AFFIRMATIVE ACTION AFTER *SFFA V. HARVARD*: THE OTHER DEFENSES

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The diversity justification for race affirmative action recognized in the Bakke-Grutter-Fisher *line of cases survived the* SFFA v. Harvard *ruling. However, the diversity rationale is scathed enough that universities should end the nearly forty-year-old practice of relying exclusively on the institution's educational need for diversity to satisfy strict scrutiny. This Article argues that the* SFFA v. Harvard *ruling is a wake-up call for universities to understand and be prepared to invoke other defenses for race affirmative action in college admissions.*

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And yet, though the truth can't be denied or erased, it can be systematically obscured, strategically misinterpreted, and hidden from mainstream comprehension.
—John Lewis[1]

PROLOGUE

I am a seventh-generation American. Yet, I am a first-generation "full citizen" American. I trace my ancestry to my great-great-great-great grandfather who was born in Duplin County, North Carolina in 1775. At that time, the Duplin County area of Eastern North Carolina was "populated mostly by English colonists and enslaved African Americans."[2] Generations of my family, living over 200 years in America, were "American anti-citizens"—persons whose racial identity as African American marked them, before the U.S. Civil War, as racially ineligible for citizenship under the U.S. Constitution and, after the enactment of the Fourteenth Amendment, as specially racially targeted for constitutional citizenship negation by an ideology built on the idea that full inclusion in America and its body politic is antithetical to Blackness.

Spanning two centuries of American history, the lifetimes of my first, second, third, and fourth great-grandfathers were all marked by exclusion from full American citizenship. Because *Dred Scott v.*

1. JOHN LEWIS, ACROSS THAT BRIDGE: A VISION FOR CHANGE AND THE FUTURE OF AMERICA 89 (2012).

2. This is the same year the first battles of the American Revolution were fought. *See*, e.g., *Eighteenth-Century North Carolina Timeline*, N.C. MUSEUM OF HIST., https://www.ncmuseumofhistory.org/learn/classroom/nc-fast-facts-and-timelines/eighteenth-century-north-carolina-timeline (last visited Apr. 7, 2024). North Carolina had thirty-five counties in 1775. *See Carolina Counties - 1775 to 1777*, AM. REVOLUTION IN N.C. N., https://www.carolana.com/NC/Revolution/nc_counties_during_revolution.html (last visited Apr. 7, 2024).

Sandford,[3] the 1857 Supreme Court ruling riddled with logical inconsistencies and white supremacist personal beliefs, held that the identity of persons of African descent as Black—whether enslaved or "free" Blacks—was antithetical to the status of being an American citizen,[4] "[c]itizenship was non-existent"[5] for my ancestors of African descent. Still under predominantly traitorous Confederate rule in 1866, the North Carolina legislature refused to satisfy the legal condition of ratifying the Fourteenth Amendment in order to qualify for re-entry as a loyal member state of the United States of America.[6] As a result of that refusal, "North Carolina remained under military rule from March 1867 until July 1868 as part of the Second Military District of the Carolinas under the command of Gen. Daniel E. Sickles."[7] It was a North Carolina state legislature that included African American legislators that ratified the Fourteenth Amendment.[8] From 1868 to 1872, the four years from when my second great-grandfather was twenty-four to twenty-eight years old, were the only years during his seventy-seven-year lifetime when any African American men were elected members of North Carolina's state legislature.[9]

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3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV § 1. (holding that "a negro, whose ancestors were imported into [the U.S.], and sold as slaves," "whether emancipated or not," "or who are born of parents who had become free before their birth" cannot be considered a U.S. citizen "in the sense in which the word citizen is used in the Constitution of the United States"). *Dred Scott* has never been overturned by the U.S. Supreme Court.

4. *Id.*

5. Henry L. Chambers Jr., *Slavery, Free Blacks and Citizenship*, 43 Rutgers L. J. 487, 488, 502 (2013).

6. *See, e.g., War's End and Reconstruction*, N.C. HIST. SITES, https://historicsites.nc.gov/resources/north-carolina-civil-war/wars-end-and-reconstruction (last visited Apr. 7, 2024).

7. *Id.*

8. *Id.*

9. *See, e.g., id.* "Three Negro senators and seventeen Negro representatives sat in the 1868 [North Carolina state] legislature." Elizabeth Balanoff, *Negro Legislators in the North Carolina General Assembly, July 1868-February, 1872*, 49 N.C. Hist. Rev. 22, 23 (1972). *Id.* at 53 ("[T]hirty-four Negro legislators served North Carolina between 1868 and 1872."). For the ninety-seven years from 1872 to 1969, zero African Americans were legislators in the North Carolina General Assembly until the election of one African American representative in 1969. *See, e.g.,* Milton C. Jordan, *Black Legislators: From Political Novelty to Political Force*, North Carolina Insight , Dec. 1989, at 2, https://nccppr.org/wp-content/uploads/2017/02/Black_Legislators-From_Political_Novelty_to_Political_Force.pdf (describing tenure of Henry Frye as "the lone black" in the North Carolina General Assembly from 1969 to 1971). In 1989, the number of African American North Carolina state legislators—four African American state senators, thirteen African American house representatives, and one African American legislator appointed to

The citizenship clause of the Fourteenth Amendment enacted in 1868, conferring citizenship on "all persons born or naturalized in the United States,"[10] is the basis for African Americans' American citizenship. Supreme Court rulings interpreting the citizenship-conferring amendment, marred by white supremacist ideology and deviating from the proper judicial role by intermingling constitutional analysis with the individual jurists' personal policy objections to full citizenship rights for African Americans, imposed American "anti-citizen" status on my African American ancestors between 1872 and the enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. By the time my great-grandfather was born in 1875, the Supreme Court was actively engaged in a constitutional interpretation project[11] to undermine the full political, social, and economic inclusion that the text of the Fourteenth Amendment conferred on him. Although born seven years after the ratification of the Fourteenth Amendment, my native-born American great-grandfather was an American anti-citizen for the entirety of his eighty-nine years of life and had his citizenship rights interpreted into oblivion by Supreme Court decisions like the *1880 Civil Rights Cases.*[12] Dying four months before the passage of the Civil Rights Act of 1964—the federal civil rights law that would have finally included him in the American polity, my great-grandfather was never a fully equal American.

My mother and father, both born in 1943, lived out their full childhoods under American Jim Crow in the state of North Carolina. It was not until the enactment of the Civil Rights Act of 1964 that my American-born parents had full citizenship rights in their country of birth. Like the five or more generations of their American-born parents, grandparents, great-grandparents, and beyond, my parents were born into an America with federal, state, and local laws that treated them as racial inferiors to White Americans.[13] This makes me the first generation in my family to be born a full-citizen American. So, despite

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fill the unexpired portion of another's term—did not exceed the twenty African Americans who served in the North Carolina General Assembly in 1868. *Id.* at 42.

10. U.S. CONST. amend. XIV, § 1.

11. *See, e.g.,* The Civil Rights Cases, 109 U.S. 3 (1883). *See, e.g.,* United States v. Cruikshank, 92 U.S. 542, 548 (1876) (reversing the criminal convictions of White men whose illegal takeover of a Louisiana parish government involved brutal atrocities against and killings of large numbers of African American men); United States v. Reese, 92 U.S. 214 (1876).

12. *See* The Civil Rights Cases, 109 U.S. 3 (1883).

13. My parents were eleven years old when the Supreme Court overruled *Plessy v. Ferguson*. They were twenty-one years old when the United States Congress enacted the Civil Rights Act of 1964.

being a seventh-generation American, I am a first-generation full citizen African American.

INTRODUCTION

"Do not misread *SFFA v. Harvard*" is the headline of the opinion article of a higher education administrator who led his institution during a legal attack on its affirmative action admissions policy.[14] His school vigorously defended affirmative action and won in the Supreme Court.[15] In stark contrast to the many misreads that declared that *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (decided jointly with *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*) (*SFFA v. Harvard*)[16] "ended" or "killed"[17] affirmative action, the former dean of Michigan Law School, Jeffrey Lehman, observed in his July 17, 2023 *Inside Higher Ed* article that "[t]he decision in the *Students for Fair Admission* cases did not overrule *Grutter*."[18] Lehman, an accomplished lawyer and

14. Jeffrey Lehman, *Don't Misread SFFA v. Harvard*, INSIDE HIGHER EDUC. (July 17, 2023), https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion# ("It will not be easy to design affirmative action policies that comply with *SFFA*, but it should not be impossible.").

15. *Id.* The case his school won is *Grutter v. Bollinger*, 539 U.S. 306 (2003).

16. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023) [hereinafter SFFA v. Harvard].

17. *See, e.g.,* Hannah Natanson, *After Affirmative Action, a White Teen's Ivy Hopes Rose, a Black Teen's Sank*, WASH. POST (Nov. 18, 2023, 6:05 AM), https://www.washingtonpost.com/education/interactive/2023/affirmative-action-race-teen-college-applications/ (stating that affirmative action "fell"); David Brooks, *Affirmative Action is Dead. Campus Diversity Doesn't Have to Be*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/opinion/affirmative-action-campus-diversity.html (stating that affirmative action has "ended" and colleges may no longer consider race in admissions); Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your "Identity*," N.Y. TIMES (Aug. 18, 2023), https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html (stating that because affirmative action is "banned," college application essays about life experience remain "the one place in admissions where discussing race is still explicitly legal); Richard Lempert, *Overturning Affirmative Action was a Power Play*, CHRON. OF HIGHER ED. (June 30, 2023), https://www.chronicle.com/article/overturning-affirmative-action-was-a-power-play (stating the Supreme Court used faulty reasoning to "end" race-based affirmative action); Bernd Debusmann, Jr., *Affirmative Action: U.S. Supreme Court Overturns Race-Based College Admissions*, BBC NEWS (June 29, 2023), https://www.bbc.com/news/world-us-canada-65886212# (stating that the ruling "upends" affirmative action).

18. Lehman, *supra* note 14.

graduate of the law school where he served as dean, is correct.[19] Colleges and universities misread *SFFA v. Harvard* if they interpret the opinion as eliminating what this Article calls "the diversity defense" for race affirmative action. However, higher education institutions also miss an important implicit message in *SFFA v. Harvard* if they assert just one goal—only one "why"—for their affirmative action policies. The six-justice *SFFA v. Harvard* majority's use of the words "[in]coherent"[20] and "imponderable"[21] to describe the "interests"[22] in diversity asserted by Harvard and the University of North Carolina's flagship Chapel Hill campus (UNC) do not bode well for diversity-only defenses of affirmative action.[23]

After *SFFA v. Harvard*, the marker of whether a university understands the statistical reasons race affirmative action is necessary to admit more than a token number of students belonging to numerical minority racial groups, particularly African Americans,[24] and whether it is sincere in its commitment to race affirmative action is not simply their mounting of a vigorous diversity defense. After *SFFA v. Harvard*, higher education leaders should prepare and mount defenses other than diversity. Accordingly, this Article presents and explains some key examples of *other defenses* for affirmative action.

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19. *Id.* Jeffrey Lehman served as dean of the University of Michigan Law School when that institution "applied and defended" the affirmative action policy that the U.S. Supreme Court upheld in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

20. The exact words in the majority opinion are "not sufficiently coherent for purposes of strict scrutiny," *SFFA v. Harvard*, 600 U.S. at 214.

21. *Id.* at 215 ("The interests that respondents seek, though plainly worthy, are inescapably imponderable.").

22. This Article employs various terms to describe the "goal, "interest," "purpose," or desired "end" of a university's affirmative action policy. In constitutional law analysis, such as in *SFFA v. Harvard*, 600 U.S 181 (2003), the terms are used interchangeably. *See, e.g., id.* at 209, 211, 224, 228, 231 ("goal"); *id.* at 211, 214–17, 223–24 ("goals"); *id.* at 207 ("compelling governmental interests" and "whether the government's use of race is 'narrowly tailored' … to achieve that interest"); *id.* at 209, 211, 213, 226 ("interest"); *id.* at 214–15 ("interests"); *id.* at 210 ("use race for the purpose") *id.* at 214 ("requires more than … an amorphous end to justify it").

23. *See, e.g.,* Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 1 UTAH L. REV. 59, 62 (2019) (describing "the doctrinal insecurity" that accompanied the diversity rationale before the 2023 *SFFA v. Harvard* ruling).

24. It is beyond the scope of this Article to explain why certain types and levels of racial diversity and inclusion are impossible without affirmative action for particularly highly selective colleges and universities. *But see*, *e.g., infra* Epilogue (naming and explaining "Kane's paradox").

Part I presents the background and explains the substantive requirements and legal applicability of the *Bakke-Grutter-Fisher*[25] strict scrutiny means-end test and how Chief Justice Roberts applied it in the majority opinion in *SFFA v. Harvard*. Part II highlights some of the many potential non-diversity defenses—other defenses for affirmative action such as the "fairness in admissions defense"—by discussing the central role that such defenses played in the landmark *Regents of the University of California v. Bakke* case[26] and how affirmative action has been defended outside of higher education in the decades since the *Bakke* case made diversity the center-stage defense for colleges and universities. It also discusses two other defenses for affirmative action: the "remedial"—remedying racism—defense and the preservation of federal funding defense.

I. DO NOT MISREAD *SFFA V. HARVARD*

Even if scathed by the tone and disdain with which it was applied in *SFFA v. Harvard*, the diversity defense for race affirmative action in college admissions survived another visit to the high court. In *SFFA v. Harvard*, the Court observes that: "The Court's analysis [in the *Grutter* case] tracked Justice Powell's [analysis in the *Bakke* case] in many respects. As for compelling interest, the Court held that '[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.'" [27]

The *SFFA v. Harvard* decision applies the same strict scrutiny legal test that has been in place as the law of the land since the 1978

25. This Article uses "*Bakke-Grutter-Fisher*" to refer to the line of cases articulating the Supreme Court equal protection jurisprudence applying and explaining the requirements that higher education institutions must fulfill to satisfy the strict scrutiny equal protection test. Those cases are Fisher v. Univ. of Tex., (Fisher II), 579 U.S. 365, 376 (2016); Fisher v. Univ. of Tex. (Fisher I), 570 U.S. 297 (2013); Grutter v. Bollinger, 539 U.S. 306, 343 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

26. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (majority opinion in Parts I and V-C) (Powell, J., joined by Brennan, White, Marshall, Blackmun, JJ.) (Powell, J., controlling concurring opinion in Parts II, III-A, B, C, IV, V-A, B, and VI). Justice Powell's concurring opinion in *Regents of Univ. of California v. Bakke* is controlling Supreme Court precedent because Powell concurred in the judgments of the Court in the *Bakke* case "on the narrowest grounds." *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'").

27. SFFA v. Harvard, 600 U.S. 181, 211 (2023) (citing Grutter, 539 U.S. at 328).

Bakke ruling.[28] UNC and Harvard lost in *SFFA v. Harvard* because of the Supreme Court's *application*—not overruling—of the *Bakke-Grutter-Fisher* equal protection case precedent. Additionally, the *SFFA v. Harvard* decision maintains (even if it may question the clarity of) the diversity defense for race affirmative action recognized by the *Bakke-Grutter-Fisher* precedent[29] for the past four decades.[30]

This point—that the diversity defense of affirmative action remains viable after *SFFA v. Harvard*—is the central point conveyed by Lehman, the former dean of Michigan Law School. He speaks with great authority as an administrator of a university that successfully mounted, and won before the U.S. Supreme Court by employing, a diversity defense for its race-based affirmative action admissions policy.[31] Lehman's article essentially invites colleges and universities ready to take up the legal fight of defending race affirmative action after the *SFFA v. Harvard* ruling to roll up their proverbial sleeves to mount their defense.[32]

The *SFFA v. Harvard* majority opinion[33] is based on two distinct but related types of law—first, the federal constitutional law of the Fourteenth Amendment's Equal Protection Clause and, second, the federal statutory law of Title VI of the Civil Rights Act of 1964.[34]

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28. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978).

29. *See Bakke*, 438 U.S. at 320; *Fisher II*, 579 U.S. at 376; *Grutter*, 539 U.S. at 343.

30. *See Bakke*, 438 U.S. at 320; *Grutter*, 539 U.S. at 343. As already explained above, the diversity defense for race affirmative action is available to universities that are interested in relying on the pedagogical educational need for a racially diverse and inclusive student body—part of a college's First Amendment academic freedom.

31. Michigan Law School defended its affirmative action policy as what this Article calls "diversity-justified" in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

32. Lehman, *supra* note 14.

33. The concurring and dissenting opinions of justices are not legally binding on colleges and universities. *See, e.g.,* Lehman, *supra* note 14 (observing that "there is force to the majority's observation that 'a dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion'") (citing *SFFA v. Harvard*, 600 U.S. at 230). Like the two dissenting opinions authored by Justices Sotomayor and Jackson, *SFFA v. Harvard*, 600 U.S. at 318 (Sotomayor's dissent); *id.* at 384 (Justice Jackson's dissent), the three concurring opinions by Justices Thomas, Gorsuch, and Kavanaugh, *SFFA v. Harvard*, 600 U.S. at 231 (Thomas' concurrence); *id.* at 287 (Justice Gorsuch's concurrence); *id.* at 310 (Justice Kavanaugh's concurrence), are not legally binding Supreme Court opinions. Justice Ketanji Brown Jackson took no part in the consideration or decision of the case in *SFFA v. Harvard*, 600 U.S. at 181.

34. *Id.* at 197–98; *See generally* Civil Rights Act of 1964 Title VI, 42 U.S.C §§ 2000d–2000d-7 (1964). Privately operated as well as state government operated colleges and universities may be sued for violating Title VI statutory law if they apply

Because only exercises of government power —federal or state government-operated entities—are subject to the requirements of the U.S. Constitution,[35] the Students for Fair Admissions (SFFA) organizational plaintiff sued only the state government-chartered UNC (and not the private corporation-chartered Harvard) for violating the constitutional provision, but SFFA sued both Harvard and UNC for violating the federal law, Title VI.[36] The Equal Protection Clause of the Fourteenth Amendment was enacted by the U.S. Congress in 1866 and ratified to become part of the U.S. Constitution in 1868.[37] Section 603 of Title VI was enacted in 1964[38] and it makes supplemental federal financial assistance conditionally available to institutions and programs, whether state government-operated or privately-operated, in exchange for the entity agreeing to abide by Title VI racial inclusion and antidiscrimination rules. Although the Equal Protection Clause and Title VI impose substantively different legal tests on entities to which the respective laws apply, the *SFFA v. Harvard* Court majority used the strict scrutiny test to decide both the Title VI statutory law and Equal Protection Clause claims.[39]

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for and accept federal taxpayer funds in the form of federal contracts, loans, or scholarship money. *Id.*

35. This is known as the "state action doctrine." *See*, *e.g.*, Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

36. *SFFA v. Harvard*, 600 U.S. at 197–98 (violating Title VI statutory law); *See supra* text accompanying note 34 (As a state government-operated university, UNC can be sued for violating Equal Protection constitutional law as well as Title VI statutory law.).

37. *Landmark Legislation: The Fourteenth Amendment*, U.S. SENATE https://www.senate.gov/about/origins-foundations/senate-and-constitution/14th-amendment.htm#:~:text=Passed%20by%20the%20Senate%20on,laws%2C%E2%80%9D%20extending%20the%20provisions%20of (last visited Feb. 22, 2024) (stating that the Equal Protection Clause was enacted in 1868 as part of the Fourteenth Amendment).

38. 42 U.S.C.A. § 2000d-2 (West 1964); *Title VI of the Civil Rights Act of 1964*, C.R. DIV. OF THE U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/TitleVI#:~:text=Title%20VI%2C%2042%20U.S.C.,activities%20receiving%20federal%20financial%20assistance (last updated Feb. 21, 2024) (stating that Title VI, 42 U.S.C. § 2000d, was enacted in 1964).

39. SFFA v. Harvard, 600 U.S. 181, 198 n.2 (2023) (citing Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003)). The Supreme Court applies the strict scrutiny means-end test for evaluating whether the race affirmative action aspects of a college's admissions policy violate either Title VI statutory law, 42 U.S.C. § 2000d—applies to private and public universities that choose to apply for and accept federal funds in the forms of grants, loans, and scholarships—and also applies this test to evaluate the equal protection constitutionality of race affirmative action in the admissions policies of public state government-operated colleges and universities. *Id.* ("We have explained that discrimination that violates the Equal Protection Clause

The *SFFA v. Harvard* ruling consolidates two cases filed in federal district court by the Students for Fair Admissions (SFFA)[40] organization in 2014, the same year the Edward Blum[41]-created non-

of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI …. [and] accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.").

