreciate the social and intellectual growth that comes from working with and learning from others on campus who represent different backgrounds and experiences, whether racial, geographic, cultural, political, or otherwise. It can also include student organizations, staff advisors, and training for faculty and staff as part of an effort to help all members of a diverse student body to feel welcome, supported, and emotionally healthy in their pursuit of education.[154]

Of course, programming to advance harmonious working relationships works best if it truly informs the audience, helping them see or experience the workplace or classroom in a more enlightened way, rather than producing counter-productive defensiveness or division. That likely requires a creative pedagogy other than lecturing the audience in an accusatory manner. The aim should be to help participants engage with each other, learn from each other, and better recognize how differences in experiences and perspectives can provide complementary strengths within a group.[155]

& Sharon Otterman, *Inside the Week that Shook Columbia University*, N.Y. Times (May 7, 2024), https://www.nytimes.com/2024/04/23/nyregion/columbia-university-campus-protests.html?te=1&nl=the-morning&emc=edit_nn_20240424; Troy Closson, *Student Protest Movement Could Cause a Tumultuous End to School Year*, N.Y. Times (Apr. 23, 2024), https://www.nytimes.com/2024/04/23/us/columbia-university-remote-classes-protests.html?te=1&nl=the-morning&emc=edit_nn_20240424. In 2025, the Trump administration announced that it was canceling $400,000,000 in federal grants and contracts to Columbia University in response to civil rights complaints filed by Jewish students for harassment during the protests, prompting the university to "pledge to work with the government to restore the funding." Janet Lorin, *Trump Hits Columbia with $400 Million in Cuts Over Antisemitism*, Bloomberg News (March 7, 2025), https://news.bloomberglaw.com/product/blaw/bloomberglawnews/exp/eyJpZCI6IjAwMDAwMTk1LTcxYmUtZGNlZS1hMzk1LWY5YmY0NmViMDAwMyIsImN0eHQiOiJDVE5XIiwidXVpZCI6InZLRTZZODhSelRqR1hURzhDajdmV3c9PUhCQk42eUE4aFBjSmFoVVVBbUFEN1E9PSIsInRpbWUiOiIxNzQxMzc0MzkyMjc0Iiwic2lnIjoibXg2ZENsSDRCSk4yc1BCODh4YmlTcmlvUXpvPSIsInYiOiIxIn0=?source=newsletter&item=read-text&region=digest&channel=bloomberg-law-news.

153 *See supra* note 151.

154 *See, e.g.*, Yusuf Zakir, *DEI Attacks Betray Professionals Striving for Workplace Fairness*, Bloomberg Law (June 25, 2024), https://news.bloomberglaw.com/us-law-week/dei-attacks-betray-professionals-striving-for-workplace-fairness (law firm's Chief DEI Officer maintains a commitment "to foster a culture where all talented people—including those from traditionally underrepresented communities—can have and can see paths to success."). *Compare* Michelle Del Rey, *Costco Remains Committed to DEI. Its CEO Told a Critic 'I Am Not Prepared to Change'*, Indep. (Jan. 15, 2025), https://www.independent.co.uk/news/world/americas/costco-dei-committed-shareholders-b2680191.html (in the face of pressures against business to abandon their DEI programs, Costco's Board wrote that "Our commitment to an enterprise rooted in respect and inclusion is appropriate and necessary.").

