AFTER AFFIRMATIVE ACTION: CONTEXTUAL ADMISSIONS AND THE FUTURE OF AFRICAN AMERICAN LAW SCHOOL ENROLLMENT

NATHAN L. BENNETT FLEMING*

Abstract

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA v. Harvard*") signaled the end of affirmative action in higher education, launching higher education law into unchartered territory.[1] The Court's mandate of race neutrality in admissions is expected to lead to a steep decline in higher education participation for underrepresented minorities, particularly African Americans.[2] For law schools, the impact of the Court's decision is expected to be even more harmful because the underrepresentation of African Americans persisted during the affirmative action era. Many scholars have called for implementing socioeconomic admissions preferences as a substitute for race-conscious admissions; however, experts predict that one-third of Harvard's Latino admits and at least half of Harvard's African American admits would likely be rejected through use of a class-based admissions.[3] Universities must explore all available tools to secure diversity in higher education.

This Article offers one such solution. In the United Kingdom, university applicants do not disclose their racial backgrounds.[4] Administrators at universities like Oxford and Cambridge use measures of disadvantage and metrics that assess the likelihood of participation in higher education at the neighborhood and school level to make admissions determinations.[5] This

* Racial Justice Fellow, DePaul College of Law. Doctoral candidate (Higher Education), University of Pennsylvania; J.D., University of California, Berkeley; M.P.P., Harvard University; B.A., Morehouse College. Many thanks to Laura Perna, Darrell Jackson, Matthew Hartley, Manoj Mate, Julie Lawton, Veronica Holmes, Charles Moreland II, Jimmie Luthuli and Melinda Oliver for their comments, suggestions, feedback, and support during the drafting of this article.

1. *See* 600 U.S. 181, 231 (2023).
2. *Id.* at 377-78 (Sotomayor, J., dissenting).
3. *See id.* at 348.
4. *See Your Details: About You*, UNIV. OF OXFORD, https://www.ox.ac.uk/admissions/graduate/applying-to-oxford/application-guide/your-details (last visited Dec. 11, 2023).
5. *See Disadvantage*, UNIV. OF OXFORD, https://www.ox.ac.uk/about/facts-and-figures/admissions-statistics/undergraduate-students/current/disadvantage (last visited Dec. 11,

Article argues that the U.K.'s contextual admissions model is the strongest race-neutral alternative for achieving African American higher education participation because systemic racism in the United States continues to manifest itself in racialized residential and school-based segregation. As a result, if higher education institutions are not allowed to ask applicants about their race, the best substitute is to rely on *measurable outcomes* of systemic racial marginalization and stratification to make admissions decisions. This article, published in the immediate aftermath of *SFFA v. Harvard*, is the first to outline how adopting the area and school-based datasets used in the U.K.'s contextual admissions approach lawfully allows colleges and universities to secure diversity after the end of affirmative action.

Table of Contents

2023); *Use of Contextual Data in the Cambridge Admissions Process*, UNIV. OF CAMBRIDGE, https://www.undergraduate.study.cam.ac.uk/apply/after/contextual-data (last updated Oct. 2023).

Introduction

On June 17, 2023, the Supreme Court outlawed affirmative action in higher education by ruling in favor of Students for Fair Admissions ("SFFA"),[6] finding that the admissions programs at Harvard University and the University of North Carolina ("UNC") violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[7] Chief Justice Roberts's opinion states that Harvard's and UNC's admissions programs are

6. Conservative strategist Edward Blum, the architect of *Fisher v. University of Texas at Austin* and *Shelby v. Holder County*, which outlawed section 5 of the Voting Rights Act, founded SFFA to serve as the plaintiff in the cases against Harvard and the University of North Carolina with the goal to "eliminate the use of racial classifications in admissions." Joan Biskupic, *A Litigious Activist's Latest Cause: Ending Affirmative Action at Harvard*, REUTERS (June 8, 2015, 2:45 PM), http://www.reuters.com/investigates/special-report/usa-harvard-discrimination/. SFFA is described as a "coalition of prospective applicants to higher education institutions who were denied admission" that successfully solicited about 150 Asian-American students to make up a membership class for the lawsuit. *Id.* Blum says that he made the decision to bring a case claiming Asian-American discrimination due to race-conscious admissions after tracking internet comments by Asian-American students and reading the *Fisher* opinion (suggesting that the Court might be open to further inquiry into the use of race in higher education admissions). *Id.* Blum says he read research claiming that Asian-American admission rates remained relatively static as applications from Asian-American students increased and determined that Harvard would be an optimal target for suit due to its prestige and its legacy of admissions quotas for Jewish students in the early 1900s. *Id.* Blum also decided to sue a public university, the University of North Carolina, on similar grounds. *Id.*

7. *Students for Fair Admissions, Inc.*, 600 U.S. at 230.

unconstitutional as they did not withstand the two-step examination of strict scrutiny, which assesses whether the use of race in admissions serves compelling governmental interests and whether such use is narrowly tailored to accomplish these interests.[8] A 6-3 majority agreed with Chief Justice Roberts's contention that the admissions programs fail strict scrutiny and violate the Fourteenth Amendment because the universities had workable race-neutral alternatives to achieve their diversity interests.[9]

A read of the majority, concurring, and dissenting opinions in *SFFA v. Harvard* reflect vastly contrasting views on the role of race in contemporary American society. Similarly, differing viewpoints regarding merit are at the core of the central dispute between the Court's conservative majority and its liberal minority. In fact, the selection of Harvard as the defendant by SFFA was notable given Harvard's historic role in shaping conceptions of merit that inform and drive current admission practices.[10] Meritocracy, touted as an impartial system that affords progress based on individual abilities and achievements, has long been considered a cornerstone of fair and just societies.[11] It proffers a promise of equity, where power, position, and privilege are earned rather than bestowed by family lineage. Nevertheless, according to some scholars, this seemingly utopian system bears significant

8. *Id.* at 206-07, 218.

9. *See id.* at 230.

10. Before the late nineteenth century, entry into Harvard was dominated by graduates of a small number of northeastern boarding schools who completed tests based on the taught curriculum of these institutions. *See* JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 172 (3d ed. 2019). To expand economic diversity, tests developed by the College Entrance Examination Board were introduced to the admissions process to expand access to Harvard to students from public schools nationwide near the turn of the century. *Id.* at 147. This led to increases in the enrollment of previously underrepresented groups. The rise in Jewish students at Harvard evoked fear of flight from students from wealthy, Protestant families, leading to the development of new conceptions of merit that paired the use of standardized admission tests with indicators of character such as leadership, athletic prowess, and legacy status. *Id.* at 197.

11. Andrew Langer, *Principle of Meritocracy and Its Importance Within the Framework of the U.S. Socio-Economic and Political Systems*, CONSTITUTING AM., https://constituting america.org/90day-fp-principle-of-meritocracy-and-its-importance-within-the-framework-of-the-us-socio-economic-and-political-systems-guest-essayist-andrew-langer/ (last visited Dec. 11, 2023).

flaws that undermine its glossy veneer of equality.[12] Indeed, determining how to measure merit has always been a vexing question.[13]

For many, performance on standardized tests is the gold standard in terms of unbiased measures of merit.[14] However, the dissenting opinions of Justices Sotomayor and Brown Jackson reflect the position of many scholars who have posited that the way merit is assessed through standardized testing is deeply flawed and perpetuates systemic disparities and societal stratification under the guise of neutrality.[15] These scholars argue that inequality persists where rewards and societal benefits are attributed to meritocratic achievement.[16] Such achievement simply reflects inequities in socioeconomic status and access to opportunity as opposed to aptitude or achievement.[17] Justice Sotomayor's dissent in *SFFA v. Harvard* asserts that "a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain underrepresented."[18]

The late Professor Lani Guinier, the first tenured woman of color at Harvard Law School, defined the obsession with merit measured by standardized tests as the testocracy, "a twenty-first-century cult of standardized, quantifiable merit, [that] values perfect scores but ignores character."[19] In her view, testocratic merit is a conception that suggests that test scores alone best reflect the value of an applicant instead of a consideration of the *contextual* factors—access to opportunity, socioeconomic status, test preparation, and inequities in educational

12. *See, e.g.*, Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1500 (1997); Michael J. Sandel, *How Meritocracy Fuels Inequality—Part I: The Tyranny of Merit: An Overview*, 1 AM. J. L. EQUAL. 4, 4 (2021).

13. *See, e.g.*, Jeff Selingo, *What Is Merit and How Should We Measure It?*, OPEN CAMPUS (Feb. 18, 2020), https://www.opencampusmedia.org/2020/02/18/what-is-merit-and-how-should-we-measure-it/.

14. *See Students for Fair Admissions, Inc.*, 600 U.S. at 284-85.

15. *Id.* at 360 (Sotomayor, J., dissenting); *see also, e.g.*, DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE ix-x (2019).

16. *Id.*

17. *Id.*

18. *Students for Fair Admissions, Inc.*, 600 U.S. at 360 (Sotomayor, J., dissenting).