40. *SFFA v. Harvard*, 600 U.S. at 190. Contrary to many media framings, SFFA is not a one-man-run entity nor is SFFA a primarily Asian American student-centered organization. *See, e.g.,* Jeannie Park & Kristin Penner, *The Absurd, Enduring Myth of the "One-Man" Campaign to Abolish Affirmative Action*, SLATE (Oct. 25, 2022, 2:48 PM), https://slate.com/news-and-politics/2022/10/supreme-court-edward-blum-unc-harvard-myth.html (challenging the "false narrative" of Edward Blum as "solo actor" by observing that, "[i]n reality, though, Blum is not some humble David going it alone in his battle against Goliath, but the well-off beneficiary of a powerful infrastructure of right-wing funders, think tanks, and lawyers that used its might to help end *Roe v. Wade* and will also go after voting and LGBTQ+ rights protections this Supreme Court term, on top of their attack on affirmative action"). Blum announced a litigation blitz strategy to sue universities to end race affirmative action years earlier. *See SCOTUSblog on camera: Edward Blum (Complete)*, SCOTUSBLOG (Aug. 18, 2014), https://www.scotusblog.com/media/scotusblog-on-camera-edward-blum-complete/. As of November 17, 2014, Blum's PFR organization-backed *Fisher* lawsuit had not yet reached a final resolution. It was on that day that Blum's SFFA organization filed lawsuits alleging that Harvard's 2014 freshman admissions process violated the Title VI rights of rejected unspecified Asian American and White applicants to Harvard and that UNC's 2014 freshman admission process violated the Title VI and Equal Protection rights of unspecified rejected White applicants to UNC. For discussion of the failings of the claims asserted in *SFFA v. Harvard* in redressing the civil rights interests of Asian American applicants rejected by Harvard, *see* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. 590, 624 (2017) [hereinafter West-Faulcon, *Obscuring Asian Penalty*]; Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, U. PITT. CTR. FOR C.R. & RACIAL JUST.: RACE RTS. & THE L. BLOG (June 6, 2023, 6:13 PM), https://www.civilrights.pitt.edu/asian-americans-and-bait-and-switch-attack-affirmative-action-vinay-harpalani.

41. Edward Blum is an opponent of inclusion-motivated attention to race. In addition to being an author, opponent, and critic of the Voting Rights Act of 1965, *see* EDWARD BLUM, THE UNINTENDED CONSEQUENCES OF SECTION 5 OF THE VOTING RIGHTS ACT (2007), Blum is also a longtime for-profit activist in the "anti-affirmative action industry" for three decades. Blum has been paid an estimated $100,000 annually since 1995 as a fellow for the American Enterprise Institute, a right-wing "think tank" that counts right-wing mega-donor Harlan Crow among its board members. Donna J. Nicol, *Activism for profit: America's 'anti-affirmative action' industry*, AL JAZERRA (Feb. 28, 2021), https://www.aljazeera.com/opinions/2021/2/28/activism-for-profit-americas-anti-affirmative-action-industry ("Since 1995, however, Blum has also received an annual salary estimated to be in the region of $100,000 from his work with the American Enterprise Institute, where he serves as a research fellow focused on legal issues related to race.") "Blum's two main non-profits, Project on Fair Representation [PFR] and Students for Fair Admissions [SFFA], received $11.2 million in contributions, with Blum receiving more than $900,000 in pay." Park & Penner, *supra* note 40 (noting that "[s]ignificant donations [to Blum's PFR and SFFA organizations] have come from prominent conservative funders Searle Freedom Trust, the Scaife Foundation and Bradley

profit was formed.[42] In *SFFA v. Harvard*, although both the federal trial judge who presided over the fifteen-day trial with testimony from thirty witnesses[43] and the U.S. Court of Appeals for the First Circuit concluded that Harvard's race affirmative action did not violate Title VI statutory law, [44] six members of the U.S. Supreme Court disagreed.[45] Although the federal trial court judge who presided over an eight-day trial in *SFFA v. UNC* concluded that UNC's use of race in admissions did not violate either the Equal Protection Clause or Title VI statutory law,[46] the same six justices of the U.S. Supreme Court also sided with SFFA.[47]

A. The Bakke-Grutter-Fisher Standard Survived

The Supreme Court ruled in *SFFA v. Harvard* that Harvard and UNC failed the "strict scrutiny" test, the most stringent of the "means-end" legal tests applied in constitutional law analysis. A means-end legal test is a two-part test by which a federal court may assess the "how" and "why" of the affirmative action components of a university's admissions practices to determine if they meet the standard for

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Foundation, alongside at least $3 million from Donors Trust, which has been called the "dark money ATM of the right," with the Koch and DeVos families among its major contributors").

42. *See, e.g.,* Park & Penner, *supra* note 40 (describing formation of SFFA).

43. Except for SFFA's two expert witnesses— Peter Arcidiacono and Richard Kahlenberg, the majority of these were fact witnesses presented by Harvard. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 158, 177, 189–206 (D. Mass. 2019), *aff'd sub nom.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023) ("the Court heard testimony from eighteen current and former Harvard employees, four expert witnesses, and eight current or former Harvard College students who testified as *amici curiae*"). "SFFA, by contrast, put up no fact witnesses and presented only the testimony of its two expert witnesses. SFFA's failure to offer testimony or evidence reflecting a single applicant purportedly harmed by Harvard's consideration of race was conspicuous, a point Judge Burroughs made in her decision." *With a Decision Deemed a "Defiant Defense of Affirmative Action," WilmerHale Secures Trial Victory for Harvard*, WILMERHALE (Oct. 18, 2019), https://www.wilmerhale.com/insights/news/20191018-with-a-decision-deemed-a-defiant-defense-of-affirmative-action-wilmerhale-secures-trial-victory-for-harvard.

44. Students for Fair Admissions, Inc., 397 F. Supp. 3d at 189–206.

45. SFFA v. Harvard, 600 U.S. 181, 230 (2023) (explaining "Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause.").

46. Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 655–67 (M.D.N.C. 2021), *rev'd sub nom.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

47. *SFFA v. Harvard*, 600 U.S. at 230.

justification required by the U.S. Constitution.[48] Starting with its endorsement by Justice Powell in the 1978 *Regents of the University of California v. Bakke* ruling, "the attainment of a diverse student body" has been recognized by the U.S. Supreme Court as a "constitutionally permissible goal for an institution of higher education."[49] Also, following the approach that Powell took in *Bakke*, [50] the Supreme Court subjects race affirmative action policies in college admissions to the highest degree of judicial suspicion—strict scrutiny.[51]

Under the Court's equal protection analysis—before *and* after the *SFFA v. Harvard* ruling, the Court applies the strict scrutiny means-end test to government uses of racial classifications. The Supreme Court applied the "strict scrutiny" legal test to both the Harvard and UNC admissions policies. This is because the Court declined to offer distinct Title VI legal analysis in deciding *SFFA v. Harvard*.[52] Instead, the Court treated the Title VI legal question—whether Harvard's admissions policy violated the federal statutory requirements of Title VI—as sufficiently similar to the equal protection requirements applicable to the state government-operated UNC that it used the Equal Protection constitutional test as a proxy test for the Title VI doctrinal question applicable to private universities like Harvard.[53] The strict scrutiny test is a two-prong evidentiary standard that the Supreme

48. *Id.* at 206 (explaining that diversity-justified affirmative action "must survive a daunting two-step examination known in our cases as 'strict scrutiny'").

49. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978).

50. *Bakke*, 438 U.S. at 290–91 (offering reasoning for applying strict scrutiny to medical school admissions policy despite lack of "discreteness and insularity" of "white males, such as respondent [Allan Bakke]"). Women-including affirmative action policies are subject to a strong, but less suspicious, intermediate level of equal protection scrutiny. *See* Califano v. Webster, 430 U.S. 313, 317 (1977). Four of the justices who decided *Bakke* called for the medical school's affirmative action policy to be subject to a standard more similar to the "intermediate scrutiny" test applied in *Califano*, 430 U.S. at 317. *Bakke*, 438 U.S. at 357–62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part).

51. *See e.g.,* Fisher v. Univ. of Tex. (Fisher II), 579 U.S. 365 (2016); Fisher v. Univ. of Tex. (Fisher I), 570 U.S. 297 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (plurality opinion).

52. *See SFFA v. Harvard*, 600 U.S. at 198 n.2.

53. *Id.* Section 601 of Title VI of the Civil Rights Act of 1964 states:

No person in the United States shall on the ground of race, color or national origin, be ***excluded*** from participation in, be denied the benefits of, or be subjected to ***discrimination*** under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1964) (emphasis added).

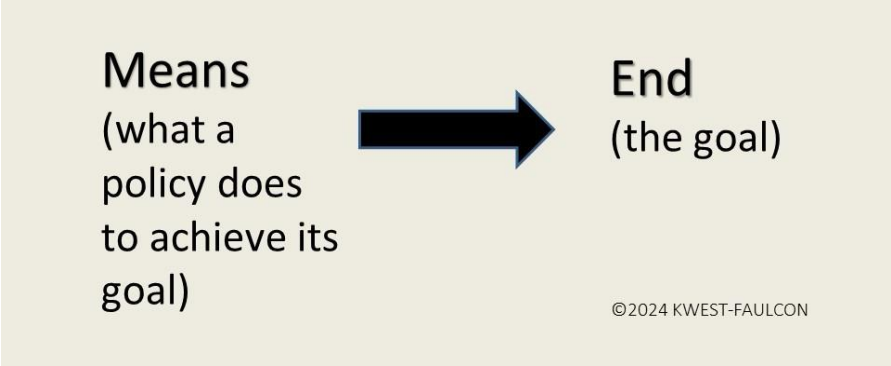
Harvard is subject to Title VI statutory and regulatory laws because it receives Title VI federal funding. *See infra* Part II.D. (explaining the Title VI statute, regulation, and requirements). The receipt of Title VI federal funding is conditioned on compliance with what the U.S. Supreme Court interprets the statute to mean.

Court has required colleges and universities to satisfy to win against legal attacks on the affirmative action components of an institution's admissions policy.[54]

1. Strict Scrutiny Means and End Explained

The *SFFA v. Harvard* ruling applies the Supreme Court's most stringent equal protection standard—the strict scrutiny legal test—to the policies used by Harvard and UNC to select freshmen for admission in 2014. The two-part high evidentiary burden of the strict scrutiny test is the most stringent version of what is more generally referred to as a "means-end" legal test. The *means* of means-end legal analysis is the "*how*?" of a particular policy, and the *end* is the "*why*?" of the policy. This is depicted in Image 1 below. Importantly, the entity defending the legality of its policy is permitted to identify more than one end—to offer more than one "*why*"—for the policy to justify it.

Image 1



In the specific context of the race affirmative action components of a college admissions process, the means are the methods by which or *how* the institution considers race in admissions and the ends are *why* the institution considers race. The means for implementing race affirmative action in college admissions can vary in the strength of their race consciousness. In *Bakke*, Justice Powell's opinion announcing the judgment of the Court rejected the means of the more strongly race-conscious racial "quota" through a separate special admissions

54. *See SFFA v. Harvard*, 600 U.S. at 214–18; *see also Bakke*, 438 U.S. at 287–91.

program at the UC Davis Medical School.[55] By contrast, the means employed by the University of Texas system's flagship Austin campus accepted as constitutional by the Supreme Court in the *Fisher II* case was weakly race-conscious—the consideration of race as a "factor of a factor of a factor" in the uniformly applied holistic admissions review process for non-"top ten percent" applicants to UT Austin.[56]

Image 2 below depicts three of the types of means-end tests and their varying levels of stringency. First, the strictest and most difficult two-prong test is strict scrutiny. Second, intermediate scrutiny is less strict, imposing a less stringent standard for both its means and end[57] than required under strict scrutiny. Third, the rational basis test is exceedingly deferential, and, accordingly, it is very easy to satisfy both its means and end prongs.[58] The three means-end tests shown in Image 2 below also vary in the strength of the fit between the means and the end and vary in the height of the evidentiary burden imposed to demonstrate the veracity and significance of the particular end proffered as justification for the policy subject to the test. In Image 2, the bar and pole vaulter represent the high evidentiary burden for both prongs of strict scrutiny, the hurdle and hurdler represent the intermediate evidentiary burden for the two prongs of intermediate scrutiny, and the visual of a jogger stepping easily over a pole resting very close to the ground represents the very weak requirements of rational basis review.

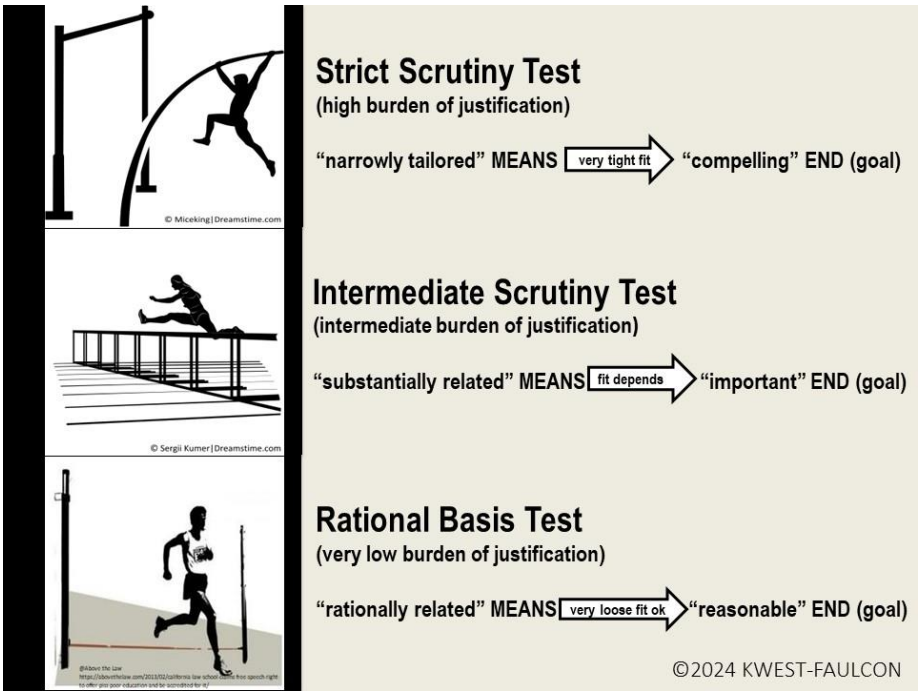
55. *Bakke*, 438 U.S. at 272–75 (that special program "set aside" sixteen seats per year in 1973 and 1974 for "Asians," "blacks," "Mexican-Americans," and "Native Americans," collectively, after the 1968 entering class of students admitted to the newly-opened state government public medical school "contained three Asian [Americans] but no blacks, no Mexican-Americans, and no American Indians").

56. *Fisher II,* 579 U.S. at 375.

57. *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197–98 (1976) (citing Reed v. Reed, 404 U.S. 71, 76 (1971)); *see* U.S. v. Virginia, 518 U.S. 515, 532–33 (1996). Federal government use of race-based, sex-based and other suspect and quasi-suspect classifications are violations of the non-textual equal protection components of the Fifth Amendment's due process clause. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Intermediate scrutiny is also applied to affirmative action for women. *See* Califano v. Webster, 430 U.S. 313, 316–17 (1977).

58. The Court applies the very deferential "rational basis" standard of review to state government use of non-suspect classifications. *See* Ry. Express Agency v. New York, 336 U.S. 106, 111 (1949).

Image 2



The three primary means-end tests shown in Image 2 are applied by the U.S. Supreme Court to determine whether government acts are constitutionally permissible under the U.S. Constitution.[59] Only one of the three means-end tests shown in Image 2—strict scrutiny—is applied to diversity-justified race affirmative action in college admissions. By contrast, sex affirmative action in college admissions is subject to the intermediate scrutiny test.[60] Until 1995, affirmative action employed by the U.S. federal government to increase racial inclusion among the owners of the entities and businesses who benefit from entering contracts with the federal government was subject to intermediate scrutiny.[61]

59. Technically, these tests are not applicable to non-government, private entities like Harvard. *See supra* note 39 and accompanying text (explaining why the Supreme Court applied the strict scrutiny test to Harvard's race affirmative action).

60. Califano v. Webster, 430 U.S. 313, 317 (1977).

61. Fullilove v. Klutznick, 448 U.S. 448, 453 (1980), *receded from by*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

2. Diversity as "End" Continues Even as Confounds

The traditional diversity defense is essentially a college or university arguing it needs, as an institution, a racially diverse entering class to achieve the institution's own unique, important, substantive educational and pedagogical goals. Justice Powell's 1978 controlling opinion[62] in *Regents of the University of California v. Bakke*[63] spurred universities to rely on the diversity defense for affirmative action. The defense is grounded in the First Amendment's protection of university "academic freedom."[64] Specifically, Powell identified the diversity defense as grounded in the constitutionally protected academic freedom of universities to determine the membership of the student bodies the institution chooses to educate.[65] However, the fact that the defendant university in the 1978 *Bakke* case, the University of California at Davis School of Medicine, offered many non-diversity defenses[66] for its race affirmative action admissions program is not widely known. Four or five members of the Court accepted some or all of these defenses, not just the diversity defense, as sufficient to uphold the legality of the medical school's affirmative action.[67] Justice Powell also suggested an additional defense other than diversity for the medical school's affirmative action policy that was not among the defenses originally proffered by the educational institution.[68]

A decade later, the U.S. Federal Communications Commission relied on a diversity as well as a remedial interest when it defended its policies of awarding new broadcasting licenses with inclusion-

62. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'").

63. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

64. *See Bakke*, 438 U.S. at 312.

65. *See id.* at 311–12 ("the interest of diversity is compelling in the context of a university's admissions program").

66. *Id.* at 305–06. The interests—what this Article is referring to as "defenses"—identified by the medical school according to Justice Powell's opinion in *Bakke* were "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently under-served; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* (internal quotes and citations omitted).

67. *Id.* at 272.

68. *See infra* Part II.A.

motivated attention[69] to non-White racial group membership as a plus factor and a minority "distress sale" program that permitted "a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms."[70] In *Metro Broadcasting v. FCC,* the Court majority invoked comparisons to the diversity interests of colleges and universities recognized as compelling in the *Bakke* case when it wrote:

> Just as a "diverse student body" contributing to a "'robust exchange of ideas'" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values. The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue

69. *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 103–04 (2010) (employing the term "attentiveness" to describe consideration of race).

70. Metro Broad. v. FCC, 497 U.S. 547, 552 (1990), overruled on the issue of the proper means-end test by Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding FCC affirmative action policies constitutional under Equal Protection analysis according to FCC's diversity and remedial defenses as government-asserted interests for its inclusion-motivated race consciousness).

Justice Brennan wrote for the majority that:

> A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue. Three Members inquired "whether the *objectives* of th[e] legislation are within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives." *Id.,* at 473 (opinion of Burger, C.J.) (emphasis in original). Three other Members would have upheld benign racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives." *Id.,* at 519 (MARSHALL, J., concurring in judgment). We apply that standard today. We hold that benign race-conscious measures mandated by Congress[12] —even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Metro Broad., Inc. v. FCC. 497 U.S. 547, 564–65, overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

> of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience.[71]

The Court's application of the less stringent intermediate scrutiny means-end test was the basis upon which the Supreme Court overruled *Metro Broadcasting* five years later in *Adarand Constructors, Inc. v. Pena*.[72] Justice Stevens, joined by Justice Ginsburg, explained why the diversity defense was untouched by the means-end test doctrinal change they dissented from in *Adarand* in the following discussion of the origin and continued viability of the diversity defense:

> What truly distinguishes *Metro Broadcasting* from our other affirmative action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of Cal. v. Bakke*. Later, in *Wygant v. Jackson Bd. of Ed.,* I also argued that race is not always irrelevant to governmental decisionmaking; in response, Justice O'Connor correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting racial diversity among the faculty." She then added that, because the school board had not relied on an interest in diversity, it was not "necessary to discuss the magnitude of that interest or its applicability in this case."
>
> Thus, prior to *Metro Broadcasting,* the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting,* of course, answered that question in the affirmative. The majority today overrules Metro Broadcasting only insofar as it is "inconsistent with [the] holding" that strict scrutiny applies to "benign" racial classifications promulgated by the Federal Government. ***The proposition that fostering diversity may provide a sufficient interest to justify such a program is not inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case***—and I do not

71. *Metro Broad.*, 497 U.S. at 568.

72. *Adarand*, 515 U.S. at 227.

> take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.[73]

Scholars have also explained that the diversity interest recognized in *Metro Broadcasting* was not addressed and thus not overturned in *Adarand*.[74] Thus, it remains an option for entities like the Federal Communications Commission and other government and non-government entities to employ the diversity defense if they face legal attacks against their affirmative action policies.[75]

The diversity defense is not just doctrinally available in the context of higher education, it has been employed virtually exclusively by colleges and universities with limited exception.[76] Over the course of the more than forty years since the 1978 *Bakke* ruling, universities defending race affirmative action have used the diversity defense and rarely, if ever, utilized the other defenses for race affirmative action. In *Grutter v. Bollinger*, the University of Michigan successfully used the diversity defense to defend the race affirmative action components of its law school's admissions policies,[77] but it unsuccessfully employed the diversity defense of the race affirmative action components of its undergraduate admissions in *Gratz v. Bollinger*.[78] The University of Texas at Austin also relied on the diversity rationale for defending the race affirmative action of its undergraduate admissions policies against the legal attacks it faced in *Fisher I*[79] and *Fisher II*.[80]

Some of the Court majority's statements in *SFFA v. Harvard* seem critical of how UNC and Harvard articulated their versions of the diversity defense, but the case does not overrule the diversity

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73. *Id.* at 257–58 (Stevens, J., dissenting) (bold and italics emphasis added).

