

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 14

AUGUST 2024

NO. 1

ARTICLE

DEFANGING DIVERSITY: *SFFA V. HARVARD* AND ITS IMPLICATIONS FOR THE DIVERSITY RATIONALE IN HIGHER EDUCATION ADMISSIONS

Daniel Kees[†]

They don't want to realize that there is not one step, morally or actually, between Birmingham and Los Angeles.

- James Baldwin, I Am Not Your Negro (2017)

This article explores the jurisprudential underpinnings of the so-called “diversity rationale” that until recently had been considered a powerful vehicle for fostering racial diversity on elite college campuses. As the national debate around diversity, equity, and inclusion measures—both their legitimacy and practice—will only intensify in the current sociopolitical climate, this writing attempts to provide a chronology of how the nation’s High Court has shaped the contours of that discourse, arguing that the Court’s juridical trepidation in this area of the law led to an unworkable framework that was doomed from inception. This article further examines the rapidly changing norms of race and identity—including the inherent tensions and complexities that such concepts engender before concluding with a recommendation for how to achieve the supposed aims of the affirmative action regime in American society.

[†] Judicial Law Clerk, Court of Appeals for the Third Circuit. B.A., Millsaps College; J.D., University of Pennsylvania Carey Law School. The author notes that this article was accepted for publication prior to his current employment. I first express my sincere thanks to the editors of the Columbia Journal of Race and Law for their continued diligence throughout this editing process. The idea for this article stems from a paper written during an education law seminar taught by Professor Michael Davis at Penn Law, when this case was before the trial court. With thanks to Prof. Davis, as well as Professor Kermit Roosevelt for his steadfast encouragement and guidance throughout the drafting of this paper, I have been able to update this piece at every turn in the case’s path to the Supreme Court. I also wish to thank Beatrix and Deidre for substantive thoughts and edits as well as their great friendship. In addition, I owe a debt of gratitude to Taylor, Ralph, Fatou, and Charlie for the many thoughtful conversations, approached with the utmost honesty and care, that allowed me to think more critically about these topics and refine my own views during the oft-taxing writing process. Sincerest thanks to Benton and Kandice for the much-needed levity and warmth of our friendship that helped me to push through hard days. And finally, to my family—Mom, Joshua, and Mr. Maples—thank you loving me, for humoring my various aspirations over the years, and for always providing a safe place to land as I continually flung myself off the proverbial cliff in an effort to learn to fly.

Table of Contents

I.	The Diversity Problem: Introduction and Brief Recap of the Legal Proceedings	1025
A.	Defining Diversity Under SCOTUS: From Then to Now	1026
II.	The Many Forms of Affirmative Action: Mechanisms for Achieving Non-Racial Diversity in College Admissions	1029
A.	Table Setting: The Meaning and Scope of Affirmative Action in Higher Education.....	1029
1.	“Elite” Athletics: The Role of Athletic Recruitment in Admissions.....	1030
2.	Early Birds: The Effects of Early Decision and Merit Aid on Admissions.....	1035
III.	Defining Diversity: An Analytical Framework.....	1037
A.	“Come to Brazil”: A Brazilian Case Study and its Lessons for the United States	1038
B.	History Lesson: A Brief Survey of Black Racial and Ethnic Identification.....	1040
C.	State of Play: Modern Fault Lines in Black Self-Identification	1044
D.	Quantification Conundrum: Diversity’s Line-Drawing Problem	1050
IV.	Trauma Porn and Introspective Elites: Legal and Social Implications of the Diversity Rationale	1054
A.	The Politics of Trauma: The “Adversity” Narrative	1054
V.	A Mutilated Meritocracy: Failed Solutions to the Diversity Rationale’s Shortcomings.....	1059
A.	Path A: More Diversity	1059
B.	Path B: Greater Socioeconomic Weighting	1062
C.	Blood at the Root: Structural Issues Reducing Diversity’s Effectiveness	1065
1.	School Segregation	1066
2.	Housing Segregation	1068
3.	Test Preparation	1071
VI.	Fixing Diversity: Making Good on the Promise of the Diversity Rationale	1074
A.	At First Glance: Preliminary Proposals	1074
B.	The Only Way Out: The Role of Desegregation in Realizing the Goals of Diversity.....	1078
VII.	Conclusion: A Promise Unfulfilled—Final Thoughts on the Diversity Rationale	1084

I. THE DIVERSITY PROBLEM: INTRODUCTION AND BRIEF RECAP OF THE LEGAL PROCEEDINGS

In September 2019, Judge Allison D. Burroughs of the United States District Court for the District of Massachusetts issued a decision in a case that would come to change the face of affirmative action in higher education: *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College (Harvard Corporation)*.¹ SFFA is “a nonprofit membership group” that believes “racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional.”² SFFA contended in its suit that Harvard unfairly discriminated against Asian American applicants in its undergraduate admissions process, violating Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. (“Title VI”). SFFA considers itself to be advancing the principles of the civil rights movement—namely, that a student’s race should not factor into their admissions chances at a competitive university.³

The Massachusetts court, in an expansive and footnote-laden opinion, considered the merits of SFFA’s and Harvard’s arguments and concluded that Harvard—whose review process has been deemed a model for race-conscious admissions⁴—did not discriminate against Asian Americans or violate the U.S. Constitution.⁵ SFFA appealed the decision all the way to the U.S. Supreme Court which reached the opposite conclusion, spelling the end of the diversity rationale in higher education admissions and ushering in a post-affirmative action era.⁶

The end of affirmative action followed years of the Supreme Court narrowing the bounds of the so-called “diversity rationale,” which is the justification provided for giving additional weight to race in the college admissions process. The Court’s failure to fully endorse the social justice orientation of the diversity rationale, or to simply require schools to more explicitly set forth what they value in admissions, resulted in an anemic jurisprudential framework utterly incapable of fulfilling its purpose. Despite this failure, diversity has—and will continue to be—an important

¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d 126, 130 (D. Mass. 2019).

² *Students for Fair Admissions, Inc., About*, STUDENTS FOR FAIR ADMISSIONS (last visited Mar. 26, 2024), <https://studentsforfairadmissions.org/about/> [<https://perma.cc/JDH7-9Y28>].

³ *Students for Fair Admissions, Inc.*, *supra* note 2.

⁴ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 316 (1978) (“The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program”); *Grutter v. Bollinger*, 539 U.S. 306, 321 (2003) (“The Court of Appeals also held that the Law School’s use of race was narrowly tailored because race was merely a “potential ‘plus’ factor” and because the Law School’s program was “virtually identical” to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion”).

⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d 126, 147 (D. Mass. 2019).

⁶ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 231 (2023). The Supreme Court also considered alongside the Harvard case one targeting the University of North Carolina’s admissions system.

part of college admissions. The Supreme Court's ruling fell far short of meaningfully curtailing schools' ability to structure admissions in the ways they see fit; rather, schools will simply have to be more innovative about achieving the desired makeup of their classes. The concept enshrined in the diversity rationale, if not the doctrine itself, survives, at least for the moment.

This Article examines the history of the diversity rationale, the factors that eroded its efficacy and legitimacy, and a path forward in a post-*SFFA* world. It also examines the elite college admissions system, an understanding of which is necessary to comprehend why the diversity rationale failed to achieve its potential as a transformative concept in American higher education. The discussion that follows is meant to shed light on a judicial framework that was doomed from inception and to advocate for a more robust framework that can achieve the implicit goals of the diversity rationale. This Article seeks to provide a more nuanced understanding of diversity—in a factual and legal sense—to aid policymakers and laypersons alike in laying the groundwork for a more equitable approach to college admissions and the legal structure under which those decisions are made.

A. Defining Diversity Under SCOTUS: From Then to Now

Note that this Article uses phrases such as “the diversity rationale” or “affirmative action” interchangeably. Though similar, these concepts differ slightly. “Affirmative action” refers to a set of policies that in recent decades have helped underrepresented groups to enter spaces to which they historically had been denied access. Specifically, affirmative action allowed people to hold certain jobs or gain admission to certain educational institutions that had previously excluded them. Affecting large swaths of this country—including Black and Brown people as well as women of all races—affirmative action initiatives helped to foster a workforce that is more representative of the country as a whole. Fostering on-campus “diversity,” on the other hand, is the limited ground upon which the Supreme Court in *Bakke* approved race-based tips in higher education admissions. Schools for decades justified the admission of many Black, Indigenous, and people of color (“BIPOC”) students on the grounds of building a “diverse” class. In most cases, however, they are two sides of the same coin.

Nailing down exactly what “diversity” means—or what it could mean—for higher education admissions is a challenging endeavor. Although modern conceptions of “diversity” often bring racial diversity to mind, the Supreme Court has always recognized the multifaceted nature of the term. In *Bakke*, where the Court first affirmed the diversity rationale as a compelling state interest, Justice Powell suggested that a plurality of “ethnic, geographic, [and] culturally advantaged or disadvantaged” backgrounds may “enrich the training of [a school's] student body and better equip its graduates to render with understanding their vital service to humanity.”⁷ Justice Powell wrote that “[t]he diversity that furthers a

⁷ *Bakke*, 438 U.S. at 314 (pertaining to a medical school's admissions program, but the Court noted that there may be “greater force to these views at the undergraduate level

compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single though important, element.”⁸ Powell further noted that the University of California at Davis medical school’s “special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of *genuine diversity*” (emphasis added).⁹ This “genuine diversity,” Justice Powell suggests, comprises more than mere ethnic or racial diversity.

Notably, the Court did not justify diversity’s use in higher education admissions on the grounds of being a remedy for past societal harms; instead, it recognized such redress only in limited situations involving specifically identified instances of racial discrimination.¹⁰ The Court noted that remedying the effects of “societal discrimination” was not compelling enough to support the use of the suspect classification of race in admissions.¹¹ Going further, the Court deemed such discrimination “an amorphous concept of injury that may be ageless in its reach into the past.”¹²

The Court again took up the question of diversity in the *SFFA* case. At issue was whether Harvard’s use of race in admissions could survive so-called “strict scrutiny,” the central test for determining the constitutionality of race-based considerations.¹³ Under the Supreme Court’s strict scrutiny analysis, Harvard may consider race only if no other workable race-neutral alternative can ensure a sufficiently diverse class.¹⁴ A strict scrutiny inquiry required that Harvard’s use of race-based classifications be “narrowly tailored” to further a “compelling interest.”¹⁵ The Massachusetts trial court took little issue with the compelling interest prong, simply reiterating Harvard’s expressed interest in creating a community that can adequately prepare leaders for the “pluralistic society” and diverse workforce that they will soon join.¹⁶ That court noted that Harvard’s goals were similar in their specificity to the goals of the University of Texas at Austin in *Fisher II*, goals that the Supreme Court

than in a medical school where the training is centered primarily on professional competency.”). *Id.* at 313.

⁸ *Id.* at 315 (pointing to Harvard College’s admission system, the very system that is now under attack, as an example of using race as one of many “plus” factors in admissions—an acceptable use of race-based tips in admissions to produce a diverse entering class.). *Id.* at 316.

⁹ *Id.* at 315.

¹⁰ *Bakke*, 438 U.S. at 307 (finding that in the “line of school desegregation cases, commencing with *Brown*,... the States were required by court order to redress the wrongs worked by *specific* instances of racial discrimination” (emphasis added), as contrasted with the *Bakke* action that concerned the use of race in admissions to remedy the effects of societal discrimination).

¹¹ *Id.*

¹² *Id.*

¹³ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 190 (2023).

¹⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d 126, 177 (D. Mass. 2019).

¹⁵ *Id.* at 191.

¹⁶ *Id.* at 192.

found to be “concrete and precise.”¹⁷ The Court of Appeals for the First Circuit agreed, finding that Harvard sufficiently demonstrated the “specific goals” it achieves from diversity.¹⁸ Because of the relative silence of the lower courts on the issue of how *Bakke*’s “compelling interest” prong applied to Harvard’s admissions scheme, the Supreme Court’s *de novo* review had even more room to fashion a new definition of diversity.

In June of 2023, the diversity rationale—and its accompanying universe of legal thought—went out with a whimper, not a bang. In a relatively brief opinion, a 6-2 majority of the Supreme Court found that Harvard’s admissions process did not survive strict scrutiny and was violative of the Equal Protection Clause of the Fourteenth Amendment.¹⁹ Specifically, the Court found that Harvard’s admissions programs “lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points.”²⁰

Most notably, the Court highlighted the imprecision of the racial categories employed by schools like Harvard. Its admissions practices did not distinguish between, for example, South Asians and East Asians. In addition, its consideration of other categories—such as Middle Eastern—might be deemed underinclusive to the extent they do not differentiate between smaller identifiable groups within the broad term “Asian.” Moreover, Harvard used categories such as Hispanic, which the Court deemed “arbitrary or undefined.”²¹ Finding such imprecision inexcusable, the Court cited a “mismatch” between the means Harvard employed to create a diverse class and the goals it sought in so doing, noting the burden this placed on courts in scrutinizing admissions programs like those at issue in this case.²²

The Supreme Court in the *SFFA* case effectively hobbled the diversity rationale and reduced the extent to which schools can consider race in admissions decisions. American colleges and universities, especially highly selective ones, had relied for decades on the protection courts afforded them to build their incoming classes as they saw fit (e.g., by giving tips to applicants from underrepresented racial groups). With that justification now gone, it remains to be seen what sorts of admissions scheme(s) will take its place.

Ambiguity and imprecision being the main issues that led to the demise of the diversity rationale, the following sections explore the backdrop against which the Supreme Court made its ruling, providing some definitional clarity for the term “diversity” and a survey of the admissions landscape facing colleges in the run-up to *SFFA*. This

¹⁷ *Id.* at 188.

¹⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157, 187 (1st Cir. 2020).

¹⁹ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023).

²⁰ *Id.*

²¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 216 (2023).

²² *Id.* at 217.

background proves essential in contextualizing the highly inequitable admissions landscape and the resulting overreliance on diversity to create incoming classes that roughly mirrored the demographics of broader American society.

II. THE MANY FORMS OF AFFIRMATIVE ACTION: MECHANISMS FOR ACHIEVING NON-RACIAL DIVERSITY IN COLLEGE ADMISSIONS

A. Table Setting: The Meaning and Scope of Affirmative Action in Higher Education

Before proceeding, situating the use of race-based tips in higher education admissions as well as the general debate around such practices will aid in understanding this multifaceted phenomenon. First, it is helpful to know that the type of race-based considerations at issue in the *Harvard* case are ultimately confined to a few highly selective schools. Generally, American colleges and universities do not employ race-based tips of the sort used by elite schools. Some scholars estimate that only about one hundred schools practice race-conscious admissions in the United States, admitting 10,000 to 15,000 Black and Hispanic students who would not otherwise have received an offer of admission.²³ That equates to about one percent of all students in four-year colleges and only about two percent of all Black, Hispanic, and Native American students in four-year colleges.²⁴

These statistics beg the question of why the Asian American plaintiffs in the *SFFA* lawsuit did not target recruited athletes, legacies, so-called Dean's or Director's interest list candidates, and children of faculty and staff (collectively, "ALDCs") who, numerically, cost them far more spots than the comparatively few students of color that schools like Harvard admit.²⁵ Eliminating the handful of "diversity admits" at schools like Harvard will do far less to increase the presence of high-achieving Asian students than would removing the preference for recruited athletes and legacies. For example, a 2016 report showed that completely eliminating Black and Latino applicants from the Harvard admissions pool increased the likelihood of Asian and white students by only one percent.²⁶ In addition, SFFA expert Peter Arcidiacono published a paper noting that over 40 percent of white Harvard admits are ALDCs and arguing that over three quarters of white ALDCs would have been rejected from Harvard had

²³ Amy Harmon, *How It Feels to Have Your Life Changed By Affirmative Action*, N.Y. TIMES (June 21, 2023), <https://www.nytimes.com/2023/06/21/us/affirmative-action-student-experiences.html?searchResultPosition=19> [<https://perma.cc/3GMK-78ZP>].

²⁴ *Id.*

²⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d 126, 138 (D. Mass. 2019). Especially when one considers the unique and powerful ways in which the Asian- and ALDC-coded variables interact in the economic models at issue in the Harvard case, this omission is notable.

²⁶ Sherick Hughes et al., *Causation Fallacy 2.0: Revisiting the Myth and Math of Affirmative Action*, 30 POLITICS OF EDUCATION ASSOCIATION SPECIAL ISSUE THEME: EDUCATIONAL POLICY AND THE CULTURAL POLITICS OF RACE 63, 81-82 (2016) (discussing admission rate changes for white and Asian applicants if there were no Black and Latino applicants). See also *Veritas: So You're Applying to College In A Global Pandemic*, VERITAS: ASIAN AMERICANS & AFFIRMATIVE ACTION (Sept. 1, 2020), (revisiting themes of the previous podcast episodes and discussing the current national debate over affirmative action and the rise in anti-Asian sentiments in the wake of the global pandemic).

they been treated as white non-ALDCs.²⁷ At some level, the more accurate conflict in affirmative action discourse is not between less qualified POC and Asian students, but more precisely, between upwardly mobile Asian kids and rich white kids—an ascendant class bumping up against a mediocre-but-well-resourced social and cultural elite. Ultimately, affirmative action policies generate an outsized level of discourse relative to the share of the American populace actually affected by this narrow policy.

The second point to keep in mind is that this debate on affirmative action, at its height, took place against the backdrop of increased violence against Asian immigrants and Asian Americans in the wake of the global pandemic. This made the conversation an even more highly consequential one, as it took on social, political, economic, and cultural dimensions.²⁸ Passionate advocates on all sides of the issue brought their own lived experiences into the debate, which only heightened the tenor of these talks. Add in a resurgence in racial consciousness spurred by the murder of George Floyd in May of 2020 and the subsequent summer of #BlackLivesMatter protests against police brutality and systemic racism that captured the world's attention, and you have a fraught discourse that can inflame the passions of all involved.²⁹ While the import of race-based admissions tips pales in comparison to the import of social movements for racial justice, these issues do conceptually dovetail, however marginally, at least insofar as they are both inextricably intertwined with this country's legacy of chattel slavery, racial apartheid, and the lasting effects of these practices.

The following sections describe two phenomena that massively shape the contours of college admissions in America today. No discussion of affirmative action is complete without giving some attention to these underlying realities that add complexity to an already highly charged discourse around diversity. In the zero-sum game that is college admissions, participants are jockeying for any and every advantage, which makes the following “back doors” to admissions extremely consequential.

1. “Elite” Athletics: The Role of Athletic Recruitment in Admissions

No discussion of diversity and affirmative action is complete without examining the role of sports in admissions. Sports are a major vehicle through which schools recruit students, and examining athletic

²⁷ Peter Arcidiacono et. al., *Legacy and Athlete Preferences at Harvard*, 4-5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26316, 2019).

²⁸ See, for example, Li Zhou, *The Stop Asian Hate movement is at a crossroads*, VOX, (Mar. 15, 2022), <https://www.vox.com/22820364/stop-asian-hate-movement-atlanta-shootings> [<https://perma.cc/LSR7-6C5T>] (describing the rise in anti-Asian harassment in 2020 and 2021 and the emergence of the #StopAsianHate movement).

²⁹ The movement has, for example, spurred discussions around who exactly is “Black” and in what contexts. See, e.g., Cydney Adams, *Not all black people are African American. Here's the difference.*, CBS NEWS (June 18, 2020), <https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/> [<https://perma.cc/22ND-RQKU>] (noting that “Black Lives Matter protests have opened up conversations about the history of privilege, racism, and the lived experiences and identities of [B]lack people in America”).

recruitment provides vital insight into the pre-*SFFA* admissions landscape especially as it relates to the lower courts' findings. The trial court found that "white applicants are significantly more likely to have made strong high school contributions to athletics, and this disparity counteracts the effect that Asian American applicants' relative academic and extracurricular strength would otherwise have on their admission rate."³⁰ While not necessarily pretextual, Harvard's justification of athlete admits presents a more complicated picture than the lower court suggests. As college admissions becomes ever more competitive, a growing body of research posits that men, particularly white men, enjoy privileges in the admissions process relative to female and minority applicants.³¹

To understand this "quiet"³² or "regressive"³³ form of affirmative action, one must first consider the demographics of the students who are given such preference in admissions. Elite colleges admit large numbers of students to play sports like field hockey, rowing, sailing, polo, lacrosse, golf, squash, and fencing—sports that are more prevalent in prep schools than low-income public high schools.³⁴ These higher admittance rates persist even though these "country club" sports are prohibitively expensive and not strong revenue generators for most schools.³⁵ Even popular sports like basketball and football do not attract high levels of top-tier athletic talent

³⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F. Supp. 3d 126, 141 (D. Mass. 2019).

³¹ See generally Jason England, *The Mess That is Elite College Admissions, Explained by a Former Dean*, VOX (May 8, 2019), <https://www.vox.com/the-highlight/2019/5/1/18311548/college-admissions-secrets-myths>. [<https://perma.cc/785T-ZXKX>] (explaining that white men have an advantage in college admissions because of their participation in Division III athletics).

³² Saahil Desai, *College Sports Are Affirmative Action for Rich White Students*, THE ATLANTIC (Oct. 23, 2018), <https://www.theatlantic.com/education/archive/2018/10/college-sports-benefits-white-students/573688/> [<https://perma.cc/97F2-3D9H>] ("Put another way, college sports at elite schools are a quiet sort of affirmative action for affluent white kids, and play a big role in keeping these institutions so stubbornly white and affluent.").

³³ England, *supra* note 31 ("Division III athletics allowed a regressive system of affirmative action for the demographic that needs it the least: white wealthy males").

³⁴ See generally Desai, *supra* note 32; John R. Thelin, *Admissions, Athletics and the Academic Index*, INSIDE HIGHER ED (April 2, 2019), <https://www.insidehighered.com/views/2019/04/03/how-admissions-and-athletics-intertwine-ivy-league-colleges-opinion> [<https://perma.cc/RVK7-NEXA>]; Paul Tough, *What College Admissions Offices Really Want*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/interactive/2019/09/10/magazine/college-admissions-paul-tough.html> [<https://perma.cc/3KLP-D6B2>]; Liam O'Connor, *Ivy League Athletics are the New "Moneyball"*, THE DAILY PRINCETONIAN (Oct. 10, 2019), <https://www.dailyprincetonian.com/article/2019/10/ivy-league-athletics-are-the-new-money-ball> [<https://perma.cc/VTP6-ACRD>].

³⁵ O'Connor, *supra* note 34 (noting that "[a]bout a fifth of the seats in each incoming class go to recruited athletes. Most of them don't play high profile revenue-generating sports like football or basketball. They play the 'country club sports' of polo, sailing, squash, rowing, and fencing, among others."); Desai, *supra* note 32 (noting that "[o]ne in five families of an elite high-school athlete spend \$1,000 a month on sports").

at Ivies.³⁶ Despite this, Harvard has been known to spend more than \$1 million per year in recruitment expenses.³⁷

There is nothing inherently wrong with a school providing space for these sports or admitting the athletes who play them. What is curious, however, is why schools continue to prop up this “phalanx of lower-profile sports”³⁸ despite their lack of money-making power. In fact, the NCAA recognized that only twenty-five athletics departments’ generated revenues exceeded their expenses in 2018-19.³⁹ As one former college admissions dean put it, “[y]ou wouldn’t want to pay to see the teams play, but these students were admitted as if they were contributing to revenue-producing sports teams at larger universities.”⁴⁰ It is unclear why schools so fiercely court these athletes in sports that do not make money or even attract fans.⁴¹

Strong preference for athletes in admissions becomes even less defensible when one considers that athletic recruitment overwhelmingly benefits wealthy white males at the direct expense of applicants outside

³⁶ RealGM, *Ivy League Players in The NBA*, REALGM (last visited Mar. 27, 2024), <https://basketball.realgm.com/ncaa/conferences/Ivy-League/14/nba-players> [<https://perma.cc/8VUS-F32P>] (listing the “Former Ivy League Players Who Played In The NBA” and noting that there were no such players in recent seasons). Football does not fare much better. See Reem Abdalazem, *Which NFL Players Went to Harvard and other Ivy League Schools?*, DIARIO AS (Dec. 11, 2021), https://en.as.com/en/2021/12/10/nfl/1639158921_102106.html#:~:text=As%20of%20January%2C%202021%2C%20there,Yale%2C%20Princeton%2C%20and%20Cornell [<https://perma.cc/X4AP-RHJM>] (noting that, as of January 2021, “there [were] 13 active Ivy League alumni in the NFL”); Dustin Ghannadi, *Checking in on every Ivy League player currently in the NFL*, THE DAILY PENNSYLVANIAN (Jan. 27, 2021), <https://www.thedp.com/article/2021/01/ivy-league-nfl-check-in-penn-quakers-football> [<https://perma.cc/EHW2-58BW>] (confirming only 13 “Ancient Eight” alumni are active on NFL rosters).