19. LANI GUINIER, THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA ix (2015).

opportunity—that impact results on standardized tests.[20] According to Guinier, the consequence is that, rather than functioning as a tool of opportunity, standardized testing tends to solidify the existing status quo, keeping disadvantaged students in an endless loop of restricted upward mobility.[21]

The idea that a meritocracy based on standardized test scores can adequately level the playing field is fundamentally flawed. Those who subscribe to the testocracy, like the *SFFA v. Harvard* Court's majority, fail to recognize both the stark disparities in resources and opportunities available to individuals from different socio-economic backgrounds and how racial marginalization continues to disproportionately relegate minorities and African Americans to diminished socio-economic positions.[22] Hence, the cycle of privilege persists under the guise of merit, with those already at an advantage having greater access to the resources necessary to "succeed" within this system. Nonetheless, as it relates to the end of race-conscious admission practices, it is important to remember that notions of merit are not static; they have changed over time. Therefore, the most prudent response to the Court's affirmative action ban may be a redefinition of merit that moves away from testocratic merit toward what Guinier calls democratic merit.[23] This transition would create "an incentive system that emphasizes not just the possession of individual talent . . . but also the ability to collaborate and the commitment to building a better society for more people."[24]

Following the Court's ban on the use of race-conscious admissions practices in higher education, much attention has turned toward future conceptions of merit and what a future without affirmative action in higher education will look like. Higher education institutions, policymakers, and other stakeholders are evaluating and revisiting core aspects of their admissions processes to determine how to best achieve diversity through race-neutral admissions practices.[25] In exploring alternative admissions practices that could yield diversity without the consideration of race, key decisionmakers have focused on using parental income and eliminating

20. *See id.* at x.

21. *See id.*

22. *See, e.g.*, *57 Years After Brown: The Impact of Residential Segregation on Educational Equity*, THE LEADERSHIP CONF. EDUC. FUND (May 17, 2011), https://civilrights.org/edfund/resource/residential-segregation/ [hereinafter *57 Years After Brown*].

23. GUINIER, *supra* note 19, at xi.

24. *Id.* at xiii.

25. *See, e.g.*, *Denise-Marie Ordway, Race-Neutral Alternatives to Affirmative Action in College Admissions: The Research*, JOURNALIST'S RES. (June 29, 2023), https://journalistsresource.org/education/race-neutral-alternatives-affirmative-action-college-diversity/.

legacy- and donor-admissions preferences.[26] Though promising, simply using parental income and removing legacy/donor preferences as a substitute for race-conscious admissions practices will not yield similar levels of African American higher education participation.[27]

This Article highlights admissions practices used in the United Kingdom and argues that such practices can be instructive in developing a race-neutral approach to achieving diversity that does not involve asking applicants about their racial backgrounds. In the U.K., higher education regulators share the goal of ensuring that students from underrepresented groups and the most disadvantaged backgrounds can access higher education, yet applicants are not asked to disclose their racial background on applications.[28] There, higher education institutions have access to national databases that allow for consideration of individual and place-based measures of disadvantage.[29] Admissions decisionmakers are empowered to use these measures to contextualize academic indicators.[30]

The U.K. approach, termed contextual admissions, has successfully allowed a nuanced evaluation of not only test scores and grades but also disparities in advantage and opportunity. Applications from students of low-opportunity neighborhoods and schools are often flagged so that admissions decisionmakers can more closely consider these students' academic indicators in context of the structural disadvantages that these students have faced.[31] At universities like Oxford and Cambridge, students whose indicators of educational attainment might not adequately reflect their potential—due to structural disparities in opportunity—may receive a "contextual" offer of admission at a lower level of educational attainment than "standard" offers.[32]

---

26. *See, e.g.*, Michelle N. Amponsah & Emma H. Haidar, *Could Losing Legacy Admissions Sustain Racial Diversity?*, HARV. CRIMSON (Sept. 22, 2023), https://www.thecrimson.com/article/2023/9/22/harvard-without-legacy/.

27. *See* NED RESNIKOFF, LEGIS. ANALYST'S OFF., NARROWING CALIFORNIA'S K-12 STUDENT ACHIEVEMENT GAPS 5 (2020), https://lao.ca.gov/reports/2020/4144/narrowing-k12-gaps-013120.pdf.

28. *See* PAUL BOLTON & JOE LEWIS, HOUSE OF COMMONS LIBR., EQUALITY OF ACCESS AND OUTCOMES IN HIGHER EDUCATION IN ENGLAND 9 (2023), https://researchbriefings.files.parliament.uk/documents/CBP-9195/CBP-9195.pdf; *Your Details: About You*, *supra* note 4.

29. *See* BOLTON & LEWIS, *supra* note 28.

30. *See* id.

31. *See* VIKKI BOLIVER ET AL., SUTTON TRUST, ADMISSIONS IN CONTEXT: THE USE OF CONTEXTUAL INFORMATION BY LEADING UNIVERSITIES 10 (2017), https://www.suttontrust.com/wp-content/uploads/2019/12/Admissions-in-Context-Final_V2.pdf.

32. *See id*.

The contextual admissions model is a stronger race-neutral admissions approach than an approach driven by parental income because racialized residential and school-based segregation is connected to lower participation in higher education.[33] Therefore, a system that contextualizes academic indicators by considering disparities in advantage and opportunity will yield more admissions of African American students than a system geared towards parental income only. Racialized residential and school-based segregation continue to persist in the United States.[34] Public schools currently have levels of racial and economic segregation that are higher than they were in the 1970s.[35] The "achievement gap," or the differences in educational attainment between African American and white students, can be partially explained by the "opportunity gap," which is the difference in the levels of opportunities in the schools and neighborhoods that many African American students learn and live in.[36]

Scholars have long recognized the link between housing and education, in that students who live in segregated neighborhoods are assigned to their neighborhood school.[37] This link reinforces neighborhood segregation in the educational domain.[38] Moreover, school funding is often tied to property tax receipts, meaning that schools housed in neighborhoods with lower socio-economic levels have less resources to provide a quality education.[39] Education is designed to eradicate the disparities that amount from residential segregation, but just as in the higher education context, K-12 educational practices far too often exacerbate the effects of inequity and marginalization that exist in far too many predominately African American neighborhoods.[40]

33. *See Why Access to Education Is Key to Systemic Equality*, ACLU (Sept. 6, 2023), https://www.aclu.org/news/racial-justice/why-access-to-education-is-key-to-systemic-equality.

34. *See 57 Years After Brown*, *supra* note 22.

35. *Id.*

36. *See* Ellis Cose, *The Color Bind*, NEWSWEEK (May 11, 1997, 8:00 PM), https://www.newsweek.com/color-bind-172958.

37. *See* Emily Bramhall, *Why Does Segregation Between School Districts Matter for Educational Equity?*, HOUS. MATTERS (May 12, 2021), https://housingmatters.urban.org/articles/why-does-segregation-between-school-districts-matter-educational-equity.

38. *Id.*

39. *57 Years After Brown*, *supra* note 22.

40. *See* RESNIKOFF, *supra* note 27.

Accordingly, if higher education institutions are not allowed to ask applicants about their race, the best substitute for these institutions is to rely on *the measurable outcomes* of systemic racial marginalization and stratification to inform admissions determinations. The contextual admissions approach, which relies on verifiable metrics that can measure and highlight racialized disparities in neighborhood and school-based opportunities, allows admissions decisionmakers to focus on the outcomes of systemic and structural racism rather than race itself.

Strict scrutiny is applied to admissions programs that involve the use of race, but it is not applied to programs that use facially neutral measures of disadvantage that have a racially disparate impact.[41] Legal scholars have studied and outlined individual measures of disadvantage, such as whether a student has received free lunch, that could be used to redefine merit to advantage students "who have demonstrated determination to overcome structural challenges."[42] Building upon this work, this Article outlines how the area-based and school-based datasets used in the U.K.'s contextual admissions model can work in tandem with individual measures of disadvantage to serve as a race-neutral mechanism to achieve the educational benefits of diversity in a post-affirmative action admissions environment.

Contextual admissions will benefit students of all races who have navigated structural disadvantages. Nonetheless, given the inextricable link between race and the lack of social mobility in modern American society, the contextual admissions approach could empower higher education institutions to achieve the educational benefits of diversity and maintain current levels of African American student enrollment without asking applicants about their racial backgrounds. This Article is the first academic article that discusses how the contextual admissions model can mitigate the effects of an affirmative action ban in the United States. There was significant discussion of race-neutral admissions practices in the briefs, amicus briefs, oral argument, and majority and dissenting opinions in *SFFA v. Harvard*, yet the U.K.'s contextual admissions model went unmentioned. As a result, this Article holds significant value for various stakeholders, including university administrators, policymakers, and individuals, interested in the implications of the Court's affirmative action ban.

41. *See* Eboni S. Nelson et al., *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2209 (2017).

42. *Id.* at 2196.

This Article's focus on African American law school enrollment holds special import for the legal sector, given the persistent underrepresentation of African Americans in law schools and the legal profession, even with the use of race-conscious admission practices.[43] The underrepresentation of African American law students is likely to be exacerbated due to the Court's ban. Without race-conscious admissions policies, some scholars have suggested that more than 78% of African American applicants will be rejected from every law school to which they apply.[44] African American students have historically faced obstacles in accessing a legal education, and these obstacles drive the continued underrepresentation of African Americans in the legal profession.[45] In a recent admissions cycle, 49% of African Americans were rejected from every law school that they applied to.[46] Only 39% of white applicants received denials from every law school they applied to.[47]

Citing data from the U.S. Department of Labor, Professor Mary Wright reports that although African Americans account for 13% of the population, they account for 4.8% of lawyers.[48] The representation of African Americans is lower in the legal profession than it is in almost any other professional occupation.[49] Justice Sotomayor's *SFFA v. Harvard* dissent speaks to the need for a diverse pipeline of college graduates to achieve diversity in the legal profession.[50] She notes that lawyers, Supreme Court law clerks, federal judges, and state judges are disproportionately white, relative to the number of white Americans in the population.[51] The underrepresentation of African Americans in the legal profession and the challenges in accessing a legal education for African Americans, such as lower average LSAT scores, has

43. *See* Jon Mills, *Diversity in Law Schools: Where Are We Headed in the Twenty-First Century*, 33 U. TOLEDO L. REV. 119, 126-27 (2001).