74. For consideration of the government and non-government interests in racial diversity in broadcasting and beyond after the Supreme Court's ruling in *Adarand*, see*, e.g.*, Leonard M. Baynes, *Life After Adarand: What Happened to the Metro Broadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?*, 33 U. MICH. J. L. REFORM 87 (1999).

75. *Cf. id.*

76. *But see* Podbereskey v. Kirwan, 38 F.3d 147, 152 (4th Cir. 1994) (University of Maryland defending its African American merit scholarship program as justified by compelling need to remedy the "present effects of past discrimination [that] exist at the University").

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

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

79. Fisher v. Univ. of Tex., 570 U.S. 297, 311 (2013).

80. Fisher v. Univ. of Tex., 579 U.S. 365, 390 (2016).

defense.[81] Granted, there is plenty of language in the *SFFA v. Harvard* opinion that throws dust in the eyes of the non-expert reader about the diversity defense. The opinion describes the Harvard and UNC articulations of the diversity defense as "imponderable" and incoherent.[82] The doctrinal significance of the Supreme Court suggesting as, the *SFFA v. Harvard* majority does, that it finds a college's articulation of its interest beyond the Court's capability to "ponder" is vague and best understood as non-controlling dicta,[83] not a legal conclusion. In any event, the Court majority's description of the asserted "end" proffered by a defendant as incoherent or difficult to contemplate is not a rejection of the strict scrutiny means-end test. As much as *SFFA v. Harvard* may constitute an expression of a six-justice frustration with the diversity defense, university leaders like Lehman are correct in observing that university administrators should still understand this most recent affirmative action opinion as leaving the route for defending affirmative action based on diversity open and viable.

Rejecting petitioner SFFA's request that the Court overrule the *Bakke-Grutter-Fisher* line of cases, the six-justice majority in *SFFA v. Harvard* relied on its past equal protection admissions cases as the relevant legal authority.[84] The diversity defense was first recognized in the 1978 *Bakke* Supreme Court opinion and has been applied in *Grutter, Fisher I,* and *Fisher II*, subsequently. If *SFFA v. Harvard* were an opinion that overruled the *Bakke-Grutter-Fisher* line of cases, the opinion would have marked the end of the diversity defense. But, as the former Michigan Law School dean observed, that did not happen in *SFFA v. Harvard*.[85]

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81. *SFFA v. Harvard* retains the overarching stringent strict scrutiny means-end legal test for government uses of racial classifications. *See, e.g.*, *Bakke*, 438 U.S. at 361–62. *Cf.* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022). The most well-known contemporary example of a Supreme Court ruling overturning decades-old case precedent is the *Dobbs v. Jackson Women's Health Organization* ruling. *Id.* The Court majority opinion in *Dobbs* uses explicit language to overrule *Roe v. Wade* ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."). *Id.*

82. *SFFA v. Harvard*, 600 U.S. at 215.

83. *See, e.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000–05 (1997) (explaining the concept of *dicta*).

84. *Id.* at 213.

85. *See* Lehman, *supra* note 14.

Chief Justice Robert's majority opinion for the Court does not accept petitioner SFFA's explicit "ask" in its brief that the Supreme Court, in deciding *SFFA v. Harvard*, overrule *Grutter*[86] such "that universities can no longer use race in admissions,"[87] nor does the Court's ruling grant SFFA's request that the "Court should hold that the Fourteenth Amendment and Title VI forbid institutions of higher education from using race as a factor in admissions."[88] SFFA's merits brief to the Supreme Court in *SFFA v. Harvard* explicitly asks the Supreme Court to overrule *Grutter*, claiming that *Grutter* satisfied every factor that the Court considers when deciding to overrule precedent by arguing that (1) the *Grutter* Supreme Court ruling was wrong the day it was decided, (2) has spawned significant negative consequences, and (3) has generated no legitimate reliance interests.[89] Next, SFFA covered its bases, arguing that if the Court did not opt to overrule the *Grutter* case, the Court should hold that neither Harvard nor UNC complied with the *Grutter* strict scrutiny standard.[90]

Despite this request by SFFA that the Court opinion mirror *Dobbs* by overruling the *Bakke-Grutter-Fisher* precedent for the exact reasons that *Dobbs* overruled the *Roe v. Wade* precedent,[91] the Court declined. Far from overruling *Grutter*, the *SFFA v. Harvard* majority

86. Brief for Petitioner at 68-69, SFFA v. Harvard, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707) (inviting the court in *SFFA v. Harvard* to use the lower bar for overruling long-existing precedent introduced in the 2018 Supreme Court precedent in *Janus v. American Federation of State, County, & Municipal Employees*) (referencing Janus v. Am. Fed'n. of State, Cnty. & Mun. Emps., 138 S.Ct. 2448, 2485 n.27 (2018)).

87. Brief for Petitioner at 69, SFFA v. Harvard, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707)("While overturning Grutter will mean that universities can no longer use race in admissions, the burden of changing illegal policies 'is not a compelling interest for stare decisis.'" (citing *Janus*, 138 S.Ct. at 2485 n.27)).

88. Brief for Petitioner at 71, SFFA v. Harvard, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

89. *Id.* at 50, 60, 65.

90. *See, e.g.*, *id.* at 71, 83 (arguing in Part I that *Grutter* should be overruled but, in the alternative, arguing in Part II and Part III respectively, that if Court does not overrule *Grutter* that "Harvard's admission process fails strict scrutiny" and that "UNC's admissions process fails strict scrutiny").

91. This request by SFFA even employed language that echoed the Supreme Court majority opinion in *Dobbs v. Jackson Women's Health*. The *Dobbs* majority opinion accepted the state of Mississippi's invitation to overrule the Court's longstanding *Roe v. Wade* precedent. That opinion, authored by Justice Samuel Alito, states, "Roe was egregiously wrong from the start." Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

opinion cites the 2003 *Grutter v. Bollinger* ruling nearly fifty times, including by name in more than half of those citations, identifying the *Grutter* case for controlling propositions throughout its analysis.[92] Likewise, far from accepting petitioner SFFA's invitation to overrule *Grutter* by holding that universities may no longer use race in admissions, the Supreme Court directly follows its previous *Bakke-Grutter-Fisher* holding that Harvard and UNC's programs are to be analyzed under strict scrutiny and even ends its opinion with an explicit example to explain how race may still be utilized in college admissions going forward. That advice to universities from the *SFFA v. Harvard* majority ruling states:

> [N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.[93]

Yet, as valuable as this single explicit example from the Court is in confirming that it is incorrect to read *SFFA v. Harvard* as fully banning all consideration of race in college admissions, colleges and universities that are sincerely committed to affirmative action will need to add additional defenses beyond the diversity defense to increase the likelihood of satisfying the strict scrutiny test applied in *SFFA v. Harvard*. Thus, the lesson for universities from *SFFA v. Harvard* on the diversity defense is nuanced and two-fold. First, the diversity defense remains available and can be employed successfully if institutions follow the roadmap set forth in *Grutter* and *Fisher* of "using the critical mass concept" to break down racial stereotypes that students bring to campus from their prior life experiences to bolster the diversity interest enough to satisfy *Bakke-Grutter-Fisher* strict scrutiny.[94] Second, although not mentioned by Lehman, universities should identify more

92. *See SFFA v. Harvard*, 600 U.S. at 211–13, 217, 219–21, 224–25, 227–28.

93. *Id.* at 230. In *Rothe v. Department of Defense*, 836 F.3d 57 (2016), the D.C. Circuit Court of Appeals employs language and reasoning bearing interesting similarities to this *SFFA v. Harvard* explanation of the types of race consciousness sufficiently tailored to satisfy strict scrutiny. *Id.* at 64 (describing the provision as basing its attentiveness on "an individual applicant's experience of [race] discrimination"). In *Rothe*, the D.C. Circuit Court of Appeals distinguished the defense of the U.S. Department of Defense from the affirmative action policy considered by the Supreme Court in *Bakke*, observing that the contracting statute relied upon by the DOD is "an individual-based approach that focuses on experience [of racism] rather than on group [racial] characteristic[s]." *Id.*

94. Lehman, *supra* note 14.

than one *end* goal—multiple "interests"—of the institution's affirmative action policy.

Lehman correctly articulates the first point in the following observations:

> The decision in the Students for Fair Admission case did not overrule Grutter. Instead, the majority opinion declared that Harvard University and the University of North Carolina had policies that were meaningfully different from both Michigan's policy and the University of Texas policy….Both the Michigan and Texas policies explicitly recognized the benefits all students would experience if their classes included critical masses of classmates from different groups….The majority opinion in SFFA did not renounce the earlier decisions' recognition that universities have a compelling interest in providing such an environment. Rather, it noted that "neither Harvard nor UNC claims to be using the critical mass concept." Instead of being designed in the manner of Michigan and Texas to break down racial stereotypes, the majority concluded that Harvard and UNC were reinforcing them.[95]

As Lehman explains, the diversity defense lives on because the *Bakke-Grutter-Fisher* line of cases remains controlling precedent. Accordingly, affirmative action policies are still defensible on diversity grounds if they are factually distinguishable from the Harvard and UNC policies. Additionally, Lehman offers suggestions about how to articulate the diversity defense in a manner that is more ponderable and comprehendible for the Court—a way to succeed where Harvard and UNC failed. He observes that "[i]ndeed, I expect that many universities are already in compliance" and then sets forth "five things" university leaders can do to defend their particular affirmative action policies.[96]

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95. Lehman, *supra* note 14 (explaining the critical mass concept and its significance in combatting racial stereotypes among all students attending a college or university).

96. Universities seeking to defend race affirmative action must still satisfy the "narrow-tailoring" means-prong and the strong basis in evidence of a "compelling" interest in diversity when proffering a diversity defense. *See infra* note 108. The "five things" Lehman identifies for universities to satisfy these strictures of strict scrutiny successfully are set forth as follows:

> It will not be easy to design affirmative action policies that comply with SFFA, but it should not be impossible. Indeed, I expect that many universities are already in compliance. What is required? As I see it, only five things.

Lehman accurately advises that, for universities relying on the diversity defense for affirmative action after the most recent Supreme Court ruling, it "will not be easy to design affirmative action policies that comply with *SFFA* [*v. Harvard*], but it should not be impossible."[97] Moreover, Lehman emphasizes how important it is for university leaders seeking to defend affirmative action to focus on the factual distinctions between their particular admissions policies and the two policies that failed strict scrutiny as applied in the *SFFA v. Harvard* majority opinion.[98]

Lehman's analysis, which is grounded in experience as a university administrator whose university successfully defended affirmative action at the Supreme Court and won, is a valuable reminder that affirmative action policies vary from one institution to another.[99] It is a helpful and highly substantive reminder that, as educational

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> First, the university must have a mission that includes preparing students to be effective members of a racially integrated society.
>
> Second, the university must have analyzed whether it needs to take affirmative action to create a student body where students' preconceptions and stereotypes are broken down, or whether such a student body will just emerge effortlessly.
>
> Third, if it concludes that such action needs to be taken, the university must have an admissions policy that clearly explains how an individual applicant's contribution to the breakdown of stereotypes might be a plus factor comparable to other plus factors within their file. Importantly, applicants of any race should be able to show how they might be able to break down other students' stereotypes.
>
> Fourth, the admissions policy must have a clear expiration date, at which time the university must undertake a full good-faith review that measures how well stereotypes are being broken down and determines on that basis whether the policy should be revised.
>
> And fifth, the university must be committed to walking the walk. It must operate as a racially integrated community where stereotypes are broken down through continuous intellectual engagement and respectful disagreement, where people are appreciated as individuals who have complex and multidimensional identities.

Lehman, *supra* note 14.

97. *Id.*

98. *Id.* (explaining that "the [*SFFA v. Harvard*] majority opinion declared that Harvard University and the University of North Carolina had policies that were *meaningfully different* from both Michigan's policy and the University of Texas policy") (emphasis added).

99. *Id.*

institutions consider which other defenses beyond diversity they might adopt if the affirmative action components of their institution's admissions policies come under legal attack, mounting such defenses is legally reasonable and of significant institutional import.[100] Not only is Lehman's message a reminder that the institution-specific facts of how an institution designs and implements the affirmative action components of its admissions policies matter greatly in mounting a successful defense of that specific institution's use of affirmative action, Lehman's analysis makes it exceedingly clear that neither affirmative action nor the diversity defense of it "died" in June 2023.

However, not noted by Lehman, is the importance of universities recognizing and adjusting their approach to defending affirmative action in light of how perplexed the six-justice majority purported to be when faced with Harvard and UNC's diversity-based defenses. This is especially strategic in light of the fact that the Supreme Court's *SFFA v. Harvard* Court majority ruling references interests other than diversity as "compelling" and thus capable of satisfying the end-prong of the strict scrutiny standard.

3. What Else Constitutes a "Compelling" End in SFFA v. Harvard

The *SFFA v. Harvard* majority's explanation of which end goals for the use of race classifications have been previously recognized as compelling under established case precedent reads:

> Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will **prevent harm to those in the prison**. When it comes to workplace discrimination, courts can ask whether a race-based benefit **makes members of the discriminated class "whole for [the] injuries [they] suffered."** And in school segregation cases, courts can determine whether any race-based remedial action **produces a distribution of students "compar[able] to**

100. *See, e.g., id.(*observing that "stereotypes about Black students break down when students from other races see Black students disagreeing with one another," which "only happens when the number of Black classmates adds up to a critical mass" because classroom "dynamics change when several Black classmates are in the room, disagreeing with one another"); Lehman, *supra* note 14 ("America's goal of building a racially integrated society where all individuals are treated fairly and with equal respect is as important today as it was 20 years ago.").

> **what it would have been in the absence of such constitutional violations."**[101]

After offering these examples of interests that do qualify as compelling and thus satisfy the end-prong of strict scrutiny, the *SFFA v. Harvard* Court majority contrasts two compelling interests—"whether a prisoner will be injured" and "whether an employee should receive backpay" — with what it calls a "standardless" question of "whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhance[s] appreciation, respect, and empathy,' or effectively 'train[s] future leaders.'"[102] The *SFFA v. Harvard* Court's subsequent criticism of the invocation of the interest in diversity articulated by Harvard and UNC is further reason colleges and universities would be best served by adding other defenses, such as the "remedial" defenses for affirmative action. Remedial defenses are compelling when a college or university is remedying racism or rectifying a past racial wrong, preventing dire harm stemming from past or ongoing racism or its effects, or to produce a student body comparable to what would exist in the absence of racism and its effects.

In the midst of discussing the *Bakke-Grutter-Fisher* rule that race classifications employed by universities in their admission policies must satisfy the strict scrutiny means-end test, the Court in *SFFA v. Harvard* drops a footnote that recognizes other (non-diversity) interests that the Court deems as a sufficiently compelling end to satisfy the end-prong of strict scrutiny in defense of affirmative action. Footnote four of the *SFFA v. Harvard* ruling explicitly acknowledges the existence and viability of other defenses that are "distinct"—uniquely available to—U.S. military academies if confronted with a legal attack

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101. *SFFA v. Harvard*, 600 U.S. at 215 (citing Johnson v. California, 543 U.S. 499, 512–13 (2005); Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 420 (1977)) (internal citations omitted) (bold emphasis added).

102. *Id.* (citing Students for Fair Admissions, Inc., v. University of North Carolina, 567 F. Supp. 3d 580, 656; Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 980 F.3d 157, 173–174). After describing this question as standardless in comparison to the three compelling interests it has identified, the Court declares of Harvard and UNC's asserted diversity interests: "The interests that respondents seek, though plainly worthy, are inescapably imponderable." *Id.* Here, again, it is worth noting that Jeffrey Lehman suggests ways to design an affirmative action policy and a way to defend it grounded in the articulation of the benefits to all students of classes with more than token numbers of non-Whites as a way to successfully employ the diversity defense after the *SFFA v. Harvard* ruling. *See* Lehman, *supra* note 14.

on their race-based admission programs in the final sentence of the following observation:

> The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.[103]

Here, the *SFFA v. Harvard* ruling explicitly notes that military academies have distinct end goals for employing race affirmative action—interests distinct from their diversity interests. Accordingly, the opinion can be fairly read to encourage colleges and universities to make a remedying racism defense or (military) leadership legitimacy defense[104] in addition to the traditional diversity defense that universities are more accustomed to invoking. If *SFFA v. Harvard* reflects a wariness by the six-justice majority as to colleges' diversity interest, it makes sense for universities to identify and develop a strong evidentiary basis in support of non-diversity interests as backups for satisfying the strict scrutiny test. In other words, a subtle but important message of *SFFA v. Harvard* is that strict scrutiny can be satisfied by the identification of a compelling purpose[105] for affirmative action that is separate and distinct from the diversity defense. Employing other defenses in addition to diversity is how universities may better guarantee they satisfy the end-prong of strict scrutiny after *SFFA v. Harvard.*

4. Strict Scrutiny Applied to Harvard and UNC

SFFA v. Harvard applies strict scrutiny to Harvard and UNC's admitted use of racial classifications in their respective 2014 admissions processes, but neither institution successfully clears the high evidentiary bar called "strict scrutiny" that the Court previously set in its *Bakke-Grutter-Fisher* line of equal protection cases as applying to race classifications.[106] In particular, the Court in *SFFA v. Harvard*

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103. *Id.* at 213 n.4.

104. *See infra* Image 4.

105. In addition, the methods that universities use—their *means* of being race-inclusive—to achieve the non-diversity goal or *end* must be narrowly tailored. *See supra* Image 2.

106. *See* SFFA. v. Harvard, 600 U.S. 181, 208–10, 226–28 (2023) (six-justice Court majority opinion relying on its own analysis of Justice Powell's opinion in *Bakke* and the majority opinions in Richmond v. J.A. Croson Co., 488 U.S. 469,

held that Harvard and UNC failed to satisfy the means prong of strict scrutiny because their admissions policies "employ[ed] race in a negative manner, [that] involv[ed] racial stereotyping, and lack[ed] meaningful end points."[107] The Court also held that Harvard and UNC failed to establish the strong basis in evidence[108] of a compelling reason to employ race in its admissions process—the legal standard for satisfying the end prong of strict scrutiny—when the majority opinion observes that both the Harvard and UNC programs for admitting 2014 freshmen "lack[ed] sufficiently focused and measurable objectives warranting the use of race."[109]

The Supreme Court's holding in *SFFA v. Harvard* strikes down the race-inclusion means—*how the policy goes about accomplishing its goal/purpose*—of Harvard and UNC admissions policies as relying on racial stereotypes, lacking an end date, and tracking racial composition of the class too closely. But, notably, the *SFFA v. Harvard* decision does not change the traditional rules for the "end" prong of strict scrutiny. In not doing so, the Supreme Court refused SFFA's requests, at oral argument[110] and in its pleadings,[111] to rule that Harvard and UNC failed the *end* prong of strict scrutiny by adopting the goal of admitting a racially diverse entering class of students. In other words, though SFFA selectively targeted inclusion-motivated race

493 (1989), Grutter v. Bollinger, 539 U.S. 306, 325 (2003), Fisher v. Univ. Of Texas (Fisher I), 570 U.S. 297, 311-12 (2013), and Fisher v. Univ. of Texas (Fisher II), 579 U.S. 365, 379 (2016)).

107. *SFFA v. Harvard*, 600 U.S. at at 230. The Court in *SFFA v. Harvard* also concluded that Harvard and UNC operated their affirmative action policies in a manner such that race was a "determinative" factor that engaged in racial stereotyping, *id.* at 219. It also concluded that the two institutions tracked the racial composition of the students it admitted over the course of the admissions cycle in an insufficiently narrowly tailored manner, *id.* at 230.

108. To satisfy the end/goal/purpose prong of strict scrutiny, a college or university must demonstrate a "strong basis in evidence" of its need for a racially diverse and inclusive entering class. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989) (stating that to satisfy strict scrutiny, there must have been a "strong basis in evidence for its conclusion that remedial action was necessary"); *see also Grutter*, 539 U.S. at 330–31 (finding that a law school had a "compelling interest" in promoting a diverse student body to obtain education benefits, supported by multiple studies and evidence presented at trial).

109. *SFFA v. Harvard*, 600 U.S. at 230.

110. Transcript of Oral Argument at 5, Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023) (No. 21-707).

111. Brief for Petitioner at 49-50, Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

classification for a rule of automatic invalidity,[112] its request for this new and race exclusion-protective rule was denied.

