# EDUCATION ACCESS & OPPORTUNITY: AN INTRODUCTION

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## INTRODUCTION

This Introduction to the third book of Volume 74 of the *Syracuse Law Review* is being written at a tumultuous time in U.S. society. Social, educational, economic, and legal institutions, and perhaps most concerning, the U.S. Supreme Court, face questions about their legitimacy. In light of opinions decided by the Supreme Court in the 2023 Term on race-based affirmative action and student debt relief advanced by the Biden Administration, the *Law Review* found it important to focus on the theme, *Educational Access and Opportunity.* These consequential decisions by the Supreme Court have a sense of portent, and the *Law Review* was prompted by urgency to address the question: How do we promote education access within this new landscape? In no small measure, these questions involve not only the rule of law, but the state of democracy itself in the United States.

In addition to questions regarding race-based admissions policies and student loan debt relief programs, this new societal and legal landscape includes controversies surrounding inequitable funding and academic freedom in the K-12 public school curricula, and the proliferation of online instruction accelerated by the COVID-19 pandemic.[1] To address these matters, the third book of Volume 74 of the *Syracuse Law Review* is the culmination of a symposium that was held on October 14, 2023, to consider the magnitude of the present moment and revisit questions about students' civil and constitutional rights — or the precarity thereof. The *Law Review*'s symposium partners were the Franklin H. Williams Judicial Commission[2] and the Historical Society of the New York Courts.[3]

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1. *See* Nina A. Kohn, *Online Learning and the Future of Legal Education: Symposium Introduction*, 70 SYRACUSE L. REV. 1 (2020); *see generally* 70 SYRACUSE L. REV. 1–203 (2020).

2. As part of the Unified Court System of New York, the Franklin H. Williams Commission (FHW Commission) was established in 1988 to improve the perception and experience of fairness within the court system and to ensure equal justice in New York State. The Commission's mission is to educate and advise decision makers in the New York Court System on issues affecting employees and litigants of color and implement recommendations to address these issues. The members of the FHW Commission are judges, lawyers, court administrators, and academics, all appointed by the Chief Judge of the State of New York. *Franklin H. Williams Judicial Commission*, N.Y. UNIFIED CT. SYS., https://ww2.nycourts.gov/ip/ethnic-fairness/index.shtml (last visited Apr. 15, 2024).

3. The Historical Society of the New York Courts was founded in 2002 by then New York State Chief Judge Judith S. Kaye. Its mission is to preserve, protect, and promote the legal history of New York, including the proud heritage of its courts and the development of its courts and the development of the Rule of Law. The

The Symposium also included panel participation by esteemed members of the legal academy, Syracuse University administration, New York State judiciary, practicing bar, interdisciplinary and international communities, students, and other stakeholders. The breadth and depth of participants' experience and expertise brought to light the issues of the present moment. In her welcoming remarks, Syracuse University College of Law Teaching Professor Mary Szto clearly stated the challenges and possibilities: "Our challenges are vast. Around us is war. Conflict. Political division, natural disasters, and other suffering. Our neighborhoods are more racially segregated than before. So, our hearts are grieving. Nevertheless, we are here today to reflect, to be refreshed, and to continue to take action." Professor Szto further reminded us that the topics and issues of the panels were inextricably interrelated:

> The design of the Symposium shows that we cannot talk about access and opportunity without seeking transformative, long-term solutions. We are interdisciplinary. We cannot discuss K to 12 issues in Panel One without discussing higher education in Panel Two. We cannot discuss higher education in Panel Two without discussing financial debt and accessibility. Our Lunch and Learn session involves legal history. We cannot discuss the present without discussing the past and we cannot discuss the past without discussing the future. We cannot discuss diversity in Panel Three without hearing from our judiciary and senior administrators and taking a hard look at our profession and testing methods. We cannot discuss access and opportunity without acknowledging the cruel school to prison pipeline, which our keynote speaker is dismantling . . . . We are creating new ways of knowing.[4]

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Historical Society promotes its mission through educational outreach to New York State students, and public programs and publications. The Historical Society provides resources to educational institutions and students at all levels. The Historical Society also maintains a legal history archives. *See Mission & History*, HIST. SOC. N. Y. CTS., https://history.nycourts.gov/mission-history/ (last visited Apr. 14, 2024). The Williams Commission and the Historical Society of the New York Courts announced their collaboration to incorporate the FHW Commission's curriculum in the Historical Society's Teaching Democracy Toolkit and Education website. *See A Resource Toolkit for Teaching American Democracy & Government,* HIST. SOC. N. Y. CTS*.,* https://history.nycourts.gov/democracy-teacher-toolkit/ (last visited Apr. 14, 2024). *See also*, E-mail from Mary Lynn Nicholas-Brewster, Exec. Dir., FHW Jud. Comm'n, to FHW Comm'rs (Mar. 11, 2024) (on file with author).

4. Professor Mary Szto, *Welcoming Remarks*, Symposium Zoom Transcript [hereafter Symposium Transcript], at 81-93 (Oct. 14, 2023).

## I. OVERVIEW OF PANELS

It is helpful to appreciate the comprehensive nature of the Symposium, which included panel discussions and the articles that are published in this book. In this way, the articles that are described infra, are not stand-alone items, but part of a cohesive whole treatment of the important issues that the Symposium addressed through speakers' presentations and published scholarship. Thus, the Symposium progressed with three panels and a luncheon keynote address. Panel One was entitled *Towards Inclusive K through 12 Education: Rights, Restrictions, and Reforms*. This panel discussed recent developments in K through 12 education in the United States, with a specific focus on school funding, disability rights, and curriculum restrictions. Panel Two, *Tackling the Major Questions of Student Debt*, discussed recent developments in higher education financing, with specific focus on the path forward after the Supreme Court's decision in *Biden v. Nebraska*[5]

Dr. Julia Rose Kraut was the presenter at the Symposium's Lunch and Learn session. Dr. Kraut is an attorney and historian, who is the Resident Fellow for the Historical Society of the New York Courts. Dr. Kraut emphasized the collective obligation to educate and empower the next generation. Apropos the Symposium theme, Dr. Kraut opined that her ability to teach controversial historical and current events to her diverse group of students in New York City was because "I was able to teach freely, responsibly, and professionally without fear, intimidation, inhibition, or censorship, and [my] students were free to learn in a supportive environment."[6] Dr. Kraut concluded her address, "Academic freedom to teach and freedom to learn and receive information are not only fundamental to education, but also necessary to maintain a free democratic society and should be protected."[7]

The final panel, *The Future of DEI after Students for Fair Admission*, presented in partnership with the Franklin H. Williams Judicial Commission, focused on the Supreme Court's decisions in *Students for Fair Admission v. Harvard* and *Students for Fair Admission v. University of North Carolina* (hereafter *SFFA)*.[8] I served as moderator for this panel, which included the Hon. Richard Rivera,[9] and the Hon.

5. Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

6. *See* Dr. Julia Rose Kraut, Symposium Transcript, at 818-819.

7. *See id*. at 821.

8. Students for Fair Admissions, Inc. v. President & Fellows Harv. Coll., 143 S. Ct. 2141, 2154 (2023).

9. *See Hon. Richard Rivera,* N.Y. UNIFIED CT. SYS., https://ww2.nycourts.gov/hon-richard-rivera-36506 (last visited Apr. 14, 2024).

Troy K. Webber,[10] co-chair emeritus and co-chair of the Franklin H. Williams Judicial Commission, respectively. Judges Rivera and Webber spoke about the importance of diverse judicial systems at all levels, and their experiences as a man and woman of color in the legal profession and as members of the bench. They recounted that they were not immune to racial and gender stereotyping or misidentification as defendants or otherwise not members of the legal profession.[11] Significantly, Judge Rivera and Justice Webber were appointed to the New York State Bar Association's Committee on Advancing Diversity, which was created after the *SFFA* decisions. The Committee was tasked to "evaluate the legal and societal implications of the Supreme Court's *SFFA* decision and provide guidance for courts, educational institutions, corporations, law firms, and other organizations that wish to preserve diversity in their institutions, consistent with the dictates of the ruling.[12]

Other panelists included Associate Dean Alfreda Robinson, of George Washington University School of Law,[13] Syracuse University Vice Chancellor and Provost Gretchen Ritter,[14] and Professor Kimberly West-Faulcon, of Loyola Law School, whose article is included in the Symposium volume.

The Symposium keynote speaker was Mr. Jeremiah Bourgeois. Mr. Bourgeois is a journalist, legal scholar, formerly incarcerated person, and graduate of Gonzaga University Law School. In 1992, at age fourteen, he became one of the youngest children in the United States to receive a mandatory sentence of life without the possibility of parole and the second youngest person to receive this sentence in the State of Washington.[15] Following the Supreme Court's decision in *Miller v Alabama*,[16] which declared mandatory life without parole

10. *See Hon. Troy K. Webber*, APP. DIV., 1ST JUD. DEP'T, S. CT N.Y., https://nycourts.gov/courts/ad1/justicesofthecourt/justices_webber.shtml (last visited Apr. 14, 2015).

11. *See* Hon. Troy K. Webber, Symposium Transcript, at 140-160; *see also* Hon. Richard Rivera, Symposium Transcript, at 164-184.

12. *See Taskforce on Advancing Diversity*, NYSBA, https://nysba.org/committees/task-force-on-advancing-diversity/ (last visited Apr. 14, 2014).

13. *See Assoc. Dean Alfreda Robinson*, GEO. WASH. L. SCHOOL, https://www.law.gwu.edu/alfreda-robinson (last visited Apr. 14, 2014).

14. *See Vice Chancellor and Provost, Chief Academic Officer, Gretchen Ritter*, SYRACUSE UNIV., https://chancellor.syr.edu/university-leadership-2/chancellors-executive-team/gretchen-ritter/ (last visited Apr. 14, 2024).

15. *See* JEREMIAH BOURGEOIS, THE EXTRAORDINARY PRISONER: ESSAYS FROM INSIDE AMERICA'S CARCERAL STATE (2020); Jeremiah Bourgeois, Symposium Transcript, at 300-304.

16. Miller v. Alabama, 567 U.S. 460, 465 (2012).

sentences for juveniles as unconstitutional, he was resentenced to an indeterminate sentence, thus making him eligible for parole. Mr. Bourgeois spoke about the pivotal moment when he was exposed to education in ways that became meaningful to him.[17] Bourgeois' final message emphasized the importance of educational opportunity for people like himself who were considered unworthy by society and internalized beliefs in their worthlessness. He emphasized the importance of having diverse perspectives and people from many backgrounds in law and all other areas of societal engagement.[18]

The Symposium closed with remarks by Suzette Meléndez, College of Law Teaching Professor and Faculty Fellow for the Office of Diversity and Inclusion at Syracuse University. Professor Meléndez challenged Symposium participants to recall that lawyers must be cognizant of dealing with the whole human being in our continued focus on access to education.[19]

## II. SYNOPSIS OF ISSUES RAISED BY THE SYMPOSIUM

The *Law Review* Symposium book is timely and essential to raise issues and suggest responses to matters that are cornerstones of American society and democratic ideals. This book presents articles that examine critical questions relating to substantial new challenges to the goals of equality, equity, and inclusion in American society. Why does the present situation appear so dire for law and society? What are the effects — particularly the disproportionate effects — of the theoretical and practical questions pertaining to access to education? Who stands at the intersection of the disparate impact of these Supreme Court decisions, individually and collectively? And how can the promise of fairness, equality, equity, and inclusion be met in the aftermath of such portentous decisions in a society that holds opportunity, inclusion, and adherence to the rule of law as fundamental ideals?

The issues at the center of the *Law Review*'s Symposium book raise broad concerns and have special resonance for many people in communities of color. The long history of racial and gender discrimination in the United States places Black women and other women of color at the vortex of these legal developments. Starting with the

17. Jeremiah Bourgeois, Symposium Transcript, at 354. He also spoke about his gratitude for the opportunity to explore a future beyond incarceration. He spoke of his remorse for having taken someone's life and the lasting impact on the victim's family, as well as the pain and loss that he caused his own family. *Id.* at 354-356.

18. *Id.* at 639-649.

19. Suzette Meléndez, Symposium Transcript, at 714, 781-787.

Court's decision in *Dobbs v. Jackson Women's Health Organization,* 597 U.S. 215 (2022) in the previous term, the U.S. Supreme Court disregarded 50 years of precedent that recognized women's constitutional right to abortion and reproductive autonomy and healthcare. The opinion was widely assailed as being based on conservative political agenda rather than long held principles of constitutional reasoning, including stare decisis.[20] Particularly concerning has been the detrimental health impact on women of color and poor women across racial backgrounds. The Guttmacher Institute notes compound effects in the "failures of the health care and economic systems to provide Black, Indigenous and Latino communities and communities living with low incomes access to high-quality, affordable health care, and safe and sustainable communities," upon finding, "[t]hus, while abortion bans and other legal restrictions harm all people who are or may become pregnant, they cause even greater harm to those already subject to systemic racism and economic injustice."[21]

### *A. Students for Fair Admissions and Related Cases*

The Supreme Court's decision in *SFFA* laid the Court open to more criticism that its decision making was based on ideological

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20. *See* Michele Goodwin, *Opportunistic Originalism: Dobbs v. Jackson Women's Health Organization*, 2022 SUP. CT. REV., 111 (2022), https://chicagounbound.uchicago.edu/supremecourtrev/vol2022/iss1/5; Michele Goodwin, *Disturbing the Reconstruction: A Reflection on Dobbs*, 34 YALE J. L. & FEMINISM 30 (2023). *See also* Mary Ziegler, *The History of Neutrality: Dobbs and the Social Movement Politics of History and Tradition*, 133 YALE L. J. F. 161 (2023); *ROE V. DOBBS*: THE PAST, PRESENT AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION (Bollinger & Stone eds., 2023).