³⁷ Delano R. Franklin and Devin B. Srivastava, *The Athlete Advantage*, THE HARVARD CRIMSON (May 28, 2019), <https://www.thecrimson.com/article/2019/5/28/athlete-advantage-commencement-2019/> [<https://perma.cc/NFE6-8YKY>] (“Each year, the University pours more than \$1 million into the practice [of recruiting], and hundreds of recruited athletes commit to the College.”).

³⁸ Desai, *supra* note 32.

³⁹ National Collegiate Athletic Association, *2004-19 NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report*, NCAA (last visited July 10, 2024), https://ncaaorg.s3.amazonaws.com/research/Finances/2020RES_D1-RevExp_Report.pdf [<https://perma.cc/4AVX-3CHN>].

⁴⁰ England, *supra* note 31.

⁴¹ Many justifications are posited, but they fail to adequately explain this recruitment strategy. Some observers claim that these sports programs boost student and alumni morale, which results in more tailgating or bragging rights within an athletic conference and in turn might translate to more donations to the school. England, *supra* note 31. Another justification is that athletes are more likely than their peers to go into lucrative fields like law or business and to donate in the future. *Id.* Some research suggests that male former athletes’ donations increase when their college team wins its athletic conference. See Jonathan Meer and Harvey S. Rosen, *The Impact of Athletic Performance on Alumni Giving: An Analysis of Micro Data 1-2* (Nat’l Bureau of Econ. Rsch., Working Paper No. 13937, 2008) (noting the approximate 7% rise in general and athletic program donations from male graduates at an anonymous “selective research university” whose former teams won their athletic championships). There are a variety of justifications for a strong athletic program at selective schools, but the lack of a single prevailing narrative seems odd given the outsized preference for these student athletes.

that demographic.⁴² More “average” white female athletes generally are academically qualified enough to be admitted the traditional way, notes former Wesleyan Admissions Dean Jason England.⁴³ Spots for student-athletes of color were similarly finagled to make room for “underwhelming” white male candidates.⁴⁴ In a strategy he calls “cynical,” England describes the deferral of Black athletes to the general admissions committee, which often decided to admit them on diversity grounds, which “saved tips in the athletic committee for more underqualified white men, while robbing non-athlete Black students in the regular committee.”⁴⁵ In this way, white male athletes are deliberately propped up by admissions offices at the direct expense of women and people of color.

SAT scores can provide a “convenient justification” for admitting otherwise unimpressive students who can afford to pay full tuition—a major directive for any admissions office.⁴⁶ Another admissions professional laments that colleges routinely admit low-performing high schoolers from expensive prep schools who are at the bottom of their classes academically but who have access to SAT prep courses, tutoring, and other resources that net them a higher-than-average SAT score.⁴⁷ With this strategy, admissions committees can then justify rejecting academically successful poor students with lower SATs on the grounds of “college readiness” rather than ability to pay.⁴⁸ But SAT scores do not tell the whole story.

Even after admittance, it is not clear that many athletes at elite schools maintain the academic performance that warranted their admittance. Trinity College, a highly selective liberal arts school, provides one example. Unmotivated students with high standardized test scores often did not rise to meet the intellectual rigor of college courses.⁴⁹ This lack of performance from supposedly highly qualified students, many of whom are recruited athletes, apparently had a discouraging effect on teacher morale.⁵⁰ Furthermore, it casts doubt on what exactly standardized tests are designed to measure and the true meaning of “college readiness.”

⁴² National Collegiate Athletic Association, *NCAA Demographics Database*, NCAA (last visited Mar. 27, 2024), <http://www.ncaa.org/about/resources/research/ncaa-demographics-database> [<https://perma.cc/K7ZB-SY5M>]. For example, during the 2018-2019 school year, 64% of NCAA “student-athletes” were white. Or consider the fact that in 2018, 74% of lacrosse players in the Ivy League were white, and 3% were Black. *Id.*

⁴³ England, *supra* note 31.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Tough, *supra* note 34.

⁴⁸ *Id.*

⁴⁹ Tough expounds: “The problem is, rich kids who aren’t motivated to work hard and get good grades in high school often aren’t college-ready, however inflated their SAT scores may be. At Trinity, this meant there was a growing number of affluent students on campus who couldn’t keep up in class and weren’t interested in trying.” *Id.*

⁵⁰ *Id.* (citing Angel Pérez, a former enrollment manager at Trinity College, who noted the “morale effect on our faculty” of students with pumped-up SAT scores who populated classes in which they were disengaged and unmotivated to improve).

Finally, after being admitted, many D-I Ivy League athletes drop their sports.⁵¹ To reiterate: most of these students, whose admissions were justified largely along athletic lines, quit. At Brown University, for example, a 2016 report found that about thirty percent of student-athletes did not play their sport through their senior year.⁵² Similarly, Ithaca College, a private liberal arts school in New York, had an athlete retention rate of just forty-six percent for the class of 2014.⁵³ It is noteworthy that so many athletes—star performers funneled into elite schools on the theory that they bring some benefit to morale, donations, or campus culture—drop the sports they had played, often for the balance of their young lives, not long after arriving to campus. If sports are so integral to life at these elite colleges (and loom so large in their admissions decisions), why do so few admittees stick with them? Why does athletics continue to have an outsize effect on admissions decisions if schools know they will lose these players in a year or so?

The nature of athletics at elite schools is even more perplexing when one considers how heavily the courts weighed athletics as the *SFFA* decision made its way through the judicial branch. For example, in justifying the lower admission rates of Asian students, the trial court noted that white applicants were significantly more likely to have made “strong high school contributions to athletics” and that this counteracts the effect that Asian applicants’ grades and extracurriculars would otherwise have on their admission rate.⁵⁴ While not necessarily pretextual, Harvard’s justification for its preferential treatment of athletes in admissions presents a more complex picture than the lower court suggests.

As discussed above, these sports are prohibitively expensive even at the recruitment stage; they are not particularly popular; their athletes are not star students; they often quit their sport; and schools are losing money on them. Some might argue that Harvard, which has more sports than any school in the NCAA⁵⁵, is uniquely able to accommodate this high

⁵¹ The Next College Student Athlete or “NCSA,” a company that “helps thousands of student-athletes and their families take control of their [athletic] recruiting experience,” surveyed NCAA sports across Divisions between 2012 and 2017, finding that “over 45% of underclassmen athletes are not listed on their college roster the following year.” The Next College Student Athlete, *2019 NSCA State of Recruiting Report*, NSCA (last visited Mar. 27, 2024) <https://www.ncsasports.org/state-of-recruiting> [<https://perma.cc/VX7Z-4ZJS>]. See also The Next College Student Athlete, *The NSCA Experience*, NSCA (last visited Mar. 27, 2024), <https://www.ncsasports.org/who-is-ncsa/what-does-ncsa-do>. [<https://perma.cc/95YP-NMYQ>] (explaining what The NCSA is).

⁵² Ben Shumate, *30 percent of athletes quit respective teams*, THE BROWN DAILY HERALD (Apr. 28, 2016), <https://www.browndailyherald.com/2016/04/28/30-percent-of-athletes-quit-respective-teams/> [<https://perma.cc/HDF2-X34Y>]. O’Connor also references a study by William Bowen and Sarah Levin finding that “a lot of athletes drop varsity sports after their underclassmen years.” O’Connor, *supra* note 34.

⁵³ Kristen Gowdy, *Hanging it up: Former Student-Athletes Share their Past Athletic Experiences*, THE ITHACAN, (Apr. 9, 2014), <https://theithacan.org/sports/hanging-it-up-former-student-athletes-share-their-past-athletic-experiences/> [<https://perma.cc/SEJ4-6W62>].

⁵⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d 126, 164 (D. Mass. 2019).

⁵⁵ Harvard College, *Why Harvard: Student Activities*, HARVARD COLLEGE (last visited Mar. 27, 2024) <https://college.harvard.edu/admissions/why-harvard/student->

number of athletes of varying academic prowess, athletic ability, and revenue-generating potential due to the school's immense wealth. Even if this theory holds, athletic recruitment remains a high stakes operation at Harvard and elsewhere due to the harsh reality of class size limits.⁵⁶ As one observer put it, "every admissions slot dedicated to a talented student athlete could mean one less space for a nonmerit admit, such as an alumni legacy or the child of a generous donor."⁵⁷ For these reasons, it is not hard to imagine why even wealthy parents go to such great lengths to produce distinguished athletes—or at least the appearance of such distinction.⁵⁸ As the Massachusetts trial court recognized, athletes simply have an edge in admissions, however murky the reasons for that edge may be. The Supreme Court has not yet taken up a challenge to athletic recruitment—indeed, they may never be so inclined—but it is worth noting the massive advantage athletes receive and the corresponding disadvantage non-athletes must overcome in admissions.

2. Early Birds: The Effects of Early Decision and Merit Aid on Admissions

If athletics cannot provide a strong enough justification for the admission of otherwise underwhelming applicants, they have another tool in their admissions arsenal: early decision. Rich (usually white) applicants applying early decision can secure a spot at a prized university before their diverse counterparts have even applied. Early-admission decisions refer to an admissions process, usually occurring months before general admissions, in which students apply to one college and agree to attend that college if admitted. This practice favors wealthier applicants who can often commit to a school without knowing how much financial aid they will receive.⁵⁹ Students from low-income backgrounds—many of whom will be BIPOC students—often need to compare tuition costs and aid packages from multiple schools before making a decision. In order to compare, they need multiple admissions offers, which necessitates applying during the

activities#:~:text=Harvard%20is%20home%20to%2042,other%20college%20in%20the%20country [https://perma.cc/WFF5-GSK9].

⁵⁶ Thelin, *supra* note 34.

⁵⁷ *Id.*

⁵⁸ Varsity Blues is perhaps the most high-profile example of parents gaming the system, but it is by no means the only one. Even schools with supposedly merit-based admissions like UCLA or Berkeley are not immune. See Scott Jaschik, *University of California Admissions Disgrace*, INSIDE HIGHER ED (Sept. 27, 2020), <https://www.insidehighered.com/admissions/article/2020/09/28/university-california-admissions-scandal-worsens> [https://perma.cc/72SV-XNJL] (referencing an audit of Berkeley's admissions practices that revealed emails suggesting how or why the university admitted certain students, including: "Applicant babysat for a colleague of the former director of undergraduate admissions," ... "Child of a high-level university staff member," [and] "Applicant's family promised a large donation"). Perhaps most insidiously, this preferential treatment can directly harm those it was designed to protect. *Id.* (describing the use by admissions staff of "prospect lists"—lists of students from underprivileged backgrounds who might be strong candidates for admission—to admit students with connections to donors, staff, and faculty over similarly or better-qualified students who were members of the population the list was designed to benefit).

⁵⁹ Desai, *supra* note 32 (describing how early admissions and athletic recruitment practices work together to "warp[] the [admissions] process in favor of wealthier kids who can send in early-decision applications to selective schools without fretting about the size of the financial-aid package they'll receive").

regular decision round when they are not bound to accept the first offer of admission.⁶⁰ Researchers have consistently found that early admission disproportionately benefits the rich.⁶¹ Colleges also benefit because early admission boosts their yield rate, which is the percentage of admitted applicants who end up enrolling at the school.⁶² A school with a higher yield rate can accept fewer students to reach its intended class size, which decreases its acceptance rates and can boost a school's prestige and its place in college rankings.⁶³ Schools like Trinity and Harvard do not offer athletic scholarships, but recruited athletes can apply early decision.⁶⁴ Admissions officers like early admission because, by locking in tuition-paying applicants, it eliminates some of the uncertainty inherent in their jobs, which in significant part depend on bringing in the highest achieving students who can afford tuition.⁶⁵ It is therefore no surprise that athletes matriculate at such a high rate at selective schools.

Early decision, whether it serves as a means of securing students passionate about a particular school or merely as a wealth generator, is not inherently suspect. If schools, especially private ones, want to admit students partially—or substantially—based on their ability to pay, that is their prerogative. However, even a wealth-based justification is not wholly convincing, considering that many rich students end up paying far less than sticker price because of merit aid.

A practice that caught on in the 1980s, “merit aid” scholarships became a vehicle to lure wealthy students to enroll in higher education institutions.⁶⁶ By the 2000s, merit aid had turned into an “arms race” in

⁶⁰ *Id.* See also Tough, *supra* note 34 (noting that “nonrich students” need to be able to “compare tuition costs and aid packages from multiple colleges before deciding where to enroll”). To again invoke Trinity College, the approximately 300 early admits of a class totaling 589 were “quite a bit wealthier, on average, than the rest of the freshman class, and about half of [them] were athletes.” Tough, *supra* note 34. See also Kathy Andrews, *Welcoming the Class of 2022*, TRINITY COLLEGE (Aug. 30, 2018), <https://www.trincoll.edu/news/welcoming-the-class-of-2022/#:~:text=The%20Class%20of%202022%20at%20a%20Glance%3A&text=Record%2Dse,ttling%2015%20percent%20first,of%20Columbia%20and%20Puerto%20Rico> [https://perma.cc/N73S-ALP6].

⁶¹ *Id.*; See Jennifer Giancola and Richard D. Kahlenberg, *True Merit: Ensuring Our Brightest Students Have Access to Our Best Colleges and Universities*, JACK KENT COOKE FOUNDATION (last visited Mar. 27, 2024), <https://www.jkcf.org/research/true-merit-ensuring-our-brightest-students-have-access-to-our-best-colleges-and-universities/> [https://perma.cc/228L-93PF] (finding that students who apply early “receive the equivalent of a 100 point bonus on the SAT” [emphasis omitted]).

⁶² Maroon Editorial Board, *Early Decision Unfairly Favors Wealthy Applicants*, THE CHICAGO MAROON (Dec. 3, 2018), <https://www.chicagomaroon.com/article/2018/12/4/early-decision-unfairly-favors-wealthy-applicants/> [https://perma.cc/7J9N-8TVG] (defining yield rate). See also Tough, *supra* note 34 (adding additional support of yield being increased).

⁶³ Maroon Editorial Board, *supra* note 62.

⁶⁴ HARVARD UNIV., *Prospective Student-Athletes*, <https://gocrimson.com/sports/2020/5/5/information-recruiting-helpfulinfo.aspx#:~:text=No.,students%20who%20demonstrate%20financial%20need> [https://perma.cc/GPT7-HJB2] (“As an Ivy League institution, Harvard does not offer athletic or academic scholarships to students. However, Harvard does provide need-based financial aid to those students who demonstrate financial need.”).

⁶⁵ Tough, *supra* note 34.

⁶⁶ *Id.* (describing Jack Maguire, a former admissions dean at Boston College, who supposedly pioneered in the 1970s the technique of “deploy[ing] financial aid strategically,

which schools were offering increasingly larger merit aid packages to prospective students. Things may now be approaching a “death spiral” in which the vast majority of students are receiving merit aid.⁶⁷ In recent years, wealthy admits have been able to demand ever-steeper “tuition discounts,” substantially decreasing overall tuition revenue.⁶⁸ That is, rich families can more effectively “bargain” over tuition. These families could be lifelong contributors to a school if their child is admitted, but the price of that admittance comes at a cost—or rather, a cost reduction.

The pressure to admit underwhelming rich kids comes not only from their parents but also from data, and enrollment managers, not wanting to lose their jobs, are understandably reluctant to buck the trend.⁶⁹ This pressure results in even less aid to low-income students, however “meritorious” they might be.⁷⁰ To put this phenomenon into context, American colleges collectively give students with a family income of over \$100,000 more institutional aid, on average, than they do to a student with a family income under \$20,000.⁷¹ Simply put, colleges work much harder to admit wealthy students than talented ones from low-income backgrounds, despite the fact that the wealthy students may end up giving less money to the school.

Admissions practices related to athletic recruitment, early decision, and merit aid all interact to create an admissions landscape that is less than egalitarian. Certain candidates are privileged due to less “objective” admissions criteria such as perceived athletic ability or the likelihood of future financial contribution to the school. These advantages can be subtle but extremely consequential in such a competitive system. When schools have to choose between well-credentialed but often similarly qualified applicants, something as simple as playing the right sport can be the tiebreaker in admitting one student over another. These “side doors” function as a parallel system of affirmative action, though they engender far less controversy than race-based affirmative action.

III. DEFINING DIVERSITY: AN ANALYTICAL FRAMEWORK

The Supreme Court’s diversity jurisprudence in the higher education context centers almost exclusively on race-based tips. One major

as a way to attract the students he most wanted to admit, whether they genuinely needed financial assistance or not” and explaining the proliferation of this practice among private and some public colleges).

⁶⁷ *Id.* (citing the National Center for Education Statistics, which noted that “89 percent of students receive some form of financial aid, meaning that almost no one is paying full price”).

⁶⁸ *Id.* (referencing Pérez recalling how rich families requesting tuition cuts as a condition of acceptance caused a “financial crisis” at Trinity College).

⁶⁹ *Id.* (describing the rise of predictive analytics in admissions and financial aid, how these models point to admitting more wealthy students as the best way to ensure a school’s financial survival, and how admissions personnel feel compelled to follow the data).

⁷⁰ *Id.*; *See also* Jaschik, *supra* note 58 (referencing a state audit report that describes a situation in which Berkeley admission counselors were overruled in not recommending the admission of both a child of a staff member and child of a donor while a high-achieving third applicant from a low-income background and a “disadvantaged school” was recommended by both readers only to be rejected ultimately).

⁷¹ Tough, *supra* note 34 (citing 2015–16 National Postsecondary Student Aid Study).

challenge facing a race-based diversity regime is the issue of line-drawing. As in any legal framework, courts or juries must decide where to make cut-offs—that is, they must decide who is “diverse” under law. The Supreme Court in *SFFA* showed little interest in this exercise, but one can imagine future challenges to affirmative action policies will highlight line-drawing issues that bear on who gets which benefits. Brazil’s college admissions process provides one example of the challenges inherent in this line-drawing approach, as the country’s universities have faced backlash regarding their own affirmative action policies in recent years.

A. “Come to Brazil”: A Brazilian Case Study and its Lessons for the United States

Brazil provides perhaps the best example of what types of issues arise when a country institutes race-based quotas. Brazil is one of the most ethnically and racially diverse countries in the world, with the largest portion of people with Black ancestry outside of Africa.⁷² In this way, it is not unlike the multiracial United States. A self-stylized “racial democracy,” Brazil did not introduce significant affirmative action measures in institutions of higher education until the early 2000s.⁷³ In 2012, Brazil passed the Law of Social Quotas, a sweeping affirmative action policy that required half of incoming students in universities to come from public schools—an effort that effectively sought to increase the enrollment of Black and low income students, who are disproportionately represented in the country’s poorly performing public elementary and high schools.⁷⁴ The Brazilian government created race-based quotas for Black, Brown, and indigenous applicants to ensure that these students had access to the country’s public universities. This process was designed to lead to the “democratization of higher education” and a correction of historical wrongs in Brazil, which has its own fraught history of racial issues.⁷⁵

Almost immediately, however, Black activists started highlighting instances of “race fraud” in which students who were not phenotypically Black were matriculating to Brazilian schools.⁷⁶ Activists believed that many white Brazilians took admission spots reserved for applicants who

⁷² Simon Romero, *Brazil Enacts Affirmative Action Law for Universities*, N.Y. TIMES (Aug. 30, 2012), <https://www.nytimes.com/2012/08/31/world/americas/brazil-enacts-affirmative-action-law-for-universities.html> [https://perma.cc/G7RF-N7Z4].

⁷³ Cleuci De Oliveira, *Brazil’s New Problem With Blackness*, FOREIGN POLICY (Apr. 5, 2016), <https://foreignpolicy.com/2017/04/05/brazils-new-problem-with-blackness-affirmative-action/> [https://perma.cc/A9K4-TSMY].

⁷⁴ Romero, *supra* note 72.

⁷⁵ *Id.* See also De Oliveira, *supra* note 73. For more on Brazil’s history of racial strife, see generally Vox, *What it means to be Black in Brazil*, YOUTUBE (Sept. 23, 2020), https://youtu.be/jk1eTURC8sA?si=dlQmIXt1q8KY_Mo9 (discussing the complicated history of racial self-identification in Brazil) and Ciara Nugent and Thaís Regina, *How Black Brazilians Are Looking to a Slavery-Era Form of Resistance to Fight Racial Injustice Today*, TIME (Dec. 16, 2020), <https://time.com/5915902/brazil-racism-quilombos/> [https://perma.cc/N3QL-MEPU] (describing ongoing inequalities between Black and non-Black Brazilians and the rise of “quilombo” communities of Black Brazilians promoting anti-racism and Black empowerment).

⁷⁶ De Oliveira, *supra* note 73. Somewhat ironically, many of these activists were now challenging the implementation of the very race-conscious policies they had fought for decades to enact.

were phenotypically Black, who lived the Black Brazilian experience.⁷⁷ A state of “racial vigilance” in 2016 spread across universities.⁷⁸ Student activist groups reported and even sued students that they considered not sufficiently Black, which resulted in the temporary or permanent ejection of dozens of students from campuses across Brazil.⁷⁹

The backlash on these campuses, in the public sector, and in the courts led in many instances to the establishment of “race boards” to evaluate which applicants for government jobs or public universities were truly, verifiably Black.⁸⁰ These entities screened for what they considered to be African phenotypical characteristics, examining applicants’ lip thickness, gum color, nose width, hair texture, skull shape, among others.⁸¹ In response to one school’s evaluation committee, students were said to have shaved their heads, worn beanies, gotten tans, and employed face makeup in an effort to appear more “[B]lack.”⁸² Targeted students, many of whom identified as “pardo” (Brown)—a term signifying a mixed-race person with African ancestry—were kicked out of their educational programs, some suing to reinstate their admission.⁸³ The *pardo* identity is a complicated one in a country as uniquely diverse as Brazil, where over forty percent of people identify as mixed-race, and around thirty percent of white-identifying Brazilians have Black ancestors.⁸⁴ A number of these self-identified *pardo* students had fairly recent African ancestry, such as a Black grandparent, and considered themselves proudly mixed-race—that is, a typical Brazilian—which helps to explain why racial line-drawing can be a quixotic enterprise in Brazil.⁸⁵

Some observers cite the racial evaluation boards as engaging in a “witch hunt,” but Brazilian activists view them as a necessary deterrent,

⁷⁷ Lulu Garcia-Navarro, *For Affirmative Action, Brazil Sets Up Controversial Boards to Determine Race*, NPR (Sept. 29, 2016), <https://www.npr.org/sections/parallels/2016/09/29/495665329/for-affirmative-action-brazil-sets-up-controversial-boards-to-determine-race> [<https://perma.cc/6VF9-H9BX>].

⁷⁸ De Oliveira, *supra* note 73 (describing the work of Coletivo Negrada, Setorial Negro, and other groups in identifying and seeking the removal of non-Black students who gained admittance to schools via Brazil’s affirmative action policy).

⁷⁹ *Id.*

⁸⁰ *Id.*; Garcia-Navarro, *supra* note 77.

⁸¹ De Oliveira, *supra* note 73 (describing a leaked checklist which mentioned several of the characteristics to look for and evaluate applicants on).

⁸² *Id.* (presenting Ethnicity Evaluation Committee member Prof. Georgina Lima’s comment that “[p]eople would shave their heads, wear beanies, get a tan. Just a series of strategies to turn themselves [B]lack.”).

⁸³ *Id.*, Garcia-Navarro, *supra* note 77 (describing how one self-identified Afro Brazilian decided to sue after his school’s race board deemed him not *pardo* and therefore ineligible for his current job).

⁸⁴ De Oliveira, *supra* note 73; Garcia-Navarro, *supra* note 77.