44. George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 105 (2003).

45. *See id.* at 104.

46. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 496 (2019).

47. *Id.*

48. Mary Wright, *Mission Accomplished? The Unfinished Relationship Between Black Law Schools and Their Historical Constituencies*, 39 N.C. CENT. L. REV. 1, 9-10 n.70 (2016).

49. Shepherd, *supra* note 44, at 103.

50. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 379 (2023) (Sotomayor, J., dissenting).

51. *Id.* at 382 n.42.

consistently vexed law school administrators and other legal education stakeholders.[52]

Standardized tests like the LSAT and the bar examination are instruments of the legal-education testocracy, where the intense focus on standardized test scores, instead of more holistic factors, perpetuates and exacerbates existing inequities in wealth, access, and opportunity.[53] Because of the American Bar Association's ("ABA") accreditation requirements,[54] the LSAT is the dominant factor in law school admissions decisions, unlike undergraduate admissions and other graduate admissions processes, where holistic factors such as extracurricular activities, community service, and work experience play a larger role.[55]

The emphasis on test scores in law school admissions has been compounded by the emphasis placed on test scores in the methodology of the *U.S. News & World Report* Law School Rankings ("*U.S. News* rankings").[56] The rankings and the testocracy work together to disproportionately disadvantage prospective African American law students. Thus, scholars and advocates have criticized and called for reform to the LSAT and bar

52. *See, e.g.,* Laura Rothstein, *The LSAT,* U.S. News & World Report*, and Minority Admissions: Special Challenges and Special Opportunities for Law School Deans*, 80 ST. JOHN'S L. REV. 257, 282 (2006).

53. *See* William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 167 (2000) [hereinafter Kidder, *Rise of the Testocracy*].

54. The primary ABA regulations that present challenges for Black law school enrollment are Standards 316 and 501(b) and Interpretations 501-1, 501-2, and 501-3. Standard 316 requires law schools to have a 75% bar passage rate within two years of graduation. STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. 2023-2024, at Standard 316 (AM. BAR ASS'N, 2023). Until 2019, schools who could not comply could submit evidence such as positive trends and academic support reforms to remain in compliance. Standard 501(b) requires that law schools only admit applicants who appear capable of graduating from the law school and passing the bar exam. *Id.* at Standard 501(b). Interpretation 501-1 notes that the ABA will consider factors such as entering GPA and LSAT, attrition rate, bar passage rate, and the quality of academic support programs to assess the capability of admitted students. *Id.* at Standard 501, Interpretation 501-1. Interpretation 501-2 notes that extracurricular activities, work experience, performance in other graduate programs, obstacles overcome, and skills demonstrated can be considered in a sound admissions process. *Id.* at Standard 501, Interpretation 501-2. Interpretation 501-3 states that law schools with an attrition rate of above 20% will presumptively be out of compliance with Standard 501(b). *Id.* at Standard 501, Interpretation 501-3; *see also* Eremipagamo M. Amabebe, *Beyond 'Valid and Reliable': The LSAT, ABA Standard 503, and the Future of Law School Admissions*, 95 N.Y.U. L. REV. 1860, 1875-76 (2020).

55. *See* Amabebe, *supra* note 54, at 1900-01.

56. *See* Rothstein, *supra* note 52, at 258-59.

examination for decades.[57] Recently, consensus regarding the negative impacts of overreliance on these standardized tests has grown and reforms related to both the LSAT and bar examination are currently being considered, proposed, and implemented.[58] Concurrently, an overwhelming majority of law schools ranked at the top of the *U.S. News* rankings recently announced that they will no longer cooperate with the rankings regime.[59] These developments signal a disruption of foundational elements of the testocracy in law school admissions.

In many ways, this is a moment of both promise and peril as it relates to African American law school enrollment. Obviously, the Court's affirmative action ban will harm future African American law school applicants, but the shift away from rankings and standardized tests toward alternative assessment factors is promising. We must remember that this is not the first time that a Supreme Court decision, accreditation change, or an affirmative action ban has drastically shifted the landscape for prospective African American law students.[60] This Article seeks to make sense of this moment by critically engaging with the history of African American law school enrollment and by offering concrete solutions to shape the post-affirmative action future.

This Article makes four primary contributions. First, by examining African Americans' struggles to access the legal profession, the Article situates the moment by connecting the present with historical themes from the past. African American law students and lawyers were instrumental in desegregating higher education for all Americans through skilled use of the federal courts. Therefore, the story of race and higher education cannot be told without telling the story of African American law students' struggles for accessible legal education. Second, the Article calls for the dismantling of

---

57. There are several scholars who object to the overreliance on LSAT scores in legal admissions and in setting accreditation for law schools. *See, e.g.*, William C. Kidder, Comment, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CALIF. L. REV. 1055, 1119 (2001) [hereinafter Kidder, *Does the LSAT Mirror or Magnify*].

58. *See, e.g.*, Karen Sloan, *ABA Votes to Keep Law School Standardized Test Requirement*, REUTERS (Feb. 6, 2023, 12:58 PM), https://www.reuters.com/legal/legal industry/aba-votes-keep-law-school-standardized-test-requirement-2023-02-06/.

59. Ruth Graham, *After Boycott from Law Schools, U.S. News & World Report Changes Ranking System*, N.Y. TIMES (Jan. 2, 2023), https://www.nytimes.com/2023/01/02/us/after-boycott-from-law-schools-us-news-world-report-changes-ranking-system.html.

60. *See* Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1529-31 (1999).

testocratic merit, and it documents developments within legal education that suggest a shift away from testocratic merit. Third, the Article clarifies the new legal standard related to achieving educational diversity post-*SFFA v. Harvard*. Finally, the Article suggests the contextual admissions model in the U.K. as a constitutional post-*SFFA v. Harvard* approach to achieving racial diversity. The Article highlights that this approach advances democratic merit as opposed to testocratic merit because metrics used in contextual admissions decisions in the U.K. address how racial marginalization persists in the United States through residential and educational segregation.

This Article proceeds in four parts. Part I provides a historical background on African American law school enrollment and the jurisprudence regarding race and higher education. Part II highlights the opportunities presented for prospective African American law students that result from changes to the testocracy in legal education. Part III discusses *SFFA v. Harvard* in greater detail, clarifying the post-affirmative action legal standard requiring race-neutral admissions practices. Part IV explores the contextual admissions model as a potential race-neutral solution for stakeholders who would like to maintain or exceed current levels of African American student enrollment, not only at the law school level but across the higher education sector.

I. African American Law School Enrollment: Historical Background

Before considering the implications of the Court's decision to end affirmative action on African American law school enrollment, it is necessary to develop a common understanding of African Americans' historic struggles for access to legal education and the legal profession. A critical examination of the history of African American law school enrollment supports six claims: (1) African American students overcame state-sponsored exclusion to gain access to legal education, primarily through historically Black law schools ("HBLS"); (2) HBLS and African American lawyers were at the forefront of dismantling segregation in higher education and de jure segregation in the United States; (3) historically, ABA accreditation policies have directly influenced diminished African American law school enrollment; (4) immediately following desegregation and the implementation of affirmative action, African American law school enrollment grew at traditionally white law schools, yet growth quickly stagnated, and it remains so; (5) although African American law students continue to face challenges in accessing a legal education, ABA accreditation pressures contribute to a decline in African American enrollment and an increase in white enrollment at HBLS; and (6) consequently, the nation's six HBLS do not have the capacity to serve a significant number of the African

American students who may be excluded because of the Court's decision in *SFFA v. Harvard*. The next subpart offers a brief history of African American law school enrollment as contextual background.

A. African Americans and Access to Legal Education Prior to the Desegregation of Higher Education

The history of the African American law school enrollment in America starts with John Mercer Langston, the first African American lawyer in Ohio and the first known African American applicant to an American law school.[61] In the 1850s, Langston was admitted to law schools in New York and Ohio, on the condition that he agree to "pass" as a white man.[62] Langston refused and was subsequently denied entry.[63] He later became an attorney by completing a judge apprenticeship and went on to become the founding Dean of Howard University School of Law ("Howard Law School") and a Member of Congress representing Virginia.[64] Prior to Langston, only three African Americans had been admitted to the bar nationwide.[65]

Following the Civil War, African Americans entered the legal profession at a much slower rate than other professions, such as medicine and the ministry.[66] Some entered the legal profession through mostly white institutions, such as George Lewis Ruffin, who in 1869 became both the first African American to graduate from Harvard Law School and the first African American to graduate from any American law school.[67]

Several private law schools, such as those at Yale University and Columbia University, admitted African American law students during the Reconstruction period.[68] In the 1870s, some public law schools opened their doors to African Americans, beginning with the University of South Carolina.[69] The University of Michigan and the University of Iowa graduated their first African American students in 1877 and 1879, respectively.[70]

---

61. J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944, at 34 (1993).

62. *See id.*

63. *Id.*

64. *See id.* at 34, 60, 583.

65. *History and Legacy of John M. Langston*, JOHN M. LANGTON BAR ASS'N OF L.A., https://www.langstonbar.org/history (last visited Dec. 11, 2023).

66. SMITH, *supra* note 61, at 6.

67. *Id.* at 63-64; Edward J. Littlejohn & Leonard S. Rubinowitz, *Black Enrollment in Law Schools: Forward to the Past?*, 12 T. MARSHALL L. REV. 415, 417 (1987).