155 Erik Larson, *New Research: Diversity + Inclusion = Better Decision Making at Work*, Forbes Newsletter (Sept. 21, 2017, updated Dec. 10, 2021), https://www.forbes.com/sites/eriklarson/2017/09/21/new-research-diversity-inclusion-better-decision-making-at-work/; David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, Harvard Bus. Rev. (Nov. 4, 2016), https://hbr.org/2016/11/

2. Affinity Groups for Enrolled Students

An affinity student group, such as a Black Law Students Association or a Women's Law Student Association, will typically have a faculty or staff advisor who stands ready to provide support and counseling, while student members enjoy a sense of community through participation in activities related to each group's mission statement. Although an affinity group's mission often includes exploring issues or engaging in activities related to a personal characteristic or cultural heritage—such as exploring issues faced by members of a nearby ethnic community, or gaining inspiration from women who have overcome challenges to succeed in certain professions—a school would not run afoul of the *Harvard* decision by recognizing and supporting these groups so long as membership is open to *any* student who has an interest in the group's mission and activities.[156] Moreover, a college with a student body of at least one thousand students likely will spawn student groups so numerous and diverse that any student should be able to find at least one group that explores issues of interest to the student and that provides a sense of community for the student.[157]

3. Academic Support/Academic Success Programs

Academic support or success programs (ASP) can help students survive, succeed, and sometimes thrive in a challenging academic setting. As discussed in Section IV.D, these programs should not be racially exclusive, but they can help retain and graduate members of a diverse student body.

4. Earlier Interventions

Those who favor greater equity in higher education should not be content with creative admissions programs at the college level. That comes too late to address the headwinds of income inequality, housing segregation, and inequitable funding of public schools. If we wish to redress decades and centuries of discrimination, including obstacles to wealth creation, we should lend our support to universal pr-kindergarten schooling, full and equitable funding of public schools, and pipeline programs that reach diverse students as early as middle school if not earlier.[158]

V. THE OUTLINES OF A RACE-NEUTRAL ASSESSMENT OF MERIT, BROADLY DEFINED

Schools faced for the first time with a requirement of race-neutrality after the *Harvard* decision can learn from the experience of schools in a handful of states that

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why-diverse-teams-are-smarter; Ramirez, *supra* note 92, at 1315–21 (describing various studies of decision-making in groups with diverse experiences, knowledge, and perspectives).

156 The new administration's Department of Education appears to agree with this general analysis. Its February 2025 guidance on frequently asked questions states that Title VI would not prohibit school programs that "focus on interests in particular cultures, heritages, and areas of the world" or that "recognize historical events and contributions, and promote awareness," so long as they do not exclude or discourage participation based on race). Dept. Educ., *FAQ*, *supra* note 136, at 6.

157 For example the website for the Sandra Day O'Connor College of Law at Arizona State University lists more than fifty student organizations at the college. https://law.asu.edu/student-life/organizations (last visited March 6, 2025).

158 *See supra* notes 105–07; Calleros, *supra* note 106, at 714, nn.46–47 and accompanying text.

had adopted state laws banning racial preferences many years prior to *Harvard*.[159] For example, the University of California system suffered a dramatic decline in racial diversity after adoption of Proposition 209 in 1996, but it later made gains in diversity, partly by investing substantial resources in outreach and recruitment to increase the diverse pool of applicants.[160]

Of course, Proposition 209 still succeeded in dampening diversity; gains generally fell short of the diversity previously made possible by race-conscious affirmative action.[161] Moreover, the progress is mixed. For example, efforts to mitigate the effects of Proposition 209 have been more successful in the California State University system than in the flagship University of California campuses.[162] In 2023, California admitted a record high percentage of female and minority attorneys to the bar, at fifty-six percent and fifty-five percent, respectively, but minority representation among all lawyers in California is still much smaller than their representation in the general population, showing the need to make up for lost ground.[163]

Mixed though the results might be, universities that have long labored under restrictive state laws have not thrown in the towel; instead, they've rolled up their sleeves and set examples for others to emulate or surpass.[164] As stated by Justice Sotomayor in her *Harvard* decision dissent,

> The pursuit of racial diversity will go on. Although the court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education.[165]

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159 *See supra* notes 100–02 and accompanying text (referring to laws in nine states that ban racial preferences).