B. Incomplete Victory for SFFA: It Was Never About Colorblindness

SFFA is one of a significant number of anti-diversity, equity, and inclusion (anti-DEI)[113] organizations funded by anti-union, anti-regulation, and climate-denialist trusts[114] like the Searle Freedom Trust and DonorsTrust.[115] Although SFFA convinced the Supreme Court to rule against Harvard and UNC, the anti-DEI SFFA organization, like Allan Bakke back in the 1970s, fell short of its ultimate doctrinal goal of winning a Supreme Court ruling declaring it categorically unconstitutional for universities to consider race in admissions. An example of another anti-DEI organization engaged in contemporary attacks on inclusion-motivated attention to race by universities is America First Legal (AFL), a group created by Stephen Miller, a former adviser to President Donald Trump, and former Texas Solicitor General Jonathan Mitchell, "the legal architect of the state's six-week abortion ban."[116] Notably, Miller's AFL group is also attacking affirmative action for women in medical school admissions.[117]

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112. *See infra* Part I.B (discussion of Justice Kennedy's concurrence in *Croson* rejecting Justice Scalia's argument for this automatic invalidity rule).

113. The term "anti-DEI" is shorthand for groups and individuals who oppose and attack racial diversity, equity, and inclusion policies and laws. For a recent discussion of such groups and individuals, see Nikole Hannah-Jones, *The "Colorblindness" Trap: How a Civil Rights Ideal Got Hijacked*, N.Y. TIMES (Mar. 13, 2024). For an extensive examination of their origins, see *generally* LEE COKORINOS, THE ASSAULT ON DIVERSITY (2003).

114. DonorsTrust has been described as "the dark money ATM of the right" that "[o]ver the past decade has funded the right's assault on labor unions, climate scientists, public schools, and economic regulations." Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/.

115. *See, e.g.,* Camille Caldera & Sahar Mohammadzadeh, *Public Filings Reveal SFFA Mostly Funded by Conservative Trusts Searle Freedom Trust and DonorsTrust,* HARV. CRIMSON (Feb. 7, 2019), https://www.thecrimson.com/article/2019/2/7/sffa-finance/.

116. Kate McGee, *In Lawsuit, Student Claims Six Texas Medical Schools are Illegally Considering Race and Sex in Admissions*, TEXAS TRIB. (Jan. 10, 2023) available at texastribune.org/2023/01/10/texas-medical-school-lawsuits-admissions.

117. *Id.*

Image 3 below is a visual representation of the legal remedy sought by the petitioner SFFA organization—it shows that SFFA had hoped but was not successful in ending the application of the *Bakke-Grutter-Fisher* strict scrutiny rule to diversity-justified affirmative action.[118] SFFA's doctrinal goal of categorical invalidity for inclusion-motivated attention to race in college admissions was not granted by the Court's S*FFA v. Harvard* decision. Image 3 also shows that anti-DEI organizations like SFFA (and AFL) seek a new legal regime under which inclusion-motivated race consciousness, such as race affirmative action, is automatically illegal, while race consciousness for policing, border patrol, or prison management is not.

Image 3

If the Supreme Court had replaced the strict scrutiny equal protection standard with the equal protection rule proposed by SFFA that is visually represented in Image 3, there would be no present-day

118. Brief for Petitioner at 50, Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181 (2023) Nos. 20-1199 and 21-707.

opportunity for colleges or employers to defend diversity-justified race affirmative action. Still, it would not mean that we live in a color-blind America. If the Court had declared any and all race affirmative action illegal in its *SFFA v. Harvard* decision, the legality of race consciousness for prisons, policing, and border security would not have been affected.[119]

The Court's ruling in *SFFA v. Harvard* declined to grant the extreme and categorical anti-affirmative action interpretation of the Equal Protection Clause and Title VI that SFFA sought. Instead of imposing a new rule categorically prohibiting race affirmative action under the Equal Protection Clause and Title VI as SFFA requested, the Supreme Court's ruling leaves the pre-existing strict scrutiny rule intact. It strikes down the two diversity-defended race affirmative action programs before it—the 2014 admissions policies of Harvard and UNC—but does not make the dramatic change in precedent that individuals and groups attacking affirmative action have sought for decades.[120]

In his concurring opinion in the *City of Richmond v. Croson Co.*, a Supreme Court justice who regularly sided with those attacking race affirmative action[121] drew a line that contemporary attackers of race affirmative action continue to ask the Supreme Court to cross. Justice Anthony Kennedy rejected what is only a euphemistically "color-blind" legal rule—a rule targeting inclusion-motivated attention to race that seeks "automatic invalidity" for race affirmative action but no such rule for the government's other uses of racial classifications. Kennedy's concurrence in *Croson* explains the difference between the

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119. Had SFFA succeeded in its ultimate equal protection doctrinal goal, these non-inclusion-motivated race attentive policies would be doctrinally subject to strict scrutiny while inclusion-motivated race consciousness like race affirmative action in college admissions would, in SFFA's preferred doctrinal regime, be categorically (automatically) illegal.

120. While it is quite likely that there are enough votes among the current justices on the Supreme Court to one day grant the longtime anti-DEI doctrinal wish that the Court overrule the forty-year-old case precedent recognizing the diversity defense for race affirmative action in college admissions, it has not happened yet.

121. *See, e.g.,* Theodore Shaw, *Justice Anthony Kennedy's Race Jurisprudence*, SCOTUSBLOG (Jun. 29, 2018, 3:31 PM), https://www.scotusblog.com/2018/06/justice-anthony-kennedys-race-jurisprudence/ (describing and contrasting Justice Kennedy's five votes striking down affirmative action policies in *Croson*, *Adarand, Grutter, Gratz,* and *Fisher I* to his single vote to uphold an affirmative action policy in *Fisher II*.) "In affirmative action cases, Kennedy, almost without exception, voted to strike down race-conscious measures." *Id*.

decades of equal protection case precedents and the line that hard-core ideological opponents of race affirmative action like Justice Antonin Scalia[122] and anti-DEI organizational plaintiffs like SFFA ask the Supreme Court to cross. The rule that Kennedy explains he refuses to adopt is the same doctrinal rule the Supreme Court majority silently, but significantly, also refuses to adopt three decades later in *SFFA v. Harvard*. Kennedy rejected the invitation suggested by Scalia and others to eliminate any and all means-end testing of race affirmative action policies and adopt a automatic illegality rule for inclusion-motivated attention to race saying that such a "rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents."[123] Kennedy continued on to explain that "our precedents" require that affirmative action policies be assessed with "a case-by-case test."[124]

The *SFFA v. Harvard* six-justice majority opinion continues to follow the "less absolute rule" applied by the *Croson* majority.[125] Kennedy declared and explained his confidence that continuing to apply the strict scrutiny means-end tests to affirmative action policies on a case-by-case basis best aligns with the meaning of the Equal Protection Clause and that "the strict scrutiny rule is consistent with our precedents, as Justice O'Connor's [majority] opinion [in *Croson*] demonstrates."[126] Anti-DEI groups' ultimate doctrinal goal is the automatic invalidity rule suggested by Justice Scalia in his solo-authored concurring opinion in *Croson*. For this reason, colleges and universities are in a similar position as was true of abortion providers over the decades of legal attacks seeking to change the legal test applied to abortion regulations—those attacking affirmative action are less concerned as to whether they win or lose one specific case applying strict scrutiny to a particular institution's affirmative action policy than they are with eventually convincing the U.S. Supreme Court to adopt a new and unprecedentedly racially exclusionary interpretation of the Equal Protection Clause. To repeat, the goal of organizations like SFFA is to institute an unprecedented rule that inclusion-motivated attention to race

122. For an example of Justice Scalia's strong opposition and attacks on race affirmative action, see Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L. Q. 147 (1979).

123. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

124. *Id.*

125. *Id.* ("I accept the less absolute rule contained in Justice O"Connor's [majority] opinion [in *Croson*]").

126. *Id.*

is automatically illegal under any circumstance without any case-by-case determination—in other words, they seek an end to the current rule under which the Supreme Corut applies the strict scrutiny test to affirmative action. It is critical for colleges and university leaders committed to race inclusion to recognize that this affirmative-action-is-automatically-illegal-in-all-circumstances proposed SFFA rule change remains a goal, not a legal reality, because it is not what the Supreme Court held in its *SFFA v. Harvard* ruling.

It is also crucial for university leaders to recognize that organizations like SFFA do not identify which institutions to legally attack for employing affirmative action based on an evaluation of the particulars of the institution's admissions practices. Racial divisiveness, media attention, and another lawsuit that the anti-DEI group can lose at the lower court level and then appeal to the U.S. Supreme Court to offer the anti-affirmative action six-justice majority a case that serves up the opportunity to make affirmative action automatically illegal are the major drivers behind legal attacks against university's inclusion-motivated consideration of race in admissions. Similarly, in the years before *Dobbs v. Jackson Women's Health*, [127] the degree to which a specific abortion policy did or did not comply with existing Supreme Court substantive due process precedent was of no matter to those with an ideological agenda to impose a new legal rule that all regulations of abortion become presumptively constitutional—they were seeking a new rule under which even the most extreme early pregnancy abortion bans would be constitutional. Those attacking abortion knowingly enacted abortion laws they knew to be unconstitutional under *Roe v. Wade*[128] and *Planned Parenthood v. Casey*[129] Supreme Court precedents and legally attacked abortion providers that were acting consistently with current law because the Supreme Court could only overrule *Roe* in a case about an abortion law that ran counter to it. Essentially, this means that, as a practical matter, the only abortion providers safe from this kind of scorched earth legal agenda would have been abortion providers that voluntarily stopped providing any abortion service prior to *Dobbs*[130] decision's overruling of *Roe*[131]—these abortion

127. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 300 (2022) (striking down the *Casey* "undue burden test" and holding that abortion regulations are subject to rational basis review).

128. Roe v. Wade, 410 U.S. 113 (1973).

129. Planned Parenthood v. Casey, 505 U.S. 833 (1992).

130. 597 U.S. at 300.

131. 410 U.S. 113.

providers would have been prematurely acquiescing to an extremist anti-abortion agenda, not complying with any then-existing Supreme Court requirement.

In the same way, the scorched earth legal agenda of those attacking affirmative action in college admissions incentivizes university leaders to run what is essentially a "race to the bottom" over race exclusion —high-profile and highly selective universities racing to admit fewer and fewer African Americans and students from other underrepresented racial groups to appease the anti-DEI groups executing such attacks. University leaders should recognize that decreasing race inclusion for such reasons is, like it would have been for a hypothetical pre-*Dobbs* abortion clinic that closed down to avoid legal attack, a premature acquiescence to an extreme race exclusion agenda, not actions dictated by existing Supreme Court requirements. Perversely, if a college's admissions outcomes exclude African Americans enough to significantly decrease the risk of being targeted for a premeditatively meritless legal attack by a group like SFFA, that college has already served SFFA and other anti-DEI organizations a major victory. The point of attacking a particular college or university's affirmative action plan is not to single out institutions that are falling short of the requirements of the *Bakke-Grutter-Fisher* strict scrutiny legal standard or to bring so-called "colorblindness" to college admissions.[132] The goal of the multi-decade attack on race affirmative action is to end it by making it automatically legally invalid—no longer subject to strict scrutiny—but not to make any changes to the legal tests the Supreme Court applies to race attentiveness unrelated to racial diversity, equity, and inclusion.[133] To be clear, selectively targeting and attacking inclusion-motivated race classifications is anti-racial diversity, anti-racial equity, and anti-racial inclusion (anti-DEI), not colorblind.

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132. Professor Elise Boddie has insightfully argued why even a sincere request for a so-called "colorblindness" interpretation of the Fourteenth Amendment would be unconstitutional, unfair, and nonsensical. *See* Elise Boddie, *The Indignities of Color Blindness*, 64 UCLA L. Rev. Disc. 64, 67 (2016) (arguing that policies that are blind to race—"colorblindness"—"treat[] racial identity as inferior" by "exclud[ing] race from consideration of an individual's background while considering other forms of social identity" and stigmatizes and demeans by foreclosing "those who racially self-identify the full expression of their identity.").

133. *See, e.g.,* COKORINOS, *supra* note 113, at 5.

II. OTHER DEFENSES FOR AFFIRMATIVE ACTION

As explained in the prior section, the multi-decade targeting of affirmative action in college admissions to make it subject to a new rule of automatic legal invalidity is not because it is race-conscious, but because it is inclusion-motivated. It is within this broader context that this Article offers numerous blueprints for other defenses of affirmative action that university leaders could replicate. Recognition that the anti-DEI organizations filing lawsuits like *SFFA v. Harvard* are ideologically committed to challenging any and all means and manners of race inclusion may inform which and how many defenses higher education leaders and stakeholders consider. This Part presents a broad array of defenses from which colleges and universities may choose to defend affirmative action against future not-so-colorblind legal attacks.

It begins by revisiting the defenses other than diversity proffered by the UC Davis Medical School in the *Bakke* case, explaining the footnote in *SFFA v. Harvard* that references the availability of distinct defenses of affirmative action available to U.S. military academies, and discussing approaches used by entities outside higher education to defend affirmative action policies ruled on by the U.S. Supreme Court over the years since the earliest affirmative action policies sporadically came into existence in either the 1960s and 1970s and were attacked in court immediately. Next, it offers the Supreme Court's articulation of what is required to successfully use the remedial defense for affirmative action, calling it a classic defense. Lastly, this Part draws on the federal funding exceptions to state anti-affirmative action laws as an example of a defense for affirmative action tied to compliance with the race inclusion maximization and antidiscrimination requirements upon which the receipt of federal financial assistance is conditioned under Title VI of the Civil Rights Act of 1964.[134] The various defenses discussed here are not exhaustive of all the potentially viable legal justifications that a particular college or university may, working in conjunction with lawyers with specific expertise in this subject matter, establish with a strong evidentiary basis. In fact, universities may offer numerous compelling goals for their affirmative action policies in addition to those mentioned here.[135]

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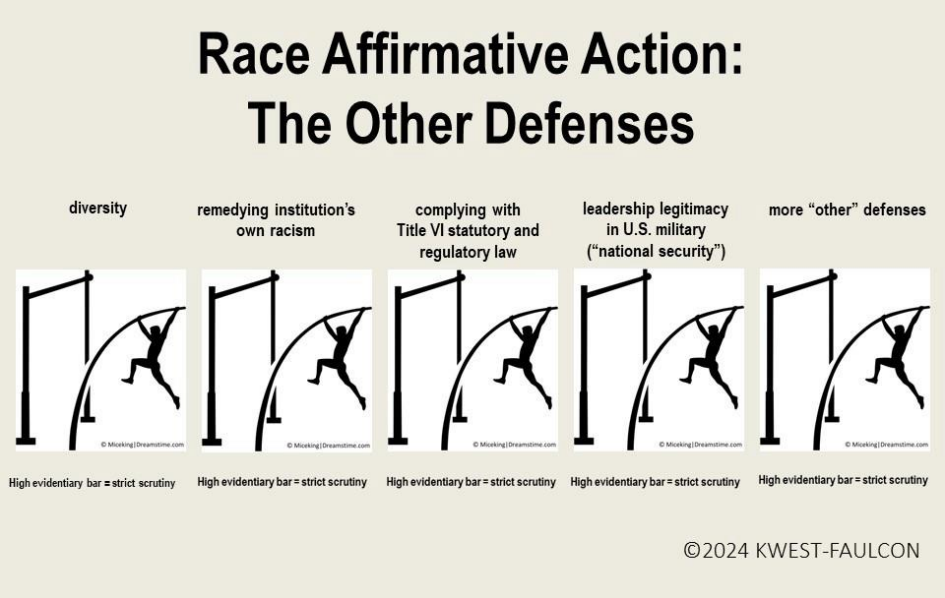
134. 42 U.S.C. § 2000d (2018).

135. A variety of legitimate, nondiscriminatory reasons for race affirmative action can be offered for a college's policy choice to employ race affirmative action in aspects of its admissions process.

Image 4 visually represents the defenses for affirmative action examined in the next sections. After a pole vaulter labeled "diversity" in Image 4, the pole vaulter labeled "remedying the institution's own racism" represents a remedial defense of affirmative action available to universities.[136] The pole vaulter labeled "leadership legitimacy in US military" represents the (military) leadership legitimacy defense for affirmative action. The pole vaulter in Image 4 labeled "complying with Title VI statutory and regulatory law" represents a preservation of federal funding defense.[137] Image 4 also includes a final pole vaulter labeled "many 'other' defenses" for affirmative action to represent the fact that these four defenses are not exhaustive of the defenses that colleges and universities may proffer in litigation defending against legal attacks on their affirmative action policies.

Image 4



A. Defenses Tried to Try Again?

The first higher education institution to defend its affirmative action admissions policy before the Supreme Court, the University of California at Davis Medical School did so by advancing multiple

136. Other remedial defenses include remedying the effects of a university's own institution-specific past or present systemic and Jim Crow-style racism.

137. *See infra* Part II.D.

defenses in *Regents of University of California v. Bakke*.[138] Of those presented by the Davis Medical School, the *Bakke* ruling identifies several interests other than diversity that a university could use to satisfy the end-prong of strict scrutiny. As the diversity defense seems to be in less favor with the *SFFA v. Harvard* six-justice majority than previous iterations of the Supreme Court, non-diversity defenses tried by the Davis Medical School could be tried again. Additionally, the *Bakke* Supreme Court ruling itself identifies another compelling interest for affirmative action beyond diversity that contemporary colleges and universities might have an evidentiary basis to adopt.[139]

"[P]romot[ing] better health-care delivery to deprived citizens" is an end—purpose—for race affirmative action in medical school admissions identified as compelling in the *Bakke* Supreme Court ruling.[140] Thus, medical schools facing allegations that their affirmative action admissions policies are illegal have the legal option of mounting the "promot[ion of] better healthcare delivery" defense recognized in *Bakke*.[141] Other types of graduate and professional schools might explore and establish an evidentiary basis for analogous defenses for their affirmative action policies.[142] In addition to deeming two—diversity and better healthcare delivery—of the four purposes for affirmative action asserted by the UC Davis Medical School as

138. Regents of Univ. Cal. v. Bakke, 438 U.S. 265 (1978). An attack on the affirmative action components of a law school's admissions policy considered by the U.S. Supreme Court prior to the *Bakke* case was not decided on the merits because the Court decided the case was not justiciable due to mootness. DeFunis v. Odegaard, 416 U.S. 312, 319-20 (1974).

139. As explained by Justice Powell in *Bakke*, race consciousness in court-ordered remedies for school desegregation are not affirmative action policies. *See Bakke*, 438 U.S. at 300 ("The school desegregation cases are inapposite."). Likewise, court orders entered against companies and firms found guilty of violating Title VII employment rights, consent decrees entered after federal agency investigative findings of Title VII violations, and congressional legislative actions are legal remedies that should not be understood as affirmative action policies of the type at issue in *Bakke*. *See id.* at 303 n.41.

140. *Id.* at 310 ("It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification.").

141. *Id.* at 311.

142. *See, e.g.*, Gregory Curfman, *Bakke Redux – Affirmative Action and Physician Diversity in Peril*, 50 J. L., MED. & ETHICS, 619–24 (2022).

compelling,[143] the Supreme Court's *Bakke* ruling identifies a fifth compelling purpose, not advanced by the medical school.[144]

Professor Devon Carbado has argued that there has been widespread oversight in the legal academy of what Justice Powell called the "fifth purpose,"[145] and I term here the "fairness in admissions defense" for affirmative action.[146] Justice Powell's controlling opinion in *Bakke* declares this purpose as a defense that, as Professor Carbado has noted, is so strong that it might obviate the Court's need to apply the strict scrutiny test at all.[147] Footnote forty-three in the *Bakke* opinion presents what I will call a "fairness in admissions" defense that Justice Powell explains could (and should) be mounted by universities to defend "[r]acial classifications in admissions."[148] In that important footnote, the *Bakke* opinion states:

> Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting

143. *See Bakke*, 438 U.S. at 306–15 (listing the four purposes advanced by the medical school as: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.").

144. Regents of Univ. Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (identifying this "fifth purpose").

145. *See* Devon Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1120–21, 1128 (2019) (arguing that "taking footnote forty-three seriously invites" asking "the question of whether courts should apply strict scrutiny to race conscious governmental action that operates as a countermeasure, not a racial preference."); *see also* Jonathan Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 548–49 (2019).

146. Another iteration of this defense is the "test deficiency" defense I have identified. *See* Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1290 (2011) [hereinafter West-Faulcon, *More Intelligent Design*] (explaining that the "'test deficiency' defense I propose here could augment and bolster the 'diversity rationale' invoked by selective universities sued by rejected white applicants alleging their rejection constituted illegal race discrimination.").

147. Carbado, *supra* note 145, at 1126.

148. *Bakke*, 438 U.S. at 306 n.43.

> academic performance, it might be argued that there is no "preference" at all.[149]

I have explained in my prior research the types of evidence that universities might present to establish the factual predicate for the fairness in admissions defense announced in *Bakke*.[150] For institutions that establish a strong basis in evidence that the affirmative action components of their admissions policies operate as a corrective for inaccuracies in the appraisal of an applicant's admissions-related merit, as Justice Powell said, "it might be argued that there is 'no preference' at all."[151] In short, colleges and universities need to look no further than the *Bakke* ruling for other strong non-diversity-based defenses for affirmative action.