68. SMITH, *supra* note 61, at 64.

69. *Id.*

70. *Id.*

1. Founding of Black Law Schools

HBLS were the largest source of African American law graduates in the segregation era. The largest number of African American law graduates came from Howard Law School, which was founded in 1869.[71] By the 1920s, three-fourths of all the nation's African American attorneys were educated at Howard Law School.[72]

Diversity was evident at Howard Law School from the onset. The school was the first to have an integrated law faculty and student body, the latter of which included white women—another group that was excluded from admission to other American law schools.[73] Langston, who traveled the South making mission-centered speeches to encourage applicants, exclaimed that graduates from Howard Law School would inherit the expectations to emancipate, protect, and expand the recently secured rights of African Americans, such as the Thirteenth and Fourteenth Amendments.[74]

The stated educational mission at the founding of Howard Law School was to direct the political life of African Americans and to ensure that there was African American access to the legal profession.[75] This mission is indicative of the historical mission of Black law schools. Professor J. Clay Smith states, in his seminal text on the history of the African American lawyer, that the aim of Howard Law School was to "train predominately [B]lack male and female students in the principles of law, to aid these men and women in the law knowledge that would allow them to lead the freedmen out from under laws, rules, regulations, and human conduct that denied, negated, or restrained the virtue of liberty."[76]

In 1924, Charles Hamilton Houston, the most influential African American legal academic of the era—perhaps of any era—joined the law faculty at Howard Law School (where he eventually became vice-dean).[77] Houston graduated from Harvard Law School following undergraduate studies at Amherst College.[78] Houston was the first African American student to serve as an editor of the *Harvard Law Review*.[79] Houston's educational philosophy helped to shape the historical mission of Howard Law School and

71. *Id.*; Littlejohn & Rubinowitz, *supra* note 67, at 417.
72. Littlejohn & Rubinowitz, *supra* note 67, at 419.
73. SMITH, *supra* note 61, at 64.
74. *Id.* at 43.
75. *Id.*
76. *Id.*
77. *See id.* at 48.
78. *Id.* at 47.
79. *Id.* at 39.

other HBLSs.[80] Houston outlined his philosophy on the mission of Howard Law School in the following statement:

> If a Negro law school is to make its full contribution to the social system it must train its students and send them [into situations to apply pressure]. This does not necessarily mean a different course of instruction from that in other standard law schools. But it does mean a difference in emphasis with more concentration on the subjects having direct application to the economic, political and social problems of the Negro.[81]

According to Justice Thurgood Marshall, Houston's most famous and influential student, Houston shared the following with his law students: "I am not training lawyers; I am not training members of the bar. I am training social engineers who will go out and do things for the people."[82] Houston departed the law school in 1935 to become special counsel and direct national civil rights planning for the National Association for the Advancement of Colored People ("NAACP").[83] In 1937, Howard Law School faculty member James Madison Nabrit, Jr. started the first civil rights course at an American law school.[84] This course achieved Houston's vision of Howard Law School as the center of civil rights methodology and practice.[85]

2. American Bar Association Policies Lead to Closure of Black Law Schools

Between 1869 and 1939, nineteen HBLSs were established.[86] Straight University started its program a year after the founding of Howard Law School.[87] Numerous private Black colleges established law programs

80. *See generally* Charles H. Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935).

81. *Id.* at 51.

82. L. Darnell Weeden, *In Response to the Call for Social Justice, Historically Black Law Schools Represent the New Mission of Educational Diversity in the Legal Profession*, 14 J. GENDER, RACE & JUST. 747, 748 (2011) (quoting Thurgood Marshall, *Address by the Honorable Thurgood Marshall*, 4 TEX. S. L. REV. 191, 191 (1977)).

83. SMITH, *supra* note 61, at 50.

84. *Id.* at 51.

85. *Id.*

86. *Id.* at 65.

87. *See id.* at 56.

between 1900 and 1932.[88] The overwhelming majority of these HBLs closed by 1945.[89] Smith tied the closure of these schools to the ABA.[90] Starting in the early 1920s, the ABA began to set new standards for law schools.[91] These standards required students to complete two years of undergraduate studies and two years of law school before qualifying for bar examination.[92] The implementation of the new ABA standards made it difficult for schools to maintain evening and part-time programs because many of the evening and part-time students had not graduated from college.[93] Unfortunately, these part-time programs enrolled larger numbers of African American students and other ethnic minorities than full-time programs.[94] The ABA did not extend membership to African American lawyers until 1943; therefore, African American lawyers could not influence standards set in 1921.[95]

Howard Law School obtained ABA accreditation by ending both its evening program and its special admissions program that allowed students without college degrees to attend law school.[96] These changes also reduced the size of the student body.[97] Following these changes, total student enrollment at Howard Law School fell from 135 students to forty-four students.[98]

The reduction in student enrollment at Howard in order to gain ABA accreditation and the closure of other Black law schools that could *not comply* with ABA standards illustrate how such standards negatively impact African American law student enrollment. Following the introduction of the ABA standards, there was a clear period when the number of African American attorneys was stagnant.[99] Between 1910 and 1940, before the ABA standards were set, the total number of African American lawyers more than doubled, rising from 798 lawyers to 1,925 lawyers.[100] Yet in the period

88. Examples include law schools established at Wilberforce University, Harper College, Lincoln University, Central Tennessee, Allen University, Shaw University, Simmons College of Kentucky, Morris Brown College. Wright, *supra* note 48, at 3.

89. SMITH, *supra* note 61, at 65.

90. *See id.* at 42.

91. *Id.*

92. *Id*.

93. *See id*. at 41-42.

94. *Id.*

95. *Id.* at 41.

96. *Id.* at 49.

97. Shepherd, *supra* note 44, at 113.

98. *Id.*

99. Dan Hurley, *Are Black Law Schools Obsolete?*, STUDENT LAW., Mar. 1984, at 12, 14.

100. *Id.*

following the standards from 1940 to 1960, the total number of African American lawyers in the United States grew by fewer than 100 lawyers, from 1,925 lawyers to 2,004 lawyers.[101]

3. Separate but Equal Jurisprudence Leads to Development of Black Law Schools

Government-sanctioned exclusion from society informed the educational mission of the Black law schools from their inception.[102] In the late 1930s and early 1940s, four of the six HBLSs that exist today were established because of the separate but equal jurisprudence that emerged in *Plessy v. Ferguson*.[103] Because racially separate facilities were permitted in *Plessy*, African American students were excluded from graduate school at white public universities in their states.[104] Charles Hamilton Houston's legal strategy, as demonstrated by *Missouri ex rel. Gaines v. Canada*, exploited the lack of separate public graduate schools for African Americans under a separate but equal regime.[105] The Court's decision likely led directly to the creation of today's HBLSs.[106] Gaines, a Missouri resident, sought admission to the University of Missouri School of Law, but he was denied admission because of his race.[107] Missouri, like other states, attempted to comply with separate but equal mandates by paying for the graduate education of African Americans at out-of-state schools.[108] The Court held that this practice did not meet the constitutional standard of equal protection, and therefore, Missouri would have to establish a law school for African American students in order to pass constitutional muster.[109] Legislators in North Carolina who wanted to avoid similar lawsuits established the North Carolina Central School of Law in 1940.[110]

---

101. *Id.*

102. *See e.g.*, Wright, *supra* note 48, at 2-3; Kemit A. Mawakana, *Historically Black College and University Law Schools: Generating Multitudes of Effective Social Engineers*, 14 J. GENDER, RACE & JUST. 679, 681-82 (2011).

103. Donald K. Hill, *Social Separation in America: Thurgood Marshall and the Texas Connections*, 28 T. MARSHALL L. REV. 177, 244-45 (2003).

104. *See* Adriel A. Hilton et al., *The Relevance of Black Law Schools*, 40 S. U. L. REV. 145, 148 (2012).

105. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 349-50 (1938).

106. *See* Hilton et al., *supra* note 104, at 148-49.

107. *Gaines*, 305 U.S. at 343.

108. *Id.* at 344.

109. *Id.* at 351.

110. *See* Wright, *supra* note 48, at 4.

Similar actions led to the establishment of law schools at Texas Southern University, Southern University, and Florida Agricultural and Mechanical University. The facts in *Sweatt v. Painter* are similar to the facts in *Gaines*.[111] In Sweatt, Heman Sweatt applied to the University of Texas School of Law in 1946, when the state constitution prohibited nonwhites from attending the University of Texas.[112] The University of Texas denied Sweatt admission, and he responded with a lawsuit.[113] While Sweatt's case was being adjudicated in Texas, the state established a law school at the Texas State University for Negroes (the original name of Texas Southern University).[114] The Texas supreme court denied Sweatt's application for writ of error.[115] The United States Supreme Court disagreed and ordered the University of Texas to admit Sweatt.[116] This case struck down the state's separate but equal laws in higher education.[117]

In 1946, the year that Sweatt was denied admission to the University of Texas, Charles Hatfield was denied admission to Louisiana State University's law school.[118] Hatfield subsequently filed a writ to compel the school to admit him.[119] Two weeks later, the Louisiana Board of Education voted to create a law school at the Southern University for Blacks.[120] As a result, Hatfield's state case was dismissed.[121]

The final major separate but equal case of this era led to the development of the law school at the Florida Agricultural and Mechanical University. In *Florida ex rel. Hawkins v. Board of Control*, Hawkins was denied admission to the University of Florida's law school and appealed his denial on the basis of race.[122] As a result, the state established a law school at the Florida Agricultural and Mechanical College for Negroes in 1949.[123]

The separate but equal cases outlined above illustrate the role of HBLSs in enabling African American students to gain access to a legal education.