160 *See* Teresa Watanabe, *California Banned Affirmative action in 1996. Inside the UC Sstruggle for Diversity*, L.A. Times (Oct. 31, 2022) https://www.latimes.com/california/story/2022-10-31/california-banned-affirmative-action-uc-struggles-for-diversity#:~:text=California%20banned%20affirmative%20action%20in%201996.%20Inside%20the,10%20campuses%20offers%20lessons%20on%20race-neutral%20admission%20practices.

161 *See generally* Robert A. Garda, Jr., *Students for Fair Admissions Through the Lens of Interest-Convergence Theory Reality, Perception, and Fear*, 77 SMU L. Rev. 93, 120 (2024) (summarizing the experiences of California and Michigan university systems after those states banned racial preferences).

162 Thomas Peele & Daniel J. Willis, *Dropping Affirmative Action Had Huge Impact on California's Public Universities*, EdSource *Investigation* (Oct. 29, 2020), https://edsource.org/?p=642437.

163 Karen Sloan, *California Shows Gains in Minority Lawyers, but Numbers Lag Far Behind General Population*, Reuters (Mar. 26, 2024), https://www.reuters.com/legal/legalindustry/california-shows-gains-minority-lawyers-numbers-lag-far-behind-general-2024-03-26/.

164 *See, e.g.*, Michael Blacher & Gabriella Kamran, *Following in California's Footsteps*, Inside Higher Ed (Mar. 4, 2024), https://www.insidehighered.com/opinion/views/2024/03/04/chart-future-admissions-look-california-opinion; Brandon Busteed, *Why Arizona State University Should Win the Nobel Peace Prize*, Forbes (Mar. 1, 2024) (lauding ASU's innovation, expansion of online learning, and its emphasis on inclusion with success rather than exclusivity), https://www.forbes.com/sites/brandonbusteed/2024/03/01/why-arizona-state-university-should-win-the-nobel-peace-prize/?sh=45d5ee7596ef&utm_campaign=ASU_News_News+3-29-24_6846773&utm_medium=email&utm_source=Media%20Relations%20&%20Strategic%20Communications_SFMCE&utm_term=ASU&utm_content=Forbes&ecd42=518002422&ecd73=172972610&ecd37=Now%20daily&ecd43=3/29/2024.

165 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 384 (2023).

To that end, universities can seek to expand educational opportunities in ways consistent with the *Harvard* decision. This article has addressed two such paths in Sections II.B and IV.A. Section IV.A discussed classes of applicants other than race that deserve special outreach and assessment, including socioeconomic disadvantage, status as the first-generation in higher education, and diverse geographic origin. Section II.B described the *Harvard* majority's approval of admissions criteria that value character traits and accomplishments, even if developed through experiences or perspectives inseparable from the applicant's race. Section V.D addresses factors that a school should consider in choosing between these paths or in pursuing both.

More generally, the sections below recommend steps a school can take to enhance access and diversity, with excellence. Admissions officers should take those steps with a genuine appreciation for the kinds of diversity that current law permits a school to seek and assess, excluding valuation of an applicant's race in the abstract. The likely effect should be diversity of many kinds in the student body, including racial diversity, even if less than was achievable with the now impermissible *Grutter-style* race-conscious holistic approach.[166]

A. Outreach to Potential Applicants and Future College-Bound Students

Universities will employ various means to attract students to apply to their undergraduate and graduate programs, from informative websites to personal visits to high schools and colleges. At this stage, they can cast their net broadly, inviting interest from all qualified potential applicants. Beyond general outreach, universities can specially target certain communities for pathway programs, as discussed above in Sections IV.A and IV.B, based on race-neutral criteria such as socioeconomic status, geographic diversity, and first generation in higher education.

But universities should do more than compete for applicants from the end of the pipeline to higher education. Schools, private organizations, and individual mentors should work to broaden access to higher education by developing or supporting pathway programs that encourage K-12 students to consider higher education, guiding them in preparing for its demands.[167] Again, universities can direct special attention to youth in underrepresented communities, based on race-neutral criteria such as socioeconomic status, geographic diversity, and first generation in higher education. By doing so, pathway programs can address barriers to higher education

(Sotomayor, J. dissenting).