⁸⁵ De Oliveira, *supra* note 73 (presenting the story of pseudonymous “Fernando” who was kicked out of school but who views himself as *pardo*, coming from a family that he says struggled with discrimination when his white grandfather married his black grandmother). Garcia-Navarro, *supra* note 77 (presenting Lucas Siqueira, who lost a highly competitive job at Brazil’s Ministry of Foreign Affairs after a race committee, spurred to investigate by members of the public who dug into Siqueira’s social media accounts, deemed him not Black, despite him having a Black grandfather).

given the country's complicated racial history.⁸⁶ Because so much of the country is mixed-race, some believe that skin tone matters more than race in this racial democracy, making the race determinations of committees an all-the-more convoluted—and consequential—exercise.⁸⁷ As one ousted university student noted, “[n]one of the race committee [interviewers] were *pardo*. There was no one there that could identify with me.”⁸⁸ Even though affirmative action policies account for mixed-race individuals, the student felt singled out for being lighter skinned.⁸⁹

A major problem with Brazil's system was that applicants were asked to racially self-identify. That is, they were asked to select their own race, which opened a multitude of responses that overwhelmed a government ill-equipped to evaluate the race of these applicants in a timely and systematic way against the backdrop of growing social anxiety and calls for reform.

From Brazil's experience implementing an affirmative action regime, several lessons can be learned. First, clear guidelines must be in place to ensure that the policy helps the intended population. That is, at some level, there will have to be a discussion of how best to define “Black person” for the purposes of affirmative action in the American context. Second, policies must be enforced in a way that seems more objective—one can hardly imagine a “race panel” deciding if an applicant qualifies for affirmative action in the United States. Therefore, policymakers must find a more objective framework that presents as more legitimate in the eyes of the people. Third, there must be ways of preventing both “racial fraud” and “witch hunts” or other types of activism that is ultimately meant to “expose” persons who are not viewed as sufficiently “Black.” If all of the above seems unworkable or even dangerous, that is because this is likely so. As will be discussed below, a purely race-based affirmative action justification is susceptible to numerous challenges that make such a scheme virtually impossible to implement successfully.

B. History Lesson: A Brief Survey of Black Racial and Ethnic Identification

Not unlike Brazil's *pardo*, many terms—e.g., African American; Black; person of color (“POC”); Afro-American; nonwhite; colored; Negro; Brown; minority; “melanated”; and BIPOC—have been created to describe persons of African ancestry living in the United States. These modes of racial self-identification will only continue to proliferate amongst Americans, exacerbating the challenges of defining who is diverse.

⁸⁶ Garcia-Navarro, *supra* note 77 (noting committees are a deterrent); De Oliveira, *supra* note 73 (noting general support for the race commissions among Black Brazilians while others see it as a “witch hunt”).

⁸⁷ Garcia-Navarro, *supra* note 77. Siqueira describes visiting at least seven dermatologists who used the Fitzpatrick scale, a test measuring skin tones, to prove his Afro-Brazilian identity.

⁸⁸ De Oliveira, *supra* note 73.

⁸⁹ *Id.*

The newly *en vogue* “people of color” has already encountered difficulties.⁹⁰ Professor Efrén Pérez of UCLA describes the label as being created by and for African Americans but a moniker that has “evolved into an identity that politically mobilizes many nonwhites toward common goals.”⁹¹ The term has obvious social implications, but it also contains cultural and political dimensions as well.⁹²

Further, the histories behind these terms tend to be complex, as their meanings evolve at least as quickly as social mores and political speech. For example, the term “person of color” has historical roots that differ significantly from its modern usage.⁹³ The word “Negro” was once a near-ubiquitous term.⁹⁴ Once-heralded political chimeras like “African

⁹⁰ See Benjamin Goggin, *There's a Growing Debate Over Who Qualifies as a 'Person of Color' — Who Is and Isn't Included?*, INSIDER (Dec. 8, 2018), <https://www.insider.com/the-internet-is-debating-who-to-call-people-of-color-2018-11> [<https://perma.cc/G59E-WSLP>] (describing the evolution of the term “person of color” from a social justice-oriented phrase to a more widely adopted term and the ensuing debate over whether Asians should be considered people of color, specifically in contrast to Black people, whose experiences and viewpoints many argue are erased by use of the term “people of color”) and E. Tammy Kim, *The Perils of ‘People of Color’*, THE NEW YORKER (July 29, 2020), <https://www.newyorker.com/news/annals-of-activism/the-perils-of-people-of-color> [<https://perma.cc/6ZYG-6LMX>] (discussing the origins of the term and the presence of anti-Black racism among “people of color” while simultaneously cautioning against the abandonment of the solidarity inherent in the intersectional phrase).

⁹¹ Efrén Pérez, “‘People of Color’ are Protesting. Here’s What You Need to Know About this New Identity.”, THE WASHINGTON POST, <https://www.washingtonpost.com/politics/2020/07/02/people-color-are-protesting-heres-what-you-need-know-about-this-new-identity/> [<https://perma.cc/HYE5-E5TA>] (researching the history and eventual adoption of the term “people of color” by mainstream newspapers).

⁹² *Id.* For example, Pérez found in his research that “[a] stronger level of POC identity is strongly associated with support for BLM among [B]lack, Latino and Asian adults, independent of other influences like personal ideology. This pattern also emerges on other political issues, like support for Deferred Action for Childhood Arrivals (DACA) and curbing police brutality.” Pérez also found that support for the term “people of color” tended to narrow when individuals felt their respective racial group’s unique needs and challenges were being ignored within the broad “POC” framework.

⁹³ Kim, *supra* note 90. *Gens de couleur* originally described mixed-race colonial subjects in eighteenth-century France.

⁹⁴ W.E.B. Du Bois, *The Name Negro*, TEACHING AMERICAN HISTORY (last visited Mar. 28, 2024), <https://teachingamericanhistory.org/library/document/the-name-negro/> [<https://perma.cc/S74Q-H62Q>]. “Negro” was endorsed by Black intellectual titans like author and activist W.E.B. Du Bois, who called it a “fine” word that is as much an accident of history as is the widespread adoption of words like “[w]hite,” “German,” or “Anglo-Saxon.” *Id.* Du Bois believed that the term was as definite “as any name of any great people” and that, practically speaking, Black people needed some way to differentiate themselves and their communal struggles and priorities from that of white people (hence the disutility of a nondescript “American” moniker). Still, “Negro” fell out of widespread use by the 1970s. See Ferris State University Jim Crow Museum, *When Did the Word Negro Become Socially Unacceptable?*, JIM CROW MUSEUM OF RACIST MEMORABILIA (Oct. 2010), <https://www.ferris.edu/HTMLS/news/jimcrow/question/2010/october.htm> [<https://perma.cc/7SX6-LMWB>] (outlining a controversy around Sen. Harry Reid’s use of the word “Negro” and tracing the history of the word in the United States). See also Ben L. Martin, *From Negro to Black to African American: The Power of Names and Naming*, 106 POLITICAL SCIENCE QUARTERLY, 83, 107 (1991) (analyzing the historical debates and social movements centered around competing notions of Black racial and ethnic identity). Of course, the term would seem offensive to many Black people today, but social conventions can change quickly. Indeed, the term “Black” was offensive to many African Americans living in the first half of the twentieth century. *Id.* at 8.

American” face questions probing their continued relevance.⁹⁵ Today, in the “Black vs. African American” debate, some argue that the default to “African American,” often borne out of a desire to appear politically correct or merely polite, obscures differences among persons with African ancestry.⁹⁶ Terms of racial self-identification carry no fixed notions of identity, but are rather social and political descriptors that are subject to the myriad forces that cause their use to ebb, evolve, or evaporate altogether.⁹⁷

The politics of the term “Black” are vast and often situation dependent. For example, the NPR podcast “Code Switch” presented the story of Christina Greer. During a pre-orientation event for Black students at Tufts University in the mid-1990s, Greer recalled one session in which students were asked to close their eyes and raise their hands if their parents had told them not to associate with “[B]lack” students upon their arrival to Tufts. What initially seemed an odd question to Greer—in a room full of Black kids—made sense when she opened her eyes and discovered “everyone’s hands were raised except for the [six] [B]lack Americans” because the rest of her peers in the room were either Black immigrants or the children of Black immigrants, Greer recalls.⁹⁸ Greer goes on to recount other differences between what she terms “JBs” or “just [B]lacks” (i.e., non-immigrant or non-immigrant-descended Black people) and these other students, such as the various affinity groups catering to, for example, students of African or Caribbean origin (in addition to the general Black student union).⁹⁹ Of course, Black students in these groups sometimes viewed themselves as one community, but at other times, these separate identities predominated, which is not a phenomenon unique to Tufts or any university for that matter.¹⁰⁰ Such differences, when highlighted, can be a

⁹⁵ See Martin, *supra* note 94 at 1 (describing Jesse Jackson’s endorsement of the term “African-American” as an ethnic reference to supplant a racial one (i.e., “[B]lack”) and the term’s eventual adoption in the national press). By the late 1960s, “African American” became popular due to the term’s ability to unite Black persons of varying backgrounds by emphasizing their “American-ness” without glossing over a shared African heritage.

⁹⁶ Cydney Adams, *Not all Black People are African American. Here’s the Difference.*, CBS NEWS (June 18, 2020), <https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/> [https://perma.cc/PRD8-TWVX] (noting that “Black Lives Matter protests have opened up conversations about the history of privilege, racism, and the lived experiences and identities of black people in America.”). While “African American” is a nation-specific term usually describing Black persons born in the United States, “Black” could refer to persons of African ancestry born in Africa, the Caribbean, Europe, or elsewhere. *Id.* Of course, for much of this country’s history, most “Black” people were enslaved Africans or their descendants, but this changed as immigration from Africa and elsewhere increased in the latter half of the twentieth century. *Id.* These people were more likely to be first- and second-generation immigrants without a direct link to enslaved Americans or their progeny. *Id.*

⁹⁷ The issue of self-identification and the associated terminology is not solely a Black one; one need look no further than the perennially controversial term “Latinx.” See, e.g., Luis Noe-Bustamante, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020), <https://www.pewresearch.org/race-and-ethnicity/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/> [https://perma.cc/94K8-WXQC].

⁹⁸ Code Switch, *Who’s ‘Black Enough’ For Reparations?*, NPR, at 6:32-7:23 (Feb. 3, 2021), <https://www.npr.org/2021/01/25/960378979/whos-black-enough-for-reparations> [https://perma.cc/C9UQ-99WP].

⁹⁹ *Id.* at 4:34-4:54.

¹⁰⁰ *Id.* at 4:54-5:22.

source of tension even within singular racial groups such as Black Americans.

These myriad tensions—the painful history, the competing powers and communities, the ever-changing faces claiming to speak for what ultimately may be a collective of intersecting but differentiated interests—ensure that “Blackness” as a concept is anything but straightforward. Self-identifying can in this way involve innumerable considerations and sometimes imperceptible nuances that are lost even on the individuals themselves as the role of history—both as it happened and as it is retold—can shape our perceptions of our own identity.¹⁰¹

Over a decade ago, historian Ira Berlin remarked that “[s]uch discord over the meaning of the African American experience and who is (and isn’t) part of it is not new, but of late has grown more intense.”¹⁰² It is undeniable that the Black experience, whether that of the descendants of enslaved people or of voluntary immigrants, is at some level a shared one. For example, Africans are more likely than other immigrants to live near African Americans; this proximity results in Black immigrants being deported at higher rates than other immigrants because the Black communities in which they reside are already over-surveilled.¹⁰³ Moreover,

¹⁰¹ Even major corporate entities have gotten behind this idea of telling a more “complete” story. See Cartoon Network, *Tell the Whole Story / The Crystal Gems Say Be Anti-Racist* / Cartoon Network, YOUTUBE (Dec. 3, 2020), https://www.youtube.com/watch?v=7JheC-8I5A&ab_channel=CartoonNetwork (presenting the story of Lewis Latimer and his role in the creation of the modern lightbulb—all of which is a vehicle for commentary on the erasure of Black narratives from history and the importance of telling a more complete story).

¹⁰² Ira Berlin, *The Changing Definition of African-American: How the great influx of people from Africa and the Caribbean since 1965 is challenging what it means to be African-American*, SMITHSONIAN MAGAZINE, (Feb. 2010), <https://www.smithsonianmag.com/history/the-changing-definition-of-african-american-4905887/> [<https://perma.cc/SHK6-UHMA>] (describing Berlin’s appearance on public radio to discuss the Emancipation Proclamation and the concept of “self-emancipation” of enslaved Africans, which has generated controversy among historians).

¹⁰³ See, e.g., Ashoka Mukpo, *For Black Immigrants, Police and ICE Are Two Sides of the Same Coin*, ACLU (Sept. 3, 2020), <https://www.aclu.org/news/criminal-law-reform/for-black-immigrants-police-and-ice-are-two-sides-of-the-same-coin> [<https://perma.cc/7NWM-9LYL>] (presenting the story of Guinean Amadou Diallo, who was gunned down by NYPD in the Bronx over 20 years ago. Diallo represents one of many Black immigrants whose experiences with law enforcement are colored by their relationship to the Black community in the United States. That is, no matter one’s origin, dark skin marks one as “Black” in America, and all associated challenges attach, even if one is not from this country and was not born into the legacy of slavery and segregation. The author, recounting Diallo’s story, suggests that the persistent over-policing of Black neighborhoods generally led in part to Diallo’s death, noting that modern chants of #BlackLivesMatter should include advocacy for Black immigrant communities. Mukpo also notes that, despite only constituting about 7% of non-citizens, Black immigrants make up over 20% of those in criminal deportation proceedings, another testament to the impact of systemic racism on native Black and Black immigrant communities alike). See also Peniel Ibe, *Immigration is a Black Issue*, AM. FRIENDS SERV. COMM. (Feb. 16, 2021), <https://www.afsc.org/blogs/news-and-commentary/immigration-black-issue> [<https://perma.cc/A2YE-FYGG>] (noting that, despite making up less than 9% of the undocumented population, Black immigrants make up over 20% of all immigrants facing deportation on criminal grounds or due to criminal offenses) and Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story is a Common One for Black Immigrants*, VOX (Feb. 5, 2020), <https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison->

Black immigrants have similar poverty rates to U.S.-born Black persons, with twenty percent of Black immigrants living below the poverty-line compared with twenty-eight percent of U.S.-born Black persons.¹⁰⁴ Also, African immigrants, by virtue of being Black in America, are in some ways more likely to identify with Black American culture. African immigrant children also share the yoke of American racism and continue to be frontline leaders in racial justice movements.¹⁰⁵

These similarities, these shared experiences, surely unite Black people in undeniably important ways. However, this unity is not absolute, and growing divisions could further complicate what it means to be “Black” and “diverse” in a post-affirmative action world. In light of the below, it is crucial that Black Americans recognize the shared history and challenges of the diaspora, as opponents of affirmative action may try to sew division to weaken political unity among Black persons in an effort to undermine diversity initiatives.

C. State of Play: Modern Fault Lines in Black Self-Identification

Immigration policy and the arrival of more African and West Indian immigrants to the United States has intensified the nationwide discussion of Black identity, and this conversation is already seeping into the affirmative action debate. Diversity advocates must take care not to engage in reductive arguments that pit members of the Black diaspora against one another. The “ADOS” movement, which has gained prominence in recent years, provides an example of potential division. ADOS, which stands for “American Descendants of Slavery,” is a group that argues, among other things, that affirmative action policies designed to help Black Americans descended from enslaved people have mostly benefitted other groups, including African and Caribbean immigrants.¹⁰⁶ ADOS believes that descendants of the formerly enslaved should have their own racial category on the census as well as on college applications.¹⁰⁷ Groups like ADOS have seized upon the growing exclusion of “native [B]lacks”¹⁰⁸ at elite colleges as a rallying cry to push their policy preferences.

deportation-pipeline. [<https://perma.cc/S2YW-XDYQ>] (describing the “prison-to-deportation pipeline” and its effect on Black immigrant communities).

¹⁰⁴ Monica Anderson, *A Rising Share of the U.S. Black Population Is Foreign Born* 20, PEW RSCH. CTR. (April 9, 2015), <https://www.pewresearch.org/social-trends/2015/04/09/chapter-1-statistical-portrait-of-the-u-s-black-immigrant-population/> [<https://perma.cc/4NGP-N8ZQ>].

¹⁰⁵ For example, Ayo (formerly, “Opal”) Tometi, a founder of the Black Lives Matter Network, is the daughter of Nigerian immigrants. See Aly Wane, *A Conversation with Opal Tometi*, PEACE NEWSL. (Syracuse Peace Council, Syracuse, N.Y.) July – Aug. 2015 at 8, <https://www.peacecouncil.net/sites/default/files/pnl/pdf/PNL844Jul-Aug15%20small.pdf> [<https://perma.cc/Q8C8-PNCQ>] (stating in interview that Tometi is the daughter of Nigerian immigrants).

¹⁰⁶ Farah Stockman, “We’re Self-Interested”: The Growing Identity Debate in Black America, N.Y. TIMES (last updated Nov. 13, 2019), <https://www.nytimes.com/2019/11/08/us/slavery-black-immigrants-ados.html>.

¹⁰⁷ *Id.*

¹⁰⁸ This term describes the descendants of people who were enslaved and subjected to forced migration to a foreign land (that would become the United States) by colonizers who themselves deprived the land’s actual native inhabitants of its use. It is admittedly a bit of a misnomer, but it seems to be the most commonly used term to distinguish the descendants of slaves in the United States from foreign-born Black people and their progeny.

It is true that African immigrants and the children of African immigrants are disproportionately represented at higher education institutions relative to their percentage of the U.S. population, a reality that is even more pronounced at elite schools.¹⁰⁹ Just as in broader American society, many students of African immigrant origin do not fully or solely identify as African American or Black.¹¹⁰ As one author noted, “[t]hese new arrivals have shaped their own priorities, values, and identities around their former lives in their native countries; naturally, it is not likely that such uniquely shaped priorities and values of immigrants will translate to the native [B]lack American child who has her own experiences that might even contradict the former.”¹¹¹ Similarly, many “native” Black people do not necessarily feel that they share a racial or ethnic identity with immigrant-born Black persons or, at least, believe that room for differentiation exists.¹¹² These sentiments have been well documented at Harvard as well.¹¹³

A June 2004 *New York Times* article contextualizes the native-immigrant landscape as it existed almost twenty years ago. During a forum at a reunion of Harvard’s Black alumni, Professor Henry Louis Gates Jr. and Harvard Law Professor Lani Guinier brought attention to the fact that, out of Harvard’s roughly eight percent of Black undergraduates, as many as two-thirds were “West Indian and African immigrants or their children,

Other terms include “just [B]lack,” “regular [B]lack,” and “slave [B]lack.” See, e.g., Josie F. Abugov, *Are We In The Minority?*, THE HARV. CRIMSON (Oct. 15, 2020), <https://www.thecrimson.com/article/2020/10/15/gaasa-scrut/> [<https://perma.cc/34MM-UCZE>] (listing various monikers Black students at Harvard used to self-identify).

¹⁰⁹ For example, in 2007 researchers at Princeton and University of Pennsylvania published a report stating that, at Ivy League schools, 41 percent of the Black students were of immigrant origin (18 points higher than at similarly selective state schools). Douglas S. Massey, et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, AM. J. OF EDUC., vol. 113, Feb., 2007, at 243, 249, www.jstor.org/stable/10.1086/510167.

¹¹⁰ *Id.* at 253 (describing a survey of Black students at selective schools and finding that “immigrant- and native-origin [B]lack [students] appear to hold somewhat different ethnic identities, with a larger share of immigrants expressing an identity other than just [B]lack, Negro, or African American”).

¹¹¹ Maurice R. Dyson, *Racial Free-Riding on the Coattails of a Dream Deferred: Can I Borrow Your*

Social Capital?, 13 Wm. & Mary Bill Rts. J. 967, 994 (2005), <https://scholarship.law.wm.edu/wmborj/>

vol13/iss3/8.

¹¹² For example, Black students at Cornell University lobbied for more “underrepresented [B]lack students” whom they defined as Black Americans with several generations in the United States. Stockman, *supra* note 106. These students cited a “lack of investment” from the school in students whose families were affected by slavery in America. Stockman, *supra* note 106.

¹¹³ Abugov, *supra* note 108 (describing the rise of a “Generational African American” or “GAA” identity at Harvard for native Black students and a recognition of the scarcity of such non-immigrant students at the College). Abugov documents the rise of a GAA affinity group and the related warnings from faculty—including Prof. Henry Louis Gates Jr.—that the group could be seen as competing with or antagonistic to the numerous Africa-centered groups on campus. Abugov questions the role affirmative action plays in admitting Black students to campus, and she considers the role of groups such as ADOS in the broader conversation around Black identity.

or to a lesser extent, children of biracial couples.”¹¹⁴ The professors, who were concerned about elite schools overlooking Black students whose families had been in the United States for generations, emphasized that drawing such distinctions was not about excluding immigrants. Rather, they were concerned about how native Black students were disadvantaged by the legacy of Jim Crow laws, segregation, poverty, and inferior schooling.¹¹⁵ In theory, these are the very students that affirmative action was designed to protect, the *Times* article suggests.¹¹⁶

That insinuation, however, is problematic because the Supreme Court in *Bakke* explicitly rejected social justice-oriented rationales for race-based considerations in admissions, opting for the more nebulous concept of “diversity.” This option shielded schools from having to engage with how the legacy of slavery impacts the social and economic outcomes that feed into Black Americans’ college preparedness. The Court expressed a preference for “diversity” for its own sake over more social justice-oriented justifications such as affirmative-action-as-reparations. Still, that does not eliminate the “moral understanding of the purpose of affirmative action,” which is precisely the social justice-rooted belief that affirmative action does—or at least should—remedy past societal discrimination.¹¹⁷

The vast overrepresentation of African students in schools compared to native Black Americans complicates the debate about whether affirmative action is serving its intended purpose and its intended population.¹¹⁸ Some see affirmative action as more of a remedial system designed to correct for the ongoing racial ills of this country, while others view it as a means to correct for past racial injustice.

Some in the latter camp view the overrepresentation of African students as a form of “racial free-riding” that, if left unchecked, will exacerbate inequality, especially for low-income native-born Black students.¹¹⁹ This Article does not adopt that language, as any discussion of “free-riding” is best employed when discussing its most prevalent form (i.e., legacy admissions) and should not be weaponized by one marginalized ethnic group against another. Still, it is true that the current iteration of affirmative action discourse “focuses on race, which elides an honest discussion about class and ethnicity in the context of [B]lack student admissions.”¹²⁰ To the extent affirmative action as currently practiced serves as a “clumsy proxy” for fulfilling a “moral” mandate, it should be reformed to clarify and to better reach its intended beneficiaries.¹²¹ This

¹¹⁴ Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), <https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Dyson, *supra* note 111, at 974.

¹¹⁸ As one author put it, “[f]or African Americans who find the overrepresentation of their West Indian, African, and biracial counterparts [in college admissions] troubling, the assumption remains that affirmative action should be a means to correct historical injustices against African Americans.” *Id.* at 972.

¹¹⁹ *Id.* at 922.

¹²⁰ *Id.* at 971.

¹²¹ *Id.* at 977 (stating that “[w]hile affirmative action, as currently practiced, is a clumsy proxy for fulfilling at least the ‘moral’ mandate to target its intended beneficiaries,

could be accomplished by schools clarifying how they define and weigh diversity in college applications.

These distinctions become especially salient when considering the prevalence of Black students from economically advantaged¹²² backgrounds at elite schools. It is well-documented that “highly selective colleges, epitomized by the Ivy League, have seen [B]lack enrollment stagnate, and increasingly they have admitted the sons and daughters of voluntary [B]lack immigrants to the U.S. rather than descendants of enslaved [B]lac[k] [people] forcibly brought to America’s shores.”¹²³ Black immigrants are, on average, more educated than white Americans and native Black Americans, which results in them having a higher proportional representation at selective colleges.¹²⁴ In addition, sociological

the temptation to racialize other minority groups in a vicious fight to the top is all too dangerous if past experience is any indication. Here, too, the remarks of Tucker Carlson come to mind”).

¹²² The Argument, *Affirmative Action and America’s ‘Cosmetically Diverse’ College Campuses*, N.Y. TIMES, at 11:40 (Feb. 9, 2022), <https://www.nytimes.com/2022/02/09/opinion/affirmative-action-the-argument.html> (noting that 2/3 or 70% of Black students at elite colleges are from “economically advantaged” backgrounds). Of course, “economically advantaged” in this context does not necessarily mean “rich,” especially at a school such as Harvard where the median household income is already significantly higher than the national average. The Upshot, *Economic Diversity and Student Outcomes at Harvard University*, N.Y. TIMES, <https://www.nytimes.com/interactive/projects/college-mobility/harvard-university>.