21. Liza Fuentes, *Inequity in U.S. Abortion Rights and Access: The End of Roe is Deepening Existing Divides*, GUTTMACHER INST. (Jan. 1, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides. The author further notes that "Not only Black, Latino and Indigenous people and people living with low incomes, but transmen and nonbinary people, immigrants, adolescents and people with disabilities are all particularly likely to encounter compounding obstacles to abortion care and be harmed as a result." *Id. See also* Shawna Mizelle, *Restrictive Abortion Laws Disproportionately Impact Black Women in GOP-led States*, *New Democratic Memo Notes*, CBS NEWS (Feb. 26, 2024 9:04 PM), https://www.cbsnews.com/news/restrictive-abortion-laws-disproportionately-impact-black-women-in-gop-led-states-democratic-memo/ (noting in Florida, for example, where abortion is banned at fifteen weeks, Black women are nearly four time as likely to die from complications from pregnancy or in childbirth than White women; and in Georgia, where the abortion ban is at six weeks, Black women are over three times more likely to die from pregnancy complications than White women); Kira Eidson, *Note Addressing The Black Mortality Crisis in the Wake of Dobbs: A Reproductive Justice Policy Framework*, 24 GEO. J. GENDER & L. 929 (2023).

agenda rather than principled reasoning and adherence to conventions of legal analysis, again having overturned nearly forty years of Supreme Court precedent that recognized the importance of race-conscious admission in U.S. colleges and universities.[22] In the *SSFA* cases, the Court effectively overturned long-standing precedent, particularly *Grutter v. Bollinger*, the 2003 case in which the Court upheld the use of race as part of holistic admissions policies.[23] As one writer opined:

> The central difference between the [Chief Justice Roberts' majority and Justice Sotomayor's dissenting opinions in *SFFA*] underscores that the United States now has two Constitutions. That makes this case as consequential as the earthshaking decision a year ago terminating the half-century-old federal constitutional right to abortion. In the Constitution favored by the Supreme Court's conservative super-majority in the admissions case, the Fourteenth Amendment *prohibits* government from drawing lines based on race. In the other Constitution, embraced by the Court's liberal minority in the case, the Fourteenth Amendment *established a mandate for equal protection of the law*, not for color-blind policies. It recognizes a profound difference between *exclusion* and *inclusion*, between seeking to perpetuate a racial caste system through racist discrimination and seeking to help eradicate racial subordination and its persistent, rife afterlife through positive race-conscious practices.[24]

The Lawyers Committee for Civil Rights Under Law found fault in the Court's ahistorical rendering of the Fourteenth Amendment analysis:

> The Court grounds its decision in a narrow and misguided historical overview of the Fourteenth Amendment, ignoring the substantial history of the Equal Protection Clause showing Congress's intent both to repel the subjugation of Black people

22. *See* Jamelle Bouie, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/opinion/harlan-thomas-roberts-affirmative-action.html. *See also* Courtney Hagle, *NYT Writer Jamelle Bouie Breaks Down How Right-Wing "Colorblind" Argument Against Affirmative Action is Rooted in White Supremacy*, MEDIA MATTERS FOR AM. (July 7, 2023, 5:05 PM), https://www.mediamatters.org/supreme-court/nyt-writer-jamelle-bouie-breaks-down-how-right-wing-colorblind-argument-against.

23. Grutter v. Bollinger, 539 U.S. 306, 311 (2003).

24. Lincoln Caplan, *The Supreme Court Affirmative Action Rulings: An Analysis*, HARV. MAG. (June 30, 2023), https://www.harvardmagazine.com/2023/06/harvard-affirmative-action-analysis.

> to advance opportunity for Black people. Indeed, Congress rejected language in proposed amendments that were more aligned with colorblindness. Nevertheless, the Court concludes that the Equal Protection Clause was enacted to ensure colorblindness and authorized racial classifications only under narrow circumstances that could survive their articulation of strict scrutiny, such as race-based remedial plans and plans that avoid imminent and serious risks to safety in prisons.[25]

This point was emphasized in Justice Sotomayor's dissenting opinion in *SFFA*, stating:

> Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education . . . . At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value. To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation.[26]

It is important to note that the Supreme Court's decision in *SFFA* did not expressly overturn *Grutter*; however, it has made it ever more difficult to employ race-consciousness in admissions policies. The Court made narrow exceptions to the use of race in individual students' applications and in the military academies.[27]

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25. LAWS. COMM. C.R. UNDER L, SUMMARIES OF THE SUPREME COURT'S DECISION IN STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT & FELLOWS HARV. COLL. & STUDENTS FOR FAIR ADMISSIONS V. UNC 2 (2023), https://www.lawyerscommittee.org/wp-content/uploads/2023/08/LC_Harvard-UNC-Cases_D.pdf.

26. Students for Fair Admissions v. President & Fellows Harv. Coll., 143 S. Ct. 2141, 2239, 2248 (2023) (Sotomayor, J. dissenting).

27. Note Roberts' opinion in which limited use of race can be included in applicants' statements. Further, Roberts' opinion at Footnote 4, reserved judgment on the constitutional applicability of race-conscious admission in the military academies. *Students for Fair Admissions*, 143 S. Ct. at 2166 n.4. Predictably, the SFFA, filed suit against the military. *Students for Fair Admissions v. U.S. Military Academy at West Point* is before a federal appellate court. Students for Fair Admissions v. United States Mil. Acad. at W. Point, No. 23-CV-08262, 20244 U.S. Dist. LEXIS 2222, at *1 (S.D.N.Y. Jan. 3, 2024) *appeal withdrawn*, Docket No. 24-40, 2024 U.S. App. LEXIS 8511 (2d Cir. Feb 13, 2024). The Supreme declined to issue a preliminary injunction against West Point; however, stated that no inferences were to be drawn on the merits from this decision, indicating instead that the "record was underdeveloped." *See* Lawrence Hurley, *Supreme Court Declines to Immediately Block West Point Considering Race in Admissions Process*, NBC NEWS (Feb. 2, 2024, 5:20 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-immediately-block-west-point-considering-race-a-rcna136527; Abby VanSickle,

Justice Jackson responded in dissent to the majority's exception for military academies, finding "The Court has come to rest on the bottom-line conclusion that racial diversity in higher education is only worth potentially preserving insofar as it might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom."[28]