166 *See*, *e.g.*, *supra* note 51 and accompanying text (evidence in *Fisher II* that alternative paths to diversity did not achieve adequate racial diversity). "[I]t's still too early to draw definitive conclusions" about the effect of *Harvard* on the first full admissions cycle after the decision, and any analysis is complicated by an uptick in the percentage of students who decline to disclose their race. Aatish Bhatia et al., *What Happened to Enrollment at Top Colleges After Affirmative Action Ended*, N.Y. Times (Jan. 15, 2025), https://www.nytimes.com/interactive/2025/01/15/upshot/college-enrollment-race.html. Nonetheless, a national survey of average enrollment nationwide shows that Black enrollment dropped from about seven percent of total enrollment in 2023–24 to six percent in 2024–25, and Hispanic enrollment dropped from about fourteen percent to thirteen percent.

167 *See*, *e.g.*, The Education Pipeline to the Professions: Programs that Work to Increase Diversity (Sarah E. Redfield, ed., 2012)).

stemming from relatively few role models, inadequate information regarding admission and financial aid, and possibly even undue pessimism about higher education's commitment to access to a broad spectrum of society.

Finally, universities should dispel any misconceptions among students of color that aspiring to and applying for higher education would be futile after the *Harvard* decision. As discussed in Section IV.B, nothing in the law would prevent a university from hanging out a welcome sign to applicants of all races by advertising a positive climate on campus for racial diversity.[168]

B. Robust Recruiting of Newly Admitted Students

After a college or university has offered admission to students, it will typically engage in substantial efforts to persuade the school's chosen admittees to enroll there rather than in a competing university. As discussed in Section IV.C, some ways of connecting admittees with members of the academic community can be race-neutral while serving the needs of a broadly diverse class of newly admitted student.

C. Magnet Programs

Schools can attract applicants of color and persuade admittees to enroll by offering curricular programs that will likely attract a diverse pool of applicants. A grouping of courses addressing transnational issues related to our border with Mexico, for example, could attract students of any race but might be disproportionately interesting to students with familial or ancestral ties to Latin America.

On a more ambitious scale, in 2024, Sacramento State University inaugurated its Black Honors College for students of any race who have a specific interest in Black studies. In addition to offering more specialized courses relating to the Black and African American experience, the college's general core courses will include coverage of Black history, perspectives, and contributions to the field.[169] Although students of any race could be attracted to at least a sampling of the courses offered by this college, one could expect that Black students especially will be attracted to a curriculum that reflects an effort to include Black history, experience, and contributions. Indeed, it might help influence and inspire some high school students to view college as an attractive option, thus increasing the aggregate pool of applicants.

D. Race-Neutral Admissions Criteria that Promote Diversity

1. A Fork in the Road?

Sections II.B and IV.A of this article describe race-neutral admissions criteria that

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168 *See supra* note 133 and accompanying text.

169 Katy Adams, *Nation's First-Ever Black Honors College Hopes to Inspire Others*, Insight into Diversity, 26–28 (Apr. 2024), https://www.insightintodiversity.com/wp-content/media/digitalissues/april2024/index.html. Although President Trump's administration might disapprove of this race-centered curriculum and even threaten to withhold funding, *see supra* note 134, such a content-based restriction on speech and academic freedom would surely face serious legal challenge, *see supra* note 147.

nonetheless can enhance student diversity, broadly defined. Richard Kahlenberg argues that schools should take the path that focuses on socioeconomic disadvantage and geographic diversity, which he believes will also achieve meaningful racial diversity.[170] Kahlenberg discourages schools from pursuing the path that places value of character traits, some related to an applicant's race, because he fears it will invite litigation due to difficulty in taking that path in a truly race-neutral fashion or at least in avoiding the suspicion of race-conscious admissions.[171]

Kahlenberg reasonably warns of the risks of taking the second path. One can imagine that an admissions officer, with years of experience implementing *Grutter*-style race-conscious admissions, might veer into a forbidden trail of valuing race itself, even if only subconsciously, after reading a personal statement in which the applicant's race is revealed. Moreover, even a school that adheres to *Harvard*'s standards for the second path could invite litigation if the high value it places on character traits results in admission of students with significantly lower GPAs and entrance exam scores.[172] For that reason, schools that are risk averse to legal challenges could minimize their risk by taking Kahlenberg's advice.