Universities may also be able to identify defenses similar to the defenses available to U.S. military academies referenced in the fourth footnote in the *SFFA v. Harvard* majority opinion.[152] Footnote four in *SFFA v. Harvard* alludes to, but does not explicitly examine nor explain, a potential defense for affirmative action in relation to national security and the need for leadership credibility in the officer ranks of the U.S. armed services.[153] In addition to offering U.S. military academies their own unique national security-related defenses and military readiness defenses as options for staving off legal attacks on such institutions distinct interests for employing inclusion-motivated attention to race in selecting individuals to train to be future officers, U.S. military leaders have weighed in on the important role that higher education institutions more broadly have on the leadership legitimacy of

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149. *Id.*

150. *See* Kimberly West-Faulcon, *More Intelligent Design*, *supra* note 146, at 1289–91. Universities could present evidence of the psychometric properties and predictive limitations of standardized tests like the SAT, LSAT, and MCAT to establish this defense. *See id.* at 1291 ("Social science research demonstrating that new systems-based college admissions tests are twice as predictive as factorist tests like the SAT is the type of empirical evidence of 'test deficiency' that could potentially justify the consideration of race in selective admissions.").

151. Regents of Univ. Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978)

152. SFFA v. Harvard, 600 U.S. 181 (2023).

153. *Id.* at 213 n.4; *see supra* text accompanying note 103; *cf., e.g.*, Erin Gretziner, *The Supreme Court Excluded Military Academies From Its Admissions Ruling. Now SFFA is Challenging It.*, CHRON. HIGHER ED., (Sept. 19, 2023), https://www.chronicle.com/article/the-supreme-court-excluded-military-academies-from-its-admissions-ruling-now-sffa-is-challenging-it (examining the U.S. Military Academy's race conscious admission practices and the contended effect on national security).

the American armed services. Pointing to the role that colleges and universities play in training future officers for the military, high-ranking U.S. military leaders have advocated vigorously for decades in amicus curiae U.S. Supreme Court briefs that the compelling national security-interests distinctly applicable to U.S. military academies are also compelling defenses to attacks levied against colleges and universities that are not federal military academies if that particular university operates programs to train future U.S. military officers.[154]

The national security and military readiness defense is a particularly compelling version of the broader "leadership legitimacy" defense for affirmative action that the Supreme Court has recognized for decades. The *Grutter* Supreme Court was explicit about the leadership legitimacy defense for affirmative action.[155] In that case, the Court observed that:

> to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.[156]

U.S. military leaders have encouraged this defense to apply to college and university Reserve Officers' Training Corps (ROTC), stating that "[r]acially diverse ROTC programs at selective universities are of particular importance to our military leadership."[157]

Most supported in existing precedent for military service academies and for non-military universities as well is another legal defense for race affirmative action: the national security interest in training military leadership that the various military corps will respect as legitimate. This defense has been articulated by amicus briefs submitted to the Court in all of the lawsuits that have attacked race affirmative action in cases like *Grutter*, *Fisher*, *SFFA v. Harvard*, and *SFFA v. UNC*.[158] The evidence a college would present to invoke this defense

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154. *See, e.g.*, Brief of Adm. Charles S. Abbot et al., at 4, SFFA v. Harvard, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707) ("Prohibiting educational institutions from using modest, race-conscious admissions policies would impair the military's ability to maintain diverse leadership, and thereby seriously undermine its institutional legitimacy and operational effectiveness.").

155. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

156. *Id.* at 332.

157. Brief of Adm. Charles S. Abbot et al., *supra* note 154, at 23.

158. *See* Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241 & 02-516); Brief of Lt. Gen. Julius

would parallel how the U.S. military has defended affirmative action as integral to the successful functioning of the armed forces. Facts bolstering the military leadership legitimacy defense are that "[h]istory has shown that placing a diverse Armed Forces under the command of homogenous leadership is a recipe for internal resentment, discord, and violence." [159]

The anti-DEI SFFA organization is out to test this defense in a lawsuit against one of the U.S. service academies. SFFA has sued the United States Military Academy at West Point despite the clear doctrinal strength of West Point's numerous defenses, including a literal national security defense, in addition to the strong leadership legitimacy defense that can also be invoked by higher education institutions that are not military academies.[160] The defenses raised in amicus briefs filed by groups of military officers are particularly compelling in both the legal and non-constitutional law senses of the term.[161]

Whether from footnotes in *Bakke* or *SFFA v. Harvard*, Supreme Court cases ruling on the legality of affirmative action policies in the higher education context offer other defenses that can be mounted in addition to the diversity defense. In addition to rulings by the Supreme Court in cases involving universities, universities seeking to defend affirmative action vigorously are well-served if they also examine how entities outside higher education have approached defending against legal attacks on policies adopted for the purpose of racial inclusion and race fairness.

B. Defending Affirmative Action Outside of Higher Education

In higher education, there has been almost singular reliance on the diversity defense since the *Bakke* ruling in 1978.[162] By contrast, other defenses are employed by government entities when legally attacked for affirmative action policies combatting white-favoring race discrimination in employment practices and in spending federal, state,

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W. Becton, Jr. et al., Fisher I, 570 U.S. 297 (2013) (No. 11-345); Brief of Lt. Gen. Julius W. Becton, Jr. et al., Fisher II, 579 U.S. 365 (2016) (No. 14-981); Brief of Adm. Charles S. Abbot et al., *supra* note 154, at 23.

159. Brief of Adm. Charles S. Abbot et al., *supra* note 154, at 23.

160. The SFFA legal attack on affirmative action in admissions to United States Military Academy at West Point will be the first legal test of this defense in federal court. *Cf.* Complaint, Students for Fair Admissions v. United States Military Academy at West Point et. al., No. 7:23-CV-08262 (S.D.N.Y., NY.).

161. Brief of Adm. Charles S. Abbot et al., *supra* note 154, at 3.

162. *See supra* Part I.A.2.

and local tax dollars for the award of contracts for government work projects to private businesses. Local entities like the city and county of Richmond, Virginia,[163] and Santa Clara, California,[164] and the school board of Jackson, Michigan[165] as well as federal government agencies such as the U.S. Department of Commerce,[166] the Department of Transportation,[167] and the Federal Communications Commission[168] have paved the way for defending affirmative action beyond the diversity defense.

Lessons for universities as to how to mount non-diversity-based defenses for the affirmative action components of their institution's admissions policies can be gleaned from the study of how city and county governments have defended their affirmative action employment policies against legal attacks. In *Johnson v. Transportation Agency*, a county staved off an attack by a White male employee of the county transportation agency who alleged, unsuccessfully, the illegality of the facets of employment practices employing inclusion-motivated attention to race and sex for the promotion of a female employee to join a workforce division that was all males as a promotion from her current position in which she was he only female.[169] The litigant attacking the employment affirmative action policy alleged that the attention to the biological sex and race of applicants to a workforce that had been exclusively comprised of White men invoked a landmark civil rights provision.[170] Paul Johnson unsuccessfully alleged that the selection of the first woman to hold a road maintenance worker position in the city's history to become the first female road dispatcher was invidious sex discrimination against Johnson, as a man, in

163. Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

164. Johnson v. Transp. Agency, 480 U.S. 616, 642 (1987) (finding that Santa Clara County's Transportation Agency's attention to sex and race in that public agency's employment affirmative action policy is legally permissible under Title VII of the Civil Rights Act of 1964).

165. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

166. Fullilove v. Klutznick, 448 U.S. 448, 453 (1980), *abrogated by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

167. A*darand Constructors, Inc.*, 515 U.S. at 205.

168. Metro Broad. v. FCC, 497 U.S. 547, 552 (1990), *overruled by Adarand Constructors, Inc.*, 515 U.S. at 227.

169. *Johnson v. Transp. Agency*, 480 U.S. at 635.

170. *See id.* at 619.

violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17.[171]

However, most of the Supreme Court's decisions characterized as involving affirmative action in the context of employment differed from *Johnson v. Transportation Agency* in that the inclusion-motivated race consciousness under legal attack was an attack on a policy unrelated to the everyday hiring or promotion of workers. Instead, the inclusion-motivated race consciousness under attack involved the inclusion of non-Whites in training programs and in programs instituted by involuntary court orders or consent decrees entered by employers to settle race discrimination lawsuits filed against them. In such a case decided in 1979, *United Steelworkers of America v. Weber*, the Supreme Court upheld the legality of an affirmative action program attacked by a White employee, who alleged it was a violation of Title VII of the Civil Rights Act of 1964 for a union-negotiated agreement reached between a labor union and an employer to use inclusion-motivated race consciousness in selecting trainees for high-skilled union work to redress the fact that only Whites held such jobs.[172] In *Weber*, the Supreme Court held that union agreements like the one attacked by Brian Weber are legal under Title VII when there are "manifest" racial "imbalances" in the percentage of non-White workers in historically racially "segregated job [classifications]."[173]

Other employment-related Supreme Court rulings on the legal defensibility of inclusion-motivated race consciousness have been attacks on judicial rulings, consent decrees entered by courts to resolve cases after employers were found culpable for employment-related race discrimination, and terms of employer-union agreements. These have included *Local 28 of Sheet Metal Workers' International Ass'n v. EEOC*, a case that was a legal attack on an affirmative action

171. *See id.* at 635 (rejecting claim that women-including affirmative action employment policy violated Title VII); *cf., e.g.*, Ricci v. DeStefano, 557 U.S. 557, 592 (2009) (ruling in favor of Title VII claimants who challenged "discarding [of] test results" because the city employer "lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results."). Unfortunately, an extensive examination of Title VII is also beyond the scope of this Article.

172. United Steelworkers of America v. Weber, 443 U.S. 193, 197 (1979) (upholding affirmative action policies requiring that at least fifty percent of trainees for skilled workers be African American until the African American skilled craft workers approximated the percentage of African Americans in the local labor force).

173. *Id.* at 197.

program devised by the parties in a lawsuit under the supervision of a court-appointed administrator, which was not an affirmative action policy instituted by an employer.[174] In deciding cases such as *United States v. Paradise*[175] and *Local Number 93, International Ass'n of Firefighters v. City of Cleveland*,[176] which were lawsuits filed by White plaintiffs attacking consent agreements agreed to by employers that courts had found guilty of engaging in extensive race discrimination, the Supreme Court endorsed the legality and propriety of inclusion-motivated attention to race to rectify past racism by including African Americans other than those who were the direct victims of the prior race discrimination.[177]

Several of the non-diversity defenses of affirmative action made before the Supreme Court have been mounted by departments of the United States federal government. As explained above,[178] the U.S. Federal Communications Commission defended its inclusion-motivated race attentive broadcast ownership rules with a diversity defense as well as a separate remedial defense—a remedying race discrimination defense and a broadcast programming diversity defense—both of which the Supreme Court accepted and upheld as constitutional under

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174. *See* Loc. 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 426 (1986) (Supreme Court ruling against legal challenge to a court ruling that labor union found to have engaged in racial discriminatory hiring practices and failed previously to comply with court orders to cease its race discrimination admit specific percentages of non-White workers to the union).

175. *See* United States v. Paradise, 480 U.S. 149, 153 (1987).

176. *See* Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 504 (1986).

177. Consent agreements regarding layoffs of employees with attention to the racial composition of the post-layoff workforce have been defended less successfully. *See, e.g.*, Firefighters Loc. Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (striking down such an agreement and thus not permitting inclusion-motivated race attentiveness to retain non-White teachers because non-White teachers overwhelmingly made up the most recently hired and thus were disproportionate among the teachers to be fired under "last hired" lay-off policy). The school board of Jackson, Michigan defended its K-12 school district's race attentive union collective bargaining agreement as remedying disproportionate last-hired status of tenured "minority" — defined as "Black, American Indians, Oriental, or of Spanish descendancy"—teachers, as remedying societal race discrimination defense that more than a token number of non-White tenured teachers serve as valuable "role models" for non-White K-12 students and as "remedy[ing] prior discrimination against minorities by the Jackson School District in hiring teachers." *Id.* at 272 n.2, 277.

178. *See supra* text accompanying notes 70-71.

equal protection principles.[179] In *Fullilove v. Klutznick*, the U.S. Secretary of Commerce defended affirmative action as justified to accomplish the goal of remedying race discrimination in the appropriation of billions of dollars of federal government grant funding from the Economic Development Administration to state and local governmental entities for use in local infrastructure projects.[180] In *Adarand Constructors, Inc. v. Pena*, the U.S. Secretary of Transportation defended affirmative action as justified to accomplish the remedial purpose of remedying race discrimination in the appropriation of billions of dollars of federal government funding from the Surface Transportation and Uniform Relocation Assistance Act for use in the construction of highways, highway safety, mass transportation, and relocation assistance programs.[181]

The decades that these federal government entities spent defending affirmative action policies based on interests other than diversity have created a significant amount of legal precedent for non-diversity-based defenses. This precedent can be applied to the higher education affirmative action admissions factual context. A starting point for university leaders interested in identifying alternative options of the "end"—a different "compelling interest"—to satisfy the strict scrutiny test is the remedial defense for race affirmative action. Recognized as a compelling purpose for inclusion-motivated attention to race by Supreme Court justices across a range of ideologies and over time, the remedial defense is fairly described as a classic defense for affirmative action.

C. The Classic Remedial Defense

The Supreme Court's 1989 ruling in the *City of Richmond v. J.A. Croson Co.* best exemplifies the difference between the diversity defense for affirmative action invoked by higher education institutions

179. Metro Broad. v. FCC, 497 U.S. 547, 566 (1990). At that time, the Supreme Court applied intermediate scrutiny to race-attentive policies with purposes related to remedying the effects of race discrimination and with the purpose of increasing race-inclusive diversity. *Id.* at 564.

180. Fullilove v. Klutznick, 448 U.S. 448, 453 (1980), *abrogated by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Court in *Adarand* raised the standard of review applied to federal government race affirmative to the higher strict scrutiny standard from the intermediate scrutiny standard the Court had held in *Fullilove* to apply to federal government use of race classifications. *See id.* at 235.

181. Adarand Constructors, Inc., 515 U.S. at 212–13 (1995).

and the classic remedial defense, which has been the primary and staple defense for affirmative action outside of higher education.[182] The crux of this classic defense is for the entity employing affirmative action to present evidence of its own race discrimination, current and past, as needed to "remedy" the present effects of its own institution-specific race discrimination and systemic racial exclusion.[183] *Croson* is the Supreme Court decision that colleges and universities should look to for the evidentiary standard for demonstrating a compelling interest in remedying institution-specific race discrimination or an institution's "passive participation" in race discrimination by another entity that impacts its selection and inclusion of non-Whites.[184] The *Croson* remedial defense has long been available for a university that seeks to rectify systemic exclusion of historically disproportionately excluded racial groups that stems from that university's own past or ongoing institution-specific forms of race discrimination.[185] But, it has gone unused in the higher education context.

Professor Charles Lawrence made this point over two decades ago, in reference to the University of Michigan's defense in the *Grutter* and *Gratz* cases, writing that "[t]he University's strongest case was one that combined the remedial justification with the diversity defense."[186] Lawrence's analysis of the strategic and doctrinal value of universities defending affirmative action with a remedial defense rings even more true after the judicial iciness expressed in *SFFA v. Harvard* toward the Harvard and UNC articulations of their versions of a diversity defense.[187] In fact, the remedial defense has long been and still is

182. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 489 (1989).

183. *Id.* at 510.

184. *Id.* at 493.

185. *Id.* at 509.

186. Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 956 (2001). Professor Lawrence criticized the University of Michigan for solely relying on its diversity interest to defend against legal attacks on affirmative action in admissions to its undergraduate and law schools. *Id.* at 955–57. He theorized that a university's "concern that by admitting its own discriminatory practices it would expose itself to liability vis-à-vis minority applicants and students" was the reason the defense had been neglected in the past. *Id.* at 956.

187. *See supra* Part I.A.4 (discussing language in *SFFA v. Harvard* majority opinion describing facets of diversity interests offered by Harvard and UNC to lack coherence).

"the University's safest and most straightforward strategy" for defending affirmative action.[188]

As Professor Lawrence observed,[189] two Supreme Court cases that ruled in favor of the parties attacking affirmative action are the doctrinal basis for the remedial defense for affirmative action that is available and viable for contemporary colleges and universities willing to mount it.[190] "The Court's opinions in *City of Richmond v. J.A. Croson Co.* and *Adarand v. Pena* ha[ve] made it clear that the remedy of identified past and continuing discrimination [i]s a compelling state interest and that a racial classification, narrowly drafted to serve that interest, would survive strict scrutiny."[191] On the point of the specific relevance of the 1989 *Croson* case to the remedial defense, as a legal analysis published in the *Yale Law & Policy Review* observed the same year it was decided, *Croson* was "the first recognition in a Supreme Court majority opinion" of the remedial defense—holding "that race-conscious affirmative action is, in some circumstances, a constitutionally permissible tool for remedying the effects of prior racial discrimination."[192]

The *Croson* case sets forth the strict scrutiny test requirements for remedially-based affirmative action.[193] In that it was the first time the Court had applied the same strict scrutiny test applicable to Jim Crow-style racism and racial internment to an affirmative action policy, *Croson* unquestionably made remedial affirmative action policies more difficult to successfully defend against legal attacks.[194] With analysis that prioritized concern regarding harm that affirmative action could cause to White innocents over rectifying effects of race

188. Lawrence, *supra* note 186, at 955.

189. *Id.*; c*f.* David S. Cohen, *The Evidentiary Predicate for Affirmative Action After Croson: A Proposal for Shifting the Burdens of Proof*, 7 Yale L. & Pol'y Rev. 489, 489 (1989) ("Although the Court did indeed strike down Richmond, Virginia's minority business set-aside program on constitutional grounds, *Croson* nonetheless represents the first recognition in a Supreme Court majority opinion that race-conscious affirmative action is, in some circumstances, a constitutionally permissible tool for remedying the effects of prior racial discrimination.").

190. Both *Croson* and *Adarand* are deemed contemporary controlling equal protection precedents today. *See* SFFA v. Harvard, 600 U.S. 181, 206, 224, 226 (2023) (citing favorably and applying *Adarand* and *Croson*).

191. Lawrence, *supra* note 186, at 955.

192. Cohen, *supra* note 189, at 489.

193. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–98 (1989).

194. *See* Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944).

discrimination and race exclusion, the *Croson* ruling is not just the first time that the Supreme Court articulated the evidence required to mount a remedial defense for affirmative action. It is also the first Supreme Court opinion in which city, county, and state government affirmative action policies, at that time only defended as remedial, were subject to the super stringent strict scrutiny test that had previously been reserved for diversity-justified affirmative action by state colleges and universities.[195] Just like the Supreme Court's ruling in *Bakke* was "a loss,"[196] *Croson* was another major one as well for the anti-subordination interpretation of the Fourteenth Amendment.[197]

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195. When *Croson* was decided, a majority of the Court was of the view that Congress's Fourteenth Amendment Section 5 enforcement power warranted greater deference and thus the application of the intermediate scrutiny test to affirmative action. *See*, e.g., *Croson*, 488 U.S. at 505 (distinguishing intermediate scrutiny tests applied in Fullilove, 448 U.S. at 487, on the grounds that in enacting the federal affirmative action policy "Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination"). Justice O'Connor writes for a five-justice majority and six justices voted to strike down Richmond's policy in Croson. Justice Scalia filed a solo separate opinion concurring only in the judgment, not joining in any portion of the opinion authored by Justice O'Connor. *Croson*, 488 U.S. at 520 (Scalia, J., concurring in the judgment).

196. *See* Theodore M. Shaw, *From Brown to Grutter: The Legal Struggle for Racial Equality*, 16 J. LAW & POL'Y 43, 55 (2004) ("*Bakke* was a loss for African-Americans…..[i]t was a loss because, one, the Court completely ignored the history of the Fourteenth Amendment and refused to acknowledge that its original purpose was to bring the former slaves into all of the benefits of full citizenship."). A newly constituted Supreme Court decided *Adarand* in 1995, five years after *Metro Broadcasting* decided in 1990 and six years after *Croson* in 1989 continued this trajectory of "losses" after two of the three Supreme Court justices—Justice Thurgood Marshall and Justice William Brennan—who applied different means-end tests to inclusion-motivated race classifications as compared to racially-subjugating race classifications were replaced by Justices Clarence Thomas and David Souter, who anti-affirmative U.S. President George H.W. Bush appointed. *Cf., e.g.*, Donna Thompson-Schneider, *Paved with Good Intentions: Affirmative Action after Adarand Paved with Good Intentions: Affirmative Action after Adarand*, 31 Tulsa L. J. 611, 623 (1996) (describing the "balance" between *Metro Broadcasting*'s application of intermediate scrutiny to the federal government's use of affirmative action and *Croson*'s application of strict scrutiny for local and state affirmative action as "slipp[ing] away with Justices Marshall, Brennan, and White's retirements" and "it seem[ing] only a matter of time until the new conservative Court would reconsider the issue").