¹²³ Howard Gold, *Opinion: The harsh truth about black enrollment at America’s elite colleges*, MARKETWATCH (June 25, 2020, 9:21 AM), <https://www.marketwatch.com/story/the-harsh-truth-about-black-enrollment-at-americas-elite-colleges-2020-06-25>.

¹²⁴ *Immigrant Blacks More Likely to Attend Elite Colleges*, PHYS.ORG (Aug. 11, 2009), <https://phys.org/news/2009-08-immigrant-blacks-elite-colleges.html> [<https://perma.cc/GGG4-YRCZ>] (“A larger proportion of immigrant [B]lack high school graduates attend selective colleges and universities than both native [B]lack and white students in America, according to a study by sociologists at Johns Hopkins University and Syracuse University.”). See also Monica Anderson & Phillip Connor, *Sub-Saharan African Immigrants in the U.S. Are Often More Educated Than Those in Top European Destinations*, PEW RSCH. CTR. (April 24, 2018), <https://www.pewresearch.org/global/2018/04/24/sub-saharan-african-immigrants-in-the-u-s-are-often-more-educated-than-those-in-top-european-destinations/> [<https://perma.cc/P3UD-Z7K3>] (“Immigrants from sub-Saharan Africa ages 25 and older in the U.S. not only stand out from those in Europe, but they are also more likely than the overall U.S.-born population to have at least some college experience (69% vs. 63%)”); *Immigrants from Africa Boast Higher Education Levels Than Overall U.S. Population* 1, NEW AM. ECON. (Jan. 11, 2018), <https://www.newamericaneconomy.org/press-release/immigrants-from-africa-boast-higher-education-levels-than-overall-u-s-population/> [<https://perma.cc/856L-7BZV>] (“These immigrants naturalize at high rates, they attain higher levels of education than the overall U.S. population as a whole, and are more likely to have earned their degree in a Science, Technology, Engineering, and Math, or STEM, field.”).

Black immigrants also have higher median incomes than native Black people due to their higher levels of education in their home countries and domestically. Anderson, *supra* note 104. Furthermore, “[i]mmigrant [B]lack and white children are more likely than native [B]lack children to come from two-parent households and to attend private schools, two factors that have been shown to have a positive impact on attending an elite college.” PHYS.ORG, *supra* note 124. Indeed, many of the most prominent Black political figures in recent memory—Barack Obama, Kamala Harris, and Colin Powell—are all the children of immigrants. Despite being only about 10% of Black Americans, Black immigrants are well represented in elite educational spaces. See Christine Tamir & Monica Anderson, *One-in-Ten Black People Living in the U.S. Are Immigrants* 15, PEW RSCH. CTR. (Jan. 20, 2022), <https://www.pewresearch.org/race-ethnicity/2022/01/20/one-in-ten-black-people-living-in->

factors likely contribute to the relative success of African immigrants in the United States and to their disproportionate representation at top schools.¹²⁵

Even when selective colleges do seek out low-income Black students, they tend to pull from a small set of elite private schools.¹²⁶ Schools do not seriously recruit Black talent from average or underperforming public high schools that Black students are far likelier to attend.¹²⁷

To be clear, students from immigrant backgrounds have earned their spots. And they surely contribute to diversity of the student bodies at elite schools. Harvard can and should admit African students if they are qualified. Harvard should not, however, pass their presence off as evidence of its implicit commitment to correcting past discrimination because its current admissions practices, in reality, evince no such commitment. The

the-u-s-are-immigrants/ [https://perma.cc/B7K3-6SXJ]; see also PHYS.ORG, *supra* note 124 (noting that “among immigrant [B]lack students, those who either immigrated with their families or are American-born children of immigrants, 9.2 percent were enrolled in elite colleges such as those in the Ivy League, compared with 2.4 percent of other [B]lack students and 7.3 percent of white students”). African immigrants are assumed to enjoy other potential advantages that ease acculturation in American society, such as positive stereotypes of hard-working immigrants and “psychological advantages” such as being from a majority-Black country in which positive role models abound and which, absent a race-based caste system, leads many immigrants and their children to be optimistic about their prospects for success in the United States. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 Vand. L. Rev. 1141, 1152 (2007) (describing the growing exclusion of native Black students at elite colleges and arguing that admissions offices should give increased weight to Black applicants’ “ancestral heritage” to more fully deliver on the promises of the diversity rationale and affirmative action).

¹²⁵ Onwuachi-Willig, *supra* note 124, at 1169-1170 (discussing the differing impact of “oppositional culture” on native and immigrant Black people). Onwuachi-Willig discusses additional social factors that might ease the transition of immigrant and mixed-race students to elite environments: “Overall, factors such as living in integrated neighborhoods, attending integrated schools and programs, and having a diverse group of friends in high school may present an advantage for [these students] because they allow for greater familiarity with integrated environments and allow for the opportunity of an easier transition for these students in predominantly white college environments, which studies have repeatedly shown can be alienating for students of color.” *Id.* at 1174. Onwuachi-Willig also writes that “to the extent that there are positive stereotypes about [B]lack immigrants and mixed-race people, such perceptions may transform into psychological benefits that enable a certain kind of psychic freedom from the racial stigma and disadvantage that legacy Black people may have a harder time obtaining because of pervasive, negative stereotypes about African-Americans.” *Id.* at 1177.

¹²⁶ These students have been deemed the “privileged poor” due to the scarcity of low-income students at schools like Phillips Exeter and Harvard Westlake. Admissions officers seem to value students from these schools because they satisfy a diversity quotient without requiring enhanced outreach to schools that are not elite feeder schools. For more, see generally ANTHONY A. JACK, *THE PRIVILEGED POOR* (2019); see also Gold, *supra* note 123.

¹²⁷ Gold, *supra* note 123. Also consider Lani Guinier’s words in *The Boston Globe* almost two decades ago: “Many colleges rely on private networks that disproportionately benefit the children of African and West Indian immigrants who come from majority [B]lack countries and who arrived in the United States after 1965. Affluent, well-educated new immigrants from South America bolster Latino diversity statistics while the children of migrant farm workers are left behind.” Lani Guinier, *Our preference for the privileged*, BOS. GLOBE, July 9, 2004, at A13, http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2004/07/09/our_preference_for_the_privileged?pg=full.

import of viewing this debate through the appropriate lens cannot be understated.¹²⁸ SFFA and ADOS—groups that effectively pit minorities against one another in a struggle for resources—demonstrate well how these conversations can be weaponized to push for policy preferences that may ultimately have little to do with the purported question before a court (or the court of public opinion) and may in fact do further harm to all marginalized communities. It is therefore paramount that greater ethnic and socioeconomic diversity not come at the expense of groups benefitting from the current system of affirmative action.

Diversity's amorphous character provides universities an admissions criterion as laudable as it is malleable. Even when "diversity" was a viable admissions justification, elite schools were not especially concerned with its proper meaning. For example, in the aforementioned *Times* piece, then-Harvard President Lawrence H. Summers declined to comment on this issue, and Lee C. Bollinger, then-President of Columbia University (the same "Bollinger" defending the University of Michigan's admissions policies in the *Gratz* and *Grutter* cases), said that a Black applicant's ancestry should not matter "for purposes of admissions," arguing that the "differential effect" of whether one "[grew up] [B]lack or white" is the real basis for affirmative action.¹²⁹ Their responses—and their lack of attention to potential differences among Black applicants—are not surprising. One former executive at an SAT test development company noted that colleges had "found an easy way out" by admitting high-performing Black students from immigrant families, as higher education institutions were no longer connected to the civil rights movement in the ways they had been previously.¹³⁰ Still, universities like Harvard tout their commitments to the ideals of "diversity," "equity," and "inclusion,"¹³¹ words that carry social justice undertones and that suggest a commitment to remedying past harms in pursuit of a more just society. Smiling Black and Brown faces populate any given school's admissions brochure, and one can hardly imagine an alumni donation mailer not featuring a note from an underprivileged ethnic student discussing how a benefactor's generosity has helped finance their education at their dream school.¹³² This veneer of a multi-ethnic utopia starkly contrasts with the reality at elite schools.

¹²⁸ "Just as native [B]lack Americans will seek recourse for the preferred status of immigrants, so too will the preferred status of [B]lack [Americans] in admissions become the predicate on which either Latinos or Native Americans will challenge their status. Further, with Asians, Asian Americans, and Caucasian women being among the greatest beneficiaries of affirmative action, it might be reasonable to believe that another inter-group conflict is inevitable. . . A divide-and-conquer strategy cannot be too far away." Dyson, *supra* note 111, at 974.

¹²⁹ Dyson, *supra* note 111, at 970.

¹³⁰ *Id.* at 989.

¹³¹ *Equity, Diversity, and Inclusion*, HARV. COLL. DEAN of STUDENTS OFF. (last visited Apr. 20, 2024), <https://dso.college.harvard.edu/inclusion-belonging-team> [<https://perma.cc/H9HK-LQZJ>].

¹³² For more on the deceptive diversity of college brochures, see Deena Prichet, *A Campus More Colorful Than Reality: Beware That College Brochure*, NPR (Dec. 29, 2013, 10:31 AM), <https://www.npr.org/2013/12/29/257765543/a-campus-more-colorful-than-reality-beware-that-college-brochure> [<https://perma.cc/LNX8-9UVU>] (discussing the "inflated diversity" of certain colleges' marketing materials); Annie Murphy Paul, *When Images of Diversity Don't Match Reality*, HUFFPOST (last updated March 11, 2014), https://www.huffpost.com/entry/when-images-of-diversity-_b_4934767

The diversity rationale was an all-in-one tool at the disposal of admissions offices everywhere. The language of diversity allowed universities to justify virtually any combination of non-white, non-male persons in their classes. Social attitudes regarding who exactly is “diverse” are constantly changing. Therefore, schools could espouse their commitment to attaining diversity in whatever mode it was presently fashioned.

D. Quantification Conundrum: Diversity’s Line-Drawing Problem

As in Brazil, racial classifications grow exponentially more complicated with the increasing number of people identifying as mixed-race, biracial, or multiracial. Given the pluralities and subjectivity involved in racial self-identification, the term “diversity” problematizes what would ideally be an objective line drawing exercise for affirmative action purposes. For example, the most recent U.S. census revealed an increase in non-Hispanic Americans who identify as multiracial, surging from six million to 13.5 million, a 127% increase over the last decade.¹³³ Including multiracial Hispanics, the total number of mixed-race Americans increased by 276%, and the group now represents about ten percent of the population.¹³⁴ An uptick in the birth rate of multiracial babies is one obvious explanation. However, changing attitudes toward racial self-identification as well as alterations to the U.S. census itself surely have contributed to this notable increase in people of mixed racial heritage.¹³⁵ Improvements in data processing and coding capacity also strengthened the government’s ability to capture and adequately report the responses provided by census takers.¹³⁶

This shift is significant in several ways, not least of which being its potential impact on considerations of “diversity” and who fits into that framework. As one sociologist noted, “[t]he off-the-shelf standard American is going to be some kind of blend of Asian, Latino[,] and white. The big

[<https://perma.cc/PU6B-4D38>] (presenting the findings of multiple studies highlighting discrepancies between the overrepresentation of students of color in college marketing materials and their actual numbers on campus and noting that the lived experiences of those students often differ from the versions presented in these materials); Nathan Willers, *Marketing Authenticity in Higher Education*, INSIDE HIGHER ED (June 24, 2019), <https://www.insidehighered.com/blogs/call-action-marketing-and-communications-higher-education/marketing-authenticity-higher> [<https://perma.cc/XMA4-MHZ8>] (documenting the use of digitally altered images in college admissions materials to promote false notions of campus diversity). Curiously, schools devote comparatively fewer pages to espousing the benefits of legacy admissions, despite the far larger number of legacy students on campus.

¹³³ *Race and Ethnicity in the United States: 2010 Census and 2020 Census*, UNITED STATES CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html> [<https://perma.cc/V52P-SVQH>].

¹³⁴ *Id.*

¹³⁵ Sabrina Tavernise et al., *Behind the Surprising Jump in Multiracial Americans, Several Theories*, N.Y. TIMES (Aug. 13, 2021), <https://www.nytimes.com/2021/08/13/us/census-multiracial-identity.html?smid=tw-nytimes&smtyp=cur> (describing this “surprising jump” in multiracial Americans in census data). For example, until the year 2000, the U.S. Census Bureau only permitted one response for race per person, but in the 2020 census, write-in lines were added under the boxes for Black and white, allowing respondents to describe their racial backgrounds in greater detail. United States Census Bureau, *supra* note 133.

¹³⁶ *Id.*

question always is, how do Blacks fit in.”¹³⁷ African Americans are the “one group that was never allowed to cross the line into whiteness,” but, in a world that may soon place less social cache on “whiteness,” it is less than clear how “blackness” may be defined in any context, let alone the highly consequential context of admissions to elite universities. America’s newfound plurality of intersecting racial identities complicates these dynamics, as terms like “diversity” and “white” are sure to take on new meanings as well.

All of this is to say nothing of how race-based admissions tips should work for applicants checking multiple boxes. For example, how should an admissions team score a biracial and self-identified “Black” female applicant who writes about overcoming racial adversity at her elite prep school? How much of a boost does she get? Should she be seen more as a Black student who has overcome obstacles or as a high-performing elite who may not “need” such race-based tips to secure her admission? When one attempts to weigh any of these factors, they introduce subjectivity into an already less-than-straightforward process. This all but ensures that some applicants will feel their rejections from their preferred schools were due to unfair penalizations or for tips given to questionably disadvantaged (and questionably deserving) others, even if those “others” are members of their same group. Such tensions, not unlike those between some “native” Black applicants and the children of immigrants, serve only to weaken support for the use of race in admissions.

If the spirit of the diversity rationale is to persist in some form, it will inevitably encounter problems in quantifying the “Blackness” of multiracial individuals as this demographic group becomes more visible. Even though many schools now include a multiracial option on admissions questionnaires, one can easily imagine frictions emerging when greater numbers of mixed-race individuals, people who see themselves as Black, are admitted on diversity grounds and are therefore, rightly or wrongly, injected into the affirmative action debate. A proliferation of Black identities does not lend itself to straightforward evaluation in the context of the zero-sum admissions game, and any intraracial conflict would only weaken the power of Black people to advocate for themselves as a collective. Indeed, this phenomenon is not unlike the current dynamics that plague African and Black American students on some college campuses.

Racial identities have never been fixed in the United States of America. Issues of line-drawing can be fatal to any affirmative action regime, and racially and ethnically diverse countries like the United States are uniquely susceptible to these challenges. Indeed, *Plessy v. Ferguson*, which in 1896 enshrined America’s “separate but equal” racial caste system, concerned a Black man who was a so-called “octaroon.”¹³⁸ That is, Mr. Plessy was a person with one-eighth of African blood, the equivalent of one great-grandparent, but enough African ancestry to be considered “Black” in 1892 America. Would a person with phenotypically European features that has a Black great-grandparent be considered “Black” today? Would the question even arise—now or then—if not for phenotypical

¹³⁷ *Id.*

¹³⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

expression? More interestingly, was the standard even applied consistently in 1892 America? Some research suggests that it was not.

An economics paper by Ricardo Dahis, Emily Nix, and Nancy Qian used U.S. census data to document a phenomenon in which over 300,000 Black males self-identified as—or “passed for”—white between 1880 and 1940 (with thirty percent of them “reverse passing” as Black in the following census).¹³⁹ The authors use census data to examine the high rate at which Black males in the U.S. changed their racial self-identification during the height of Jim Crow and anti-miscegenation laws. In addition to their statistical modeling, the authors provide large amounts of anecdotal data suggesting the various reasons that these presumably Caucasian-looking Black men chose to “pass” as white (largely due to a lack of social and economic opportunities for Black men).¹⁴⁰ Facing discrimination in education, housing, and employment, many Black males saw the ability to re-brand themselves as white as a chance at a better life.¹⁴¹

In an age where racial categories are more fluid than ever before, one can imagine a scenario where a “borderline” diverse applicant is admitted due to their perceived contributions to campus diversity, only to find that this applicant does not actually share lived experiences with the marginalized group that they claimed in their application. Imagine a wealthy biracial male admit (with minimal Black phenotypical expression) who, upon matriculation to Harvard, does not socialize with other Black students and does not offer a “unique” (i.e., “Black”) perspective in class. Does the “diversity” this student brings meaningfully contribute to the growth of his peers? Does it matter that this student chooses not to engage with on-campus Black programming or that he is otherwise socially and economically indistinguishable from his white peers? More consequentially, does it matter that this same applicant highlighted his Blackness to give himself an edge in admissions?

The phenomenon of racial amnesia was not reserved for white-passing Black people. Many of this nation’s “white” majority, especially in the Deep South, are less “white” than they allow themselves to believe. This phenomenon was illuminated in a study published in *The American Journal of Human Genetics*, which showed through examination of genetic

¹³⁹ Ricardo Dahis et al., *Choosing Racial Identity in the United States, 1880-1940*, NAT’L. BUREAU of ECON. RSCH., 2-3 (2019), https://www.nber.org/system/files/working_papers/w26465/w26465.pdf. The study focused on Black men in part because of the difficulty of tracking Black women, whose names might change with marriage, from census to census.

¹⁴⁰ Of course, mixed-race people have always existed, but acknowledgement of such a fact was in tension with attitudes of white supremacy and white racial purity of the past several centuries. To admit that mixed-race individuals were anything more than anomalies—despite empirical evidence to the contrary—would have posed an existential threat to the American project of white racial superiority. Ideas like the need for racial segregation would have immediately been called into question. Indeed, the very idea of “whiteness” would have been less absolute than many civic, intellectual, and religious leaders of the day would have preferred. For a helpful primer on this paper, see The Weeds, *The Never Ending Election Story*, VOX, at 39:35 (Nov. 2020), <https://open.spotify.com/episode/0QluGZdvuc5lFtt2ygnEtC> [<https://perma.cc/KGA2-QRF5>].

¹⁴¹ Though, of course, this transformation incurred heavy costs in many cases such as abandoning family members who could not or would not assimilate and moving away from one’s community. See generally Dahis et al., *supra* note 139, at 13.

data that many white Americans have significant and recent Black ancestry.¹⁴² The researchers found that Americans with less than twenty-eight percent of African ancestry—that is, more than twice the amount of Black blood that Plessy had—tended to identify as some type of European American as opposed to African American. Ironically, especially in the South, a large portion of these white people have enough Black ancestry to make them “Black” under the “one drop” rule (an adage that if a person had even “one drop” of Black blood, they were socially and legally considered Black). In an appreciable sense, despite the racial tensions characteristic of the American South, many of its most stridently anti-Black racists are themselves “Black,” illustrating the incredibly complex ways in which notions of race inform America’s view of its history.¹⁴³

Like its Brazilian counterpart, the U.S. government is ill-equipped for such line-drawing exercises in the complicated area of race. Indeed, one does not want the government to formalize (again) the very types of racial quotients that plagued this country’s past. Nor should any government branch have the power to enforce, investigate, and evaluate one’s heritage, a practice that is, at best, invasive and, at worst, dehumanizing. The aforementioned Brazilian case study provides ample evidence that such systems are often flawed, and one wonders if a workable scheme even exists. Moreover, it is not clear that granting the government broad investigative authority would not result in further violence upon Black and Brown bodies—an unjustifiable outcome in any context—in pursuit of quantifying something that is not easily quantifiable.¹⁴⁴ Even the Supreme Court has tacitly recognized the difficulty of racial quantification.¹⁴⁵

¹⁴² See generally Katarzyna Bryc et al., *The Genetic Ancestry of African Americans, Latinos, and European Americans across the United States*, AM. J. HUM. GENETICS (Dec. 18, 2014), [https://www.cell.com/fulltext/S0002-9297\(14\)00476-5](https://www.cell.com/fulltext/S0002-9297(14)00476-5). For additional media reporting on the article, see Jenée Desmond-Harris, *Here’s where ‘white’ Americans have the highest percentage of African ancestry*, VOX (last updated Feb. 20, 2015, 2:22 PM), <https://www.vox.com/2014/12/22/7431391/guess-where-white-americans-have-the-most-african-ancestry> [<https://perma.cc/Y7PU-S57C>]; and Lizzie Wade, *Genetic study reveals surprising ancestry of many Americans*, SCIENCE (Dec. 18, 2014), <https://www.science.org/content/article/genetic-study-reveals-surprising-ancestry-many-americans-rev2>.

¹⁴³ The researchers also found that around 19% of self-identified Black folks had white ancestry linked to a European male, often appearing in the early 1800s. This fact squares with the routine and systematic rape of enslaved women at the hands of white men when slavery was still legal in the States, which produced many mixed-race children who were at once their fathers’ illegitimate children and legal livestock. As Harriet Jacobs wrote, “[w]hat tangled skeins are the genealogies of slavery!” HARRIET JACOBS, INCIDENTS IN THE LIFE OF A SLAVE GIRL 70 (2016) (protagonist discussing the complicated feelings engendered by the birth of her daughter due to the difficulties of life as an enslaved woman).

¹⁴⁴ Rani Molla, *Genetic Testing Is an Inexact Science with Real Consequences*, VOX (Dec. 13, 2019), <https://www.vox.com/recode/2019/12/13/20978024/genetic-testing-dna-consequences-23andme-ancestry> (detailing some of the dangers and potential misuses of imperfect genetic testing procedures).

¹⁴⁵ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007) (noting that, in striking down schools’ racial balancing schemes, “[e]ven when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and [B]lack/‘other’ terms in Jefferson County”). The footnote to this section also noted that multi-racial applicants were either rejected or placed into a single racial category: “Upon enrolling their child with the district, parents are required to identify their child as a member of a particular racial group. If a parent identifies more than one race on the form, [t]he application will not be accepted and,

Finally, the centralized collection of genetic information at a massive scale should caution anyone who sees this approach as viable.¹⁴⁶

IV. TRAUMA PORN AND INTROSPECTIVE ELITES: LEGAL AND SOCIAL IMPLICATIONS OF THE DIVERSITY RATIONALE

A. The Politics of Trauma: The “Adversity” Narrative

Prior to diversity’s downfall, a chorus of voices in academic spaces and elsewhere have cited the discrimination to which the diversity rationale’s employment ultimately subjects students of color.¹⁴⁷ Before many of them ever set foot on a university campus, let alone fabled collegiate institutions such as Harvard, Black and Brown students of color must master the art of the college application essay—an exercise that for non-wealthy, non-white students often involves a sort of commodification of one’s experiences, packaging them in the tight confines of a 500-ish-word essay meant to show how an applicant has “overcome adversity” or risen above challenging circumstances, as requested by an oft-ambiguous essay prompt. This nearly ubiquitous application requirement, the so-called “adversity narrative,” forces students to “reduce their own lives to stories of hardship,” as one writer put it.¹⁴⁸ These essays serve the legitimate purpose of helping admissions committees calibrate their admissions criteria to account for opportunities various students have or have not had.¹⁴⁹

College essay prompts clumsily (or dangerously) cast applicants’ identities and backgrounds in the same mold as “talents” or “hobbies.” That

if necessary, the enrollment service person taking the application will indicate one box.” *Id.* at n.11.

¹⁴⁶ See, e.g., Eric Rosenbaum, *5 biggest risks of sharing your DNA with consumer genetic-testing companies*, CNBC (June 16, 2018, 2:18 PM), <https://www.cnbc.com/2018/06/16/5-biggest-risks-of-sharing-dna-with-consumer-genetic-testing-companies.html> [<https://perma.cc/464W-HTEJ>] (surveying various risks of sharing genetic information with genetic testing services); and Julian E. Barnes, *U.S. Warns of Efforts by China to Collect Genetic Data*, N.Y. TIMES (Oct. 22, 2021), <https://www.nytimes.com/2021/10/22/us/politics/china-genetic-data-collection.html> (documenting China’s efforts to collect genetic data to build the world’s largest bio-database and warning that U.S. agencies should be doing more to secure critical technologies in that space).