---

111. *See* Sweatt v. Painter, 339 U.S. 629, 631-32 (1950).
112. *Id.* at 631.
113. *Id.*
114. *Id.* at 633.
115. *Id.* at 632.
116. *Id.* at 635-36; *see also* Jonathan L. Entin, Sweatt v. Painter*, the End of Segregation, and the Transformation of Education Law*, 5 REV. LITIG. 3, 58 (1986).
117. Entin, *supra* note 116, at 59.
118. Wright, *supra* note 48, at 5.
119. *Id.* at 5-6.
120. *Id.* at 6.
121. *Id.*
122. *See* Florida *ex rel.* Hawkins v. Bd. of Control, 350 U.S. 413, 413-14 (1956).
123. Hilton, *supra* note 104, at 150-51.

Additionally, the cases help clarify the two-pronged mission of HBLSs. The HBLSs were founded in the separate but equal era to provide a legal education to African Americans who were unable to receive it elsewhere.[124] Thus, providing access to African American students who otherwise could not obtain a legal education is the first prong of the historical mission of Black law schools.

The second prong of the historical mission is the edict to produce attorneys who would advocate on behalf of the African American community.[125] It follows that HBLSs historically focused on educating students who would work to overcome racial obstacles similar to the ones that led to establishment of the HBLSs themselves. The second prong of the historical mission of Black law schools is best exemplified by the work of Charles Hamilton Houston and Thurgood Marshall, work which dismantled de jure segregation in *Brown v. Board of Education*.[126]

B. African American Law School Enrollment Following the Desegregation of Higher Education and the Implementation of Affirmative Action

Ironically, Howard Law School's commitment to desegregate higher education opened it and other African American law schools up to intense competition from traditionally white schools. Following *Brown*, increasing access to legal education and the legal profession for African Americans became a central focus of the entire legal community.[127] Accordingly, affirmative action programs related to higher education admissions were initiated following President Kennedy's Executive Order 10925.[128]

In 1960, before desegregation and affirmative action had come into full force, there were 2,180 African American lawyers.[129] In the mid-1960s, approximately one-third of the 700 African American students enrolled in law schools nationwide were enrolled in law schools at historically Black colleges and universities (HBCUs)—nearly 40%.[130] The remaining 433 students attended ABA-accredited law schools.[131] The ABA-accredited law schools had an average of one African American student in each graduating

124. Wright, *supra* note 48, at 7.

125. *Id.*

126. *See generally* Brown v. Board of Education, 347 U.S. 483 (1954).

127. *See, e.g.*, Harry T. Edwards, *A New Role for the Black Law Graduate—A Reality or an Illusion?*, 69 MICH. L. REV. 1407, 1409 (1971); Margaret M. Russell, *McLaurin's Seat: The Need for Racial Inclusion in Legal Education*, 70 FORDHAM L. REV. 1825, 1826 (2002).

128. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

129. Edwards, *supra* note 127, at 1410.

130. *See* Littlejohn & Rubinowitz, *supra* note 67, at 420.

131. *Id.*

class.[132] The 700 African American law students represented about 1% of the 65,000 law students enrolled nationwide at that point.[133] Although African American law schools experienced enrollment growth in the years immediately following desegregation,[134] the competition for African American students from non-Black law schools immediately strained the HBLS sector.[135] The law schools at Florida Agricultural & Mechanical University and South Carolina State University were closed shortly after integration.[136]

In the 1970s, at the height of affirmative action, growth in the number of African American law students accelerated. In the 1969-1970 school year, there were 2,128 African American law students enrolled in ABA-approved law schools.[137] By 1976-1977, that number more than doubled to 5,503 African American law students.[138] In the early 1970s, there were 3,845 African American lawyers, representing less than 2% of the legal profession; even though African Americans represented 11% of the total population.[139] In 1970, over 90% of African American lawyers practicing in the South were graduates of HBLSs.[140] In the same year, there was clear evidence of the shift in African American law students attending traditionally white schools.[141]

While African American law students progressed in gaining access to schools that were previously restricted, a majority of African American students attended a small number of schools, mostly the nation's leading law schools such as Yale, Harvard, and Michigan.[142] Each of the other 177 law schools in the country had an average of eighteen African American students in attendance.[143] The nation's leading law schools were steep competition for HBLSs.[144] Of the national law schools, Harvard and Michigan had the largest number of African American students; 118 students attended Harvard and

132. *Id.*
133. *Id.* at 420 n.16.
134. *Id.* at 437.
135. *See id.* at 442 n.129.
136. *Id.*
137. *Id.* at 435.
138. *Id.*
139. Edwards, *supra* note 127, at 1410.
140. *Id.* at 1411.
141. Littlejohn & Rubinowitz, *supra* note 67, at 434.
142. Edwards, *supra* note 127, at 1423-24.
143. Harold R. Washington, *History and Role of Black Law Schools*, 5 N.C. CENT. L.J. 158, 158 (1974).
144. *See* Edwards, *supra* note 127, at 1424.

seventy-seven students attended Michigan in 1970.[145] Harvard and Michigan were the two largest law schools in the nation at that time.[146] Yale Law School was the only traditionally white school to have an African American student population that approached the African American population nationwide.[147]

Gains in enrollment of African Americans at law schools nationwide began to stagnate beginning in the mid-1970s for the first time since desegregation.[148] For example, there was a decline in African American first-year law school enrollment at law schools nationwide for the first time since desegregation, dropping from 1,943 students in 1973 to 1,910 students in 1974.[149]

Meanwhile, the impact of increased market competition began to show at HBLSs. In the 1972-1973 school year, the ABA visited all four then-operating HBLSs and determined that the schools failed to meet ABA standards.[150] These pressures forced administrators to respond to ensure the survival of their institutions.[151] As a result, African American enrollment at HBLSs began to decline in the mid-late 1970s as administrators sought to meet ABA standards following the onset of affirmative action.[152]

While HBLSs were grappling with the ABA's stringent standards, they were contemporaneously grappling with shifting affirmative action regimes. In the 1970s, courts initially upheld the constitutionality of affirmative action programs, but attitudes changed quickly. The Supreme Court's decision in *Regents of the University of California v. Bakke* served as the turning point where the Court began to view such programs not as redress for past racial harms but rather as "reverse discrimination" against other racial groups.[153]

In *Bakke*, the Court held that the admissions program at the University of California Davis Medical School, which reserved sixteen seats for minority students, some of whom earned scores less than candidates that were rejected, was unconstitutional.[154] As a result, admission programs that reserved seats

145. *Id.*
146. *Id.*
147. *Id.*
148. *See* Littlejohn & Rubinowitz, *supra* note 67, at 435.
149. *Id.*
150. *See id.* at 442, 447 n.164.
151. *See id.* at 442.
152. *Id.* at 444.
153. Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After* Fisher v. University of Texas, 62 UCLA L. REV. 272, 280 (2015).
154. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 379 (1978).

for minority students, termed set-asides, had to be reworked at higher education institutions throughout the country.[155] Although the Court struck down set-asides in *Bakke*, it permitted the continued use of race in admissions decisions, reasoning that diversity is a compelling state interest that can be furthered by allowing the use of race as a plus factor in admissions.[156] After *Bakke*, courts began to apply strict scrutiny to the use of racial classifications in state-based activity.[157]

Following *Bakke*, enrollment of African American students decreased at both HBLSs and traditionally white law schools as a result of the obligation to meet accreditation standards and related pressures. Between the late 1970s and the mid-1980s, the increase in African American enrollment amounted to less than one African American student for each of the law schools that reported.[158] African American representation at law schools nationwide was 5.1% of total enrollment for the 1986-1987 school year, which was only two-tenths higher than the representation of African Americans at law schools a decade earlier.[159] African American enrollment in law schools peaked in the 1994-1995 school year, just prior to Proposition 209 and the further retrenchment of affirmative action.[160]

C. African American Law School Enrollment and the Rollback of Affirmative Action

Following the enactment of California's Proposition 209 in 1996, several states implemented policies that limited or prohibited the use of race in admissions.[161] Proposition 209, a California ballot referendum, banned the use of racial classifications in employment, education, and contracting.[162] Similar language was used in ballot referendums in Washington, Nebraska, Colorado, and Michigan, and these initiatives passed in each state except

155. *See* id. at 378.

156. *See* id. at 317.

157. *Id.* at 361-62. Strict scrutiny is the highest level of scrutiny used to evaluate the constitutionality of equal protections disputes. Barnes et al., *supra* note 153, at 280 n.33.

158. *See* Littlejohn & Rubinowitz, *supra* note 67, at 435.

159. *Id.*

160. *See* Jennah K. Jones, Black Students' Perceptions of Challenges in Pursuing a Law Degree: An Interpretation Through Marronage 31, 46-47 (May 2017) (Ph.D. dissertation, University of Southern California) (ProQuest), https://www.proquest.com/docview/1999355402/abstract/A5BEE588A96B43C2PQ/1.

161. Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1088-89 (2009).