197. Richmond, a city government with a contracting program that awarded over 99% of all its prime contracts to White prime contractors in the previous past

Nevertheless, also like *Bakke*, the *Croson* case can and should still be studied and utilized by colleges and universities to defend affirmative action. The portion of the *Croson* majority opinion that is applicable to a contemporary defense of affirmative action requires that the discrimination to be rectified be *specific "identified discrimination"*[198] *based on statistical comparison to the qualified pool of non-White applicants*:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. *See Bazemore v. Friday,* 478 U.S., at 398; *Teamsters v. United States,* 431 U.S., at 337–339. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. *See*, *e.g., New York State Club Assn. v. New York City,* 487 U.S. 1, 10–11, 13–14 (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.[199]

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half-decade, adopted an affirmative action policy to require future White-owned businesses to whom the city awarded prime contracts to "subcontract at least 30% of the dollar amount of the contract," which in the particular case litigated involved the subcontracting of supply of some of the plumbing parts that the J.A. Croson company would have used as the winning prime contractor to install toilets in the Richmond City jail. *See* Croson, 488 U.S. at 482 ("On October 13, 1983, the sealed bids were opened. Croson turned out to be the only bidder, with a bid of $126,530.") The Ohio-based J.A. Croson is a White-owned multi-million dollar plumbing company. *See Croson Keeps Estimating; Gives Retirement the Rub*, ENG'G NEWS REC., (July 16, 2007) (describing J.A. Croson as "$47-million plumbing business").

198. *Croson*, 488 U.S. at 505 (rejecting Richmond's affirmative action policy for its failure to offer "evidence [that] point[ed] to any *identified discrimination* in the Richmond construction industry").

199. *Croson*, 488 U.S. at 509.

Next, the *Croson* remedial defense rules observe that a "pattern of individually discriminatory acts," if "supported by appropriate statistical proof," would constitute a compelling basis for the remedial defense:

> Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. *See generally McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802–803, (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. *See Teamsters, supra,* 431 U.S., at 338.[200]

So, additionally, the *Croson* decision identifies a remedial defense that does not require colleges and universities to prove themselves to have been guilty of race discrimination. If colleges and universities can show that they have "essentially" become "passive participants" in a system of racial exclusion by an outside industry, such as the standardized testing industry,[201] *Croson* explains its significance as a potential remedial defense for affirmative action as follows:

> if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice. *Cf. Norwood v. Harrison,* 413 U.S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish") (citation and internal quotations omitted).[202]

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200. *Id.* at 509.

201. *Cf.*, *see generally* West-Faulcon, *More Intelligent Design*, *supra* note 146.

202. *Id.* at 492-93.

Thus, despite unsuccessful deployment by the city of Richmond,[203] the *Croson* case established useful parameters for mounting a remedial defense based on a university's compelling need to remedy past and contemporary racism and its institution-specific effects.

The long histories of various forms of racism by UNC and Harvard outlined in amicus briefs filed in the *SFFA v. Harvard* litigation[204] demonstrate the existence of missed evidentiary opportunities for either or both institutions to mount classic remedial defenses for their affirmative action policies by establishing present effects stemming from their respective past institution-specific racism. The North Carolina state legislature founded what is now the flagship Chapel Hill campus of the University of North Carolina (UNC) in 1789. The same North Carolina state legislature imposed and oversaw a state law regime that affirmatively protected racialized intergenerational forced labor captivity and protected the acts of human traffickers and enslavers.[205] Seventy years later, the North Carolina General Assembly that chartered, funded, and operated UNC joined ten other state

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203. Justice O'Connor's opinion for the majority did not seem to apply the means-prong of strict scrutiny because of the failure of the city to link its remedial defense to "identified discrimination," observing that it found "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Id.* at 505.

204. *See e.g.,* Brief for HBCU Leaders and National Association for Equal Opportunity in Higher Education as Amici Curiae Supporting Respondents at 3–5, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. & Univ. of North Carolina, et. al., 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707) (outlining Harvard's racist past including its use of enslaved persons to serve its presidents, professors, and students; discussing UNC's efforts to continue excluding Black students by replacing "*de facto* discrimination" with "*de jure* discrimination"); Brief for 25 Harvard Student and Alumni Organizations as Amici Curiae in Support of Respondent at 3, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (No. 20-1119) ("For almost 85% of its nearly 400-year history, Harvard maintained a near-categorical exclusion of Black, Latinx, Native/Indigenous, Asian American, and other students of color as it provided white students with all the educational and professional advantages that a Harvard education affords."); Brief for the NAACP Legal Defense and Educational Fund, Inc. & The NAACP in Support of Respondent at 18–19, Students for Fair Admissions v. Univ. of North Carolina, et. al., 600 U.S. 181 (2023) (No. 21-707) (describing the University of North Carolina's historical efforts to "ke[ep] its doors shut to Black Americans on the basis of their race" and North Carolina as a "late holdout" in complying with the desegregation of its public universities).

205. *See, e.g., generally* Ernest Clark, *Aspects of the North Carolina Slave Code, 1715-1860*, 39 N.C. HIST. REV. 148 (1962).

governments to become a belligerent to the United States of America[206]—called the Confederate States of America.[207] UNC was so fully entrenched with the pro-slavery confederation of state legislatures from 1861 to 1865 that "[a]pproximately 1,000 [UNC] alumni and students (about 40 percent) served in the Confederate forces."[208] Harvard, a private university in the northern United States also has significant "ties to slavery [that] were transformative in the [u]niversity's rise to global prominence."[209] Harvard had "enslaved individuals on campus, funding from donors engaged in the slave trade, and intellectual leadership that obstructed efforts to achieve racial equality."[210] But,

206. Because the over 330,000 persons enslaved in North Carolina had no right to vote and the men among the approximately 30,000 "free"—not enslaved African Americans—living in North Carolina had been disenfranchised when the 1835 North Carolina Constitution eliminated the right to vote that free Black men had possessed under the 1776 North Carolina Constitution, neither free nor enslaved African Americans elected the NC state legislators who joined the Confederate States of America. *See* Ordinance to Dissolve the Union Between the State of North Carolina and the Other States United with Her Under the Compact of Government Entitled the Constitution of the United States in ORDINANCES AND RESOLUTIONS PASSED BY THE STATE CONVENTION OF NORTH CAROLINA, First Session (May and June 1861) available at https://docsouth.unc.edu/imls/ncconven/ncconven.html (repealing North Carolina ordinance ratifying the U.S. Constitution and declaring that "union now subsisting between the State of North Carolina and the other States under the title of the United States of America, is hereby dissolved"); Lacy Ford, *Ending Free Black Suffrage in North Carolina in* DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH 418, 438 (2009) (describing substantive debate and by "ten votes, 64-54" vote at 1835 convention imposing "total ban on free black voting"); David Dodge, *The Free Negroes of North Carolina*, ATLANTIC (Jan. 1886 Issue), https://cdn.theatlantic.com/media/archives/1886/01/57-339/131867775.pdf.

207. The Confederate States of America was a centralized governing body of state legislatures traitorous to the U.S. federal government "devoted to securing a society in which enslavement to white people was the permanent and inherited condition of all people of African descent." *See, e.g.,* Stephanie McMurry, *The Confederacy Was an Antidemocratic, Centralized State*, ATLANTIC (June 21, 2020), https://www.theatlantic.com/ideas/archive/2020/06/confederacy-wasn't-what-you-think/613309/.

208. *Civil War*, UNC A TO Z, https://uncatoz.com/entry/civil-war/#:~:text=Approximately%201%2C000%20alumni%20and%20students,of%20the%20five%20university%20tutors (last visited Feb. 22, 2024).

209. Alvin Powell, *Dual Message of Slavery Probe: Harvard's Ties Inseparable from Rise, and Now University Must Act*, HARV. GAZETTE (Apr. 26, 2022), https://news.harvard.edu/gazette/story/2022/04/slavery-probe-harvards-ties-inseparable-from-rise/.

210. *Id.*

despite both Harvard and UNC having institutional histories of racism that have present-day effects and existing policies and practices that are arguably forms of contemporary racism,[211] UNC and Harvard did not try to satisfy the strict scrutiny test employing the remedial defense for affirmative action.

UNC and Harvard were both unsuccessful in their defenses of affirmative action in *SFFA v. Harvard*.[212] Accordingly, their failure to invoke the remedial defenses available to them should be a cautionary tale. After four decades, since *Bakke*,[213] of asserting an interest in diversity as the exclusive defense for affirmative action, colleges and universities should weigh hesitancy to admit their own racist pasts and contemporary use of admissions criteria that unjustifiably disproportionately exclude non-Whites against the concern that only token numbers of numerical minority racial groups, such as African Americans, will be among their students[214] if affirmative action goes undefended.

D. Preservation of Federal Funding Defense

Colleges and universities voluntarily undertake the obligation to comply with the statutory and regulatory requirements of Title VI of the Civil Rights Act of 1964[215] if, and only if, they are among the institutions that apply for and accept millions of dollars in optional federal loans, grants, and other monies.[216] Because the U.S. national

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211. *See, e.g.,* Transcript of Oral Argument at 91, Students for Fair Admissions, Inc. v. University of North Carolina et. al., 600 U.S. 181 (2023) (No. 21-707) (North Carolina Solicitor General Ryan Park stating "we're not pursuing any sort of remedial justification for our policy, but we do think that our university's history is relevant to the diversity analysis").

212. *See SFFA v. Harvard*, 600 U.S. at 231.

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

214. *See infra* Epilogue (explaining the mathematical reality "that highly selective colleges and universities that draw from the very highest-SAT-scoring youth population cannot find viable substitutes for race affirmative action that maintain the levels of African American student enrollment possible with affirmative action").

215. 42 U.S.C. § 2000d; *See generally* STEPHEN C. HALPERN, ON THE LIMITED OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT (1995).

216. "Given the breadth of institutions that receive federal education money, all public elementary and secondary schools are subject to Title VI, as well as nearly all colleges and universities, public and private." Jared P. Cole, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, CONG. RSCH. SERV. 1 n.9 (2019). (citing U.S. Dep't of Educ., Office for Civil Rights, Race and National Origin Discrimination: Frequently Asked Questions). *See, e.g.*,

government does not operate private nor public state colleges and universities, receipt of federal tax dollars to support such institutions is a privilege, not an entitlement nor a requirement.[217] Public state universities are entities operated and funded by the governments of the fifty states.[218] The U.S. Congress, through its constitutional power to impose conditions on its spending, only makes available receipt of federal tax dollars to private and state government colleges and universities if those institutions accept the conditions that Title VI imposes on the receipt of that supplemental and conditional federal monetary support. Conversely, compliance with Title VI may not be necessary if a college or university forgoes federal financial assistance for its programs or activities.

Private parties or the U.S. Department of Justice may sue colleges and universities for violating Title VI.[219] Private parties may also file complaints alleging that a particular college or university has violated

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30 Colleges With the Most Federal Funding 2024, COLL. VALUES ONLINE (Dec. 19, 2023), https://www.collegevaluesonline.com/colleges-benefiting-from-government-spending/.

217. *See, e.g.,* Lillie Heigl & Zahava Stadler, *Refusing Federal Education Dollars Jeopardizes Students with Disabilities*, NEW AM. BLOG POST (Mar. 6, 2023), https://www.newamerica.org/education-policy/edcentral/refusing-federal-education-dollars-jeopardizes-students-with-disabilities/ (describing Republican lawmakers in the states of Tennessee, Oklahoma, and South Carolina as considering "say[ing] no to a billion dollars" by entertaining "the idea of rejecting federal support for the state's schools" and to "phase out all federal dollars"). As Heigl and Stadler note, in states with schools that "are already among the lowest-funded in the nation," if the state legislatures pass on supplemental federal funding, the students who "would be hurt most [would] include[] students in poverty, English learners, students from military families, Indigenous students, and students with disabilities." *Id.* Students of color would also be hurt. *Cf. id.*

218. U.S. national government funding "plays a minimal role" in the funding of public elementary and secondary schools—the U.S. government provides "less than 8% of total revenue" of state and local government's public K-12 schools. Sylvia Allegretto et al., *Public Education Funding in the U.S. Needs an Overhaul,* ECON. POL'Y INST. (July 12, 2022) https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/ ("just 7.8% comes from the federal government"). Only a few federal government-run colleges exist in the United States. These include the U.S. military academies.

219. *See* Alexander v. Sandoval, 532 U.S. 275, 279-80 (2001). *See also* Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement,* 66 STAN. L. REV. 1293, 1294 (2014).

either Title VI statutory law[220] or Title VI regulatory law[221] with the Office of Civil Rights (OCR) of the U.S. Department of Education.[222]

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220. Since the Supreme Court's 1983 ruling in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 599 (1983), liability under Title VI itself is identical to the federal Equal Protection Clause constitutional *Feeney* standard in its requirement that plaintiffs need to prove racist discriminatory intent to trigger heightened scrutiny, Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). *Guardians Ass'n.,* 463 U.S. at 599. In short, the Title VI nondiscrimination mandate is a prohibition against "disparate treatment." Cole, *supra* note 216, 6-7. Prior to 1983, the Title VI ban on race discrimination prohibited both disparate treatment-style race discrimination and racially discriminatory effects forms of race discrimination as recognized and held by the U.S. Supreme Court in Lau v. Nichols, 414 U.S. 563 (1974)—what I term "*Lau*-style racial effect discrimination" was barred by the Title VI statute's ban on "discrimination" before the *Guardians* ruling narrowed *Lau*'s interpretation of the forms of discrimination barred by the Title VI statute. Cole, *supra* note 216, at 7-10. The preservation of federal funding defense of affirmative action discussed here is based on the oft-ignored non-exclusion mandate textually set forth in the Title VI statute, which is the statute's twin mandate of the more-discussed nondiscrimination mandate of the Title VI statute, *see* Cole, *supra* note 216 at 6-16 (the latter has been subject to extensive judicial and scholarly analysis while the former is highlighted in this Article).

221. Today, Title VI regulatory law, not Title VI statutory law, bars *Lau*-style racial effect discrimination. *Id.* Also, since 2001, private parties have been barred from filing lawsuits to enforce Title VI regulatory law. Alexander v. Sandoval, 532 U.S. 275, 279-80 (2001). *Sandoval* did not change nor lessen the legal obligations of colleges and universities to comply with Title VI regulatory law and thus such institutions are still obligated to avoid *Lau*-style racial effect discrimination. Title VI disparate impact regulations promulgated by the U.S. Department of Education pursuant to Title VI statutory law state that a recipient of federal funds may not "utilize criteria or methods of administration ***which have the effect*** of subjecting individuals to discrimination because of their race, color, or national origin." 34 C.F.R. § 100.3(b)(2) (2024) (emphasis added). For further explanation of what constitutes the *Lau*-style racial effect discrimination prohibited by Title VI regulations, see Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009) 1075, 1122-23 (2009) [hereinafter West-Faulcon, *The River Runs Dry*]. Under existing law, first, private parties may still file OCR complaints alleging that a college or university is guilty of *Lau*-style racial effect discrimination; second, the Department of Education's OCR can investigate and limit or end that institution's federal funding if found to have engaged in *Lau*-style racial effect discrimination; third, the U.S. Department of Justice can sue a college or university for engaging in *Lau*-style racial effect discrimination in violation of 34 C.F.R. § 100.3(b)(2)'s ban on subjecting students or applicants to the college or university to criteria or methods of administration that have "the effect" of discriminating. *Id.* at 1122. Proving that an institution has engaged in *Lau*-style racial effect discrimination does not require the

The Justice Department often decides to sue institutions following a referral from OCR.[223]

The position that "federal dollars should not go to support programs or institutions that discriminate based on race"[224] was taken by the administrations of four U.S. Presidents—Truman, Eisenhower, Kennedy, and Johnson—prior to the passage of Title VI of the Civil Rights Act of 1964. It was the "tacit"[225] whites-only admissions policy of the University of Alabama in Tuscaloosa and the dramatic televised[226] act of race exclusion of then-governor of Alabama George Wallace that precipitated U.S. President John F. Kennedy providing one of the clearest explanations of Title VI in a speech to the U.S. Congress on June 19, 1963.[227] Eight days after Wallace physically

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Department of Justice to satisfy the high evidentiary bar of proving the university acted with a discriminatory "purpose." *Id.*

222. Cole, *supra* note 216, at 17-19.

223. *Id.* at 2.

224. Cole, *supra* note 216, at 2. *See also* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 4-7 (1981).

225. Lucy v. Adams, 134 F. Supp. 235, 239 (N.D. Ala.), *aff'd*, 228 F.2d 619 (5th Cir. 1955) (ruling in favor of class of African American plaintiffs excluded from the flagship University of Alabama campus observing that while "[t]here is no written policy or rule excluding prospective students from admission to the University on account of race or color…there is a tacit policy to that effect" and that William F. Adams, the Dean of Admissions of the University of Alabama, "has pursued such policy in denying applications for admission").

226. WSB-TV Newsfilm Clip of Alabama Governor George[sic] C. Wallace Standing in the Doorway to Prevent Registration of African American Students at the University of Alabama, Tuscaloosa, Alabama, 1963 June 11 (on file at Digital Library of Georgia), https://crdl.usg.edu/record/ugabma_wsbn_wsbn35309.

227. Kennedy delivered his first significant endorsement of civil rights legislation on the very same night America had seen, on their televisions, Wallace's act of vehemently racist barring of Black students' entry at doorway of the flagship state university door. *See* University of Virginia Miller Center, *The Civil Rights Act of 1964* available at https://millercenter.org/the-presidency/educational-resources/the-civil-rights-act-of-1964 (observing that "President Kennedy wanted to wait until his second term to send a civil rights bill to Congress, but events conspired to constrict his timetable"). Kennedy's turnaround toward a more prompt introduction of the Civil Rights Act of 1964 took place the very evening of Wallace's "stand" for whites-only access to flagship higher education in Alabama:

> That night President Kennedy took to the air waves, speaking forcefully about civil rights. He announced his intention to ask Congress to act, declaring that a moral crisis existed in the country and requesting Congress

obstructed the federal court order in the *Autherine J. Lucy v. Williams P. Adams*[228] case by standing in front of a university building to bar the entry of African American students Vivian Malone and James Hood for the start of the summer session for which the students were enrolled,[229] Kennedy articulated the reason that entities that engage in race discrimination should be barred from receiving federal taxpayer funding:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. **Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious**; and it should not be necessary to resort to the courts to prevent each individual violation. . . .Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance—by way of grant, loan, contract, guaranty, insurance or otherwise—to any program or activity in which racial discrimination occurs.[230]

The sixth of the eleven titles of the Civil Rights Act of 1964,[231] Title VI, is legislation enacted pursuant to Congress's spending power[232] to effectuate President Kennedy's point that it is a form of

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> to move forward with legislation to desegregate public accommodations and speed up the integration of public education.

Id.

228. *Adams*, 134 F. Supp. 235 at 239. *See also* United States v. Wallace, 218 F. Supp. 290, 291 (N.D. Ala. 1963).

229. *See* Miller Center, *supra* note 227.

230. John F. Kennedy, *Special Message to the Congress on Civil Rights and Job Opportunities*, 88th Cong., 1st Sess. 3 (Jun. 19, 1963) available at The American Presidency Project https://www.presidency.ucsb.edu/node/236711 (bold emphasis added).

231. Christine J. Back, *The Civil Rights Act of 1964: Eleven Titles at a Glance*, CONG. RSCH. SERV. (Dec. 14, 2020).

232. *See* South Dakota v. Dole, 483 U.S. 203, 206-07 (1987) (holding that, under the Spending Clause of the U.S. Constitution, U.S. CONST., art. I, § 8, cl. 1, "Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power to further broad policy objectives by conditioning receipt of

invidious race discrimination by the U.S. federal government "to furnish financial assistance. . . to any program or activity in which racial discrimination occurs."[233] President Lyndon B. Johnson succinctly explained the rationale underlying Title VI in remarks to the National Urban League on December 10, 1964, six months after the provision was enacted into law: "It is simple justice that all should share in programs financed by all and directed by the government of all the people."[234]

A bit less than twenty years prior, in 1947, President Truman's Committee on Civil Rights had called for the creation of "a federal office to review the expenditures of all government funds, so that none would go to subsidize discrimination based on race, color, creed, or national origin."[235] Expressing a similar sentiment in 1953, "President Eisenhower []also express[ed] dismay at the discrimination in expenditure of federal funds as among our citizens."[236] President Kennedy's Attorney General Robert Kennedy also advocated leveraging federal funds "to persuade southern states to alter their racial practices."[237] The racist actions—the "racial practices"—that Robert Kennedy wanted to dissuade by conditioning federal funds on racial inclusion and nondiscrimination were actions like those of Governor Wallace to maintain whites-only flagship state universities and those of American Whites whose actions to maintain whites-only K-12 schools caused an "explosion" in White private school enrollment between 1958 and 1965[238] in non-sectarian elementary and secondary

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federal money upon compliance by the recipient with federal statutory and administrative directives") (citation omitted).