¹⁴⁷ See generally Casey Quinlan, *5 Things That Make It Hard To Be A Black Student At A Mostly White College*, THINKPROGRESS (Jan. 25, 2016), <https://archive.thinkprogress.org/5-things-that-make-it-hard-to-be-a-black-student-at-a-mostly-white-college-33ef44abe034/> [<https://perma.cc/UC76-VFUM>]; Gabriela Thorne, *For Students of Color, Ivy League Schools Have a Long Way to Go*, THE NATION (Jan. 25, 2018), <https://www.thenation.com/article/archive/for-students-of-color-ivy-league-schools-have-a-long-way-to-go/> [<https://perma.cc/6ZVL-YY5E>].

¹⁴⁸ Rose Courteau, *The Problem With How Higher Education Treats Diversity*, THE ATLANTIC (Oct. 28, 2016), <https://www.theatlantic.com/education/archive/2016/10/trading-identity-for-acceptance/505619/> [<https://perma.cc/5TFC-F89W>].

¹⁴⁹ *Id.* Ironically, *SFFA* may serve only to reinforce these trauma narratives, as minority applicants may no longer tick a racial box on their application, tacitly signaling to an admissions committee the hardships inherent in that classification. Rather, the High Court leaves room for these students to discuss race in other ways, such as through their admissions essays—the weight of which will surely grow in the wake of the decision. Applicants will be incentivized to cram even more parts of their identity into those precious few paragraphs, but, perhaps, their ability to do so is itself a form of meritocracy.

is, applicants are invited to inform admissions committees how their non-white, non-middle-class upbringings are a neat quirk that make them worthy of admission. Because of this mold, white students are more likely to see their ethnic peers as window dressing for their educations, figures to be interacted with in pursuit of personal growth.¹⁵⁰ But such a framing proves dangerous. The trauma essay reduces racial groups to monoliths: a smart-but-fungible Asian or a Black kid from the inner city. Whether the Black kid is actually from the inner city and whether the Asian student enjoys a multifaceted existence prove irrelevant to their peers. Similarly, whether the Black student is even a “diversity admit” (and whether the Asian student is not) prove immaterial once snap judgments are made.

Unfortunately, the reality inside university classrooms differs substantially from what the array of smiling Benetton faces on school websites and brochures would suggest.¹⁵¹ A great irony—in truth, a great failing—of the U.S. education system is that the very need for a “balanced diet of multiculturalism” consumed by white college students stems from the widespread racial segregation and rapid resegregation of American primary and secondary schools.¹⁵² Students today are less likely to have

¹⁵⁰ One article, reviewing a book by Natasha Warikoo, recounts an excellent example of a student who, when asked if diversity created issues for their university, discussed the role of athletes on campus. *Id.* The student initially felt athletic recruits had an unfair advantage, but they eventually came to see student-athletes as merely bringing a different type of qualification to the school—a realization that came after going to football games, which the student viewed as a “fun” part of student life. The implication here is that, because the athletes provide entertainment to the broader student populace, they are worthy of admission. The article then invites readers to swap the word “athletes” with “poor” or “minority”—a subtle change that makes clear the danger in this mode of thinking. This view of merit is dangerous because the underlying assumption is that students not fitting the traditional mold (i.e., white and middle-class students with good test scores) must justify their place on campus some other way, lest they be considered free riders undeserving of the benefits of an elite education. In reality, these students in many cases have done more with fewer resources, and they may well be more “deserving” than their more privileged peers who simply used the tools in front of them to reach the same destination. Some would argue that fact alone should warrant greater admission of underserved populations to elite institutions. Regardless, diversity is not a “talent” and should not be considered as such. Such a framing, however well-intentioned, treads precariously close to dehumanizing applicants. Such practices center the growth of white students and reduce others to mere stock characters along the road of that student’s enlightenment; rather, these nonwhite students should be at the center of their own stories and viewed as fellow travelers on the road to enlightenment.

¹⁵¹ See generally Pritchep, *supra* at 132; Paul, *supra* at 132. If schools invested even half the resources in fostering diversity that they invest in maintaining the *appearance* that they do so, perhaps there would be little need for papers like this one.

¹⁵² Courteau, *supra* note 148. See also Keith Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html>; Will Stancil, *School Segregation Is Not a Myth*, THE ATLANTIC (March 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614/>; Gloria J. Browne-Marshall, *Busing Ended 20 Years Ago. Today Our Schools Are Segregated Once Again*, TIME (Sept. 11, 2019, 8:12 AM), <https://time.com/5673555/busing-school-segregation/>; Erica Frankenberg, *What school segregation looks like in the US today, in 4 charts*, THE CONVERSATION (July 19, 2019, 7:35 AM), <https://theconversation.com/what-school-segregation-looks-like-in-the-us-today-in-4-charts-120061>.

grown up in socioeconomically or racially diverse neighborhoods, so many middle- and upper-class college freshmen have their first substantive interactions with low-income and non-white persons on a college campus.¹⁵³ The onus—at times implicit, at times explicit—is constantly on minority students to be representatives of the racial or affinity groups to which they belong. Voluntarily joining the Black student union is one thing; being asked during or after a class discussion to explain how systemic racism has specifically affected *you* is another matter. The push for this pre-packaged diversity often results in Black students feeling like caricatures, two-dimensional guides whose purpose is to educate their affluent white peers in their journey to enlightenment. It is not hyperbole to say that, in many higher education institutions, white growth comes at the expense of Black pain. Moreover, diverse students are not compensated for this involuntary labor, and they must grapple with these incidents in addition to their other responsibilities as college students. Many Black students struggle to adjust to their new normal, and this difficulty can manifest as lower grades, decreased motivation and extracurricular involvement, and a host of other symptoms.¹⁵⁴ The very experiences and difficulties these students overcame to gain admittance to these institutions all too often serve as a source of cultural vertigo during interactions with more privileged peers.¹⁵⁵ The subject matter of their essays—the stories that have made them the exceptional candidates they are—may prove less intelligible to privileged classmates, resulting in a feeling of whiplash or otherness when these differences surface.¹⁵⁶

When POC students are reduced to the adversities they have overcome, their humanity is stripped away. The Supreme Court has shown some concern for this stereotyping argument. In discussing “serious problems of justice connected with the idea of preference itself,” the majority in *Bakke* noted that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”¹⁵⁷ That is, racial preferences in admissions carry the implication that the beneficiaries of these policies are, on the whole, less

¹⁵³ See e.g., Patrick Sharkey, *Rich Neighborhood, Poor Neighborhood: How Segregation Threatens Social Mobility*, BROOKINGS (Dec. 5, 2013), <https://www.brookings.edu/blog/social-mobility-memos/2013/12/05/rich-neighborhood-poor-neighborhood-how-segregation-threatens-social-mobility/> [https://perma.cc/ME6J-KTX9]; Richard Rothstein, *Modern Segregation*, ECON. POL’Y INST. 3 (March 6, 2014), <https://www.epi.org/publication/modern-segregation/> [https://perma.cc/QR99-GQFX] (arguing that “the racial segregation of schools has been intensifying because the segregation of neighborhoods has been intensifying”).

¹⁵⁴ Thorne, *supra* note 147.

¹⁵⁵ These issues may be exacerbated at institutions like Harvard and at selective liberal arts colleges like Trinity College, where students—especially low-income students of color—may struggle to adjust to the culture of wealth and privilege into which their rich white classmates were born. See generally Tough, *supra* note 34.

¹⁵⁶ The fictional Frank Gallagher put it thusly: “I can’t think of a better use of tokenism than to promote diversity.” *Shameless*, season 8, episode 4 at 14:20 (Showtime Nov. 26, 2017) (story arc involving a Black child serving as a diversity admit in a cosmopolitan, liberal prep school in Chicago).

¹⁵⁷ *Bakke* at 438 U.S. at 298 (referencing *DeFunis v. Odegaard*, 416 U.S. 312, 416 U.S. 343 (1974) (Douglas, J., dissenting)).

qualified than those admitted through other means.¹⁵⁸ When admittances of non-white students to elite universities carry the implication of being due in large part to the benevolence of high-minded admissions committees, even the most liberal white students that populate college campuses may find it hard to fight their biases and presuppositions. The ongoing failure to more accurately define and apply the diversity rationale furthers this misunderstanding.

Similarly, the ways in which race and class (the latter not being a legally protected status) interact also illuminates some of the diversity rationale's shortcomings. One need look no further than the lack of socioeconomic diversity at schools like Harvard, a well-documented fact that Harvard itself seems to recognize, to illustrate this point.¹⁵⁹ While Harvard's classes in recent years have become more racially diverse, income diversity has remained elusive.¹⁶⁰ That is, elite schools like Harvard provide an academic playground in which the many-hued children of doctors and lawyers can commingle; the perspective of, say, a teacher's or a plumber's child—of any color—will be in shorter supply. While non-white elites surely still bring a unique perspective to these campuses,¹⁶¹ it is not hard to imagine the ways in which their viewpoints converge with those of their white peers.¹⁶² Indeed, the most privileged members of any

¹⁵⁸ *Id.* Furthermore, the Court said that “transitory considerations” of which groups should be given preference were subject to the political process and inconsistent application, foreclosing the idea that race-based preferences in admissions could be used to correct for past societal discrimination.

¹⁵⁹ See, e.g., Marina N. Bolotnikova, *Harvard's Economic Diversity Problem*, HARVARD MAGAZINE (Jan. 19, 2017), <https://www.harvardmagazine.com/2017/01/low-income-students-harvard#:~:text=Harvard%20College%20has%20almost%20as,in%20the%20top%20%20percent> [<https://perma.cc/8ET6-QZUF>] (noting that, in recent years, more than half of Harvard students come from the top 10% of the income distribution in the United States and that Harvard had “almost as many students from the nation's top 0.1 percent highest-income families as from the bottom 20 percent”); The Upshot, *Some Colleges Have More Students From the Top 1 Percent Than the Bottom 60. Find Yours.*, N.Y. TIMES (Jan. 18, 2017) <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> [<https://perma.cc/Q45Y-BY89>] (visualizing results of 2017 Raj Chetty study on income mobility in American colleges and universities, showing that the median family income of a Harvard student is \$168,800 and 67% of students come from the top 20 percent of the income distribution); Max Larkin, *Harvard Has Become More Racially Diverse, But Most Of Its Students Are Still Really Rich*, WBUR NEWS (October 24, 2018), <https://www.wbur.org/news/2018/10/24/harvard-diverse-wealth> [<https://perma.cc/PLX8-49MW>] (2018 report on the *SFFA* case and on Harvard's lack of socioeconomic diversity).

¹⁶⁰ Larkin, *supra* note 159 (noting that Harvard's 2018 class was its “most diverse” up to that point but that this description applies to race, not socioeconomic status or class, as Harvard continues to lag behind other schools in diversifying its student body along socioeconomic lines by admitting poorer students).

¹⁶¹ Though, again, one must consider whether “non-white” includes biracial (in this context, half-Black students with one white parent) who are disproportionately represented at elite schools relative to their percentage of the population.

¹⁶² This is why the disproportionate representation of mixed-race and immigrant students presents a missed opportunity to have a more robust diversity of viewpoints and experiences represented on elite campuses. Native Black students, who are more likely to come from a lower socioeconomic stratum than other types of Black students, provide meaningful diversity in that they can speak to, for example, the interaction of poverty and race—a phenomenon that other types of Black students may not have experienced. Without these perspectives, white and other students on elite campuses are receiving a much

group—even a marginalized one—are likely to have at least some commonalities with the elites of the majority group.¹⁶³ And does this limited type of diversity feed into the “critical mass” justification of diverse students that the Court blessed in *Grutter*?¹⁶⁴

At present, colleges cannot say that they are educating a “representative group of future leaders” due to the growing exclusion of native Black Americans from their campuses.¹⁶⁵ Professor Gates summarizes: “If [affirmative action is] about getting [B]lack faces at Harvard, then you’re doing fine. If it’s about making up for 200 to 500 years of slavery in this country and its aftermath, then you’re not doing well.”¹⁶⁶ He continues: “And if it’s about having diversity that includes African-Americans from the South or from inner-city high schools, then you’re not doing well, either.”¹⁶⁷ Anthony W. Marx, a former president of Amherst College, similarly noted that the exclusion of Black students with predominantly American roots deprives campuses of “voices that are particular to being African-American, with all the historical disadvantages that that entails.”¹⁶⁸ The *Times* article closes with a Harvard student recalling that the school discouraged him and his classmates from

narrower view of the lived realities of non-wealthy Black Americans, depriving them of a more multifaceted and pluralistic education that the Court blessed in *Bakke*. As Onwuachi-Willig writes, “insofar as first- and second-generation Blac[k] [students] and mixed-race students tend to be of a more privileged socioeconomic and educational class, the disproportionate percentage of them on elite college campuses may paint a distorted view of [B]lack achievement and advantage to many of the future leaders of the world.” Onwuachi-Willig, *supra* note 124, at 1185. Onwuachi-Willig later states that “[w]ithout exposure to the diverse ideas and viewpoints that may stem from legacy Blac[k] [students] in the classroom and beyond, cross-racial and cultural understanding and exchange is diminished on campus, thus lessening the promotion of better learning outcomes.” *Id.* at 1213.

¹⁶³ Consider the words of J. Harvie Wilkinson III in 1979, describing the challenging integration processes in Virginia and North Carolina in the mid-twentieth century: “The token [B]lack people that whites first encountered would be elite members of the race, carefully selected by white pupil-placement boards from those [B]lac[k] [students] courageous and determined enough to apply to white schools in the first place. Thus, favorable first impressions would be formed; integration would brightly begin.” J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* at 86 (Oxford University Press, 1979). Wilkinson ultimately concluded that this rationale was “insulting,” but the description of the Black people leading the charge for school desegregation in the 1950s and 60s hardly differs from the Black people most likely to be found at elite schools today; in fact, many of today’s non-immigrant Black elites are the descendants of those “courageous and determined” few who integrated white schools and benefitted from their credentialing.

¹⁶⁴ *Grutter*, 539 U.S. at 340. The Court in that case found a compelling interest in diversity and in admitting a “critical mass” of diverse students such that these students feel comfortable expressing different viewpoints, debunking stereotypes, and facilitating a robust exchange of ideas. Recall that the court in *Bakke* did not limit diversity to race. *Bakke*, 438 U.S. at 315 (“Petitioner’s special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity” (emphasis in original)).

¹⁶⁵ Onwuachi-Willig, *supra* note 124, at 1214.

¹⁶⁶ Rimer & Arenson, *supra* note 114.

¹⁶⁷ *Id.* Thomas Chatterton Williams, in discussing his evolving opinion of race-based affirmative action, has expressed similar opinions: “I don’t know what it means to say that [B]lack people in this country have been enslaved and then suffered through decades of Jim Crow and were redlined out of wealth, but we’re going to accept this Nigerian daughter of professionals to Harvard, and that’ll check the [B]lack’ box.” The Weeds, *On biracial identity (with Thomas Chatterton Williams)*, VOX, at 36:31-36:51 (Oct. 2020), <https://open.spotify.com/episode/3ozIwN7jDf4B3ic5hSYrud?si=81ff654d84474f08>.

¹⁶⁸ Rimer & Arenson, *supra* note 114.

collecting data on the backgrounds of their Black peers. The reasons for Harvard's alleged interference are not clear.¹⁶⁹

It is unfair to place students of color, irrespective of background, in situations in which they are expected to represent their group—that is, to perform their race—for the consumption of their white peers. All students should expect to be free to enjoy the benefits of the education they receive; they should not be forced to do the additional unpaid labor of educating their peers on the respective communities to which they belong. If not, schools will be in danger of perpetuating a kind of “enlightened minstrelsy” in which students of color are admitted to elite schools only to perform their trauma under the guise of “class participation” or “dialogue” solely for the edification of white children. Schools valuing diversity must ensure that their students are more than their backgrounds and that all students are able to take advantage of the immense resources that higher education can provide. If not, schools risk perpetuating a perverse reality in which “[i]nstitutions of higher learning favor grievance without the aggrieved; they want to hear the song of the marginalized without doing anything to ensure more of the marginalized ascend to the university’s gilded platforms to sing it.”¹⁷⁰

V. A MUTILATED MERITOCRACY: FAILED SOLUTIONS TO THE DIVERSITY RATIONALE’S SHORTCOMINGS

The next two subsections lay out potential “solutions” to the problems posed by the diversity rationale before explaining the underlying phenomena that make those solutions unviable. The following subsections are not intended to survey all possible solutions to issues inherent in the diversity rationale; rather, they highlight frameworks that might, under more ideal circumstances, have provided a path forward.

A. Path A: More Diversity

The first and perhaps most obvious solution to the diversity problem is simply to admit more diverse applicants. Increasing the number of Black and Brown students on campuses would surely not have a chilling effect on the conversations that diversity is designed to foster. If students feel that they have a robust, supportive community, they are more inclined to share their individual experiences with a wider audience, as they feel less like a token or representative of their entire group.

However, if schools are aiming only to maintain the aforementioned “critical mass” of diverse students, they are unlikely to see this approach as viable. That is, they have enough “diversity” and may not be keen on altering the formula. The trial court noted that SFFA’s modeling of various

¹⁶⁹ *Id.* It is also curious, considering the centrality of data analytics to modern admissions programs (and the general push for checking as many diversity boxes as possible in a given class), that schools do not seem to track information such as the ethnic breakdown of their Black students.

¹⁷⁰ Jason England, *Why Was It So Easy for Jessica Krug to Fool Everyone?*, CHRON. HIGHER EDUC. (October 2, 2020), https://www.chronicle.com/article/why-was-it-so-easy-for-jessica-krug-to-fool-everyone?emailConfirmed=true&supportSignUp=true&supportForgotPassword=true&email=daniellkees%40gmail.com&success=true&code=success&bc_nonce=zn65vp98hc9up6dt7qoq2&cid=gen_sign_in_

race-neutral alternatives incurred “significant costs” to Harvard.¹⁷¹ For example, the modeling suggested that giving less weight to ALDCs and more to students from lower socioeconomic backgrounds might lead to an increased number of incoming Harvard students indicating an interest in fields such as engineering, a change that would alter the composition of the incoming classes and “would pose administrative and staffing challenges.”¹⁷² The *SFFA* trial court does not investigate whether Harvard, with its \$50-plus billion endowment in fiscal year 2021,¹⁷³ could accommodate such changes in pursuit of diversity, but it does conclude that Harvard demonstrated “that there are no workable and available race-neutral alternatives...that would allow it to achieve an adequately diverse student body while still perpetuating its standards for academic and other measures of excellence.”¹⁷⁴

In presenting the findings of several committees that Harvard convened to study race-neutral alternatives in admissions, the appellate court notes that one committee report found “that Harvard already devotes significant resources to recruitment efforts [for racially and socioeconomically diverse applicants] and that expanding them further would not increase diversity. [The report] said that a more racially diverse applicant pool is itself not helpful.”¹⁷⁵ Expanding the recruitment pool further would simply add more students unlikely to be admitted, according to the report, and might even discourage younger students from applying in the future.¹⁷⁶ The appellate court seemed to take Harvard’s various claims at face value, though there is reason to question whether Harvard’s current recruitment efforts actually square with its proffered justifications.

While schools like Harvard constantly tout their efforts to increase recruitment of minority applicants, research suggests these efforts may be cosmetic. In a working paper that uses admissions data made public in the *SFFA* case, three economists—including Peter Arcidiacono, the aforementioned *SFFA* expert—argue that Harvard recruits students differently depending on their race and in a way that ultimately harms Black applicants.¹⁷⁷ Black students are encouraged to apply to Harvard

¹⁷¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d 126, 182 (D. Mass. 2019).

¹⁷² *Id.*

¹⁷³ HARVARD UNIV., <https://www.harvard.edu/about/endowment/> [<https://perma.cc/TP69-QTCN>] (last visited May 16, 2024).

¹⁷⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 397 F.Supp.3d at 183.

¹⁷⁵ *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157, 176 (1st Cir. 2020).

¹⁷⁶ *Id.*

¹⁷⁷ Peter Arcidiacono et al., *Recruit to reject? Harvard and African American applicants*, NAT’L. BUREAU ECON. RSCH. (November 2019), <https://www.nber.org/papers/w26456> (relying on Harvard admissions data unsealed in the *SFFA* case to argue “that Harvard encourages applications from many students who effectively have no chance of being admitted, and that this is particularly true for African Americans”). For additional reporting on this paper, see Anemona Hartocollis, *That Recruitment Letter From Harvard Probably Doesn’t Mean Much*, N.Y. TIMES (Nov. 29, 2019), <https://www.nytimes.com/2019/11/29/us/harvard-admissions-recruit-letter.html> (outlining the “recruit-to-deny” strategies used by Harvard and other selective schools to boost the number of diverse applicants, even if such applicants have a virtually nonexistent chance of admission).

despite having lower standardized test scores than their white and Asian peers, according to the report.¹⁷⁸ This discrepancy might prove less problematic if Harvard's efforts resulted in greater numbers of Black students actually enrolling in the fall, but the study's authors found that, despite "soaring" numbers of Black applicants to Harvard in recent years, the share of admitted Black students remained stagnant.¹⁷⁹ The authors speculated that Harvard may have been trying to balance out sharp disparities in admissions rates across racial groups by encouraging more Black students to apply, which would have the effect of "downplay[ing] the magnitude of race-based preferences" and avoiding more lawsuits.¹⁸⁰

At trial, Harvard acknowledged that the lower score cutoff was instituted to account for economic disadvantage, as Black and Hispanic students had less opportunity to prepare well for standardized tests. What remains unexplained, however, is why, in light of these efforts, the share of Black students at Harvard and its peer schools has stagnated in the past thirty-plus years. According to analysis by the *New York Times*, Black and Hispanic students are less represented today at top colleges than they were over thirty years ago.¹⁸¹ Schools like Harvard are noted to perform especially poorly in this regard, with the *Times* noting that "Black students [in and around 2017] ma[d]e up nine percent of the freshmen at Ivy League schools but fifteen percent of college-age Americans, roughly the same gap as in 1980."¹⁸² Despite the fact that much of the Supreme Court's most significant affirmative action jurisprudence stems from cases brought against top schools (e.g., University of Michigan, UC Davis, Harvard), these same schools, after vigorously defending the educational benefits of diversity as intrinsic to their mission and to their very existence, do little to actually capitalize on their court wins and fail to meaningfully increase the diversity represented on their campuses.

The Arcidiacono paper's findings bring into question whether Harvard and its peer schools' recruitment practices amount to a "cynical enterprise" in which students are led to believe they are competitive for schools that would never admit them, serving only as admissions cannon fodder to pad the numbers.¹⁸³ Despite yearly national headlines portraying underprivileged youth—often Black youth—winning admission to a

¹⁷⁸ In fact, almost half of the students who qualified for a recruiting letter were members of underrepresented minority groups. Arcidiacono, *supra* note 177.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Jeremy Ashkenas et al., *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (August 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html#:~:text=Even%20after%20decades%20of%20affirmative,is%20virtually%20unchanged%20since%201980> [https://perma.cc/X8VC-D7GQ] (showing in 2017 that, even accounting for the supposed effects of affirmative action policies at the nation's colleges and universities, Black and Hispanic students remain underrepresented relative to their portion of the U.S. college-age population, this underrepresentation being most pronounced at Ivy League and other elite schools).

¹⁸² *Id.* The *Times* continues: "At all eight schools, white enrollment declined as Asian enrollment increased. In recent years, the growth of Asian enrollment has slowed at some schools, and some Asian-American students say they are being held to a higher standard," linking there to a profile about the *SFFA* case.

¹⁸³ Hartocollis, *supra* note 177.

smorgasbord of prestigious schools, these stories are equal parts laudable and curated.¹⁸⁴ The reality is that, as things stand now, the vast majority of Black teenagers applying to these schools will not get in, even to schools that asked them to apply. Of course, this study offers only one view, and more research on this topic is warranted. However, the fact that Harvard, despite its supposedly more aggressive recruitment efforts, chose not to actually *admit* more Black students, while proclaiming that it *wanted* to admit more Black students, raises questions about the school's justifications for its admissions scheme.

B. Path B: Greater Socioeconomic Weighting

Of course, no consideration of solutions to race-based affirmative action is complete without a discussion of socioeconomics.¹⁸⁵ With words such as “class consciousness” re-entering the American zeitgeist, and with the economic forecasts for all but the wealthiest Americans looking ever more grim,¹⁸⁶ the concept of class—a broad term often used in America to encompass socioeconomic, cultural, political, racial, and other affiliations—has reemerged as an uber-salient topic, a lens through which any discussion, even of the most marginalized groups, must be viewed.