162. CAL. CONST. art. I, § 31.

Colorado.[163] Since then, Idaho, New Hampshire, Oklahoma, and Florida have also implemented affirmative action bans.[164] Prior to these affirmative action bans, total African American enrollment at the University of California at Berkeley, the University of California at Davis, the University of Washington, the University of Texas, and UCLA was 6.65%.[165] Following the ban, African American enrollment at these schools dropped to 2.25%.[166]

The hostility toward affirmative action was not restricted to the ballot box. In *Grutter v. Bollinger*, the Supreme Court once again considered a challenge to affirmative action in higher education.[167] The *Grutter* Court upheld the University of Michigan Law School's admissions program that considered race as a plus factor in an individualized review of an application.[168] The Court held that it would defer to universities' judgments that diversity is vital to their educational missions, yet universities could not "insulate applicants who belong to certain racial or ethnic groups from the competition for admission."[169] *Grutter* also held that race-based admissions programs must be time limited, suggesting that in twenty-five years from the Court's decision, such programs should be unnecessary.[170] About a decade later, in *Fisher v. University of Texas at Austin (Fisher I)*, the Court did not overrule *Grutter*, but it narrowed the decision to provide less flexibility to universities in comprising their policies related to race in admissions decisions.[171] In *Fisher I*, Abigail Fisher was denied admission to the University of Texas, which had a separate admissions process that granted admission to the top 10% of students at any Texas high school.[172] This process left only 20% of the seats for Texas residents who were not in the top tenth percentile.[173] Fisher claimed that this practice violated the Equal Protection Clause of the

163. West-Faulcon, *supra* note 161, at 1086.

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

165. William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 30-31 (2003).

166. *Id.* at 31.

167. *See* Grutter v. Bollinger, 539 U.S 306, 328 (2006).

168. *Id.* at 334.

169. *Id.*

170. *Id.* at 343.

171. *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 314-15 (2013).

172. *Id.* at 304-05.

173. Brief for Respondents at 11, *Fisher I*, 570 U.S. 297 (2013) (No. 14-981).

Fourteenth Amendment, yet the Court upheld the program.[174] The Court held that race-based admissions programs must be narrowly tailored to achieve a university's compelling interest in diversity.[175] This holding required that universities must consider race-neutral alternatives before resorting to race-conscious admissions programs.[176] This holding weakened the holding in *Grutter*.[177] In *Fisher v. University of Texas at Austin (Fisher II)*, the Court reiterated that the university must prove that "'a nonracial' approach would not promote its interest in the educational benefits of diversity 'about as well and at tolerable administrative expense'".[178]

In the years immediately preceding *SFFA v. Harvard*, following the global recession, law school enrollment declined on a yearly basis.[179] During the 2010s, enrollment declined each year, except for a small increase in enrollment in 2018 and 2019.[180] The decline was attributed to factors such as high debt loads, diminishing employment opportunities, and competition from the technology sector.[181] As law school enrollment declined, African American students made up a slightly larger share of total law school enrollment.[182] Enrollment of African American students increased from 7.2% in 2011 to 7.8% in 2019.[183] Even though the aggregate total of African American law students has declined, African Americans comprise a greater share of the total number of law students because Asian American and white enrollment has declined tremendously.[184] For African American men, however, accessing law school is still challenging. In 2019, the number of African American women in law school exceeded the number of African American men in law school by 83%.[185] In addition, African American students currently comprise a larger share of students at law schools that ranked lower in the *U.S. News* rankings.[186] African American students and

174. *Fisher I*, 570 U.S. at 315.
175. *Id.* at 312-15.
176. *Id.*
177. *Id.*
178. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 377 (2016) (quoting *Fisher I*, 570 U.S. at 312).
179. Miranda Li et al., *Who's Going to Law School? Trends in Law School Enrollment Since the Great Recession*, 54 U.C. DAVIS L. REV. 613, 622 (2020).
180. *Id.*
181. *See id.* at 615.
182. *Id.* at 614.
183. *Id.* at 626.
184. *Id.* at 617.
185. *Id.* at 626.
186. *See id.* at 618.

Hispanic students make up 40% of students at law schools that are not fully ABA-accredited or are not ranked in the *U.S. News* rankings.[187] What follows from attendance at a lower ranked law school is less stable employment prospects, particularly at law firms and coveted government positions.[188]

HBLSs continue to significantly contribute to the education of African American lawyers. In 2011, Florida A&M had 249 African American students, Howard University had 366 African American students, North Carolina Central University had 293 African American students, Southern University had 351 African American students, Texas Southern University had 272 African American students, and the University of the District of Columbia had eighty-six African American students.[189] Historically, the six HBLSs, including the two that are now defunct, have produced a total of approximately 1,600 African American graduates per year.[190] Over 20% of African American law students nationwide in 2010 were enrolled at HBLSs.[191] In 2010, about 50% of all African American professional lawyers and 80% of African American judges attended an HBCU, either for law school or undergraduate studies.[192] When considering the top ten law schools in number of African American students, four out of the ten are HBLSs.[193]

However, today, HBLSs are among the least selective law schools in the country based on LSAT scores of entering students.[194] According to the 2018-2019 ABA-required disclosures, five of the six HBLSs are among the bottom ten law schools in terms of entering students' LSAT scores.[195] Table 1 shows the bottom ten law schools, as ranked by the lowest quartile of LSAT scores for entering students. Howard Law School is the only private HBLS and is also the only HBLS not in the bottom ten in terms of entering LSAT scores.[196]

---

187. *Id.*

188. *See id.* at 614.

189. Mawakana, *supra* note 102, at 684-85.

190. *Id.* at 685.

191. Ronald G. Fryer Jr. & Michael Greenstone, *The Changing Consequences of Attending Historically Black Colleges and Universities*, AM. ECON. J.: APPLIED ECON., Jan. 2010, at 116, 116.

192. *Id.*

193. *See* Mawakana, *supra* note 102, at 688.

194. Littlejohn & Rubinowitz, *supra* note 67, at 443.

195. *See 509 Required Disclosure: 2018 First Year Class*, AM. BAR ASS'N, https://www.abarequireddisclosures.org/Disclosure509.aspx (under "Compilation - All Schools Data," input 2018 for "Select Year"; select "First Year Class" from the dropdown menu for "Select Section"; click "Generate Report") (last visited Dec. 14, 2023).

196. *Id.*

Table 1. 10 Lowest Performing U.S. Law Schools based upon LSAT Score—based on twenty-fifth percentile score of accepted applicants who chose to attend, 2018-2019

School	LSAT 75%	LSAT 50%	LSAT 25%	Undergrad GPA 75%	Undergrad GPA 50%	Undergrad GPA 25%
1. WMU Thomas Cooley	147	142	139	3.33	3.02	2.64
2. Southern University – HBLS	146	144	142	3.13	2.83	2.55
3. Appalachian School of Law	147	144	143	3.32	3.05	2.64
4. Texas Southern – HBLS	147	144	143	3.37	3.03	2.73
5. North Carolina Central – HBLS	150	146	144	3.50	3.26	3.07
6. Concordia Law	151	148	144	3.52	3.05	2.80
7. Thomas Jefferson	149	147	145	3.09	2.80	2.53
8. Florida A&M – HBLS	149	146	145	3.36	3.09	2.79
9. Widener Commonwealth	148	147	145	3.47	3.13	2.83
10. University of the District of Columbia – HBLS	150	147	145	3.17	2.92	2.72

Source: 2018-2019 ABA 529 Disclosures

Table 2 shows that Howard Law School is also the only HBLS with substantial African American enrollment (88% in 2018-2019).[197] In 2018, five of the six HBLSs had African American enrollments of no more than 58%.[198]

197. *Id.*
198. *Id.*

Table 2. HBLS by Percentage of African American Enrollment, 2018-2019

School Name	Percentage of African American Enrollment
1. Howard University School of Law	88%
2. Southern University Law Center	58%
3. Texas Southern University	55%
4. North Carolina Central School of Law	53%
5. Florida A&M	44%
6. University of the District of Columbia	40%

Source: 2018-2019 ABA 529 Disclosures

Diminishing African American enrollment at HBLSs, stagnant African American enrollment at law schools overall, and the overrepresentation of African American law students at lower-ranked law schools reflect how obstacles such as the LSAT and the ABA's accreditation standards continue to impact African American law school admissions. Following *SFFA v. Harvard*, law schools and the legal sector must remain mindful of these historical challenges in crafting a path forward for prospective African American law students. Part II discusses developments in legal education that were contemplated prior to the end of affirmative action and that were designed to remove obstacles to legal education for African Americans.

II. African American Law School Enrollment: The Contemporary Environment

The current environment related to African American law school admissions is a moment of peril and promise. While African American law students have the most to lose from the Court's decision to overturn the use of race in higher education admissions, they have the most to gain from recent efforts that deemphasize the role that standardized tests play in the law school admissions process and in the legal education ecosystem—an ecosystem largely influenced by the *U.S. News* rankings. The following sections examine how contemporary legal education reforms affect African American law school admissions.

A. LSAT Reform

The ABA professes a commitment to diversity in Standard 211, which requires that law schools recruit and provide special assistance to minorities.[199] Nonetheless, the ABA's accreditation standards have historically negatively impacted African American law school admissions.[200] Until recently, law schools exclusively required applicants to submit LSAT scores because the ABA requires law schools to use a valid and reliable test for admissions purposes.[201]

In 2016, the University of Arizona College of Law started accepting the Graduate Record Examination (GRE) as another option for law students seeking admission.[202] This action challenged the notion that the LSAT was the only valid, reliable test that complied with ABA accreditation standards.[203] Since then, nearly half of ABA-accredited law schools began accepting the GRE as well as the LSAT.[204] A recent study revealed that law schools that accept the GRE have increased the diversity of their applicant pool and increased the percentage of African American applicants.[205] Despite growing acceptance of the GRE in law school admissions, legal scholars have concluded that expanding diversity in law schools requires reform of the use of the LSAT.[206]

The ABA is currently reconsidering whether to require law schools to consider LSAT scores, or scores from other standardized tests, in their

199. Shepherd, *supra* note 44, at 104.

200. The story of Howard Law in the 1920s, which ended its special admissions program and its evening program, significantly reducing the student body, is an example of how historically the ABA standards have led to a decrease of African Americans in law school. In order to gain accreditation, the student enrollment at Howard dropped from 135 to forty-four. *Id.* at 113. The ABA's effort to ensure that states required graduation from ABA accredited schools, its requirements related to financial stability, library minimums, and policies related to full time faculty all had a negative impact on the number of Black lawyers. *Id.* at 110. In fact, ABA's accreditation efforts and the decrease in bar passage rates led to there being fewer Black lawyers in the 1960s than there had been before law schools desegregated. *Id.* at 113.