233. *See, e.g.*, Miller Center, supra note 227; Cole, supra note 216, at 2; Digital Library of Georgia, supra note 226.

234. Lyndon B. Johnson, *Remarks at the National Urban League's Community Action Assembly* (Dec. 10, 1964), available at The American Presidency Project https://www.presidency.ucsb.edu/node/236711.

235. Cole, *supra* note 216, at 2 (internal quotes omitted).

236. *Id.* (internal quotes and brackets omitted).

237. *Id.* at 3.

238. *See A History of Private Schools and Race in the American South,* S. EDUC. FOUND., https://southerneducation.org/publications/history-of-private-schools-and-race-in-the-american-south/ (2016) (explaining that "[p]rivate schools in the South were established, expanded, and supported to preserve the Southern tradition of racial segregation in the face of the federal courts' dismantling of 'separate but equal'" and that "[w]hite students left public schools in droves to both traditional and newly formed private schools"). The growth in White attendance in private schools was not limited to the American South. *Id.* ("From 1950 to 1965,

schools that racially excluded African Americans and other non-Whites.[239] The vehemence with which American Whites clung to whites-only schooling a full decade after the 1954 *Brown v. Board of Education*[240] ruling involved Whites founding private whites-only schools from which African Americans were excluded. It was not until 1976—just two years before its ruling in *Bakke*[241]—that the Supreme Court ruled, in *Runyon v. McCrary*,[242] that whites-only race exclusionary admissions policies of private schools violated 42 U.S.C. §1981 of the Civil Rights Act of 1866 and §201(e) of Title II of the Civil Rights Act of 1964, 42 U.S.C §2000a(e).[243] As one legal commentator explained:

> Legislative history reflects at least two related motivations for enacting Title VI. One aim was to address the denial of equal access to and discrimination in the full range of federally-funded programs or activities based on citizens' race—from discrimination and exclusion in school lunch programs to vocational rehabilitation programs to the receipt of surplus

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private school enrollment grew at unprecedented rates all over the nation, with the South having the largest growth.").

239. Such schools are also known as white "segregation academies." *See, e.g.,* Elizabeth Spiers, *What Nikki Haley — and I — Learned at a Segregation Academy*, N.Y. TIMES (Jan. 14, 2024).

240. Brown v. Bd. of Educ., 347 U.S. 483 (1954). By 1964, ten years after the Supreme Court's ruling in *Brown v. Board of Education* prohibited whites-only public schools, "only 1.2 percent of black schoolchildren in the South attended school with whites." GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008). Title VI is heavily credited for bringing about the significant school desegregation that took place in the American South in the decades following its passage in 1964. *Id.*

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

242. Runyon v. McCrary, 427 U.S. 160, 165, 172 (1976).

243. *See McCrary*, 427 U.S. 160, 165, 172 (1976) (holding that Bobbe's School that advertised in telephone books and mailed brochures addressed to "resident" and told African Americans parents "that only members of the Caucasian race were accepted" and that the school was not "[racially] integrated" violated provisions of the §1981 of the Civil Rights Act of 1866 and §201(e) of Title II of the Civil Right Act of 1964). Even then, in *McCrary*, the Court distinguished the private school's Jim Crow-style racial exclusion of African Americans and other non-Whites from exclusion by private social clubs, which is legally permitted under both the U.S. Constitution and the exemption for such race discrimination codified in U.S. federal statutory law by §201(e) of the Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a(e). More recently still, tax-exempt status for schools that racially discriminate has also been heavily litigated. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 577 (1983).

> agricultural commodities by the U.S. Department of Agriculture. Title VI was also responsive to the federal government's distribution of billions of dollars to institutions such as hospitals and medical care centers, as well as private universities and other research centers, which continued to racially segregate their facilities, staff, patients, or students, or otherwise excluded black citizens altogether.[244]

The form of race discrimination that African American and other non-White students were facing in elementary, secondary, and higher education at the time Title VI was enacted was actions by Whites to keep the most desirable educational institutions whites-only. Again, as the same commentator observed, Title VI was passed with the primary purpose to create a financial incentive to end programs and activities that "excluded black citizens altogether."[245] Sending federal tax dollars to support state public universities or private universities that engaged in race exclusion of African Americans is the form of "indirect" federal government race discrimination that President Kennedy described as invidious when he called on Congress to pass Title VI.[246] "More colloquially, the operation of Title VI has been described in the following way: 'Stop the discrimination, get the money; continue the discrimination, do not get the money.'"[247]

It is this simple justice rule and the Title VI statutory mandate that private and public colleges and universities that fall within the definition of a "program or activity" that receives "Federal financial assistance" in the form of "grant, loan, or contract"[248] that constitutes another defense for affirmative action. This defense—here, I will call it "the preservation of federal funding" or "the Title VI compliance" defense—is even available to public universities in states with so-called "anti-affirmative action laws" like California, Michigan, and Washington.[249] Each of these state's anti-affirmative action state laws includes a "federal-funding exception" from their bans on "racial

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244. Christine Back, *The Civil Rights Act of 1964: An Overview*, CONG. RSCH. SERV. 45 (Sept. 21, 2020).

245. *Id.*

246. *See* Kennedy, *supra* note 230.

247. Back, *supra* note 244, at 47.

248. *See* 42 U.S.C. § 2000d-1 (referring to "Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty").

249. *Cf.*, e.g., Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 251 (6th Cir. 2006) ("What Title VI requires, in other words, Proposal 2 expressly allows— eliminating any conflict between the two laws.").

preferences."[250] As I have explained, "the federal-funding exception eliminates any potential conflict between state anti-affirmative action laws and Title VI because the provision makes explicit that race-based policies, including racial preferences, are permissible if needed to establish or maintain compliance with federal legal mandates."[251] I have also noted that "[t]his is the framework under which public universities whose admissions cycles reveal statistically significant racial disparities in admissions might argue that they have the authority, consistent with state anti-affirmative action law, to put the brakes on an unjustified freefall in minority admissions."[252]

Title VI prohibits colleges and universities from engaging in intentional disparate treatment racial discrimination against African Americans and other non-White students. As the number of African Americans attending the most selective campus of their respective state's university system dwindles more and more each year,[253] it is critical to recognize the fact that, in addition to its nondiscrimination mandate, Title VI has a textual and twin *non-exclusion mandate* that is regularly ignored and altogether underexamined by the

250. CAL. CONST. art. I, § 31(e); MICH. CONST. art. I, § 26(4); WASH. REV. CODE ANN. § 49.60.400(6). This exception to state anti-affirmative action laws provides explicitly that the laws "do[] not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state." MICH. CONST. art. I, § 26(4); WASH. REV. CODE ANN. § 49.60.400(6). The California law states: "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." CAL. CONST. art. I, § 31(e).

251. West-Faulcon*, The River Runs Dry*, *supra* note 221, at 1155. *Id.* at 1084 ("even in states whose courts define racial preferences to include race-conscious policies adopted to correct a Title VI discriminatory impact, universities may invoke the federal-funding exception to defend the readoption of race-conscious admissions policies as legally permissible under their state's anti-affirmative action laws"). I have also explained how universities may defend affirmative action as "not a preference under state anti-affirmative action laws" or defend affirmative action in states with such laws under their "federal funding exception" provisions. *Id.* at 1151 ("Using the same reasoning, the institution could also invoke the federal-funding exception to state anti–affirmative action laws on the ground that race-based affirmative action adopted for the remedial purpose of complying with Title VI federal regulations is legally permissible, even if it constitutes a racial preference under state law.").

252. *Id.* at 1151.

253. *See infra* notes 268 & 270 and text accompanying (detailing recent findings in the Hechinger Report that the flagship universities of most states significantly and increasingly exclude African American and Latino students).

contemporary legal academy. Thus, dwindling Black inclusion imposes potential Title VI statutory legal liability on flagship "public ivy" campuses that are in the midst of returning to the days of excluding Blacks altogether.[254] My point here is to emphasize the Title VI statutory violation of which public universities are guilty of committing for excluding African Americans from their state's most coveted public campus. This exclusion-based Title VI statutory liability is insufficiently emphasized when university leaders evaluate their compliance with Title VI statutory law requirements. Overall, it is underemphasized that Title VI *conditions the federal financial assistance* the U.S. Department of Education and other federal agencies[255] provide to private and state public universities *on the racial inclusion of non-Whites, including African Americans in particular*. This racial inclusion requirement—that racial groups not "be excluded"[256]—is a requirement that flagship state university campuses and hyper-selective colleges and universities be attentive to race to avoid their threatening near return to the "exclu[sion of] black citizens altogether"[257] that Title VI was designed to discourage.

Title VI's statutory language is explicit on this point of avoiding racial exclusion, stating that "***[n]o person in the United States shall***, ***on the ground of race***, color, or national origin, ***be excluded*** from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[258] This is the basis of proffering the preservation of federal funding defense if legally attacked for race affirmative action components of admissions to the most selective flagship campuses in state

254. *See id.* (describing Hechinger report findings of flagship universities declining admissions of African American and Latino enrollments compared to their state's annual numbers of African American and Latino high school graduates).

255. "[N]umerous federal agencies—from the Departments of Transportation to the Treasury, the Environmental Protection Agency to the Federal Emergency Management Agency (FEMA)—enforce Title VI with regard to their respective funding recipients." Back, *supra* note 244, at 54. (explaining that "[w]hen a program or activity receiving federal financial assistance commits race discrimination in violation of Title VI's requirements, the federal agency that disbursed the funds may terminate or withhold funding to that recipient"). "In contrast to other titles of the 1964 Act, which are typically enforced by one or several federal entities, Title VI's antidiscrimination mandate is enforced by every 'Federal department and agency' that "is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract.'" *Id.*

256. 42 U.S.C. § 2000d.

257. Back, *supra* note 244, at 45.

258. 42 U.S.C. § 2000d (bold and italics emphasis added).

universities systems and to hyper-selective private colleges and universities that accept millions of dollars in supplemental funding that the federal government is under no obligation to provide higher education institutions that exclude African Americans.[259]

In mounting the preservation of federal funding defense, university leaders' use of such a defense is bolstered by Title VI federal regulations and interpretations that make it clear that 1) "the exercise of a race-based motive does not mean that the recipient's actions automatically violated Title VI," 2) race affirmative action policies are textually and explicitly declared permissible in Title VI regulatory law and described as a legitimate nondiscriminatory reason (LNR) [260] in

259. African Americans and other racial groups that are numerical minorities are subject to the empirical reality explained by "Kane's paradox"—the reality that students identifying as members of such racial groups will only be admitted in more than token numbers if race affirmative action, not proxies for it, is employed. *See infra* Epilogue.

260. Race affirmative action is not Title VI disparate treatment or intentional race discrimination if it satisfies strict scrutiny. The Title VI legal standard of applying the *Bakke-Grutter-Fisher* strict scrutiny equal protection test has a different Title VI statutory significance and label. Colleges and universities that employ race affirmative action in admissions in a manner that is narrowly tailored to achieve a compelling purpose establish that their race affirmative action policy is a "legitimate, nondiscriminatory reason" (LNR) for considering race under Title VI. This could be a salient difference in the legal tests federal courts may apply in the future—there is a prospect of applying different legal tests to defenses for race affirmative action mounted by private universities (only regulated by Title VI) and state government universities (regulated by the U.S. Constitution as well as Title VI). If a private college or university proves its race affirmative action satisfies strict scrutiny, Title VI law categorizes the private college's affirmative action as a permissible consideration of race under Title VI. It is *not* Title VI disparate treatment–it is *not* Title VI intentional race *discrimination*. Moreover, under Title VI law, the burden is on the plaintiffs—the persons or organization alleging that the private college has violated Title VI disparate treatment law—to prove the contention by a preponderance of the evidence. In the specific case of *SFFA v. Harvard,* if the private university had convinced the Court that its means of considering race in its affirmative action policy was narrowly-tailored and utilized the other defenses for affirmative action such as remedying institution-specific racism and complying with Title VI to preserve federal funding, in addition to the diversity defense, Harvard would have had a better chance of satisfying the two prongs of strict scrutiny. Conversely, SFFA might not have been able to satisfy its burden of proving that Harvard's race consciousness was illegitimate under Title VI. SFFA had the burden under Title VI of proving by a preponderance of the evidence that Harvard's race consciousness failed strict scrutiny and thus did not constitute a legitimate nondiscriminatory reason (LNR) to consider race. For further explanation and a discussion of the difference between disparate treatment and disparate

the Department of Education OCR agency explanation of when Title VI permits educational institutions to "use" race, and 3) under Title VI regulatory law, race affirmative action is *required*, not simply permitted if an institution discriminated on the basis of race in the past or does so presently.

The Department of Education's Office of Civil Rights *Title VI Legal Manual* explains that inclusion-motivated consideration of race by a Title VI recipient can satisfy the strict scrutiny test:

> It is critical for agencies to be aware that the exercise of a race-based motive does not mean that the recipient's actions automatically violated Title VI. The Supreme Court has held that strict scrutiny applies to a government entity's intentional use of race, a standard that applies through Title VI to any recipient of Title VI funds. The Court has also held that strict scrutiny does not automatically invalidate the use of race; race may be used when the government has a compelling interest supporting its use and that use it narrowly tailored to support the stated compelling interest. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S.701, 720 (2007).[261]

Title VI regulatory law, 28 C.F.R. § 42.104(b)(6)(ii), states: "Even in the absence of such prior discrimination, a recipient in administering a program ***may take affirmative action*** to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."[262] In addition, race affirmative action is required under 28 C.F.R. § 42.104(b)(6)(i) Title VI regulatory law. This provision requires that colleges and universities, when "administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient ***must take affirmative action*** to overcome the effects of prior discrimination."[263]

These agency explanations of what Title VI permits and requires to remedy the effects of institution-specific race discrimination

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impact, see Cole, *supra* note 216, at 6-10 (explaining the difference between Title VI disparate treatment and disparate impact claims); *see also Section VII- Proving Discrimination-Disparate Impact*, TITLE VI LEGAL MANUAL: U.S. DEP'T JUST., https://www.justice.gov/crt/book/file/1364106/dl?inline; https://www.justice.gov/crt/fcs/T6Manual7; *Education and Title VI*, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html (last visited Feb. 24, 2024).

261. C.R. DIV., U.S. DEP'T JUST., TITLE VI LEGAL MANUAL § VI at 25 (2024).

262. *Id.*; 28 C.F.R. § 42.104(b)(6)(ii) (DOJ regulations) (emphasis added).

263. 28 C.F.R. § 42.104(b)(6)(i) (2024) (DOJ regulations) (emphasis added).

highlight how the various defenses discussed in this Part necessarily intersect and interact in both their legal substance and their factual predicate. The point of this examination has not been to precisely delineate the exact parameters nor the exact evidentiary burdens necessary to identify race consciousness that is narrowly tailored to achieve interests other than diversity. Instead, the goal of this section has been to articulate the textual requirement in Title VI law that institutions of higher education must avoid racial exclusion and include African Americans and other non-White racial groups in more than token numbers to satisfy the purpose and spirit of Title VI of the Civil Rights Act of 1964.[264]

Defending inclusion-motivated race consciousness in general and race affirmative action in particular, as required by a particular institution's institution-specific need to preserve federal funding is a strong legal defense to an anti-affirmative action attack. An institutional need that is shared by all private and public higher education institutions that opt to receive supplemental financial assistance from the United States federal government is the need to comply with both Title VI statutory and regulatory law. Failure to do so is a violation of federal law and a violation of the overall commitment to fairness and racial justice that is among the institutional missions of most American colleges and universities.

Compliance with Title VI law to maintain federal funding, like the other defenses examined in the previous sections of this Article, is sufficiently legally viable that it warrants consideration by university leaders as they contemplate the road forward with respect to continuing and defending race affirmative action in higher education admissions. As universities, particularly the flagship and most selective campus of each state's public university system, consider whether to mount defenses of race affirmative action, analysis of the extent to which their admission policies fairly include non-Whites, particularly African Americans, is an important evidentiary consideration. Outside the context of higher education, entities contract with outside entities to conduct disparity studies to help build the evidentiary predicate for their use of race-based affirmative action.[265] Studies

264. *See, e.g.,* Abernathy, *supra* note 224, at 40-48.

265. For a better understanding of the role "disparity studies" play as evidence justifying defenses for affirmative action in contexts outside of higher education, see*, e.g.,* U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting* (May 2006), chttps://www2.law.umaryland.edu/marshall/usccr/documents/cr1200612.pdf. A critical step for educational

conducted by economists and analysis in media reports strongly suggest the attacks on race affirmative action at the nation's most selective state public university campuses have had the effect of excluding African Americans from the very state university campuses that were exclusively and nearly whites-only at the passage of the Civil Rights Act of 1964. Attacks on race affirmative action began as soon as the first race affirmative action policies took effect[266] and were vehemently opposed despite increasing the numbers of African Americans, Latinos, and Asian Americans by only single digits in many cases.[267]

Contemporary exclusion of African American and other non-White students from state flagship university campuses—those state university campuses that "are among the most prestigious public universities in the country, financed in [large] part by tax dollars, and their missions include providing affordable and high-quality education to residents of their states"—is on the rise in the midst of attacks on affirmative action.[268] Economist Zachary Bleemer recently found a

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institutions mounting any of the defenses for affirmative action is hiring experts to conduct a "disparity study" to establish evidence of that particular college or university's institution-specific racism, past and present. *Cf. id.*

266. *See, e.g., Bakke* 438 U.S. at 272, 276 (describing the legal attack on the affirmative action policy at the University of California Davis Medical School by Allan Bakke, who applied "in both 1973 and 1974" and the medical school faculty devising the affirmative action policy "over the next two years" after 1971).

267. The exact set-aside or "quota" of sixteen admissions slots that Allan Bakke challenged was designated for Asian Americans, Latinos, and African Americans collectively and resulted in the following admissions outcomes:

> [6] The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:
>
> | | Special Admissions Program | | | | General Admissions | | | | Total |
> |---|---|---|---|---|---|---|---|---|---|
> | | Blacks | Chicanos | Asians | Total | Blacks | Chicanos | Asians | Total | |
> | 1970 .... | 5 | 3 | 0 | 8 | 0 | 0 | 4 | 4 | 12 |
> | 1971 .... | 4 | 9 | 2 | 15 | 1 | 0 | 8 | 9 | 24 |
> | 1972 .... | 5 | 6 | 5 | 16 | 0 | 0 | 11 | 11 | 27 |
> | 1973 .... | 6 | 8 | 2 | 16 | 0 | 2 | 13 | 15 | 31 |
> | 1974 .... | 6 | 7 | 3 | 16 | 0 | 4 | 5 | 9 | 25 |
>
> *Id.*, at 216–218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner 4 n. 5.

Bakke, 438 U.S. at 276 n.6.

268. Lauren Lumpkin et al., *Black Student Enrollment Lags at Many Flagship Universities*, WASH. POST. (Apr. 18, 2021) ("[f]ifteen state flagships had at least a 10-point gap between the percentage of Black public high school graduates in their

negative impact on economic mobility after attacks on race affirmative action resulted in feeble levels of inclusion of African Americans and other non-Whites at the top-tier campuses in the California state university system.[269]

Similarly, according to the Hechinger Report:

> In Mississippi, 48 percent of high school graduates were Black in 2021 but only 8 percent of first-year students at Ole Miss, the state's flagship, were Black.…
>
> The gap [between Black public high school graduates and Black students enrolled] at the University of Georgia has grown over the past two years to 31 percentage points. In 2021, just 2 percent of incoming first-year students were Black men….
>
> Eight of the 10 flagships with the biggest gaps for Black students [from public high schools and Black students enrolled at the state's flagship university] do not consider race in admissions….
>
> In 12 states, the gap between the number of students who graduated from state public high schools who were Latino and the number of Latino students enrolled at the state flagship was 10 percentage points or more….
>
> The gap between [Latino high school public school graduates and enrolled Latino students] at 10 of those [flagship] universities – concentrated in the Southwest – has widened over the past five years….

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states in 2019 and the Black share of freshmen they enrolled that fall, according to federal data analyzed by the Hechinger Report and The Washington Post…"[f]or U-Md., the gap was 24 points — the sixth-largest in the country"—between percent of University of Maryland freshman who were African American and the percentage of African American public high school graduate and "[a]bout 7 percent of U-Md. freshmen in 2019 were Latino, compared with nearly 14 percent of Maryland's public high school graduates"). *See also id.* ("Rick Fitzgerald, a spokesman for the University of Michigan, said the percentages of Black and Latino students at the flagship in Ann Arbor had declined after a 2006 state law barred the consideration of race in public university admissions.").

269. Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility after California's Proposition,* 209, 137 Q. J. ECON. 115 (2022). *See* Teresa Watanabe, *California Banned Affirmative Action in 1996. Inside the UC Struggle for Diversity*, L.A. TIMES, https://www.latimes.com/california/story/2022-10-31/california-banned-affirmative-action-uc-struggles-for-diversity (last visited Feb. 21, 2024).

> The University of California at Berkeley has the biggest gap [in Latino students enrolled compared to public high school graduates]– 34 percentage points. The state banned affirmative action in 1996.[270]

In light of such startling statistics of Black and Latino exclusion, colleges and universities, particularly the most selective state flagship universities and hyper-selective private universities, should seriously and empirically consider whether their admissions policies accomplish earnest racial inclusion of more than token numbers of African American and other non-White students.[271]

CONCLUSION

> *But we must accept one central truth and responsibility as participants in a democracy: Freedom is not a state; it is an act. It is not some enchanted garden perched high on a distant plateau where we can finally sit down and rest. Freedom is the continuous action we all must take, and each generation must do its part to create an even more fair, more just society.*
>
> —John Lewis[272]

Over the same decades-long time period that anti-DEI forces have vigorously and continually attacked racial inclusion policies, top-ranked universities have failed to mount defenses that were equally vigorous. Nevertheless, SFFA's invitation to seal the fate of all future affirmative action policies was rejected by the six-justice majority in *SFFA v. Harvard*. This Article has argued that the *SFFA v. Harvard* ruling striking down the diversity-defended affirmative action employed by Harvard and UNC is a wake-up call for universities to move beyond the diversity defense to other defenses such as the fairness in admissions defense and the preservation of federal funding defense. It has set forth the doctrinal background that demonstrates the legal

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270. Meredith Kolodner, *Many Flagship Universities Don't Reflect Their State's Black or Latino High School Graduates,* HECHINGER REP., June 15, 2023, https://hechingerreport.org/many-flagship-universities-dont-reflect-their-states-black-or-latino-high-school-graduates/.

271. *Cf. id.* ("The case against affirmative action is based on the argument that some colleges are discriminating against Asian and white students and giving an unfair advantage to Black and Latino students…[yet] [a]t most state flagship universities, Black and Latino students are still very much underrepresented.").

272. Lewis, *supra* note 1, at 8.

leeway available to colleges and universities with the interest and will to adopt defenses for race affirmative action other than diversity.

Private universities like Harvard and state government universities like UNC can still make the policy choice to be race conscious for the purpose of inclusion and defend that policy by establishing the legal predicate for other defenses available under the Supreme Court's post-*SFFA v. Harvard* equal protection jurisprudence.[273] The holding in *SFFA v. Harvard*, if read carefully and fairly, reveals that affirmative action by colleges and universities remains permissible if it satisfies strict scrutiny. This leaves colleges and universities with the choice to mount other defenses or let those out to destroy affirmative action win by forfeit.

273. With knowledge and recognition of what this Article's epilogue terms, "Kane's paradox," highly selective colleges and universities that admit primarily from pools of applicants with very high standardized admission test scores should recognize that the complete abandonment of inclusion-motivated race consciousness is likely to disproportionately exclude certain non-White racial groups, most likely African Americans. *Cf. infra* Epilogue.

EPILOGUE

Economist Thomas Kane has explained that economic income or wealth-based affirmative action is "a very poor substitute for race for selective colleges seeking racial diversity" that includes African Americans in more than token numbers.[274] "The problem is simply one of demographics,"[275] specifically the numerical reality that African Americans are "a [numerical] minority of the [U.S.] population and, as a result," are also "a minority of the [U.S.] population of low-income youth"[276] with hyper-high SAT scores. Thus, the commonly-held "intuition that income-based preferences in college admissions would disproportionately benefit black and Hispanic youth since they are more likely to be from low-income backgrounds than whites and other non-Hispanics" is false.

Kane has explained that this literal "paradox"[277] exists "[b]ecause test scores are so strongly related to family income," only a small share of the African American high school students with SAT scores high enough to be competitive at the topmost tier of selective colleges "are actually low-income."[278] Kane specifically identified arguments like those made by Richard Kahlenberg,[279] one of the two expert witnesses in both *SFFA v. Harvard* cases.[280] Kane's point in referencing

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274. Thomas Kane, *Racial and Ethnic Preferences in Colleges Admissions,* 59 OHIO St. L. J. 971, 988 (1998). *See also id*. at 991. (explaining that "[c]lass-based preferences do not offer a way out of the quandary" that the college should expect "the number of black and Hispanic youth on campus to drop sharply" if the highly selective college ends race affirmative and retains the same degree of SAT test score selectivity).

275. *Id.* at 988.

276. *Id*.

277. A "paradox" is "a statement or situation that may be true but seems impossible or difficult to understand because it contains too opposite facts or characteristics." *Paradox,* CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/paradox (last visited Feb. 21, 2024).

278. Kane, *supra* note 274, at 990.

279. *Id.* at 987, 987 n.26 (pointing to "Kahlenberg (1996)" as an example of "some [persons who] have argued that colleges should replace racial preferences with a system of class-based preferences").

280. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 177 (D. Mass. 2019), *aff'd sub nom*. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181(2023); Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 637-48 (M.D.N.C. 2021), *rev'd sub nom*. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S.

Kahlenberg is to point out Kahlenberg as a prime propagator of the erroneous contention that socioeconomic-based affirmative action can substitute for race affirmative action in college admissions.[281] Dating back to the 1990s, Kahlenberg ignores Kane's thorough mathematical and demographic analysis and also ignores the factual reality of the *already-existing socioeconomic affirmative action* in admissions, financial aid, and recruitment practiced by the universities against whom Kahlenberg launches his scapegoat-style attacks on race affirmative action, always being sure to frame himself as an ideological "liberal."[282] Significantly, a repeated feature of Kahlenberg's attacks on

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181, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023) (finding none of Kahlenberg's proposed models eliminating race affirmative action "provided a workable [race neutral alternative] RNA").

Kane's paradox plays out over and over again, consistently with the mathematical truth and Kane's literal mathematical proof explained many years ago, Kane, *supra* note274, at 991, in real-world institution-specific admissions scenarios:

> In 2007, the Admissions Office completed a study that evaluated whether indicators of socioeconomic disadvantage could be used in lieu of race in the admissions process to yield a class with academic credentials and racial diversity similar to those of the actual admitted class. (*Id.* at 590:16-25.) Mr. Farmer testified that, after reviewing the results of this study, **he did not believe that this approach was viable as a [race neutral alternative] RNA because it led to a "substantial decline in the population of underrepresented students."** (Nov. 12 Trial Tr. 595:8-12 (Farmer); Nov. 13 Trial Transcript. 663:10-16 (Farmer).)

Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 635 (M.D.N.C. 2021), *rev'd sub nom.* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (bold emphasis added).

281. Kane, *supra* note 274. at 988 n.28.

282. Anemona Hartocollis, *The Liberal Maverick Fighting Race-Based Affirmative Action*, N.Y. TIMES (MAR. 29, 2023) (reporting that "[i]n a simulation of the class of 2019, [Kahlenberg] found that the share of Black students at Harvard would drop to 10 percent from 14 percent" but describing this drop as part of "optimistic" analysis by Kahlenberg). The article, like Kahlenberg, brushes past reduced inclusion of African Americans at Harvard and significant reductions of African American inclusion at UC Berkeley in a manner that communicates that reduced African American enrollments is an acceptable (and non-troubling) future scenario in Kahlenberg's view. *Id.* (describing as "influential" the 1996 book by Kahlenberg that Kane identifies as relying on the erroneous intuition that is the topic of this Epilogue). In the same article, the New York Times also fails to identify the factual reality that the end of race affirmative action has had statistically and otherwise significant negative impacts on the inclusion of African Americans, in particular, but has also reduced Latino access to the most selective university

race affirmative action over the past quarter century is his implicit propagation of disinformation that erases the reality that "class" or socioeconomic status *already plays* a role as a "plus factor" in the admissions processes of universities legally attacked for the race affirmative action components of their admissions.[283] The trial court in *SFFA*

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campuses in the University of California system. *Cf.* (reporting without noting the much lower rates of admission of African Americans and Latinos to the University of California at Berkeley after the end of race affirmative action yet reporting Kahlenberg's claims that "Berkeley, which was having trouble achieving its pre-ban levels of diversity, has made progress, he said," observing that "[i]n 2020, Berkeley boasted that it had admitted its most diverse class in 30 years, with offers to African American and Latino students rising to the highest numbers since at least the late-1980s, without sacrificing academic standards" without making it clear that "a rise in [admissions] offers" to African American and Latino students is not significant in calculating and comparing *rates* of admission of African Americans and Latino applicants to that of other racial groups applying to UC Berkeley). This article reporting on an interview of Kahlenberg also propagates Kahlenberg's framing of himself as a "liberal" by repeatedly reporting Kahlenberg's self-descriptions of such and by the news article's inclusion of a staged photo of Kahlenberg standing beside a photo of Robert F. Kennedy. *Id.*

283. *See, e.g,* Richard D. Kahlenberg, *Texas' College Admissions Policies Give the Well-to-Do a Leg Up*, L.A. TIMES (Dec. 8, 2015) (Kahlenberg opinion article misleadingly omitting that six of seven "special circumstances sub-factors" in UT Austin admissions policy at issue in *Fisher I* and *Fisher II* cases are socioeconomic affirmative action factors—that UT Austin's admissions policy has *six times more socioeconomic sub-factors than its one single race sub-factor*— yet saying, without identification to what "careful research" he refers, "[y]et careful research suggests that admissions officers provide no boost to disadvantaged whites"); *see also* Brief of Richard D. Kahlenberg as Amicus Curiae in Support of Neither Party, Fisher v. University of Texas at Austin, 579 U.S. 365 (2016) (No. 14-981).

For instance, the admissions policy of the University of Texas at Austin had very significant socioeconomic affirmative action textually built into holistic admissions that Kahlenberg did not mention while attacking race affirmative action at UT Austin. *See, e.g.,* West-Faulcon, *Obscuring Asian Penalty, supra* note 40, at 609.

The suggestions by Kahlenberg that he has spent twenty-five years attacking and advocating ending race affirmative because its destruction will incentivize institutions to adopt socioeconomic affirmative action is unfounded and based on the counterfactual that the universities, like UT Austin, UNC, and Harvard under attack lack "class-based" affirmative action policies. *Cf., e.g.,* Hartocollis, *supra* note282. Demonstrating this is untrue, the seven special circumstances admissions sub-factors in the UT Austin policy challenged in *Fisher I* and *Fisher II* were all socio-economic, except for one:

> (1) the socioeconomic status of the student's family; (2) whether the student lived in a single-parent home; (3) the language spoken at the

v. UNC explicitly outed Kahlenberg's tactic of relying on a contrived false dichotomy that pits race affirmative action against socioeconomic-based affirmative action.[284] The trial factfinders who evaluated Kahlenberg's analysis as an expert for the Students for Fair Admissions (SFFA) organizational plaintiff in *SFFA v. Harvard* and *SFFA v. UNC* reached the conclusion economist Thomas Kane predicted and published in the 1990s[285]—both trial court judges said the number of African American admits to Harvard[286] and the University of North

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> student's home; (4) the student's family responsibilities; (5) the socioeconomic status of the student's high school; 6) how the student's SAT or ACT score compared to the average score for the student's high school; and (7) the student's race.

West-Faulcon, *Obscuring Asian Penalty*, *supra* note 40, at 609.

284. *See* Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d at 638 (saying of Kahlenberg's concerns about socioeconomic plus factors and considerations in UNC admissions that [t]here is, however, strong evidence that the University already has several policies in place to address these concerns," that it is "an area where UNC has undertaken significant efforts").

285. Running into Kane's paradox in the real world of UNC admissions, the district judge noted:

> Even outside of the proposed alternatives provided in this case, there is strong evidence that any models based on socioeconomic status are ill-equipped to serve as [race neutral alternatives] RNAs. Though using [socioeconomic status] SES "was very attractive" to Professor Long and others in her field when the idea first surfaced two decades ago, "very, very quickly . . . researchers from across the board, economists, sociologists[,] using lots of different data sets kept coming to the same conclusion, that you couldn't get racial and ethnic diversity from an SES-based plan." (Nov. 18 Trial Transcript. 1204:13–1205:16 (Long)) This is because the majority of low-income students are white, and therefore "if you were going to have a policy that gives preferences according to SES, you're still going to be choosing more white students" from the low-SES pool than you would [underrepresented minorities] URMs. *Id.* at 1206:10-17. This is why "no university has actually implemented an SES-based plan that has replaced a holistic, race-conscious admissions approach." *Id.* at 1206:23–1207:3.

Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d at 645.

286. The Harvard trial court finding of no reasonable race-neutral alternatives to affirmative action read:

> SFFA introduced models on race-neutral alternatives through an expert, Richard Kahlenberg. The Smith Committee's conclusions and the analysis performed by Professor Card and Mr. Kahlenberg all convincingly establish that **no workable race-neutral alternatives will currently permit Harvard to achieve the level of racial diversity it has credibly**

> **found necessary for its educational mission.** Harvard's race-conscious admissions policy has a significant impact on the racial diversity of its class, with African American and Hispanic applicants being the primary beneficiaries in terms of their admissions probabilities…. Currently, although always considered in conjunction with other factors and metrics, race is a determinative tip for approximately 45% of all admitted African American and Hispanic applicants. *See* DX721 at 1. At least 10% of Harvard's admitted class, including more than one third of the admitted Hispanics and more than half of the admitted African Americans, would most likely not be admitted in the absence of Harvard's race-conscious admissions process. *See* Oct. 31 Transcript 127:22–129:2; DX721; DD10 at 107. In the absence of any other adjustments to Harvard's admissions policy, eliminating consideration of race would cause the African American representation at Harvard to decline from approximately 14% to 6% of the student population and Hispanic representation to decline from 14% to 9%. Oct. 31 Transcript 126:21–129:2. **Over the course of four years, the number of African American and Hispanic students at Harvard would fall by nearly 1,000 students.** *See* Oct. 25 Transcript 167:20–168:4; PD38 at 39. *The Court notes that Harvard's current admissions policy does not result in under-qualified students being admitted in the name of diversity—rather, the tip given for race impacts who among the highly-qualified students in the applicant pool will be selected for admission to a class that is too small to accommodate more than a small percentage of those qualified for admission. Therefore, removing attention to race, without a workable race-neutral alternative, would cause a sharp decline in the percentage of African American and Hispanic students at Harvard without resulting in a particularly significant increase in the overall academic strength of the class.* The parties' experts, as well at the Smith Committee, examined numerous race-neutral alternatives to determine if they, alone or in combination, could conceivably limit the decline in racial diversity in Harvard's class in the absence of a race-conscious admissions policy. *See* Oct. 22 Transcript 18:1–11; Oct. 31 Transcript 129:3–130:4; PX316 at 6–18. These alternatives included eliminating early action, tips for [athletes, legacy applicants whose parents attended Harvard, Dean's or Director's lists containing relations of donors and high-profile figures, children of Harvard faculty, staff, and other employees] ALDC applicants, the practice of offering deferred admissions or z-listing applicants, and consideration of standardized test scores, as well as expanding recruiting and partnership efforts, admitting more transfer students, utilizing a place-based quota system, and expanding preferences for economically disadvantaged applicants. Oct. 22 Transcript 33:15–49:8; Oct. 31 Transcript 130:5–130:23, 133:10–20; PX316 at 6–18; DD10 at 109. As more fully set forth below, Harvard has demonstrated that none of these approaches, individually or in combination, would allow it to reach the level of racial diversity that it believes necessary to achieve its educational mission without significant consequences to the strength of its admitted class.

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d 126, 177–79 (D. Mass. 2019), *aff'd sub nom.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023) (bold and italics emphasis added).

Carolina at Chapel Hill (UNC)[287] would drop significantly if their admissions programs substituted Kahlenberg's proposed economic

287. The UNC trial court finding of no reasonable race-neutral alternatives to race affirmative action reads in full:

> The Court further credits Professor Hoxby's uncontested conclusions that Professor Kahlenberg's simulations rely on both unrealistic assumptions and extreme changes to UNC's admissions process and would severely undermine the University's ability to pursue any other type of diversity. Even outside of the proposed alternatives provided in this case, there is strong evidence that any models based on socioeconomic status are ill-equipped to serve as [race neutral alternatives] RNAs. Though using [socioeconomic status] SES "was very attractive" to Professor Long and others in her field when the idea first surfaced two decades ago, "very, very quickly . . . researchers from across the board, economists, sociologists[,] using lots of different data sets kept coming to the same conclusion, that you couldn't get racial and ethnic diversity from an SES-based plan." (Nov. 18 Trial Tr. 1204:13–1205:16 (Long).) This is because the majority of low-income students are white, and therefore "if you were going to have a policy that gives preferences according to SES, you're still going to be choosing more white students" from the low-SES pool than you would [under representative minorities] URMs. *Id.* at 1206:10-17. This is why "no university has actually implemented an SES-based plan that has replaced a holistic, race-conscious admissions approach." *Id.* at 1206:23–1207:3. *To the extent that Mr. Kahlenberg contends that some of his models could nevertheless function as RNAs, Professor Long found that "he overstates how effective race-neutral alternatives have been or would be because he's not paying attention to the details." Id.* at 1210:14-18. In particular, she points out, his literature review "fails to account for the quality or the relevance of the research or the particular data used" as well as the context of the university at issue. (*Id.* at 1210:18-23.) As a result, Professor *Kahlenberg relies heavily on "thought experiments" which "provide limited insights about what might actually be feasible for colleges and universities to implement," depend upon "data that an admissions committee wouldn't have," or make "assumptions that are not reasonable for the real world." Id.* at 1207:4-18. Accordingly, **the Court finds that none of the socioeconomic models before it is a workable [race neutral alternative] RNA**.

Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580, 645 (M.D.N.C. 2021), *rev'd sub nom.,* SFFA v. Harvard, 600 U.S. 181(2023) (bold and italics emphasis added).

The UNC trial judge also found that an intuition, propagated by Kahlenberg's testimony, that the elimination of legacy admissions is a race neutral alternative to race affirmative action is incorrect in the specific factual context and institution-specific real world of UNC admissions:

> The same may be said for Plaintiff's contention that the University should eliminate preferences for legacy applicants. While intuitively, a preference for the children of former students could disproportionately disadvantage [underrepresented minority] URM students at a university that,

affirmative action for the race affirmative action components of the two universities' admissions processes.[288]

Kane has evaluated the conditional probability of identifying a "race-blind" alternative measure that selects African Americans and Latinos at levels comparable to race affirmative action. The hypothetical race-based measure he tests is "if high-scoring black or Hispanic youth were thirteen times more likely to meet some combination of wealth, neighborhood, and family income criteria than other youth."[289] Kane applied Bayes' Rule[290] to demonstrate, in a literal mathematical proof, the impossibility of achieving the same admissions outcomes with race-blindness as colleges accomplish with inclusion-motivated attention to race in admissions.[291] Due to the demographic fact that African American and Latino students comprise a very small percentage of the highest-scoring youth (because they are a numerical minority and because test scores correlate strongly with family income),[292] Kane's point is that those who argue that highly selective colleges can replace race affirmative action with socioeconomic or "class-based" affirmative action and maintain the same degree of SAT test-score selectivity and the same number of students from racial groups like African Americans that are "a minority of the population" ignore demographic and mathematical realities.[293]

> until only 70 years ago, was exclusively open to white students only, Professor Arcidiacono testified that the number of minorities admitted to the University is "minimally affected" by legacy preference. Nov. 9 Trial Transcript 317:20-24 (Arcidiacono).) Therefore, there is no basis for the Court to find that eliminating legacy preferences would serve as a viable [race neutral alternative] RNA.

Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d at 640.

288. In the words of the trial judge in SFFA v. Harvard, "[f]inally, and perhaps most significantly for present purposes, Mr. Kahlenberg's simulations uniformly suggest that African American representation in Harvard's incoming class would fall nearly one-third to approximately 10% of the class." Oct. 22 Transcript 127:16–23. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.), 397 F. Supp. 3d at 182.

289. Kane, *supra* note 274, at 990.

290. *Id.* at 991.

291. *Id.* n.28.

292. *Id.* (Kane describes this as an "implication of the demographics of race, income, and test scores").

293. *Id.* at 988 ("The simple reason for the paradox is that blacks and Hispanics are a minority of the population and, as a result, are a minority of most subgroups of the population, including low-income youth.").

"Kane's paradox," as I will call what I describe here, which shows African American admissions will drop significantly when colleges try substitutes for race affirmative action based on the intuition that Kane has debunked, is the reason that highly selective colleges and universities that draw from the very highest SAT-scoring youth population cannot find viable substitutes for race affirmative action that maintain the levels of African American student enrollment possible with affirmative action. Kane's paradox cannot be resolved. There is no "quick fix" alternative form of race-blind affirmative action for highly selective universities if those institutions are earnestly committed to racial inclusion, particularly if that commitment extends to any more than token inclusion of African Americans.