Despite the Supreme Court's professed narrowness of its decision in *SFFA*, the decision has spawned reactions across educational institutions, workplaces, and other organizations and institutions to dismantle programs designed to increase diversity. Defensive retrenchment strategies are being instituted on DEI programs in schools and businesses that are thought to be required by the *SFFA*. As the Lawyers Committee for Civil Rights Under Law detail,

> Anti-civil rights organizations will undoubtedly seek to use the Court's decision to further its agenda. In fact, it has already started. Only a few weeks after the decision, Ed Blum, president of SFFA, purportedly sent a letter to 150 colleges and universities providing an overly broad and inaccurate interpretation of the Court's holding and encouraging schools to practically eliminate the use of race in their admissions programs altogether.[29]

### *B. K-12 Racial Content Restrictions*

For many people in American society, education is viewed as the catalyst toward brighter, prosperous, and fulfilling futures for themselves, their families, and their communities. This is particularly so for

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*Supreme Court Won't Block Use of Race in West Point Admissions for Now*, N.Y. TIMES (Feb. 2, 2024), https://www.nytimes.com/2024/02/02/us/politics/scotus-admissions-west-point.html.

28. Students for Fair Admissions v. President & Fellows Harv. Coll., 143 S. Ct. 2141, 2279 (2023) (Jackson, J. dissenting).

29. LAWS. COMM. C.R. UNDER L, *supra* note 25, at 4. Indeed, the effect of the *SFFA* decision has far-ranging ramifications beyond the classroom such as the lawsuits against the Fearless Fund, a venture capital fund designated for Black women, who receive an infinitesimal amount of venture capital funding from traditional sources. These suits allege that since the grants are only for Black women, the Fearless Fund is racially discriminatory. *See* Janell Ross, *They Didn't Plan to Be at the Center of a Civil Rights Battle. Then the Fearless Fund Was Sued*, TIME (Jan. 30, 2024, 7:00 AM), https://time.com/6554929/fearless-fund-lawsuit-arian-simone-ayana-parsons-interview/; Mirtha Donastorg, *The Fearless Fund Is Back In Court Tomorrow. Here's What You Need To Know,* ATLANTA J. CONST. (Jan. 30, 2024), https://www.ajc.com/news/fearless-fund-is-back-in-court-tomorrow-heres-what-you-need-to-know/PWF3MJQ73BFOPDTNQE3YHOIMJI/.

members of American society who have long been denied the opportunity to obtain formal secondary and advanced education.[30] Thus, access to education has been a continuing concern with new iterations in contemporary times. Further, concerns about access to education arise well before the college or university experience. This includes concerns about the tenuous protections of students and teachers alike regarding academic freedom and what content can or cannot be taught in K-12 classrooms. Florida[31] is among the states that have instituted policies that criminalize teaching that contravenes state legislative measures that outlaw so-called "woke" or critical race theory (CRT) curricula.[32] These measures have been adopted in some manner by a

30. Extensive scholarship provides historical, legal, and narrative analyses and accounts of Black people's quest for education from antebellum, postbellum, and contemporary times. Just the desire for education, let alone the actual pursuit of it, often endangered the lives and livelihoods of Blacks during eras of enslavement and freedom. *See, e.g.,* THINKING ABOUT BLACK EDUCATION: AN INTERDISCIPLINARY READER (Hilton Kelly & Heather Moore Roberson eds., 2023); JARVIS R. GIVENS, FUGITIVE PEDAGOGY: CARTER G. WOODSON AND THE ART OF BLACK TEACHING (2021); JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935 (1988); JOY ANN WILLIAMSON-LOTT, RADICALIZING THE EBONY TOWER: BLACK COLLEGES AND THE BLACK FREEDOM STRUGGLE IN MISSISSIPPI (2008); W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: 1860-1880 (1992); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

31. DeSantis introduced legislation called "Stop the W.O.K.E." Act, which was focused on the use of "critical race theory." The legislation limited what schools, universities and private businesses could teach students or employees. The press release announcing the legislation promised, "The Stop W.O.K.E. Act will be the strongest legislation of its kind in the nation and will take on both corporate wokeness and Critical Race Theory." News Release, Gov. Ron DeSantis, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021).

32. Critical Race Theory or "CRT," is not new educational theory. Nor is it a theory or pedagogical method that is widely taught in secondary schools. Rather, it is a theory that is taught in higher education to examine the ways in which stereotypes and racial and intersectional disparities continue to manifest in institutionalized ways. *See* Rashawn Ray & Alexandra Gibbons, *Why are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/. The origins of CRT are largely attributed to Professor Derrick Bell, who questioned the intransigence of racism and racial stratification in American society as an attorney for the NAACP-LDF and as a law professor. In 1970, Bell wrote a seminal textbook, *Race, Racism, and American Law* (1970), which was followed by numerous articles and law school courses on the topic. Further advancement of the theory is attributed to Professor Kimberlé Crenshaw, with her article,

majority of states.[33] They have been heavily criticized as vague and discriminatory on the bases of race, gender, and sexuality, and politically expedient for conversative political causes. As such, precise definitions of the offending behavior that will trigger punishment under the statutes are often wanting. For example, when Ryan Newman, General Counsel for Florida Governor Ron DeSantis was asked to explain the meaning of "woke," he responded, "the belief there are systemic injustices in American society and the need to address them."[34]

### *C. Student Debt Relief Under Biden v. Nebraska*

Access to education at all levels is highly contingent upon the ability to finance one's education, either directly or indirectly regarding tuition or ancillary costs. However, with specific regard to higher education, the rising cost of college, university, and professional education render current and matriculated students mired in debt for many years after graduation. The data reveal that in September 2023, over forty-three million Americans held outstanding federal loan debt totaling more than $1.6 trillion.[35] It precludes graduates from

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"Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 *University of Chicago Legal Forum*. Crenshaw introduced the framework of "intersectionality" to CRT analysis, asserting that people who belong to multiple marginalized groups may experience compound forms of discrimination which were not acknowledged or addressed in the law or legal institutions; *See also* Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), https://www.newyorker.com/magazine/2021/09/20/the-man-behind-critical-race-theory. As Crenshaw explains, "[Critical Race Theory] is a way of seeing, attending to, accounting for, tracing and analyzing the ways that race is produced, the ways that racial inequality is facilitated, and the ways that our history has created these inequalities that now can be almost effortlessly reproduced unless we attend to the existence of these inequalities." Jacey Fortin, *Critical Race Theory: A Brief History*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/article/what-is-critical-race-theory.html (quoting Crenshaw).