Nonetheless, I encourage schools who can bear the risk of legal challenges to send "search parties" down both paths. The *Harvard* decision's discussion of character traits reflects a laudable recognition of merit, broadly defined. It would be ironic if schools declined to seriously consider adopting an approach explicitly approved in the *Harvard* decision. If schools adopt and document careful procedures to implement this approach, it should be in a good position to avoid challenges or prevail on a pretrial motion.[173]

The first path, based on geographic diversity and socioeconomic disadvantage is summarized at various places in this article and is explored thoroughly in Kahlenberg's article.[174] Below, subsections V.D.2 and V.D.3 discuss the procedures a university can use to stay within the guardrails of the second path, as defined by the *Harvard* decision, and to defend itself against charges of exceeding those bounds.

2. Defining Desired Traits and Eliciting Stories

In addition to traditional measures of academic achievement, such as GPA,

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170 Kahlenberg, *supra* note 57, at 287, 300–19.170

171 *Id*. at 294–300, 319–20.

172 *See*, *e.g*., Stewart v. Texas Tech. Univ. Health Sci. Ctr., 741 F. Supp. 3d 528, 552–55 (N.D. Tex. 2024) (holding that complaint plausibly alleged that school intentionally granted racial preferences in admissions based on significantly disparate MCAT scores, "despite the potential influence of other admissions factors").

173 Michael Dorf is more pessimistic about the university's litigation position: "Even if a lawsuit … would ultimately fail, it would survive a motion to dimiss and probably survive a motion for summary judgment" because the evaluation of essays "presents a serious evidentiary issue." Dorf, *supra* note 63, at 289–90. Professor Dorf's concern about evidentiary issues garners some support from the new administration's Department of Education Office of Civil Rights, which has set forth "a non-exhaustive list" of six "different kinds of circumstantial evidence that, taken together, raise an inference of discriminatory intent" in Title VI litigation. Dept. Educ., *FAQ*, *supra* note 136, at 8

174 Kahlenberg, *supra* note 57, at 300–19.

colleges and graduate schools should determine the qualities that they seek in an incoming class. For example, a school might value such qualities as

- intellectual diversity within the entering class, including in academic interests, experiences, and perspectives;
- geographic diversity, to avoid parochialism in the class and to extend the reach and reputation of the school;
- socioeconomic diversity, including status as first-generation in higher education, to avoid limiting educational opportunities to the already privileged, and to discover and develop promising students who have not yet reached their full potential;
- work ethic, motivation, and inspiration, because success in higher education requires diligence and commitment;
- resilience and ability to overcome obstacles, because students in higher education may confront daunting challenges and suffer discouraging setbacks on their journey to graduation (feel free to refer to an obstacle in general terms if you wish to keep its precise nature private);
- demonstrated leadership, to develop effective, ethical leaders in business, social, and civic settings; and
- community service, especially important to a university that seeks to be embedded in community.[175]

Schools can encourage applicants to address such qualities in their personal statements, including the full story of how they developed the traits. A personal statement might reveal an individual's experiences that will allow that applicant to advance knowledge and perspectives that will enrich the educational experience for all students. Or it might reveal that an applicant has demonstrated the persistence and work ethic to succeed in the face of headwinds and thus has a better chance of succeeding in higher education than some applicants with higher test scores. In assessing those personal statements, schools can value qualities such as motivation, inspiration, resilience, work ethic, and leadership, including those developed through experiences related to the applicant's race.