A common refrain when listing alternatives to race-based preferences, consideration of an applicant's socioeconomic background makes sense for numerous reasons. For one, socioeconomics strongly correlates to race in this country. If you are Black, you are far likelier to be born into poverty than if you are white.¹⁸⁷ Beyond that, one's financial resources (or lack thereof) can loom large in the creation of one's identity,

¹⁸⁴ See, e.g., Dominique Hobdy, *Black Teen Accepted Into All 8 Ivy League Colleges*, ESSENCE (last updated Oct. 27, 2020), <https://www.essence.com/news/black-teen-accepted-all-8-ivy-league-colleges/> [https://perma.cc/CV5C-THCS] (presenting the story of Kwasi Enin, who in 2014 earned admittance to all the Ivies); Abby Jackson, *This girl is the 2nd student in her public high school to get into all 8 Ivy League schools*, BUS. INSIDER (April 5, 2016, 9:13 PM), <https://www.businessinsider.com/augusta-uwamanzu-nna-was-accepted-into-all-8-ivy-league-schools-2016-4> [https://perma.cc/W72J-PFUS] (Augusta Uwamanzu-Nna, accepted in 2016); and CNN Newsource, *South Florida teen accepted to all 8 Ivy League schools*, WPTV (last updated June 14, 2022, 12:53 PM), <https://www.wptv.com/news/education/south-florida-teen-accepted-to-all-8-ivy-league-schools> [https://perma.cc/4W5Y-KWR2] (Ashley Adirika, accepted in 2022). Notably, reporting suggests all of these students appear to be the children of Black immigrants.

¹⁸⁵ For the purposes of this paper, socioeconomic status can be considered synonymous with class- and income-based considerations except where otherwise noted.

¹⁸⁶ See Paul Constant, *The American middle class used to signify economic security. That's now quickly becoming a luxury only the wealthiest can afford*, BUS. INSIDER (Dec. 25, 2021, 8:00 AM), <https://www.businessinsider.com/american-middle-class-no-longer-signifies-economic-security-2021-12> [https://perma.cc/7G2T-79TP] (describing the unsustainable growing economic inequality of the past several decades and concluding that “[b]y draining the middle class of wealth and consolidating that security to an ever-shrinking group of wealthy elites, America is hobbling its capacity for economic growth”).

¹⁸⁷ See, e.g., Michael B. Sauter, *Faces of poverty: What racial, social groups are more likely to experience it?*, USA TODAY (last updated October 10, 2018, 9:07 AM), <https://www.usatoday.com/story/money/economy/2018/10/10/faces-poverty-social-racial-factors/37977173/> [https://perma.cc/T4M8-Z37K] (“Black Americans are more than twice as likely as whit[e] [Americans] or Asian Americans to live in poverty”); and Diana Elliott, *Two American experiences: The racial divide of poverty*, URB. INST. (July 21, 2016), <https://www.urban.org/urban-wire/two-american-experiences-racial-divide-poverty> (“...a [B]lack child in 2014 is still three times more likely to be in poverty than a white child.”).

not unlike race.¹⁸⁸ Indeed, the desire to raise one's socioeconomic status may be a principal driver for many students in applying to college.

Greater weighting of applicants' socioeconomic background would meaningfully expand the benefits of diversity in higher education. Elites are segregated from the rest of the population by education, occupation, and housing, to name a few factors. The *Bakke* Court seemed to recognize this fact when it listed—along with more traditional metrics such as work experience, leadership potential, or maturity—“the ability to communicate with the poor” as a unique qualification potentially warranting admission to an elite university.¹⁸⁹ To follow the Court's logic here, it is not entirely clear that the wealthy scion of a Black Harvard alumnus would have any more ease than a similarly privileged white student when striking up conversation with the janitor who cleans their dormitory. However, a working-class student of any ethnicity from Pittsburgh might be expected (rightly or wrongly) to converse with a non-elite more easily. Whatever merit may or may not lie in this type of thinking, there is surely value in expanding diversity beyond the confines of race.¹⁹⁰

After all, low-income students—few in number they may be—have been known to “significantly outperform[]” their wealthier peers on elite campuses.¹⁹¹ Returning to the Trinity College example, at Trinity, “the six-year graduation rate for Pell-eligible students...was 92 percent, compared with 76 percent for the rest of the student body.”¹⁹² In this way, there are contexts in which low-income students—often students of color¹⁹³—outdo their more affluent peers (though this trend does not hold for the majority

¹⁸⁸ While not an immutable characteristic, the socioeconomic stratum into which one is born is typically “fixed” and beyond a child's control until they enter the workforce and/or begin generating their own income (typically in one's late teens or early twenties). Of course, one's parents can make choices that cause a family to move up or down the rungs of the financial ladder. As income mobility in this country stagnates, however, increased attention should be paid to just how “static” one's socioeconomic status can be.

¹⁸⁹ *Bakke*, 438 U.S. at 317.

¹⁹⁰ All of this is not to say that privileged non-white students do not encounter difficulties upon arrival to campus; however, due to their backgrounds, they may be more familiar with the pitfalls of navigating elite spaces and therefore better able to protect themselves. An entire paper could be written—and surely has been—outlining the myriad ways in which the lives and outcomes of wealthy whites differ from those of wealthy Black people. See, e.g., Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, EQUAL. OF OPPORTUNITY PROJECT (Mar. 2018), <http://www.equality-of-opportunity.org/documents/> (finding that Black men born into the 75 percentile of the income distribution end their lives, on average, 12 percentiles below white men born into similarly wealthy families); and Dylan Matthews, *The massive new study on race and economic mobility in America, explained*, VOX (March 21, 2018, 7:30 AM), <https://www.vox.com/policy-and-politics/2018/3/21/17139300/economic-mobility-study-race-black-white-women-men-incarceration-income-chetty-hendren-jones-porter> (for general discussion and summary of Chetty's findings). Rather, the purpose of this section is to show the need for expanding the base of permissible admissions tips or preferences to ensure that the diversity achieved on college campuses more fully represents the immense diversity of this country.

¹⁹¹ Tough, *supra* note 34.

¹⁹² *Id.*

¹⁹³ Unless otherwise indicated, the phrase “student(s) of color” in this writing is meant to distinguish Asian American students from other racial and ethnic minorities such as Black and Hispanic students.

of less selective schools).¹⁹⁴ Despite facing a culture of privilege that pervades campuses like Trinity (or, one can imagine, Harvard), these students overcame these challenges to excel in an environment that would justify their presence on the nebulous and potentially duplicitous ground of “diversity.”

However, weighting socioeconomic factors more heavily, taken alone, will not solve the diversity problem. SFFA’s simulations that eliminated ALDC- and LDC-related tips while increasing tips for economically disadvantaged applicants showed that Harvard could significantly increase socioeconomic diversity and the number of Black and Hispanic students in its classes “only if it abandoned all preferences for [LDCs], and implemented a sizable tip based on economic and geographic indicators of disadvantage.”¹⁹⁵ One such simulation produced a class in which forty-nine percent of students were from an economically disadvantaged background—contrasted against the twelve percent of students meeting that criteria in Harvard’s 2019 class.¹⁹⁶ However, these simulations also showed a fifty three- to seventy one-point drop in Harvard’s average SAT scores and a related drop in the profile ratings across admitted students, outcomes the trial court suggests are untenable.¹⁹⁷

Harvard’s own race-neutral proposals encountered similar obstacles in tweaking socioeconomic factors. One Harvard-commissioned report found that increased outreach to schools or organizations serving applicants of modest means would be insufficient and would result in an “incrementally small” number of admitted students that would otherwise not have applied.¹⁹⁸ Nor would increasing financial aid meaningfully add to diversity, as seventy percent of Black and sixty percent of Hispanic families already qualified for zero parental contribution under Harvard’s financial aid program.¹⁹⁹ Moreover, Harvard’s previous expansions of financial aid were shown not to significantly increase the number of Black and Hispanic applicants or admits.²⁰⁰

Beyond the reasons proffered above, however, there remains an additional roadblock to successful implementation of a class-based affirmative action scheme: rich people know how to hide their money. For example, dozens of parents in a Chicago suburb were found to have transferred legal guardianship of their kids over to friends and relatives, at which point their kids declared financial independence to qualify for a

¹⁹⁴ See, e.g., Michael T. Nietzel, *New Report Shows Large Gaps In College Progress Based On Whether Students Attend High- Or Low-Income High Schools*, FORBES (Oct. 8, 2019, 06:00 AM), <https://www.forbes.com/sites/michaelt Nietzel/2019/10/08/new-report-shows-large-gaps-in-college-progress-depending-on-whether-students-attend-high-or-low-income-high-schools/?sh=722b9acc2c13> [<https://perma.cc/RR89-YUBY>] (finding that “[o]nce enrolled, 89% of the higher-income high-school graduates continued for a second year of college, compared to 79% of those from low-income high schools.”).

¹⁹⁵ Students for Fair Admissions, Inc., 397 F.Supp.3d at 182.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Students for Fair Admissions, Inc., 980 F.3d at 177.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

bevy of tuition aid and scholarships.²⁰¹ Of course, those wealthy Chicago families—many of whom had kids in expensive prep schools—are arguably the group least in need of additional financial aid, but, like their Varsity Blues counterparts, they are also in the best position to take advantage of loopholes that allow for this sort of duplicitous behavior.²⁰² It is not even clear why wealthy families need to game the system, as schools roll out the proverbial red carpet to admit their children, showering them with aid that comes at the direct expense of lower-income students. For example, research from the think tank New America shows that over the course of almost two decades, more than half of public universities sampled have doubled their spending on “merit-based” aid, a type of non-need-based financial aid that largely targets wealthier students and their families.²⁰³ These funds often come from the same pot as need-based aid, meaning that increases in so-called “merit” aid proportionately decrease the aid that would go to qualified poorer applicants.²⁰⁴ This nearly \$32 billion in merit-based aid represents about \$2 of every \$5 going to students that the government would consider non-needy—that is, students able to afford college without financial aid.²⁰⁵

C. Blood at the Root: Structural Issues Reducing Diversity’s Effectiveness

One major reason the above problems remain so intractable—and the diversity rationale comparatively impotent—is that no institution wants to tackle the root causes of inequality in American society. These inequities directly influence the makeup of any given school’s applicant pool and the relative qualifications of that applicant pool. Some students are born with privileges that make higher education a forgone conclusion, regardless of their talent or appetite for learning. Others are born into more challenging circumstances that make the road to higher education a less

²⁰¹ While this reporting was local, the authors suggested that this could be a nationwide practice. Jodi S. Cohen & Melissa Sanchez, *Parents Are Giving Up Custody of Their Kids to Get Need-Based College Financial Aid*, PROPUBLICA (July 29, 2019), <https://www.propublica.org/article/university-of-illinois-financial-aid-fafsa-parents-guardianship-children-students#> [<https://perma.cc/9PEB-5KUP>] (reporting on the financial loophole that allowed wealthy suburbanites to secure greater need-based financial aid for their students). For additional reporting on this story, see Annie Nova, *Parents Exploit this Legal Loophole to Get Their Kids More Need-Based College Financial Aid*, CNBC (July 30, 2019), <https://www.cnn.com/2019/07/30/parents-exploit-legal-loophole-to-get-their-kids-more-college-aid.html> [<https://perma.cc/E6QD-DGX4>] (supplementing the ProPublica reporting and providing additional commentary on the potential legal ramifications for persons involved in the scheme).

²⁰² Cohen & Sanchez, *supra* note 201.

²⁰³ Stephen Burd, *Crisis Point: How Enrollment Management and the Merit-Aid Arms Race Are Derailing Public Higher Education*, NEW AMERICA (February 13, 2020), <https://www.newamerica.org/education-policy/reports/crisis-point-how-enrollment-management-and-merit-aid-arms-race-are-destroying-public-higher-education/> [<https://perma.cc/U4FF-4HC9>] (examining the merit aid “arms race” taking place among public universities that are providing so-called merit scholarships to students from the upper rungs of the income distribution in the hopes that those students matriculate, as they ultimately pay more in tuition than less wealthy students). See also Martin Kurzweil & Josh Wyner, *Rich Kids Are Eating Up the Financial Aid Pot*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/opinion/coronavirus-college-rich-kids.html> (referencing the New America study’s findings to call for congressional action to enable schools to coordinate on setting merit aid and thus rein in spending).

²⁰⁴ Kurzweil & Wyner, *supra* note 203.

²⁰⁵ Burd, *supra* note 203, at 36.

straightforward one. A comprehensive examination of the ways in which various phenomena affect one's college preparedness and competitiveness in the applicant pool is beyond the scope of this Article. That said, it behooves us to better understand some of the problems that hampered the effectiveness of the diversity rationale from the outset.

1. School Segregation

As Justice Breyer noted over a decade ago in *Parents Involved*, “resegregation is on the rise” in America’s public schools.²⁰⁶ In fact, students of color—Black students, in particular—attend schools that are about as segregated as they were in the 1960s and 1970s.²⁰⁷ In the 2015-2016 school year, more than half of American schoolchildren were in racially concentrated districts, with the nonwhite districts receiving about \$2,200 less per student on average than predominantly white districts.²⁰⁸ One report found that school districts serving mostly students of color received \$23 billion less in funding than mostly white school districts with the same number of students in 2016.²⁰⁹ This funding disparity can manifest in numerous ways from older, out-of-date textbooks to a lack of computer and internet access.²¹⁰ This dearth of resources impacts a child’s ability progress academically, and it can create large “gaps” in a student’s preparation for college and career, gaps that wealthier students will not have. Students in majority minority segregated schools are already operating at a deficit due to other factors outside the classroom, but the lack of access to quality resources at school only serves to push them further behind their well-resourced peers.

Relatedly, Black children are more than twice as likely as white children to attend high-poverty schools (schools in which fifty-one percent or more of students are eligible for free or reduced-price lunch).²¹¹ Sixty percent of Black students attend high-poverty schools with a high share of students of color, compared with less than nine percent of white students.²¹² Some attribute this concentration to the Reagan Justice Department’s abandonment of busing as a desegregation remedy, which

²⁰⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 861 (2007).

²⁰⁷ Will McGrew, *U.S. School Segregation in the 21st Century: Causes, Consequences, and Solutions*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 15, 2019), <https://equitablegrowth.org/research-paper/u-s-school-segregation-in-the-21st-century/?longform=true> [https://perma.cc/5T8K-DC5A].

²⁰⁸ EDBUILD, *\$23 Billion* (February 2019), at 4, <https://edbuild.org/content/23-billion> - CA.

²⁰⁹ *Id.* For additional reporting, see Sarah Mervosh, *How Much Wealthier Are White School Districts Than Nonwhite Ones? \$23 Billion, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/education/school-districts-funding-white-minorities.html> (supplementing the EdBuild reporting and highlighting especially inequitable school districts such as those in New Jersey and Arizona).

²¹⁰ Mervosh, *supra* note 209 (“Differences in funding translate to the classroom, where underfunded communities often use older, worn textbooks and have less access to computers, said Francesca López, associate dean of the College of Education at the University of Arizona.”).

²¹¹ Emma García, *Schools are Still Segregated, and Black Children are Paying a Price*, ECON. POL’Y INST. (Feb. 12, 2020), at 2, <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/>.

²¹² *Id.* at 3.

led to a confluence of racial and socioeconomic stratification in American cities.²¹³ Almost twenty-five percent of white students attend schools where most of their classmates are white and not poor—compared to about three percent of Black students.²¹⁴ In fact, white students have less exposure to non-white students than any other group of students.²¹⁵

Some estimates indicate that the number of segregated schools has doubled in the past two decades, with the percentage of Black students in segregated schools growing very rapidly from fifty-nine to seventy-one percent.²¹⁶ The Northeast has overtaken the South in the proportion of segregated schools, and the phenomenon is no longer confined to southern and urban regions.²¹⁷ In addition, school closures are about three times more common for segregated schools.²¹⁸ Charter schools further complicate things, as they allow students (and associated per pupil expenditures) to travel to other schools, creating what one author describes as “islands” within larger districts, depriving resource-strapped public schools of even more funds, and potentially contributing to further segregation.²¹⁹

Described by one researcher as a “major and intensifying problem,” racial segregation in U.S. schools can only lead to “serious educational, social, and civic problems” that Justice Breyer warned of in *Parents Involved*.²²⁰ The costs of attending a segregated school are many, including “reduced academic achievement, increased exposure to the criminal justice system, and significantly worsened professional and educational outcomes.”²²¹ This Article need not supply an exhaustive treatment of these woes, but it is worth elucidating some of the more subtle costs of segregated schooling that can prove just as devastating as the above. For example, the Department of Justice noted that “schools serving the most [B]lack and Latino students are 1.5 times more likely to employ teachers who are newest to the profession” with these teachers often being “less effective than their more experienced” counterparts.²²² Also, schools serving mostly minority students are less likely to offer Advanced Placement (AP) and gifted courses—with one in five Black students attending a high school that did not offer AP courses in the 2011-2012 school year.²²³

²¹³ Frankenberg, *supra* note 152.

²¹⁴ García, *supra* note 211, at 3.

²¹⁵ Frankenberg, *supra* note 152.

²¹⁶ Stancil, *supra* note 152. More recent research supports these figures, as an analysis of National Center for Education Statistics’ National Assessment of Educational Progress (NAEP) data from a February 2020 report revealed that seven in ten black children (69.2%) attend majority minority schools. See García, *supra* note 211, at 2.

²¹⁷ Frankenberg, *supra* note 152.

²¹⁸ Stancil, *supra* note 152.

²¹⁹ *Id.*

²²⁰ *Id.* (presenting the author’s findings on school segregation trends and arguing that racial segregation is on the rise in the United States, despite the work of other scholars who argue that such alarmism is unwarranted because this perceived trend is really just the racial diversification of American schools). See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 862 (2007).

²²¹ Stancil, *supra* note 152.

²²² U.S. DEPT. OF EDUCATION OFFICE FOR CIVIL RIGHTS, “Dear Colleague Letter: Resource Comparability” (Oct 1, 2014), at 4, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

²²³ *Id.* at 3.

Moreover, teachers in high schools serving mostly Black and Hispanic students were paid, on average, \$1,913 less than teachers within the same district working at schools with the lowest Black and Hispanic population.²²⁴ Two thousand dollars is no small sum, but when one considers the chronic underpayment of teachers, that number proves dire.²²⁵

For these and other reasons, it is no wonder that many minority students are unprepared for college—let alone for entry into an elite one. The paucity of resources in many of the nation's public schools all but ensure that far too many students of color—and especially Black students—are utterly ill-equipped to thrive at even moderately selective schools.

2. Housing Segregation

Controlling for factors such as education, income, geography, and marital status, nonwhite households—especially Black ones—are still less likely to own their homes when compared to white households.²²⁶ For example, in 2019, only forty-one percent of Black households owned their own homes, while more than seventy-three percent of white ones did.²²⁷ College-educated Black people are less likely to own their homes in comparison to white Americans who never finished high school.²²⁸ And, Black Americans have about one-tenth the wealth of white Americans.²²⁹

The above problems were created and exacerbated by numerous policies at all levels of American government such as race-based zoning, red lining, and the systematic exclusion of Black people from federal

²²⁴ *Id.* at 5.

²²⁵ See, e.g., Thomas C. Frohlich, *Yes, Teachers are Underpaid. Here's How Much High School Teachers are Underpaid in Each State*, USA TODAY (September 29, 2020), <https://www.usatoday.com/story/money/2020/09/29/states-with-the-most-underpaid-teachers/42699495/> [<https://perma.cc/NW42-9GKC>] (noting, for example, that the average public school teacher in the United States made almost \$30,000 less than the average occupation requiring a college degree) and Tala Hadavi, *2020 has Shone a Light on the Importance of Good Teachers, but Many are Paid Less than a Living Wage in the U.S.*, CNBC (December 11, 2020), <https://www.cnbc.com/2020/12/11/why-teachers-salaries-are-so-low-in-the-us.html> [<https://perma.cc/NMY8-5UD9>] (noting that, in parts of the country, teachers live below the family living wage and up to a quarter of teachers leave the profession each year). For additional reading, see Katie Reilly, *Exactly How Teachers Came to Be So Underpaid in America*, TIME (Sept. 18, 2018), <https://time.com/longform/teaching-in-america/> [<https://perma.cc/H86Z-4HU9>] (reporting on the large pay gap between teachers and other similar professions and highlighting legal and policy developments that have contributed to lower teacher pay).

²²⁶ Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation*, CENTER FOR AMERICAN PROGRESS (Aug. 7, 2019), at 7, <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/> [<https://perma.cc/B4CP-SGKN>].

²²⁷ Solomon et al., *supra* note 226. See also U.S. Census Bureau, *Quarterly Residential Vacancies and Homeownership, First Quarter 2024* (2024), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/W699-AW85>] (providing updated statistics).

²²⁸ Solomon et al., *supra* note 226, at 8.

²²⁹ Angela Hanks et al., *Systemic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), at 2, <https://www.americanprogress.org/article/systemic-inequality/> [<https://perma.cc/KST8-XRQU>].

homeownership programs.²³⁰ Federal home loan programs allowed white families to build and transfer wealth through generations, but they excluded Black applicants, trapping them geographically and financially and eliminating any chance of upward mobility.²³¹ So-called “blockbusting” and contract buying practices were additional methods that predatory real estate professionals used to legally and systematically strip wealth from Black families.²³² Black people were also denied access to tools such as mortgage refinancing and federal underwriting.²³³ Moreover, residential segregation was made worse by other social and political forces, like white flight and gerrymandering.²³⁴

All of this is to say nothing of the well-documented effects of laws like the Home Owners’ Loan Act, National Housing Act, and the Servicemen’s Readjustment Act (the “GI Bill”) on the Black community.²³⁵ In addition to the decades of wealth-building opportunity these laws ripped away from Black families, the descendants of those same families would be exposed to other predatory practices like those around the subprime loan market of the early 2000s.²³⁶ Moreover, Black people continue to face discrimination in housing, with forty-five percent of African Americans saying they have experienced discrimination when trying to rent or buy a home, compared with only five percent of whites.²³⁷ Another recent study found that homes in Black neighborhoods were undervalued by an average of \$48,000 due to racial bias, which translates to \$156 billion in losses nationwide.²³⁸

Policies such as single-family zoning—the intellectual descendant of race-based zoning—continue to perpetuate stark racial segregation across the country. Single-family zoning typically restricts the placing of structures like apartment buildings and multifamily units in certain neighborhoods or districts, meaning that only persons who can afford single-family homes can live in those areas.²³⁹ Because white families had greater access to federal home loan programs and higher incomes, single-family zoning allowed for rapid resegregation of America’s towns and

²³⁰ Solomon et al., *supra* note 226.

²³¹ *Id.*; see also, Classroom Segregation: History and Current Impact on Student Education, AMER. UNIV. SCH. OF EDUC. (Aug. 19, 2020), <https://soeonline.american.edu/blog/classroom-segregation> [<https://perma.cc/Y8LV-L8QU>].

²³² Solomon et al., *supra* note 226, at 9.

²³³ *Id.* at 6.

²³⁴ Stancil, *supra* note 152 (describing attempts by some white neighborhoods and cities to “secede” from larger Black or integrated districts to form all-white districts, moves often aided by state legislators).

²³⁵ Solomon et al., *supra* note 226.

²³⁶ *Id.*

²³⁷ Harvard T.H. Chan Sch. of Pub. Health et. al., *Discrimination in America: Final Summary* (Jan. 2018), at 11, <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2018/01/NPR-RWJF-HSPH-Discrimination-Final-Summary.pdf> [<https://perma.cc/PFQ4-CTUZ>].

²³⁸ Andre M. Perry et al., *The Devaluation of Assets in Black Neighborhoods: The Case of Residential Property*, BROOKINGS (Nov. 27, 2018), at 3, <https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/> [<https://perma.cc/M5YA-2Q2W>].

²³⁹ Solomon et al., *supra* note 226, at 11.

cities.²⁴⁰ Wealthier areas also had greater tax bases to support public goods, and these areas often appreciated in value—all while areas with higher concentrations of Black people were zoned for commercial and industrial use, further depressing property values (which decimated schools) and reducing access to public goods like transportation, grocery stores, and child care facilities while increasing exposure to environmental hazards like waste facilities that were often built closer to apartments and multifamily complexes.²⁴¹ Because of these realities, Black communities tend to be poorer than white ones and continue to struggle against racist policies against their social and economic interests.