33. Under the guise of banning "critical race theory," a growing number of U.S. states now limit public schools from having certain books with content or lessons relating to race or racism. *See* Russell Contreras, *Axios Explains: Critical Race Theory*, AXIOS (Mar. 3, 2023), https://www.axios.com/2023/03/03/critical-race-theory-education-books-explained; Ray & Gibbons, *supra* note 32.

34. Philip Bump, *What Does 'Woke' Mean? Whatever Ron DeSantis Wants*, WASH. POST (Dec. 5, 2022, 4:17 PM), https://www.washingtonpost.com/politics/2022/12/05/desantis-florida-woke-critical-race-theory/.

35. *See Federal Student Loan Portfolio*, U.S. DEP'T EDUC., https://studentaid.gov/data-center/student/portfolio.

establishing independent lives and fully entering the economy. The implications of high levels of student debt can have myriad personal, societal, and systemic impacts. On the personal level, high levels of debt can affect the individual's life choices such as independence and self-sufficiency, career decisions, marriage, family planning, housing, and retirement.[36] There also can be severe health consequences involving physical health and mental well-being.[37] On a larger scale, student loan debt can cause stagnation in the economy, where it is estimated that student loan payments remove $70 billion a year out of the economy.[38] These economic impacts have negative effects on federal, state and local economies through loss of taxes and consumer spending.[39]

There are great disparities in the student loan debt that students of color carry. A Brookings Institution study found that the "Black-white disparity in student loan debt more than tripled just four years after graduation, further eroding Black students' ability to build wealth."[40] According to analysts at the Thurgood Marshall Institute, this stark gap stems from years of entrenched, structural racism:

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36. *See* Miranda Marquit, *How Does Student Debt Affect the Economy?*, INVESTOPEDIA (Feb. 14, 2024), https://www.investopedia.com/student-debt-affect-economy-8550501#:~:text=Student%20loan%20balances%20can%20have,free%20cash%20in%20consumers'%20pockets.

37. Researchers find growing concern about the stress associated with student debt and its impact on poor health consequences. As studies reveal, high levels of financial stress may result in lowered productivity at work, and in extreme cases, may result in unemployment due to absenteeism from health concerns. These concerns relate to physical and mental health issues, where direct connections have been found between high rates of student debt and mental health, in particular. *See* Steven Deller & Jackson Parr, *Does Student Loan Debt Hinder Community Well-Being?*, 4 INT'L J. CMTY. WELL-BEING 263 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7814862/.

38. Moody's Analytics estimates that resumption of student loan payment will remove $70 billion a year from the U.S. economy. *See* Emily Peck, *Warning: Student Loan Cliff Ahead*, AXIOS MKTS. (July 10, 2023), https://www.axios.com/2023/07/10/student-loan-payments.

39. *See* Page Forrest & Spencer Orenstein, *October Restart of Federal Student Loan Payments Could Hurt State Economies*, PEW CHARITABLE TRS. (Oct. 11, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/10/11/october-restart-of-federal-student-loan-payments-could-hurt-state-economies.

40. Marisa Wright, *How Student Loan Forgiveness Can Help Close the Racial Wealth Gap & Advance Economic Justice*, LDF (Apr. 13, 2023), https://www.naacpldf.org/student-loans-racial-wealth-gap/ (citing JUDITH SCOTT-CLAYTON & JING LI, BLACK-WHITE DISPARITY IN STUDENT LOAN DEBT MORE THAN TRIPLES AFTER

> Racial wealth inequalities in the United States today are a direct result of centuries of racialized, exploitative social and legal structures — policies that set the foundation for a skewed distribution of land, labor, political power, and resource ownership by race. These patterns continue today and are evident in Black-white racial disparities in net worth, known as the Black-white racial wealth gap.[41]

Young Black women are the most likely found to have student debt and to carry the highest balances.[42] Problems of staggering debt and the racial wealth gap will be exacerbated by the Supreme Court's decision in *Biden v. Nebraska*[43] by scuttling the proposed remedy for relief for eligible students, under the Court's dubious analysis.[44] The Supreme Court held that the Secretary of Education does not have authority under the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act")[45] to take that action to establish a student loan forgiveness program that would cancel roughly $430 billion in debt principal and affect nearly all student loan borrowers. For some scholars of the Court, the majority's decision in *Biden v. Nebraska* was a "power grab" that rested on the "Major Question" doctrine, which

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GRADUATION (Brookings, 2016), https://www.brookings.edu/articles/black-white-disparity-in-student-loan-debt-more-than-triples-after-graduation/).

41. *Id.* Data from the U.S. Department of Education found that 86% of Black students assume student loan debt compared with only 68% of White students. *Id.*

42. *See* Ana Hernández Kent & Fenaba R. Addo, *Gender and Racial Disparities in Student Loan Debt*, FED. RSRV. BANK ST. LOUIS (Nov. 22, 2022), https://www.stlouisfed.org/publications/economic-equity-insights/gender-racial-disparities-student-loan-debt.

43. Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

44. *See* Ian Millhiser, *The Supreme Court's Lawless, Completely Partisan Student Loans Decision, Explained,* VOX (June 30, 2023), https://www.vox.com/scotus/2023/6/30/23779903/supreme-court-student-loan-biden-nebraska-john-roberts (Criticizing the Court's decision in *Biden v. Nebraska* as "nothing more than an exercise of raw power. It bears no resemblance to actual law."). *See also* Erin Webb, on the confusion sowed by the "major questions doctrine," stating "Instead, the Supreme Court's decisions to date only agree that a major questions analysis incorporates the concept of 'clear Congressional authorization,' which hasn't been quantified by the court." Erin Webb, *Analysis: Biden v. Nebraska Leaves Major Questions Unanswered*, BL ANALYSIS (July 7, 2023, 5:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-biden-v-nebraska-leaves-major-questions-unanswered.

45. *Nebraska*, 143 S. Ct. at 2375; Notice of Debt Cancellation Legal Memorandum, 87 Fed. Reg. 52,943, 52,944 (Aug. 30, 2022).

has been called gratuitous and confusing.[46] As of this writing, the Biden Administration has launched a new plan to forgive student debt.[47]

## III. OVERVIEW OF THE ARTICLES IN THIS ISSUE

The articles in this Symposium book speak cogently to these important issues. The authors bring extensive knowledge and expertise to their topics and proffer recommendations for consideration to resolve these pressing issues in our society, laws, and democratic system.