All this invites an expansion of our understanding of *merit* beyond an applicant's ability to take an expensive preparation course and then excel on an entrance exam. Consistent with section VI of the *Harvard* decision, admitting an applicant partly due to the presence of such qualities is race-neutral if all applicants have an equal opportunity to demonstrate valued qualities[176] and if the admissions officers placed

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175 For example, as one of nine design aspirations for its model of a "New American University," Arizona State University aspires to "Be Socially Embedded," through connecting "with communities through mutually beneficial partnerships." https://newamericanuniversity.asu.edu/about/design-aspirations (last visited March 6, 2025).

176 Perhaps students of color will more often have compelling stories about inspiration or resilience and persistence in the face of daunting obstacles, often relating to racial experience: "in a society in which race matters, applicants of color will typically have had more and deeper experiences

value on the qualities and the challenging or inspiring circumstances from which they arose, without giving preference to the applicant's race "for race's sake."[177] Further, if these character traits are sufficiently important to a school, it should also consider making entrance exams optional, creating an admissions track based on GPA and character traits developed through experience.[178]

A possible obstacle to this path would be reticence on the part of some applicants to reveal their full stories in their personal statements, especially if their resilience stems from their overcoming headwinds from disturbing or painful events.[179] If so, they should certainly guard their privacy but might be able to highlight their triumphs, and the means of achieving success, while painting the obstacles in broad brush. One way to signal such an approach is provided by the parenthetic at the end of the fifth bullet point near the beginning of this subsection.

3. Staying on the Path with Careful Procedures

To ensure race neutrality, and to defend admissions decisions if later challenged, admissions officers must methodically follow well-crafted procedures, and they should consider keeping a comprehensive record of instructions, decisions, and justifications for admissions decisions, particularly those influenced by a candidate's qualities arising out of the candidate's racial experiences. Ideally, the admissions staff will be led by someone who has carefully studied the requirements and parameters of the *Harvard* decision, especially the fine line it draws concerning qualities gained through racial experiences.

For example, an admissions committee might adopt the following procedures:

- If collected for reporting purposes, the race of each applicant should be removed from the portion of the application viewed by admissions officers who are engaging in preliminary triage of applications.
- The chief admissions officer should regularly instruct and remind other officers about the *Harvard* requirements and the school's procedures, and should record this coaching in the minutes of meetings.

involving race." Dorf, *supra* note 63, at 289. It may also be true that economically disadvantaged students will more often have stories about motivation, work ethic, and resilience, just as first responders or members of the military might have compelling stories about learning to perform capably in exceptionally stressful circumstances. Other applicants might have enjoyed advantages based on wealth and family connections, enabling them to attend the best private schools, to travel the world, and to secure summer employment that provided a wealth of consequential experience. If all students have an opportunity to tell compelling stories about their journey to developing valued character traits, whether based on racial experience or otherwise, it is difficult to complain that some groups of students typically suffer greater adversity in our society and that some of those students emerge from that adversity with qualities that help predict success in law school and bring credit to the school and the profession.

177 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll. 600 U.S. 181, 220 (2023).

178 *See* Feingold, *supra* note 65, at 262–64, 280 (critiquing overreliance on numerical criteria); *see also* Vinay Harpalani, *Secret Admissions*, 48 J.C. & U.L. 325, 361–63 (2023) (predicting that risk averse schools are likely to continue the trend of reducing reliance on numerical criteria).