All of these harmful policies converge in one particularly insidious way. Most schools are at some level “local” schools because they serve the students of a particular neighborhood, district, or city. While public schools do receive some funds from their respective states, much of their budgets come from local property taxes levied on residents; unsurprisingly, that means that schools in poor areas serving poor students are more likely to be underfunded—that is, poor.²⁴² Conversely, wealthier zip codes often pay more in property taxes, resulting in better funded schools that can more easily meet the needs of their students. This fact also means, however, that as America becomes more economically stratified, so, too, do its schools. The interplay of race and class outlined above ensures that many poor neighborhoods are, in significant part, “Black” neighborhoods and vice versa. Similarly, low-performing and under-resourced schools are often “Black” schools. America’s tiered housing system creates a tiered school system that reinforces a racial caste system.

The confluence of the race- and class-based exclusion undergirding residential segregation is a bipartisan phenomenon.²⁴³ The lack of reparative or redistributive measures on behalf of state or federal governments suggests that there exists little political will to reverse these trends. This inaction is hardly surprising when, as the above illustrates, the vast majority of the segregation in the United States results not from individual actors but from state-sanctioned policies designed to relegate Black people to a second-class status. Still, in light of the Supreme Court’s souring on the diversity rationale, a decision that was justified at some level under the idea that America has “progressed” racially, the above begs

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Cory Turner et al., *College Board Drops Its 'Adversity Score' For Each Student After Backlash*, NPR (April 18, 2016), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> [<https://perma.cc/8KFL-T44W>] (examining funding disparities across America’s schools and noting that many schools face funding issues due to their reliance on local property taxes, which can vary from district to district because of large differences in property values).

²⁴³ See, e.g., *Zoned Out: Examining the Impact of Exclusionary Zoning on People, Resources, and Opportunity Before the Subcomm. On Hous. Cmty. Dev. And Ins. Of the H. Comm. on Fin. Serv.*, 117th Cong. 6-7 (2021) (statement of Richard Kahlenberg, Senior Fellow and Director of K-12 Equity at The Century Foundation), <https://democrats-financialservices.house.gov/UploadedFiles/HHRG-117-BA04-Wstate-KahlenbergR-20211015.pdf> [<https://perma.cc/52K9-V92K>] (noting that the most exclusionary zoning policies are not promoted in communities with the highest levels of racial intolerance but that progressive areas tend to enact the most damaging legislation, possibly due more to a disdain for the uneducated than for minorities, specifically).

the question of how Black students could ever be expected to compete when the cards are so heavily stacked against them.

3. Test Preparation

While access to quality, well-funded, and integrated schools and neighborhoods is vital to student outcomes, the importance of test preparation in the college admissions process cannot be understated. Few dispute that test scores remain hugely consequential in admissions. Most colleges require that applicants take the Scholastic Aptitude Test (a set of subject area exams collectively termed the “SATs”) and/or the American College Testing (ACT) exam. These tests loom large in one’s application process, as they are designed to evaluate college preparedness. Applicants, especially to elite schools, spend months—years, even—preparing to take the standardized tests.²⁴⁴ This preparation ranges from school-sponsored and independent test prep courses to expensive private tutors.

The tests themselves have been shown to accurately predict how well a student is likely to do in their first year in college but not beyond.²⁴⁵ Performance on tests like the SAT more closely tracks factors like familial wealth than intellectual ability or even college preparedness. For example, a Wharton study demonstrated that SAT and ACT scores are more strongly correlated with family income than high school rank or GPA.²⁴⁶ As the report summarized, “[m]easures of student ability typically used for college admissions implicitly reflect differences in family income across students.”²⁴⁷ Similarly, a student with a parent that holds a graduate

²⁴⁴ Sam Becker, *During Test-Optional College Admissions, Exam-Prep Companies Still Thrived*, BBC (April 17, 2024), <https://www.bbc.com/worklife/article/20240416-test-optional-college-admissions-exam-prep-companies> [https://perma.cc/9NM9-MJQB] (describing the booming test preparation industry in the United States and the test preparation measures families took even during “test-optional” admissions cycles at selective universities). These efforts are in addition to more traditional resume-padding activities like volunteering and community engagement, and even these activities advantage the rich, who have social capital that will allow their children to undertake ambitious service projects or obtain impressive fellowships even before college.

²⁴⁵ See, e.g., FAIRTEST, *SAT I: A Faulty Instrument For Predicting College Success* (Aug. 20, 2007), <https://fairtest.org/sat-i-faulty-instrument-predicting-college-success/#:~:text=What%20is%20the%20SAT%20I,for%20placement%20or%20advising%20purposes> [https://perma.cc/VUA7-VQVG] (“The SAT I is designed to predict first-year college grades – it is not validated to predict grades beyond the freshman year, graduation rates, pursuit of a graduate degree, or for placement or advising purposes.”). See also Scott Jaschik, *Faulty Predictions?*, INSIDE HIGHER ED (January 25, 2016), <https://www.insidehighered.com/news/2016/01/26/new-research-suggests-sat-under-or-overpredicts-first-year-grades-hundreds-thousands> [https://perma.cc/A9GE-6XZF] (citing various failures in the predictive ability of the SATs, especially for distinct groups such as women, Black people, and Latino test takers).

²⁴⁶ Jason Sockin, *Is Income Implicit in Measures of Student Ability?*, THE WHARTON SCH. OF THE UNIV. OF PA. (Sept. 28, 2021), <https://budgetmodel.wharton.upenn.edu/issues/2021/9/28/is-income-implicit-in-measures-of-student-ability/#:~:text=SAT%20math%20and%20ACT%20scores,ranging%20from%200.06%20to%200.10> [https://perma.cc/QGD4-DHAB]. This is not a new phenomenon, as reporting from almost a decade ago touts similar findings. See, e.g., Zachary A. Goldfarb, *These Four Charts Show How the SAT Favors Rich, Educated Families*, THE WASHINGTON POST (March 5, 2014), <https://www.washingtonpost.com/news/work/wp/2014/03/05/these-four-charts-show-how-the-sat-favors-the-rich-educated-families/> [https://perma.cc/6VHR-EVUT].

²⁴⁷ Sockin, *supra* note 246.

degree scores, on average, 300 points higher on their SATs than a student with a parent that only has a high school diploma.²⁴⁸ These education- and income-related score gaps seem to be widening.²⁴⁹ In light of this information, the persistent standardized test score gap between high- and low-income students should come as no surprise. Moreover, those findings help to explain why white Americans, some Asian Americans, and students who took the PSAT (the pre-SAT test) tend to outscore other groups; it is largely a matter of test prep resources and familial wealth.²⁵⁰

If extensive test prep is not enough to boost a student's score, wealthy families have other tools in their arsenal: so-called "504 designations" that are typically provided to students with anxiety or ADHD or physical disabilities and allow for accommodations like extra time and private testing spaces.²⁵¹ White students receive such designations at a disproportionate rate in New York's high-stakes entrance exam for its most selective public schools.²⁵² Specifically, white students are twice as likely as Black and Hispanic students and ten times as likely as Asian students to receive a 504 designation, according to research conducted by the *New York Times*.²⁵³ In total, forty-two percent of 504 designations from 2016 to 2018 had gone to white students.²⁵⁴ Assuming that white people are not predisposed to ADHD or breaking an arm (the types of conditions that might warrant extra time on a test), these numbers are notable.²⁵⁵

²⁴⁸ Goldfarb, *supra* note 246.

²⁴⁹ Andre M. Perry, *Students Need More than an SAT Adversity Score, They Need a Boost in Wealth*, BROOKINGS (May 17, 2019), <https://www.brookings.edu/blog/the-avenue/2019/05/17/students-need-more-than-an-sat-adversity-score-they-need-a-boost-in-wealth/> [<https://perma.cc/2SBH-DKKT>].

²⁵⁰ It is also worth noting that most research and media outlets that report on achievement gaps of this sort do not distinguish within ethnic groups. That is, high test scores may very well be concentrated in wealthier east Asians like Chinese, Japanese, and Korean Americans while groups like Cambodian Americans or Hmong Americans may test less well overall. See Jason Ng et al., *Southeast Asian American Achievement Gaps Through Many Factors*, AAPI DATA (Oct. 11, 2017), <https://aapidata.com/narrative/blog/se-aa-achievement-gaps/> [<https://perma.cc/YT8X-YH6W>] (compiling research and data highlighting achievement gaps between certain Southeast Asian groups and other Asians, including wealth and educational attainment).

²⁵¹ Abigail Johnson Hess, *Rich Students get Better SAT Scores—Here's Why*, CNBC (Oct. 3, 2019), <https://www.cnbc.com/2019/10/03/rich-students-get-better-sat-scores-heres-why.html> [<https://perma.cc/BX3W-PRA4>]. Parents in the Varsity Blues scandal were encouraged to take advantage of such accommodations. That is, they lied about their children having learning disabilities to help secure a spot at their favored colleges.

²⁵² Kevin Quealy & Eliza Shapiro, *Some Students Get Extra Time for New York's Elite High School Entrance Exam. 42% Are White.*, N.Y. TIMES (June 17, 2019), <https://www.nytimes.com/interactive/2019/06/17/upshot/nyc-schools-shsat-504.html> [<https://perma.cc/GA32-CWQ8>].

²⁵³ [Quealy & Shapiro, *supra* note 252.](#)

²⁵⁴ [Quealy & Shapiro, *supra* note 252.](#)

²⁵⁵ Eliza Shapiro, *Only 7 Black Students Got Into Stuyvesant, N.Y.'s Most Selective High School, Out of 895 Spots*, N.Y. TIMES (March 18, 2019), <https://www.nytimes.com/2019/03/18/nyregion/black-students-nyc-high-schools.html?smid=url-share> [<https://perma.cc/H9NY-SPSF>] (reporting that, in 2019, Black and Hispanic students were just over ten percent of the population of New York City's highly selective eight specialized high schools, despite making up nearly 70 percent of New York City's public school population as a whole). This reporting also highlights the opposition from NYC's Asian community to then-Mayor de Blasio's plan to diversify these specialized high schools via elimination of the entrance exam and other measures.

More crucially, students with these extra-time provisions are about twice as likely to receive offers from specialized high schools.²⁵⁶ White students are overrepresented in NYC's elite high schools, making up about a quarter of the students despite being only about fifteen percent of the entire public school population.²⁵⁷ The medical consultations required to get a 504 designation are often pricey, which helps to explain why so many more white students seem to get them.²⁵⁸ Moreover, many of these students "attend some of [New York's] most prestigious public middle schools," a fact that supports the notion that "income, race, and privilege" can have an impact on testing, especially for high-stakes exams.²⁵⁹

Still, that Asian students, despite a tenfold accommodations advantage by white students, are the overwhelming majority at specialized high schools serves only to inflame the growing tension between often low-income communities of Asian immigrants and a well-resourced white bourgeoisie. For now, proposals to overhaul the specialized high school admissions system have focused on the underperformance of Black and Hispanic students, with some Asian groups arguing that they should not be penalized in admissions for the low performance of other groups.²⁶⁰

Regardless of their utility or predictive power, standardized tests feature prominently in the road to college for most Americans. The fierce competition for spots at the nation's top colleges have led to a testing industrial complex in which well-resourced test takers have nearly insurmountable advantages over their less privileged peers. The increased social capital and access that wealthier Americans enjoy in the education system will always make it such that only the most brilliant people of lesser means can keep up. In this way, President Biden's slip—on the 2020 campaign trail, he stated that "poor kids are just as bright and just as talented as white kids"²⁶¹—may have been Freudian, but it was not without truth.²⁶² The central idea underlying his remark, that Black and low-

²⁵⁶ *Quealy & Shapiro, supra note 252*. Tellingly, 504 extra-time testers outperform median test-takers overall.

²⁵⁷ *Quealy & Shapiro, supra note 252*.

²⁵⁸ *Id.* White families are also simply more likely to be aware that such accommodations exist, whereas minority students in low-performing school districts may not have quality test prep resources or personnel like guidance counselors who can make them aware of such tools and guide them in applying for the designation.

²⁵⁹ *Id.* Not unlike the family wealth-SAT score correlation, it appears that wealth strongly tracks whether one requests and receives a 504 designation. *See id.* (finding that, over a three-year timespan, students in a majority white and middle-class area of New York were almost five times as likely as students in other districts to have a 504 allowance and that, by comparison, a majority Hispanic and low-income area had five or fewer students *in total* to receive such accommodations in the same time frame).

²⁶⁰ Shapiro, *supra note 255*. Then-mayor Bill de Blasio's proposal to admit the top scorers from every middle school would reduce the presence of Asian students—who now make up around 60% of students at specialized schools—by about half, increasing black enrollment by fivefold. The measure was unsuccessful.

²⁶¹ He paused before adding "wealthy kids, [B]lack kids, Asian kids." Matt Stevens, *Joe Biden Says 'Poor Kids' Are Just as Bright as 'White Kids'*, N.Y. TIMES (Aug. 9, 2019), <https://www.nytimes.com/2019/08/09/us/politics/joe-biden-poor-kids.html> [<https://perma.cc/8NVC-JKNW>].

²⁶² *Stevens, supra note 261*. For additional coverage, *see* David Siders, *Biden: 'Look, I misspoke' about Poor Kids*, POLITICO (Aug. 10, 2019), <https://www.politico.com/story/2019/08/10/biden-poor-kids-bright-white-kids-1456296>

income students remain structurally disadvantaged relative to wealthier white students, is entirely correct.

If the occasional gifted, low-income student of color is able to surmount the numerous obstacles before them and gain admittance to a selective school, that would be the exception that proves the rule. Such occurrences are quirks of a skewed system, not evidence of its meritoriousness.

VI. FIXING DIVERSITY: MAKING GOOD ON THE PROMISE OF THE DIVERSITY RATIONALE

Specters of inequality haunt the admissions process from start to finish, creating a nightmarish maze in which some students, armed with the tools of wealth and privilege, clamor to marginally differentiate themselves in just the right way from their competitors, while other students do not even know where to begin and whose chances at elite credentialing will be summarily doomed should they make one wrong move. Still, some proposals hold promise for improving outcomes and fostering genuine diversity in a post-*SFFA* world.

A. At First Glance: Preliminary Proposals

National testing bodies and college admissions offices have attempted various proposals to level the playing field. For example, the College Board, which administers the SAT exam, proposed (then promptly abandoned) a measure known as an “adversity score.”²⁶³ This metric, which was to be presented alongside an applicant’s subject area scores, was supposed to capture—that is, to rate—a test taker’s school and neighborhood environment, which, as detailed above, are strong proxies for wealth and privilege.²⁶⁴ While meant to capture hardships like crime and poverty that individual applicants might have had to overcome in their college admissions journey, the adversity score brought forth “a storm of criticism from parents and educators” supposedly irate at the idea of quantifying achievement in the face of hardship.²⁶⁵ The opponents of the adversity score seemed less concerned with finding an alternative way of capturing hardship among applicants, as it appears there were few, if any, serious proposals for replacement schemes.

Some observers have called for investing more federal dollars to narrow gaps in the social and economic resources that Black and white families bring to the college-going process.²⁶⁶ Earlier and greater focus in

[<https://perma.cc/FX35-4FGP>] (Biden stating that he meant to say “wealthy” in place of “white”).

²⁶³ Anemona Hartocollis, *SAT ‘Adversity Score’ Is Abandoned in Wake of Criticism*, N.Y. TIMES (Aug. 27, 2019), <https://www.nytimes.com/2019/08/27/us/sat-adversity-score-college-board.html> [<https://perma.cc/R393-PGFP>] (describing how the College Board committed to still providing school admissions counselors and families with the information captured in the score, but claimed that it would no longer be summed up in a single number). See also Bobby Allyn, *College Board Drops Its ‘Adversity Score’ For Each Student After Backlash*, NPR (Aug. 27, 2019), <https://www.npr.org/2019/08/27/754799550/college-board-drops-its-adversity-score-for-each-student-after-backlash> [<https://perma.cc/5AFT-SAZY>].

²⁶⁴ Hartocollis, *supra* note 263.

²⁶⁵ *Id.*

²⁶⁶ PHYS.ORG, *supra* note 124 (discussing Black immigrants’ higher likelihood of attending elite colleges and universities, citing the work of Pamela Bennett and Amy Lutz).

public schools on college preparation, even as early as middle school, would help to ensure that students are better prepared for the admissions process.²⁶⁷ This preparation could range from providing greater information about college preparatory coursework to counseling on the numerous college options available to students.²⁶⁸ Exposure to these preparedness tools is a key advantage that white and Asian students have over Black and Brown students. They are aware of the need to prepare for these tests long before test day arrives.

As anyone who has attended a low-income high school knows, resources are limited for students wishing to apply to colleges. And because guidance counselors are often over-worked and underpaid, getting students into colleges—let alone elite institutions—is often a lower priority than simply getting students to their high school graduation. Because of this lack of attention and resources, even students who are aware of the steps in the college admissions process often must navigate them alone or with little support. Assistance with filling out college applications and financial aid forms is needed to help students, many of whom are overwhelmed by the breadth of information requested on forms like the FAFSA.²⁶⁹ This type of aid could be outsourced to third parties—for example, young lawyers and members of other elite professions that have learned to successfully navigate the bureaucracy that is college and post-grad admissions—who could help with preparation for college interviews or test prep itself.²⁷⁰

Moreover, challenges inherent in the financial aspects of applying to college should not go unaddressed. For example, registration costs for tests like the SAT or ACT can pose significant barriers to poor students, who may be intimidated at the prospect of applying for a fee waiver or worried that such a waiver may somehow negatively impact their admissions prospects. In addition, these registration fees preclude far too many students from re-taking the test to get a higher score, a barrier to entry that wealthy and middle-class students are likely not to face.²⁷¹ All students, regardless of family income, should have equal opportunity to test or re-test. Whether the solution is eliminating registration costs altogether (an unlikely occurrence given the profitability of the testing industrial complex) or expanding access to fee waivers, little doubt exists that testing companies can do more to aid low-income and minority students in the process of taking these mandatory entrance exams.

Some proposals focus on what admissions offices can do. For example, one author called for more explicit attention to be given to Black applicants' "ancestral heritage" to distinguish between what they term

For more on Bennett and Lutz's work, see Pamela Bennett & Amy Lutz, *How African American is the Net Black Advantage?: Differences in College Enrollment among Immigrant Blacks, Native Blacks and Whites.*, 82 SOCIO. OF EDUC., no. 1, 70 (2009), <https://www.jstor.org/stable/40376038> (examining whether the higher likelihood of Black high school graduates to attend college, net of differences in socioeconomic family background and academic performance, is more attributable to differences in the educational trajectories of native Black people versus those of immigrant Black people).

²⁶⁷ PHYS.ORG, *supra* note 124.

²⁶⁸ *Id.*

²⁶⁹ PHYS.ORG, *supra* note 124.

²⁷⁰ *Id.*

²⁷¹ Hess, *supra* note 251.

“legacy [B]lacks” (i.e., Black people descended from enslaved people in America) and other Black people (specifically, first- and second-generation Black Americans descended from African immigrants and mixed-race individuals) in the affirmative action context.²⁷² This distinction, they argue, would foster intraracial diversity among Black students, especially on elite campuses, and would satisfy affirmative action’s social justice undertones.²⁷³ Such a proposal does not prove compelling to this author, largely because admissions offices are ill-equipped to vet an applicant’s ancestral heritage.²⁷⁴ No matter how meticulously designed a racial classification system might be, any institutionalized attempt to “measure” one’s race or to quantify it in anything but the broadest terms opens the door to rampant racial fraud as seen in countries like Brazil.

Furthermore, a racial quantification scheme relies on one very large assumption: that colleges genuinely care about racial diversity. It is ambiguous where exactly these schools’ commitments lie in regard to diversity. As described above, despite their constant allusions to deeply held, deeply vague social justice commitments, selective colleges and universities have shown little interest in striving for anything beyond a semblance of diversity. Schools should not be left to their own devices in matters related to quantifying an applicant’s race, lest a new admissions system even more contorted than the current one work to exclude an entirely new swath of applicants.

Moreover, even if national testing bodies and college admissions offices reconsider their approach to admissions, it is not clear that these changes would result in more equitable outcomes. Persons with wealth and privilege will always find a way to advantage themselves and their children, even in processes designed to eliminate subjectivity.²⁷⁵ In general, wealth offers a means of superior preparation and other ways, both large and small, to “skip the line” ahead of potentially more talented individuals.

²⁷² Onwuachi-Willig, *supra* note 124, at 1156.

²⁷³ *Id.* at 1209-10. This paper largely eschews Onwuachi-Willig’s social justice justifications for affirmative action in college admissions because the Supreme Court already dismissed such considerations in *Bakke* and because such arguments are likely to find little purchase given the current makeup of the Court.

²⁷⁴ And perhaps, more fundamentally, “who can really say that a biracial student of mixed African-American and white ancestry or a [B]lack second generation, Jamaican-American student is any less ‘[B]lack’ than a monoracial [B]lack student from Mississippi who descends from plantation slaves in the United States?” *Id.* at 1209.

²⁷⁵ This is not a uniquely American or even Western phenomenon, as many East Asian countries that are known for extremely high-stakes entrance exams have regular scandals around these important tests. *See, e.g.*, Charlie Campbell, *Chinese Students Face Up to 7 Years in Prison for Cheating on College-Entrance Exams*, TIME (June 8, 2016), <https://time.com/4360968/china-gaokao-examination-university-entrance-cheating-jail-prison/> [<https://perma.cc/3EQJ-G9WA>] ([describing the lengths taken to reduce widespread cheating on high-stakes Chinese college entrance exams](#)); Ock Hyun-ju, [Feature] *Cho Kuk Scandal Reignites Debate On College Admissions System*, The Korea Herald (Sept. 15, 2019), <https://www.koreaherald.com/view.php?ud=20190915000144> [<https://perma.cc/32PM-M4NS>] (describing public outcry following an admissions scandal implicating a high-profile member of the Korean government and presenting commentary on so-called “loopholes” in Korea’s college admissions system that, perhaps inadvertently, have come to advantage wealthy and well-connected people). As these examples show, any system that evaluates credentialing is open to being gamed by those with wealth and influence, persons who can effectively tailor their candidacy to whatever requirements are valued by colleges at the time—and should that fail, can find “back doors” into elite institutions.

No matter the system of credentialing, people of means will always find a way to advantage their own. But our current system that “convert[s] wealth into merit”²⁷⁶ ensures that only the most egregious of these tactics are considered inappropriate, while expensive SAT tutors and admissions consultants are considered fully above board—despite the fact that the use of such resources is often not publicized. To the extent education has become a “private good” and as long as “good parenting and good citizenship are in conflict” in our hyper-capitalistic and highly credentialed society, parents will continue to scramble to have their students master whatever form these admissions trials take.²⁷⁷

Perhaps this hyper-competitive and deeply unequal reality is why all the courts that heard the *SFFA* case largely ignored the roles of wealth-driven test preparation, application assistance, and specialized athletic recruitment in admissions.²⁷⁸ There is little discussion of, for example, the

²⁷⁶ Guinier, *supra* note 127.

²⁷⁷ Matthew Stewart, *The 9.9 Percent is the New American Aristocracy*, THE ATLANTIC (June 2018), https://www.theatlantic.com/magazine/archive/2018/06/the-birth-of-a-new-american-aristocracy/559130/?fbclid=IwAR3MfywEYyRfcPOWIT9D51s9doJV4m5GrrUNDYlmS7hln6wmJJ4qQbZJSTM_Stewart humorously mused: “So go ahead and replace the SATs with shuffleboard on the high seas, or whatever you want. Who can doubt that we’d master that game, too? How quickly would we convince ourselves of our absolute entitlement to the riches that flow directly and tangibly from our shuffling talent? How soon before we perfected the art of raising shuffleboard wizards?” *Id.*

²⁷⁸ Indeed, this author was especially surprised to find evasion of these topics by Justice Thomas, a longtime critic of programs such as affirmative action. Justice Thomas has written extensively about the harm racial preferences wreak on unqualified Black students, but he has said virtually nothing about the damage that legacy or athletic preferences can cause. For example, Justice Thomas dissented in *Grutter*, opining about the inability of most Black students to succeed at elite educational institutions: “The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities it offers. These over-matched students take the bait, only to find that they cannot succeed in the cauldron of competition.” *Grutter*, 539 U.S. at 372. Thomas recognized that a “handful” of Black students would still be admitted without race-based preferences. *Id.* at 373. In *Grutter*, Thomas does allude to the questionable efficacy of entrance exams like the LSAT in predicting student performance, but he does not seriously consider why Black students score lower on the LSAT. He does, however, correctly note that such racial performance disparities have not driven elite schools away from the use of standardized tests. *Grutter*, 539 U.S. at 370.