A central theme connecting these essays and articles is an overriding, even foreboding sense of concern about the state of American democracy. Issues pertaining to access to education are viewed by the authors and presenters as interwoven with participation in and protection of democratic ideals and democratic practice. These concerns are raised in the context of School Funding (Christine Rienstra Kiracofe), Judicial Decision Making regarding the Autonomy of Colleges and Universities (Jonathan D. Glater), Admissions Practices regarding Legacy Preferences (Chad Marzen), Litigation on Anti-Critical Race Theory (CRT) State Action (Raquel Muñiz), Constitutional Protections for Education/Educators against "Anti-Wokeism" and Authoritarianism (Erin M. Carr & Nabil Yousfi), Affirmative Action After

46. *See, e.g.*, Professor Richard Pierce, Jr., stating, "The majority's gratuitous invocation of the major questions doctrine can only be viewed as a shot across the bow of the administration and an invitation to lower courts to invoke the doctrine any time any agency takes an action that has economic or political significance. The majority opinion will have the obviously intended effect of causing agencies to be reluctant to take any major action. The reasoning of the conservative majority in this case will have its desired effects of deterring agencies from taking any major action and will increase the intensity of the political controversy about the dominant role that the conservative majority of the Court is taking in resolving political disputes." Richard J. Pierce, Jr., *Response, Biden v. Nebraska*, GEO. WASH. L. REV. ON THE DOCKET (July 5, 2023), https://www.gwlr.org/students-for-fair-admissions-affirmative-action; *see also* Webb, *supra* note 44; *and see also* David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?* (2022).

47. *See* Press Release, White House, President Joe Biden Outlines New Plans to Deliver Student Debt Relief to Over 30 Million Americans Under the Biden-Harris Administration (Apr. 8, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/08/president-joe-biden-outlines-new-plans-to-deliver-student-debt-relief-to-over-30-million-americans-under-the-biden-harris-administration/.

*SFFA v. Harvard*: The Other Defenses (Kimberley West-Faulcon), and School Choice is Racist (And Other Myths) (Michael Bindas).

### *A. Jonathan D. Glater, Doctrinal Siege: Higher Education in Judicial Crosshairs*

In this Article, Jonathan Glater, addresses judicial attempts to undermine the credibility and autonomy of institutions of higher education.[48] Glater expresses the fear that attacks on colleges and universities are not isolated events, but are cumulative in effect. He is particularly concerned by the weakening of the influence of the nation's prestigious institutions of higher learning during the current political and cultural moment.[49] Glater's Article discusses the harmful effects of the Supreme Court's 2023 Term on the future autonomy of colleges and universities. He identifies these encroachments on academic freedom and autonomy as antithetical to the recognized role of colleges and universities to protect against tyranny and authoritarianism. Glater cites *Sweezy v. State of New Hampshire by Wyman*, in which the Supreme Court stated: "[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth."[50] *Sweezy* pronounced the four essential freedoms of a university as: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[51] For Glater, identifying the encroachment on the recognized pillars of academic freedom portend negatively for the future in continued assaults on the role of the judiciary in delimiting academic freedom.

### *B. Christine Rienstra Kiracofe, School Funding Litigation as a Tool to Achieve Education Access & Opportunity*

In this article, Professor Kiracofe provides an analysis of the historical, constitutional, and strategic issues that pertain to most school funding determinations.[52] The author lauds the United States for its

48. Jonathan D. Glater is Professor of Law, University of California, Berkeley.

49. Jonathan D. Glater, *Doctrinal Siege: Higher Education in Judicial Crosshairs*, 74 SYRACUSE L. REV. 1027, 1028 (2024).

50. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); Glater, *supra* note 49, at 1029 n.11 (quoting *Sweezy*, 354 U.S. at 250).

51. Glater, *supra* note 49, at 1030 n.14 (quoting *Sweezy*, 354 U.S. at 263).

52. Christine Rienstra Kiracofe is Professor and Director of the Ph.D. in Higher Education at Purdue University in West Lafayette, Indiana. She can be reached via email at ckiracofe@purdue.edu.

robust system of public K-12 education and highlights the importance of K-12 education in preparing the next generation of Americans for participation in the democratic system.[53] Kiracofe cites the language of *Brown v. Board of Education*, in which the Court noted that "[e]ducation is perhaps the most important function of state and local governments."[54] For a role that is so central to preparation for democratic participation, the U.S. Constitution does not contain any provision that addresses "schools or students."[55] As a result, there are vast differences in funding for K-12 schools within and across states, with more affluent states and individual neighborhoods more richly endowed and poorer states and neighborhoods starving for resources. The Article makes a compelling case demonstrating that funding matters and that litigation for funding parity and equity can foster educational success for students across K-12 school districts.

### *C. Erin M. Carr and Nabil Yousfi,* "*Anti-Wokeism*" *and Authoritarianism: A Renewed Call for Constitutional Protections for Education and Raquel Muñiz, Exploring Litigation of Anti-CRT State Action: Considering the Issues, Challenges, and Risks in a Time of White Backlash*

Two contributors to the Symposium issue have written about the proliferation of legislation that "outlaws" education on so-called "anti-woke" provisions. In these two articles, authors Erin M. Carr and Nabil Yousfi in *"Anti-Wokeism" and Authoritarianism: A Renewed Call for Constitutional Protections for Education,* and Raquel Muniz, *Exploring Litigation of Anti-CRT State Action: Considering the Issues, Challenges, and Risks in a Time of White Backlash*, focus attention on the concerns about measures that require that K-12 schools eliminate or narrowly tailor teaching about race, gender, and sexuality according to the specifications of state legislative proscriptions.[56] These

53. Christine Rienstra Kiracofe, *School Funding Litigation as a Tool to Achieve Education Access & Opportunity*, 74 SYRACUSE L. REV. 1043, 1043 (2024).

54. *Id.* at 1044 n. 1.

55. As Kiracofe notes, the absence of explicit language on this matter, renders the educational domain "within the purview of the states." Kiracofe, *supra* note 53, at 1044 n.2.

56. Erin M. Carr is an Assistant Professor at Seattle University School of Law and Nabil Yousfi is a J.D. candidate, Seattle University School of Law, 2024. Raquel Muñiz, J.D., Ph.D., is Assistant Professor at the Lynch School of Education and Human Development and the School of Law (courtesy) at Boston College and

provisions have in common conservative political assertions that teaching certain subjects are harmful to young learners. The authors of these two articles indicate that legislative measures such as the Stop the W.O.K.E. Act were enacted in the wake of the murder of George Floyd and the increased prominence of the Black Lives Matter Movement.[57] In each article, the authors debunk the claims against CRT and the charges of indoctrination of hatefulness towards the United States and White members of the population in particular.