201. *See* Jacey Fortin, *Do Law Schools Need the LSAT? Here's How to Understand the Debate.*, N.Y. TIMES (Feb. 17, 2023), https://www.nytimes.com/2023/02/17/us/law-schools-lsat-requirement.html.

202. *See* Sara Randazzo, *LSAT's Grip on Law-School Admissions Loosens*, WALL ST. J., (Feb. 21, 2016, 10:45 PM), https://www.wsj.com/articles/lsats-grip-on-law-school-admissions-loosens-1455964203.

203. *See id.*

204. Fortin, *supra* note 201.

205. Kelly Ochs Rosinger et al., *Exploring the Impact of GRE-Accepting Admissions on Law School Diversity and Selectivity*, 46 REV. HIGH. EDUC. 109, 115 (2022).

206. *See, e.g.*, Kidder, *Rise of the Testocracy*, *supra* note 53, at 171.

admissions decisions. In 2022, the ABA Council of the Section of Legal Education and Admissions to the Bar voted to lift the requirement of a standardized test in law school admissions.[207] However, in early 2023, the ABA's House of Delegates voted to oppose the Council's proposal.[208] On February 17, 2023, the Council voted again to lift the requirement, which triggered another vote by the delegates in August of 2023.[209] Per ABA rules, the Council will be empowered to lift the standardized test requirement without the consent of the delegates following August's second delegate vote.[210]

Reform to the use of LSAT scores in law school admissions decisions should be welcomed by proponents for diversity and access in law school admissions, as racial disparities in LSAT scores lead to racial disparities in admissions decisions.[211] We know that African American students who take the LSAT score lower on average than white and Asian students.[212] LSAT scores of African American students are on average ten points (141) lower than the LSAT scores of white students (151).[213] The mean score for African American test takers is below the mean score of any ABA-accredited law school.[214]

The ABA's accreditation actions regarding the LSAT are clearly decreasing African American enrollment in law schools. Between 2002 and 2004, each school that was inspected by the ABA Accreditation Committee for having a twenty-fifth percentile average LSAT score of below 151 raised their scores during the inspection period.[215] Ninety-five percent of these schools experienced a decline in enrollment of African American students during this same time period.[216] The average decline in African American

207. Fortin, *supra* note 201.

208. *Id.*

209. *Id.*

210. *Id.*

211. *See, e.g.*, Shepherd, *supra* note 44, at 120-21.

212. LAURA A. LAUTH & ANDREA THORNTON SWEENEY, L. SCH. ADMISSION COUNCIL, TECH. REP. NO. TR 22-01, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL AND ETHNIC BREAKDOWNS: 2011-2012 THROUGH 2017-2018 TESTING YEARS 3 (2d ed. 2023), https://www.lsac.org/sites/default/files/research/tr-22-01_june-2023-edition_accessible.pdf.

213. Shepherd, *supra* note 44, at 120.

214. *See* John Nussbaumer, *The Disturbing Correlation Between ABA Accreditation Review and Declining African-American Law School Enrollment*, 80 ST. JOHN'S L. REV. 991, 993 (2006).

215. *Id.* at 992-93.

216. Wright, *supra* note 48, at 13.

law school enrollment at these schools was 34%.[217] During this same period, however, the number of African American law school applicants increased by 3% nationwide.[218] Schools that experienced the highest jump (five points or more) in their twenty-fifth percentile score experienced an average decrease of thirty-five African American students.[219] The inverse was true of schools that had smaller increases in average LSAT score.[220] In 2006, the National Bar Association (NBA), the leading professional association for African American lawyers, issued a resolution that stated that "some law schools have been required by the ABA to raise their minimum LSAT requirements, and have seen their African-American enrollment decrease substantially as a result."[221]

Another manifestation of the ABA's accreditation review mechanism, one that has decreased enrollment of African American law students, is the increased use of LSAT cut-off scores in law school admissions. Action letters from the ABA to law schools at risk of sanction often cite low LSAT scores of some of the students admitted.[222] This practice persists even though the Law School Admission Council ("LSAC") "strongly discourage[s]" the use of cut-off scores, due to the disproportionate impact that cut-off scores have on minority applicants.[223]

Nonetheless, scholars suggest that, informally and practically, the ABA has a cut-off score of 141.[224] If schools have more than a few students with a score of 141, those schools risk accreditation scrutiny from the ABA.[225] The average score for African American students on the LSAT is 142.[226] A score of 141 does not fall within the twenty-fifth to seventy-fifth percentile range of any accredited law school. As a result, there are few spots for students

217. Three of these twenty schools were historically Black law schools: UDC Law, Southern Law, and Texas Southern Law. Nussbaumer, *supra* note 214, at 1004.

218. *Id.* at 994.

219. *Id.*

220. *Id.*

221. *Id.* at 1001.

222. *See* Shepherd, *supra* note 44, at 114.

223. *Cautionary Policies Concerning LSAT Scores and Related Services*, L. SCH. ADMISSION COUNCIL (July 2014), https://www.lsac.org/about/lsac-policies/cautionary-policies-concerning-lsat-scores-and-related-services.

224. *See, e.g.*, John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN'S L. REV. 167, 175-76 (2006).

225. Nussbaumer, *supra* note 214, at 998.

226. LAUTH & SWEENEY, *supra* note 212, at 22; *see also* Jenna Greene, *Now, Why Exactly Do We Need the LSAT?*, REUTERS (Sept. 13, 2022, 8:43 AM), https://www.reuters.com/legal/legalindustry/now-why-exactly-do-we-need-lsat-2022-09-13/.

with a score of 141 or below in law schools that would consider such applicants.[227]

The LSAT may also lead to a chilling effect, discouraging African American students from applying because of its reputation as a challenging test that is fraught with pressure. African American students may underperform due to a perception that the test is biased against them.[228] V.R. Randall, a professor at the University of Dayton School of Law, suggests that overuse of the LSAT leads to the denial of half of the African American students that would be admitted to law schools if undergraduate GPA was the primary criteria for admission.[229]

Legal scholars have long identified the ways that systemic racism and educational inequities impact LSAT scores. These scholars recognize that access to financial, cultural, and social capital heavily influence success on the LSAT.[230] African American law students with two U.S.-born African American parents have a 25.9% poverty rate as opposed to a 7.5% poverty rate for white students.[231] Research has shown that African American law students are less likely to have access to high quality pre-law advisement and mentoring.[232] Other scholars discuss how entrenched racial inequality in access to educational opportunities is reinforced in standardized testing.[233] William Kidder, an expert in law school admissions, examined the LSAT performance of equally achieving students from selective colleges and found that racial disparities in LSAT performance were as significant or more significant than differences in undergraduate GPAs.[234] Even among students with identical GPAs, African American students tended to have lower scores than white students.[235]

---

227. Shepherd, *supra* note 44, at 115.

228. *See* LaTasha Hill, *Less Talk, More Action: How Law Schools Can Counteract Racial Bias of LSAT Scores in the Admissions Process*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 313, 324 (2019).

229. *See* Vernellia R. Randall, *The Misuse of the LSAT: Discrimination Against Blacks and Other Minorities in Law School Admissions*, 80 ST. JOHN'S L. REV. 107, 119 (2006).

230. *See* Kevin Woodson, *Entrenched Racial Hierarchy: Educational Inequality from the Cradle to the LSAT*, 47 MITCHELL HAMLINE L. REV. 224, 229 (2021).

231. Kevin D. Brown & Kenneth G. Dau-Schmidt, *Racial and Ethnic Ancestry of the Nation's Black Law Students: An Analysis of Data from the LSSSE Survey*, 22 BERKELEY J. AFR.-AM. L. & POL'Y 1, 21 (2022).

232. Woodson, *supra* note 230, at 248.

233. *Id.* at 245.

234. Kidder, *Does the LSAT Mirror or Magnify*, *supra* note 57, at 1094.

235. *Id.* at 1080.

Kidder's study concludes that the disparity in LSAT performance was due not only to differences in educational background but also to factors like test-taking skills and familiarity with the test format.[236] Other legal scholars have contested the predictive validity of the LSAT[237] in law school and the legal profession.[238] These empirical studies have shown that LSAT scores are not a reliable predictor of law school success.[239] This is particularly true for African American students who have demonstrated that they can perform as well as or better than their white peers despite lower LSAT scores.[240] V.R. Randall, in her systematic critique of the LSAT, submits that the LSAT is only a moderate at best predictor of first-year grades in law school because less than half of the factors that predict first-year performance are related to the LSAT.[241]

At Randall's home law school, the correlation studies showed that students with an LSAT score as low as 135 were predicted to perform above the minimally required GPA level of 2.0 in the first year of law school.[242] She concludes by stating:

> Thus, where there is evidence of: (1) an admission practice that presumptively denies admission to a disproportionate number of

---

236. *Id.* at 1081.

237. The Law School Admission Council, which designs the LSAT, explains limits of using the LSAT as the dominant factor in law school admissions in an amicus brief before the Supreme Court.