Echoing the language of *Brown*, Justice Thomas in *Grutter* wrote that affirmative action stamps minority students with a “badge of inferiority” and may cause them to believe they are entitled to race-based preferences. *Grutter*, 539 U.S. at 373. *See also*, *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 494 (1954) (“*Brown I*”), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955) (“*Brown II*”) (“To separate [Black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

Curiously, though, Justice Thomas does not consider the psychological or sociological effects of practices like legacy admissions on student beneficiaries, arguing that, while problematic, “unseemly” legacy tips do not fall within the ambit of the Equal Protection Clause. *Grutter*, 539 U.S. at 368. Setting aside the fact that Thomas supplies no reasoning as to why the Equal Protection Clause could not apply to legacy admissions, his brief reference to—then prompt abandonment of—the legacy matter is curious. Should legacies not feel as if their spots are unearned? Should not the Exeter-educated legacy lacrosse player with subpar grades and marginal standardized test scores (despite an abundance of tutors) have reason to question his place at Harvard? The stigma does not seem to attach in Justice Thomas’s mind.

role that expensive college admissions consultants play in helping students craft the perfect application packet—and the potential ethical pitfalls of such crafting, as these packets are supposed to represent the students themselves, not the machinations of well-compensated admissions wizards. It begs the question of what role standardized tests and other admissions requirements are really playing. That is, are exams like the SAT really just a way to rubberstamp mediocre middle- and upper-class students who might not fare as well in a more egalitarian and competitive evaluation system?

Whatever form the new *SFFA*-imposed admissions regime ultimately takes will introduce uncertainty into an already fraught process for college applicants and their families, and there is no guarantee that it will be any better, more transparent, or more just. Perhaps it would have been better to leave well enough alone, to let an imperfectly-cast caste system remain in the hopes that a few—and only a few—extraordinary students would be able to successfully navigate the labyrinth of admissions. The current system surely captured at least a few diamonds in the rough, students from disadvantaged backgrounds who beat the odds to matriculate to their Ivy-covered dream schools. Perhaps this system is better than nothing. After all, even a broken clock is right twice a day.

While several of the above proposals are ambitious, none of them tackle the root causes of achievement and outcome gaps—at least not in a sufficiently comprehensive way. Band-aid solutions like an adversity score do not solve the problems ailing society; they attempt to address a problem but not its roots. Rather than “retrofitting test results around inequality” to level the playing field, society should provide “historically disenfranchised people opportunities to build wealth.”²⁷⁹ While such calls ring with the echo of “reparations” and are often met with strong resistance, there are avenues short of giving African Americans (or other disenfranchised groups) money; that is, there are solutions that perhaps will be more palatable to the wider—whiter—American public. Palatable is a relative term, however, as one of the most radical but comprehensive solutions to the wealth gap and other societal ills lies in a maneuver that this country has never managed to pull off in over two-and-a-half centuries: desegregation.

B. The Only Way Out: The Role of Desegregation in Realizing the Goals of Diversity

The Supreme Court’s pronouncement in *Brown v. Board of Education* that racial segregation in American schools was unconstitutional was a landmark ruling, the legacy of which remains largely unrealized. Numerous sources have documented the Court’s retreat from the goals expressed in *Brown*, and this absence of court-ordered enforcement has led to the resegregation of American schools and neighborhoods and continues to drive a gap—between rich and poor, Black and white, haves and have-nots—that threatens to enshrine a rapidly resolidifying American caste system.²⁸⁰ With social unrest an ever-

²⁷⁹ Perry, *supra* note 249.

²⁸⁰ See, e.g., J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978* 61 (1979) (noting that “[f]rom 1955 to 1968,

increasing aspect of the national conversation, efforts to desegregate public spaces prove more vital than ever before, as people must come to understand one another—but such understanding cannot happen if people do not live, work, and learn in the same spaces. In this way, making good on the promise of *Brown* is not only morally imperative; it may be essential to the survival of the American experiment.

Policies encouraging affordable housing are one major tool to desegregate communities, as the effects of those efforts will spread to schooling and education.²⁸¹ Making housing more accessible to low-income and minority communities will allow groups to move from high-poverty, resource-arid locales to more well-funded, resource-diverse areas that tend to have lower crime rates (which also has an impact on educational attainment).²⁸² This requires putting an end to exclusionary zoning, which goes hand in hand with making housing more affordable. Effectively shutting out large swaths of Americans from economically prosperous areas perpetuates a socioeconomic and racial apartheid. It also further depresses outcomes across a wide range of areas including income, educational attainment, and life expectancy for those unable to live where they wish. Relatedly, policies should address transportation needs, as low-income persons, especially in urban areas, are more likely to have to rely on public transit due to not having a vehicle (or only having one to share within a single family).²⁸³

Similarly, having more inclusive school district borders could bring major improvements to public school systems nationwide, as it helps to ensure that resources flow into all schools more equally, instead of having concentrations of highly funded schools in one area and underfunded ones in another.²⁸⁴ Districts could be redrawn or consolidated to ensure that middle- and upper-class students attend socioeconomically diverse schools, which would result in more money being funneled to these schools. In addition, entities like the Department of Justice should be further empowered to bring litigation against school districts that remain highly segregated.²⁸⁵ Increased civil rights enforcement will help keep schools on track to meet desegregation goals and ensure that poor and minority students are not shuttled into low-performing schools where they will not receive an adequate education.

Within schools, more must be done to support gifted and talented programs—including expanding access to such programs, which should not necessarily be cabined to the smallest possible percentage of students, as talent exists across multiple vectors, such as math, science, art, and

the Court abandoned the field of public school desegregation”); McGrew, *supra* note 207 (citing the decline in school segregation from the 1960s through 1980s followed by a stagnation and eventual resegregation of American schools).

²⁸¹ McGrew, *supra* note 207.

²⁸² See, e.g., E. Jason Baron et al., *Public School Funding, School Quality, and Adult Crime* (Nat’l Bureau of Econ. Rsch., Working Paper No. 29855, 2022), <https://www.nber.org/papers/w29855> [<https://perma.cc/Q9B3-USLT>] (finding that increased educational investment in public schools reduces adult crime rates).

²⁸³ AMER. UNIV. SCH. OF EDUC., *supra* note 231.

²⁸⁴ *Id.* See also, Mervosh, *supra* note 209.

²⁸⁵ McGrew, *supra* note 207.

music.²⁸⁶ Adding specialized academic programs targeted toward differently gifted students would also encourage greater enrollment at some schools.²⁸⁷ In addition, more public funds should be channeled to early childhood education, which is widely recognized as the most critical stage of child development.²⁸⁸

The benefits of these investments are many. Less segregated schools tend to produce better outcomes for students of color, especially Black students. For example, one study showed that Black children attending the same schools as white children perform much better on standardized math tests than Black children in segregated schools.²⁸⁹ Moreover, the gap between Black and white student test scores is wider in high-poverty schools with a high share of students of color.²⁹⁰ Desegregation also has positive implications for the economic mobility of Black people.²⁹¹ And, positive economic outcomes for minority students have been shown not to come at the expense of wealthier (usually whiter) students.²⁹²

In fact, desegregation fuels economic growth because it boosts capital, innovation, and productivity and also strengthens the social trust and interpersonal relationships necessary for smoothly functioning markets.²⁹³ Segregation “foment[s] social distrust and...deteriorat[es] social capital in communities across the country.”²⁹⁴ This lack of social

²⁸⁶ Central to this goal is expanding bilingual (especially Spanish-language) education, via, for example, the so-called 50/50 program model, which helps ensure that gifted students are not left behind merely because they are English language learners. This model also provides immense benefits to the broader school population, as students learn a second language as part of their everyday curriculum. For more, see Andrew Warner, *4 Benefits of Dual-Language Immersion Programs*, U.S. NEWS & WORLD REPORT (June 9, 2022), <https://www.usnews.com/education/k12/articles/4-benefits-of-dual-language-immersion-programs> [<https://perma.cc/B4H4-NDUS>] (listing several social, cultural, and intellectual benefits of dual-language programs in schools).

²⁸⁷ AMER. UNIV. SCH. OF EDUC., *supra* note 231.

²⁸⁸ *Ages and Stages of Development*, CAL. DEPT OF EDUC., <https://www.cde.ca.gov/sp/cd/re/caqdevelopment.asp#:~:text=Recent%20brain%20research%20indicates%20that,warm%2C%20loving%2C%20and%20responsive> [<https://perma.cc/2HLG-UHQQ>] (last visited May 25, 2024). (“Recent brain research indicates that birth to age three are the most important years in a child’s development.”). Children of color are disproportionately excluded from gifted and talented programs in many schools, and schools must reform the racial bias in identifying gifted students so that intellectually gifted children of color can be nurtured as much as white children. See also Danielle Dreilinger, *Why Decades Of Trying To End Racial Segregation In Gifted Education Haven’t Worked*, THE HECHINGER REPORT (Oct. 14, 2020), <https://hechingerreport.org/gifted-educations-race-problem/#:~:text=Gifted%20education%20has%20racism%20in,more%20likely%20to%20be%20white> [<https://perma.cc/D9MR-3ANN>] (examining the issue of decades-long racial disparities in gifted education); *Teacher’s Race Affects Gifted Program Selections*, VANDERBILT UNIV. RSCH. NEWS (Jan. 18, 2016), <https://news.vanderbilt.edu/2016/01/18/teachers-race-affects-gifted-program-selections/> [<https://perma.cc/EMA3-MYMH>] (summarizing research that found that “[a]mong elementary school students with high standardized test scores, [B]lack students are about half as likely as their white peers to be assigned to gifted programs in math and reading”).

²⁸⁹ García, *supra* note 211, at 3-4.

²⁹⁰ *Id.* at 3.

²⁹¹ McGrew, *supra* note 207.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

capital contributes to arbitrary discrimination and missed opportunities for economic exchange and innovation across the economy.²⁹⁵ That is, desegregation promotes economic efficiency.²⁹⁶

Social boons, such as increased understanding among racial groups, will surely pay dividends down the line. Gaining exposure to genuine diversity early in one's life sets one up for success because one learns how to coexist with many types of persons and how to navigate a pluralistic world. Moreover, the "badge of inferiority" arguments espoused by the *Brown* court and by Justice Thomas would find less purchase in a world in which white students began to understand that their non-white peers are more than their racial or economic backgrounds. It is hard to argue that a faceless POC "took your spot" at your dream school when you have studied and worked alongside this person—and perhaps been bested by them on occasion—your whole life. Indeed, this is a major benefit of integration; it allows people to see that talent exists everywhere. This understanding could help shape a more truly holistic view of "merit" in this country, perhaps even lowering the tenor of the admissions conversation in the years to come.

This option, which could be stylized as "educational-investment-as-reparations," also avoids the common question of "Reparations for whom?" that plagues these sorts of discussions. Rather than the current debate, which treats a quality education as a private good to be divvied up amongst the disadvantaged who are clamoring like crabs in a bucket, desegregation "spreads the wealth." The benefits of desegregation also accrue more widely than even a strictly socioeconomics-based approach; though both concepts implicate race and class, desegregation actually incorporates socioeconomic realities, making it a broader and potentially more effective framework. Greater investment in America's public schools works to the benefit of students, parents, citizens, and residents everywhere.²⁹⁷

Texas's practice of guaranteeing spots for the highest performing students at its public schools—the so-called "Top Ten Percent Plan" (the "Plan")—provides an excellent example of the multi-layered effects of desegregation.²⁹⁸ Under the Plan, all students in Texas graduating in the top ten percent of their high school classes were guaranteed admission to an in-state public college or university, including the flagships. This school-specific eligibility standard was designed to improve college access for disadvantaged and minority students, who disproportionately attend low-performing public high schools.²⁹⁹ Because the Plan pulled from all high

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Native Black and immigrant communities alike would reap the benefits of better funded and higher performing schools. Poor and middle-class white Americans will also benefit from increased resources and greater contact with Americans who are different from them.

²⁹⁸ The Plan was implemented after the decision in *Hopwood v. Texas*, which effectively banned affirmative action in Texas. For more, see *Hopwood v. State of Tex.*, 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁹⁹ Julie Berry Cullen et al., *Jockeying for Position: Strategic High School Choice Under Texas' Top Ten Percent Plan* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16663, 2011), <https://www.nber.org/papers/w16663> [<https://perma.cc/66MY-PFHU>].

schools, even in the highly segregated Texas public school system, this meant that a certain amount of Black and Brown students were guaranteed spots at some of the state's top universities. The positive effect of the Plan on the economic mobility of these students is not hard to imagine, as admittance to a school like the University of Texas at Austin can provide numerous opportunities for quality instruction and later for professional advancement.

Of course, the Top Ten Percent Plan also saw gamesmanship by well-resourced individuals. Specifically, after the Plan took effect, many wealthier and white students began transferring into lower-performing high schools in order to claim a spot in their new school's top ten percent of students.³⁰⁰ The tournament aspect of the Plan resulted in an increasing number of students choosing to attend comparatively undesirable neighborhood schools instead of more competitive magnet schools.³⁰¹ This outcome somewhat undermined the Plan's goal of promoting racial diversity, but the authors found that this strategic school shifting did, in the short run, slightly reduce ability stratification across high schools.³⁰²

This ever-so-slight increase in peer quality at lower performing schools provides a glimmer of hope for what a more well-designed desegregation plan could achieve. While architects must be aware of potential gamesmanship, if, on balance, they are able to create a system that incentivizes wealthier, white students to attend the public schools closest to where they actually live, over time, there is little doubt that resources will flow into these schools. If overall school quality improves, even marginally, all students at that school are more likely to be competitive for state schools, regardless of whether they finish in the top ten percent of their class. One can easily imagine a student in, say, the top

³⁰⁰ *Id.* at 2.

³⁰¹ *Id.* at 3. Among the students with both motive and opportunity to make a strategic high school shift, as many as 25 percent chose to enroll in a different high school to improve their chances of cracking the top ten percent. *Id.* at 3. The study's authors found that "[t]hrough minority students have greater strategic opportunities so are more likely to trade down [in school quality], the net effect of strategic behavior is to slightly increase the representation of *white* students in the top ten percent pool" (emphasis added). *Id.* at 23. Furthermore, "[b]oth white and minority students who trade down are relatively likely to displace minority students who otherwise would have placed in the top ten percent of their class." *Id.* at 23. Because peer achievement and minority share of a school are highly negatively correlated, the authors viewed this phenomenon of gamesmanship as "almost an inevitable consequence" of strategizing in light of the Plan. *Id.* at 23. The authors concluded that the overall effect of strategic school choice was to slightly decrease the representation of minority students in the ten percent eligibility pool. *Id.*

³⁰² *Id.* at 22-23. More recent research suggests that the Top Ten Percent Plan has led to virtually no increase in the number of public schools that feed into UT Austin and Texas A&M, though more work is needed to achieve meaningful and lasting change. However, the study also suggests that additional recruitment efforts, combined with a small amount of scholarship funds, notably increased the likelihood that an underrepresented high school would start sending students to a flagship. Jill Barshay, *Texas 10% Policy Didn't Expand Number of High Schools Feeding Students to Top Universities*, THE HECHINGER REPORT (July 8, 2019), <https://hechingerreport.org/texas-top-10-policy-didnt-expand-number-of-high-schools-feeding-students-to-top-universities/> [<https://perma.cc/R584-KZAA>]. (presenting the work of Kalena Cortes and Daniel Klasik examining the impact of the Top Ten Percent Plan on matriculation of Texas high school students to two of the state's top flagship universities).

thirty-five percent of their class at a mid-performing Texas high school gaining admission to at least one institution in the UT system.

While the effects of the Ten Percent Plan do not present a fairytale ending to the thorny problem of how to equitably achieve diversity, they do show that something short of a panacea can be found, improving outcomes for students of color where such improvements are sorely needed. While not a long-term solution, the Ten Percent Plan shows what arguably the barest form of desegregation—indeed, desegregation was not even the goal of the Plan—can do. Unfortunately, short of radical social and political change, it seems incremental change like that described above is the most feasible way forward. Outright calls for rapid desegregation will face opposition from across the American political spectrum, but a tailored “x-percent plan”³⁰³ may be able to achieve the modest aim of pumping a few more resources into America’s neediest schools.

Even if some newer formulation of an x-percent plan somehow found purchase with American courts, however, that may not usher in radical change at elite colleges. It may be that most Black and Brown students remain effectively barred from entry into the nation’s “top” schools. It may be that—no matter their qualifications—these students simply do not have what elite schools are looking for in a student population and a potential alumni donor base. Regardless, the above measures could help to close the racial achievement gap nationally and would result in greater numbers of minorities matriculating at flagship state schools that are far better pipelines to the middle class, anyway.³⁰⁴

Finally making good on the promise of *Brown*—or really, *Brown II*—will not solve all of America’s woes, educational or otherwise, but it will put the country on a clearer path to true equality and opportunity for all its residents. Enshrining harmful policies and later dismantling them “with all deliberate speed” is a talent for which American courts and policymakers have shown exceptional aptitude.³⁰⁵ The diversity rationale

³⁰³ For example, California and Florida have adopted similar plans. See *Statewide Guarantee*, UNIV. OF CAL., <https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/california-residents/statewide-guarantee/> [<https://perma.cc/3AS6-K4M4>] (last visited May 25, 2024) (outlining the University of California’s percentage plan) and the *Talented Twenty Program*, FLA. DEP’T OF EDUC., <https://www.fldoe.org/schools/family-community/activities-programs/pre-collegiate/talented-twenty-program/> [<https://perma.cc/EH9E-TFPU>] (last visited May 25, 2024) (describing Florida’s “Talented Twenty” program for students finishing in the top 20% of their high school graduating class).

³⁰⁴ See, e.g., The Upshot, *Some Colleges Have More Students From the Top 1 Percent Than the Bottom 60. Find Yours.*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> (describing the research of Raj Chetty on colleges and income mobility). Chetty and his fellow researchers found that so-called “Ivy Plus” schools (the eight Ivy League schools and similarly selective colleges) have the highest success rate, with almost 60% of students from the bottom income quintile reaching the top income quintile. However, certain less selective mid-tier universities have similar success rates with the key distinction that they admit far more low-income students. Schools such as the City University of New York, California State, and University of Texas systems often outperform schools like Harvard or Princeton in catapulting poorer students into the middle class and beyond. *Id.*

³⁰⁵ *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301(1955).

was, at some level, a break from this age-old practice, and it provided the opportunity for these United States to, in the words of many from the Harvard community, “live its values.”³⁰⁶ That opportunity remains elusive, but it is not beyond reach.

The answer to many of the problems inherent in the affirmative action debate have long rested right under *Brown*’s nose. Desegregation in housing, education, and more generally in American society, promises to bridge the gap that continues to divide this country and that has created and enforced a socioeconomically and racially stratified social order. Genuine diversity, if fostered from the pristine corridors of the Ivy League to the halls of local community colleges, promotes positive educational and economic outcomes for the benefit of all and at a cost to none. If this country can find the political and social will to make good on a promise that is not even a century old, the benefits will surely extend to ourselves and our progeny.

VII. CONCLUSION: A PROMISE UNFULFILLED—FINAL THOUGHTS ON THE DIVERSITY RATIONALE

The *SFFA* decision should be a surprise to few. Courts were always reluctant to tackle diversity in a way that accounted for the realities of our world, and the days of such juridical trepidation were always numbered. Even assuming the legitimacy of all of Harvard’s justifications for its consideration of race in admissions, the lack of a clear, singular justification beyond the nebulous concept of “diversity” doomed affirmative action from the start. The throughline here is that a broader conception of diversity was needed at the outset. If the *spirit* of the diversity rationale is to survive, because the legal doctrine is now dead, it must expand beyond its narrow confines. Diversity as a concept must be broadened to account for the pluralities of the modern age, and this liberalizing effort must extend to our notions of community, allowing us to finally desegregate our country.

³⁰⁶ Pete Buttigieg (@PeteButtigieg), X (formerly TWITTER) (Oct. 2, 2019, 12:42 PM), <https://twitter.com/petebuttigieg/status/1179436467019505664?lang=en> [<https://perma.cc/8CXD-VFDS>] (then-presidential candidate Pete Buttigieg, on the one-year anniversary of the murder of journalist Jamal Khashoggi, noting that the lack of holding his murderers accountable represented a year of missed opportunities for this country to “live our values”); CNN Politics, *Warren: We Must be a Country that Lives Our Values*, <https://www.cnn.com/videos/politics/2019/07/31/elizabeth-warren-immigration-cnn-2020-democratic-primary-debate.cnn> [<https://perma.cc/6CDU-M6HV>] (then-presidential candidate Elizabeth Warren criticizing the Trump Administration’s border patrol policies and arguing that the United States “must be a country that every day lives our values”); C-SPAN, *User Clip: George W Bush Asks us to Live by Our Values*, <https://www.c-span.org/video/?c4872239/user-clip-george-bush-asks-live-values> (President George W. Bush, in a speech at a Bush Institute event, noting that to recover America’s identity and renew the country, “we only need to remember our values” and stating that “[t]he only way to pass along civic values is to first live up to them”); Barack Obama, President, U.S. of Am., Address at 2013 Presidential Inauguration Ceremony (January 21, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> [<https://perma.cc/R7ET-PD4S>] (President Barack Obama’s 2013 inaugural address in which he says that this “generation’s task [is] to make these words, these rights, these values of life and liberty and the pursuit of happiness real for every American”).

Though this writing eschews a formal proposal of a so-called “neo-diversity rationale” in which one merely swaps the historically favored category of race for another equally amorphous category, it is clear that affirmative action defenders and sympathetic courts will have to grow ever more exacting in justifying race-based preferences in American life, as potential litigants are sure to look to *SFFA*’s success and refine their assaults on whatever is left of affirmative action in educational settings and corporate America.³⁰⁷ Harvard and its peers can avoid much of this coming headache by re-framing their stated admissions goals. On one hand, they can do the unglamorous work of truly diversifying their student body, making good on the lofty ideals espoused on their websites and in admissions brochures. On the other hand, a more explicit embrace of ALDCs and the value they bring to campus coffers might sound less lofty and egalitarian, but it may be far more honest and, perhaps, more legally defensible.

Either schools will find a new way to achieve the campus diversity they presumptively value, or they will not. Perhaps, in light of the High Court’s decision, schools will simply wash their hands of the matter, saying they have done all they could to advance racial justice, silently grateful that they no longer have to employ such complicated admissions schemes to foster on-campus racial diversity. Perhaps elite colleges and universities will more openly stress the financial incentives that play a much larger role in the process than advertised. Who can say?

The forces that led to the very need for the diversity rationale are not in the rear view. The *SFFA* case is a watershed moment in this country’s long, sordid racial history. With each feeble defense of the diversity rationale written over the recent decades, the Supreme Court retreated further into a corner, continually shrinking the role of race-based considerations in higher education admissions. Rather than continue this delicate jurisprudential waltz, the Supreme Court has now stopped the music. But silence brings opportunity. In this stillness, the vacuum wherein the word “diversity” is said in hushed whispers, stakeholders, particularly the students of this country, would be better served by an open conversation about the goals of universities, elite and otherwise, and the processes such institutions use to achieve those goals. A performative and thin endorsement of the value of “diversity” did not accomplish this aim. It never could. So, something more robust—and more honest—is needed.

³⁰⁷ See, e.g., Nate Raymond, *Affirmative Action Opponent Drops Case over Law Firm’s Diversity Fellowship*, REUTERS (Oct. 11, 2023), <https://www.reuters.com/legal/affirmative-action-opponent-drops-case-over-law-firms-diversity-fellowship-2023-10-11/> (describing Ed Blum’s dropping cases that he launched after the *SFFA* decision that were targeting U.S. law firms over their diversity programs). It is unclear how long this diversity détente will last.