Despite the similarities in their topics, the articles focus on particular issues within the realm of anti-wokeness or anti-CRT laws. Carr and Yousfi focus extensively on the historical linkage between anti-woke/CRT legislation and previous anti-literacy legislation from the colonial period, the Reconstruction Era, the Civil Rights Era, and the present period.[58] These laws, as the authors document, have propounded theories of "Black intellectual inferiority and inhumanity on which chattel slavery as an institution was built and sustained."[59] Viewed properly, Carr and Yousfi argue,

> Whereas anti-Black racism has been a consistent feature of the American experience, including in the educational context, so too has the extraordinary desire by Black Americans to defy anti-democratic efforts to suppress access to knowledge . . . . [C]ontemporary iterations of anti-literacy laws . . . have emerged as a pressing civil rights issue."[60]

The authors advance arguments to recognize a public right to education that is anchored in the guarantee of national citizenship rooted in the 14th Amendment's Citizenship Clause.[61] The authors further argue that protections for education rights is cognizable under the U.S. Constitution Guarantee Clause, Article IV, Section 4.[62]

Professor Muñiz examines the litigation trends that have challenged anti-woke and anti-CRT legislation in state legislatures. She

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faculty affiliate at the Boston College Center for Human Rights and International Justice.

57. *See* Erin M. Carr & Nabil Yousfi, *"Anti-Wokeism" & Authoritarianism: A Renewed Call for Constitutional Protections for Education*, 74 SYRACUSE L. REV. 971, 972 n.2 (2024); Raquel Muñiz, *Exploring Litigation of Anti-CRT State Action: Considering the Issues, Challenges & Risks in a Time of White Backlash*, 74 SYRACUSE L. REV. 1071, 1072-73, nn.3-10 (2024)

58. *See* Carr & Yousfi, *supra* note 57, at 975-76.

59. *Id.* at 975.

60. *Id*. at 981 n.65.

61. *See id.* at 1017 & nn. 261-64.

62. *See id.* at 1023-24 & nn 305-10.

devotes her attention to analysis of the legal arguments and outcomes of challenges of these measures. She notes initially that "advocates have only challenged anti-CRT restrictions in seven states, countering a mere fraction of the bans adopted in eighteen states."[63] She identifies that the lawsuits have focused on state law violations, free speech, and due process claims. Professor Muñiz's analytical project reveals that only the lawsuits alleging state law violations have been successful. As she states, "The empirical findings raise . . . normative questions."[64] As a normative inquiry, she interrogates the role of litigation in countering repressive laws and policies.

Her Article focuses on the first wave of the ongoing collection of data and analysis of litigation trends in this area. The researchers studied bans that restrict historically-accurate teaching of race in K-12 schools, and litigation that challenged state action in seven states: Arizona, Arkansas, Florida, New Hampshire, Oklahoma, Tennessee, and Virginia]. The legal challenges have met mixed success. "There is no straightforward, clear answer as to whether litigation should be more prominent in this area."[65] In the face of lackluster success, Professor Muñiz nevertheless advocates resort to the court system as a bulwark against leaving such provisions in place and preventing further harm and calls for a multi-systemic approach that involves a diverse and inclusive legal profession and judiciary.[66]

Both of these Articles provided copious historical detail, and constitutional and legal analyses on issues that are central to the democratic ideal of access to information and educational opportunity that reflect the historical and present circumstances accurately for all learners and citizens.

*D. Michael Bindas, School Choice Is Racist (And Other Myths)*

Michael Bindas's article, *School Choice Is Racist (& Other Myths)*, offers a perspective on school choice programs which contests the prevailing view that he argues erroneously — even falsely — continues to assert that such programs are based on racist underpinnings.[67] Bindas explains that school choice programs, which may fall under

63. Muñiz, *supra* note 57, at 1075 n.18.

64. *Id*. at 1076.

65. *Id.* at 1098.

66. *See id.* at 1099.

67. Michael Bindas is a Senior Attorney at the Institute for Justice, where he leads the Institute's educational choice practice and served as counsel of record at the U.S. Supreme Court for the prevailing families in *Carson v. Makin*.

categories of vouchers, education savings accounts, tax credit scholarships, and personal tax credits, more accurately should be called "educational choice" programs because some of them may be used for educational expenses beyond those for attendance at a private school.[68] According to Bindas, opponents to school choice programs focused legal challenges based on race after the Court rejected challenges based on religion. Bindas's article critiques the argument of school choice as racist, which is a characterization he vehemently disputes as ahistorical and false.

Bindas asserts: "[School] choice is *not* (emphasis original) racially segregative in effect. In arguing otherwise, choice opponents commonly cherry-pick and trumpet statistics that, they claim, show a higher usage of choice programs by white students compared to black students and an increasing percentage of white users over time."[69] He further argues that "The correct measure is the impact on the racial composition of schools when children use choice programs: the schools they leave and the schools they choose to attend. This measure — the actual integrative or segregative effect of choice — is one that the 'school choice is racist' crowd assiduously ignores."[70] In view of the complexities of the issues and conflicting accounts regarding public perceptions, legal arguments, and empirical data, Bindas raises salient questions in his discussion of state education clauses. These questions include: What is the correct racial balance that must be maintained in the public schools? In how many schools must there be an imbalance before a court may invalidate a statewide educational choice program? How is a court to know whether the families that enroll their children in private schools, and thus "upset" the racial balance of public schools, would not enroll their children in private schools in the absence of a choice program? And, with respect to the efficacy of the requested remedy — invalidation of the choice program — how is a court to know whether those children will return to public schools and, thus, restore the optimal racial balance?[71]

Many questions attend to the matter of school choice, a number of which are raised in Bindas's essay. Further consideration of the issue should also be given to who are the children who are served by school choice vouchers, what is the impact on state and local funding

68. *See* Michael Bindas, *School Choice is Racist (& Other Myths)*, 74 SYRACUSE L. REV. 909, 909 n.1 (2024).

69. *Id.* at 958.

70. *Id.* at 959.

71. *See id.* at 969.

and whether public financing for voucher programs is a zero sum game that would reduce public school financing or save schools money, what discretion or requirements pertain to student acceptance in voucher schools versus public — is it choice for the student or choice for the school? Lastly, what is the role or implications for persistent housing segregation on school choice and diversity (or lack thereof) in public and private schools alike?

### *E. Kimberly West-Faulcon, Affirmative Action After SFFA v. Harvard: The Other Defenses*

Professor West-Faulcon's article, *Affirmative Action After SFFA v. Harvard: Affirmative Action After* SFFA v. Harvard*:The Other Defenses*, addresses the Supreme Court's latest rulings on race-based admissions in higher education.[72] She is particularly concerned about the ways in which the Court's multiple decisions in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina—SFFA v. Harvard/UNC* may be misunderstood in a way that gives a more expansive reading than the decisions warrant.[73] West-Faulcon argues that the cases are "a wakeup call for universities to use other defenses for race affirmative action."[74] Now that a majority of the Supreme Court has rejected the diversity defense as a constitutional basis for upholding race-based admissions, colleges and universities that remain committed to racial inclusion in college and university admissions must assert other defenses to ensure educational opportunities for students of color.