179 Harpalani, *supra* note 178, at 366–68 (presenting an example of such reticence on the part of a student).

- If a personal statement reveals valued character traits and describes their provenance in racial experiences, admissions officers should be carefully trained to place value on the traits but to avoid placing value on the applicant's race itself. Officers in this position should carefully document their process of assessment, justifying the value placed on a trait and confirming the compartmentalization needed to avoid placing value on the applicant's race itself. The admissions team should also ensure that all applicants with similar qualities and traits are assessed consistently, regardless of race. That consistency, however, need not render irrelevant the experience from which the trait sprang. For example, imagine an applicant who was subjected to especially virulent racism in high school but emerged not with bitterness and defeatism but with resilience and an unflagging motivation to assume leadership positions in projects devoted to advancing civil rights and bridging racial divides in our society. The school primarily will value the applicant's resulting traits of resilience, motivation, and leadership experience. Secondarily, admissions officers can note the nature and gravity of the challenges overcome, helping them gauge the authenticity and durability of the applicant's resilience, positive outlook, and motivation.[180] They would be justified in placing a higher value on those character traits than on those of an applicant whose resilience stems from bouncing back academically in college after earning poor grades due to initially spending excessive time at parties and in computer gaming, and who participated in community service and a leadership position only in satisfaction of his college's graduation requirements. Again, the admissions team should ensure that its members apply consistent standards in considering the relevance and significance of an experience from which a character trait developed, by assessing formative experiences without regard to the race of the applicant or whether the experience was racial in nature.

- To the extent that school considers numerical indicia of merit, a proposal to admit an applicant with valued character traits should present genuine and persuasive reasons for preferring that applicant over a rejected candidate with significantly higher numbers and should submit the proposal to the admissions team for review and discussion.

E. Reducing Unfair Barriers to Admission

Universities should review their admissions criteria to minimize socioeconomic bias. For example, qualified applicants, including those who would add various kinds of diversity, can be crowded out by less qualified applicants if a university departs from meritocratic criteria through legacy preferences.[181] A university can

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180 *See generally supra* note 91 and accompanying text (*Harvard* majority providing the example of an applicant having overcome racial discrimination).

181 *See* Feingold, *supra* note 65, at 280 (discussing the disparate impact of legacy admissions against students of color); Garda, *supra* note 160, at n.171 and accompanying text (citing to several studies about the effect of legacy preferences).

erect a similar barrier to access by giving undue weight to an applicant's entrance examination score if this practice causes the university to overlook applicants who have a better chance of success in view of demonstrated qualities not measured by the examination and not given adequate weight when revealed in other application materials.[182] Eliminating or reducing such barriers can advance the search for merit, broadly defined, while likely enhancing diversity.[183]

F. Raising Scholarship Funds

The net cost of attending college could affect whether a student enrolls at an admitting university or whether the student even chooses to pursue a college education.[184] Especially if a school seeks socioeconomic diversity in its student body, success in raising scholarship funds can translate into greater success in achieving admissions goals.

G. Support for Student Success

Success in admissions will be a pyrrhic victory if large numbers of students fail to graduate. Especially for students who are first in their families to seek higher education, or who attended underfunded schools prior to college, academic support systems can help boost graduation rates and enable students to reach their full potential and promise.

VI. CONCLUSION

The *Harvard* decision raises serious questions about the appropriate framework with which to advance equality and equal protection. While it stands as the current law of the land, however, universities must follow its commands, but they should not overreact by abandoning efforts to expand opportunities for students whose merit is reflected in qualities and experiences beyond traditional numerical indicia. By expanding and cultivating the future pool of diverse applicants and assessing individual applicants for a broad range of indicia of merit and potential, schools can advance diversity in meaningful ways, including racial diversity. By following carful procedures that require and document race-neutral decision-making, schools can hope to avoid or quickly resolve legal challenges.

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182 *See* Feingold, *supra* note 65, at 262–64, 280 (discussing "fair appraisal" and the deficiencies of standard metrics, as well as the disparate impact of overreliance on standardized tests).

183 *Id*.

184 *See*, *e.g.*, Garrett Andrews & Brenna Swanston, *Is College Worth It? Consider These Factors Before Enrolling*, Forbes Advisor (June 4, 2024), https://www.forbes.com/advisor/education/student-resources/is-a-college-degree-worth-it/.