West-Faulcon's Article includes personal narrative and constitutional and statutory analysis that explains the meaning of the cases and proposes a way forward to preserve legal bases for considering race in higher education admissions. West-Faulcon displays an encyclopedic knowledge of constitutional law cases and statutory provisions pertaining to affirmative action in the educational and employment sectors. Her Article puts this knowledge to service of her argument that the *SFFA* cases need not be read as a death knell for race-conscious

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72. Kimberly West-Faulcon is Professor of Law, James P. Bradley Chair in Constitutional Law, Loyola Law School, Los Angeles; B.A., Duke University; J.D., Yale Law School.

73. Students for Fair Admissions, Inc. v. President & Fellows Harv. Coll., 143 S. Ct. 2141, 2154 (2023).

74. Kimberly West-Faulcon, *Affirmative Action After* SFFA v. Harvard*: The Other Defenses*, 74 SYRACUSE L. REV. 1101, 1101 (2024).

admissions. West-Faulcon does not argue that colleges and universities should abandon the diversity rationale altogether, since it continues to have a modicum of acceptance by the Court. However, she strenuously argues that educational institutions must employ other remedies that are available to meet the high strict scrutiny evidentiary burden. These additional defenses she identifies includes the "remedial defense," in which case the institution must acknowledge and remedy its own racism by taking race-conscious measures to rectify their discriminatory histories and the present effects thereof under the constitution and Title VI.[75]

Throughout her Article, Professor West-Faulcon forcefully argues that institutions should assert their prerogatives in defending the interests not just of diversity, but of justice in their admissions decisions.

### *F. Chad Marzen, The Conservative Case Against Legacy Preferences in College & University Admissions*

In this article, Professor Marzen[76] addresses admissions practices at elite colleges and universities that are known as "legacy admissions," which give preferences to applicants who fortuitously have an alumnus connection to the institution, usually a parent or grandparent.[77] As Professor Marzen notes, the focus on race-based admissions policies, which culminated in the Supreme Court's decision in *SFFA* declaring the consideration of race in higher education admissions to be unconstitutional, greater scrutiny has attended to other admissions policies which that are thought to provide unfair advantages. While a number of colleges and universities have ended the practice in recent years, Professor Marzen notes that the practice still persists.[78] Legal critiques of legacy admissions policies have occurred under analyses of disparate impact, the Equal Protection Clause, and Constitutional prohibitions on titles of nobility.[79] Yet, Professor Marzen offers a slightly different critique – "a conservative critique against legacy admissions" – in which he argues that legacy preferences are "inimical

75. *See id.* at 1151.

76. Chad Marzen is a Professor of Business Law, Smeal College of Business, The Pennsylvania State University.

77. Chad Marzen, *The Conservative Case Against Legacy Preferences in College & University Admissions*, 74 SYRACUSE L. REV. 1053, 1055 n. 13 (2024) (citing Shane LaGesse, *Legacy Admissions: What It Is and Why Colleges and Reconsidering It*, U.S. News & World Reports (July 21, 2023)).

78. *See id.* at 1055 nn. 14–17.

79. *See id.* at 1055-56 nn. 18–20.

to the conservative values of hard work and merit as well as self-reliance."[80]

Professor Marzen advances his argument first through the lens of hard work, merit, and self-reliance,[81] for the proposition that merit is to be judged on individual accomplishments. Combined with conservative value of self-reliance, legacy admissions are viewed as contradictory to these core conservative principles. Professor Marzen then discusses two significant pieces of legislation at the federal level, the Fair College Admissions for Students Act,[82] and the Merit-based Educational Reforms and Institutional Transparency "MERIT" Act.[83] As these measures were introduced with bi-partisan sponsorship, Professor Marzen contends that these legislative initiatives provide important opportunities for bipartisan cooperation on concerns about college and university admissions. As Professor Marzen asserts, "There is a clear moment in 2024 for policymakers on both sides of the aisle to resolve the issue of legacy preferences in admissions for good and finally end preferences based on a family collegiate legacy."[84]

Finally, Professor Marzen finds significant trends on the state level, in which legacy preferences are being debated and discontinued in some instances. Notable examples include Colorado, which is the only state to have prohibited legacy preferences within its state colleges and universities.[85] Other states are considering prohibitions on legacy admissions, including Connecticut, Massachusetts, and Pennsylvania, but have not emerged past introductory or committee stages. While one must be careful not to conflate issues of merit with respect to race-conscious admissions and legacy admissions policies, in which the former often are decried as lacking in meritorious admission of

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80. *Id.* at 1053.

81. *See id.* at 1056-57 nn. 24–26 (citing the work of Russell Kirk, whom many consider to be an intellectual founder of modern conservative thought, and Michael Johnson, Speaker of the U.S. House of Representatives, the author of "7 Core Principles of Conservatism.").

82. Fair College Admissions for Students Act, H.R. 4900, 118th Cong. (2023). The Fair College Admissions for Students Act would prohibit any institution of higher education that is a participant in federal student-aid programs from utilizing legacy preferences; S. 2524, 118th Cong. (2023).

83. Merit-based Educational Reforms and Institutional Transparency Act, S. 3232, 118th Cong. (2023). The MERIT Act establishes a new standard of accreditation for higher education institutions which prohibits preferential treatment to applicants based on relationships with donors or alumni.

84. *Id.* at 1053.

85. *See id.* at 1063 n. 65.

students of color, Professor Marzen makes incisive commentary about the role of merit when fortuity of family connection is a primary basis for college and university admissions. Such policies warrant independent examination, but also must be questioned within the stated priorities of "equal opportunities for students of all backgrounds, irrespective of parentage and pedigree, to achieve the American dream."[86]

## CONCLUSION

The Articles in this Symposium collection give serious attention and thus warrant serious consideration by readers about the future of American democracy. Central to concerns about preserving and protecting U.S. democracy involve ensuring access to education at all levels for all members of society. It means acknowledging and reckoning with hard and salient truths. As Justice Sotomayor said in *SFFA*, "Equality requires acknowledgment of inequality."[87] The authors in this Volume and the participants in the Symposium have reinvigorated critical discussions and fundamental questions with thorough doctrinal and analytical approaches. Their work bespeaks their commitment to fairness, inclusiveness, and a future that belongs to everyone.

This is an existential moment in U.S. society. It is one that threatens regression to the starkest legacies of disparity and disenfranchisement in America. This is why it is essential that individuals and institutions who are committed to knowledge, fairness, racial equity, adherence to legal rules and reasoning, and the multiplicity of voices and lived experiences that inform this society will be heard. More than ever, institutions of higher education must remain steadfast to ensure opportunity for all students. The future is now and there must be a place in it for everyone.

86. *Id.* at 1069.

87. Students for Fair Admissions v. President & Fellows Harv. Coll., 143 S. Ct. 2141, 2234 (2023) (Sotomayor, J. dissenting).