> The LSAT, for instance, was never intended to serve as a measure of 'merit.' . . . Though an important measure of cognitive abilities, the LSAT 'measures only a limited set of skills.' . . . It does not, for instance, assess writing ability, effectiveness of advocacy, negotiating ability, leadership potential, or a number of other skills and attributes integrally related to the success in law school and the legal profession. Nor does the LSAT evaluate important personal characteristics — such as motivation, perseverance, personal integrity, courage, social skills, and passion — that play a crucial role in determining success in law school and in a legal career.

Brief for Law School Admissions Council as Amicus Curiae Supporting Respondents at 20, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

238. "Repeated studies have found that the median correlation between LSAT scores and first-year grades is about 40 percent, with a range from .01 to .62; for GPA, the median is .25 with ranges from .02 to .49. Combining the two raises median correlations to about .49." WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 73 (2016).

239. *See id.*

240. *See id.* 89-90.

241. Randall, *supra* note 229, at 124.

242. *Id.* at 126.

> Blacks; (2) LSAC correlation studies predicting that the students who are presumptively denied are capable of performing successfully; and (3) a historical record that establishes that students with LSAT scores that are below the presumptive deny can perform successfully, a policy and practice that denies admission to a disproportionate number of Black applicants based primarily on the LSAT without serious consideration of other relevant factors cannot be justified by claims of academic performance.[243]

Other scholars note that the LSAT does not measure many skills that are important to success in law school and the legal profession such as written communication, the ability to work collaboratively, and the ability to show empathy.[244]

B. Bar Examination Reform

Just as the LSAT is a barrier for prospective African American law students, the bar examination is a barrier for African American law school graduates. African American law school graduates are less likely to pass the bar examination than white or Asian American law school graduates.[245] During the 2020 bar examination season, the first-time passage rate was 66% for African American law school graduates, 76% for Hispanic graduates, 78% for Native American graduates, 80% for Asian American graduates, and 88% for white graduates.[246]

More troubling, ABA Standard 301 affects admissions decisions for potential African American law students because admissions practices are influenced by studies that project a positive correlation between LSAT scores and first-time bar passage rates.[247] Schools that are concerned about compliance with Standard 301 are less likely to admit prospective African American law students.[248] African American law students face this admissions penalty, despite the fact that scholars challenge the ability of the LSAT to predict bar examination passage since undergraduate GPA is more

243. *Id.* at 131-32.

244. *See* Hill, *supra* note 228, at 327.

245. Mary Szto, *Barring Diversity? The American Bar Exam as Initiation Rite and Its Eugenics Origin*, CONN. PUB. INT. L.J., Spring-Summer 2022, at 38, 38.

246. *Id.*

247. STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCHS. 2022-2023, at Standard 301 (AM. BAR ASS'N, 2022).

248. Shepherd, *supra* note 44, at 122.

closely tied to bar examination success than the LSAT.[249] For these reasons, increasing bar passage rates by lowering the passing score[250] can benefit African American law school enrollment in a similar manner as proposed LSAT reforms.

Proponents of a more equitable pipeline into the legal profession should laud the numerous states that are considering or implementing reforms that will make bar passage more attainable; many states referenced the need to address the underrepresentation of minorities in the legal profession as a rationale for considering such reforms.[251] In 2020, California lowered its passing score from 1,440 to 1,390, which led to an increase in African American passage rates by 23.9%.[252] A previous study predicted a similar result; it determined that if California decreased its cut off score to 1300 in 2009, there would have been 1,154 more African American lawyers in the state, an increase of 15%.[253]

Rhode Island recently lowered its passing score and Washington, Oregon, North Carolina, and Hawaii lowered passing scores temporarily at the beginning of the COVID-19 pandemic.[254] Officials in Texas, Arizona, Michigan, New York, Pennsylvania, Connecticut, North Carolina, and Utah are contemplating lowering their passing scores.[255] Additionally, the National Conference of Bar Examiners ("NCBE") is preparing for the release of the next generation of the bar examination, which reduces the focus on memorization.[256]

---

249. Jane Yakowitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3, 22 (2010).

250. *See* Shepherd, *supra* note 44, at 127 (noting that states frequently change bar passage rates, and the fact that several states are lowering the mandated passing score and the passage rates in differing states vary substantially as evidence of the arbitrariness of bar passage scores).

251. Sam Skolnik, *Bar Exams May Soon Be Easier to Pass, as States Eye Changes*, BLOOMBERG L. (Mar. 29, 2021, 5:01 AM), https://news.bloomberglaw.com/business-and-practice/bar-exams-may-soon-be-easier-to-pass-as-states-eye-changes.

252. *Id.*

253. Mitchel Winick et al., *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards* 21 (AccessLex Inst. Research Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3707812.

254. Skolnik, *supra* note 251.

255. *Id.*

256. Karen Sloan, *New Bar Exam Is on Track for 2026 Debut, Licensing Officials Say*, REUTERS (Jan. 7, 2022, 2:28 PM), https://www.reuters.com/legal/legalindustry/new-bar-exam-is-track-2026-debut-licensing-officials-say-2022-01-07/.

The proposed reforms to the bar examination follow decades of critiques by legal scholars who have called for changes to bar examination grading criteria and for an enhanced focus on diversity and inclusion in bar examination preparation, given that the bar examination—much like the LSAT—reinforces existing social and wealth inequities.[257] For example, one study found that students who had more debt, had not obtained full-time employment after law school, and had attended less selective law schools were more likely to fail the bar examination.[258] African American law school graduates are less likely to have access to bar preparation courses and resources, partly because of financial concerns.[259] This partially explains why the bar examination presents specific challenges for first-generation and low income law school graduates, as both groups are disproportionately African American.[260] Racial marginalization in the law school environment, which leads to academic isolation, can also exacerbate racial disparities in bar examination performance.[261]

The Multistate Bar Examination ("MBE"), used in the majority of states, has long been criticized for cultural bias and incongruity between the skills needed for law practice and the skills tested on the examination.[262] These critics believe that the incongruity evidences that the bar examination is an ongoing mechanism of social exclusion and control rather than a reflection

257. Yakowitz, *supra* note 249, at 24.

258. *See id.* at 14, 28.

259. *See id.* at 24.

260. Szto, *supra* note 245, at 42.

261. These effects are often more pronounced for Black students in predominately white law schools. *See* Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 508 (2019). Professor Taylor suggests that marginalization is pervasive for aspiring Black lawyers both during the admissions process and inside of the classroom. *See id.* at 491. This marginalization includes curricula that can be alienating to minority students, as issues of race are either unspoken or deemed irrelevant. *See id.* at 509-10. Taylor's analysis of responses to the Law School Survey of Student Engagement leads to the conclusion that "[r]acial unevenness in legal education is rooted in the centrality of White racial and cultural norms." *See id.* at 509. Taylor suggests that this racial unevenness in the law school environment leads to lower grades and outcomes for Black students. *Id.* at 510. Taylor relies on long term study of law students at two law schools that revealed that being a student from underrepresented minority group was correlated with lower law school GPA even after implementing controls for LSAT performance and undergraduate GPA. *Id.* Taylor concludes that the disparity in outcomes for students of color is a reflection of the negative impacts of the law school environment, as opposed to being driven by the characteristics of the students. *See id.* at 511.

262. *See* William C. Kidder, *The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification*, 29 LAW & SOC. INQUIRY 547, 564 (2004).

of competence or merit.[263] The racial stratification that is connected to the bar examination and entry to the legal profession has a critical impact on matters such as access to legal counsel and the provision of social justice related legal services, particularly in underserved communities.[264] This is why some legal scholars suggest that the proposed bar examination reforms do not go far enough. These scholars advocate for alternative licensing methods such as evaluating a student's clinical experiences in law school or, like states that allow for diploma privilege, eliminating the use of the bar examination completely.[265]

C. Law Schools Withdraw from the U.S. News & World Report Rankings

The *U.S. News & World Report*'s law school rankings create the incentives that manifest the law school admissions testocracy. One of the primary difficulties in increasing diversity in law schools is the challenge presented by attempting to improve or maintain a *U.S. News* ranking position while increasing or maintaining diversity.[266] One law school admissions director stated, "The vast majority of admissions decisions—the vast majority at every school I know—are really driven by the numbers now. So that's a big impact of [*U.S. News*]."[267] The median LSAT score of an admitted class is a prominent factor in the methodology of the rankings, forcing administrators to choose between higher median LSAT scores and diversity in the student body.[268] Strategic enrollment management practices are on the rise in American universities, putting intense pressure on administrators to improve metrics and ranking positions.[269]

---

263. *See* Szto, *supra* note 245, at 57.
264. Kidder, *supra* note 262, at 582.
265. Szto, *supra* note 245, at 60.
266. Rothstein, *supra* note 52, at 258.
267. ESPELAND & SAUDER, *supra* note 238, at 74.
268. *See id.*
269. Strategic enrollment management describes the process of attaining the desired "enrollment profile" of a higher education institution, locating the "strategic purposes and mission of the institution, and then orchestrating the marketing, recruitment, admissions, pricing and aid, retention program, academic support services and program development" to meet said objectives. David H. Kalsbeek & Donald Hossler, *Enrollment Management: A Market-Centered Perspective*, COLL. & UNIV., Winter 2009, at 2, 4. The major goals of strategic enrollment management include increasing selectivity, improving the market position of the school, ensuring racial and ethnic diversity, improving retention and graduation rates, and optimizing the net revenue of the school. *Id.* at 9-10. Often the goals of strategic enrollment management, such as access and ranking position, conflict with each other. *See id.* In many ways, strategic enrollment management tends to reveal the true priorities of an institution.

Schools with larger numbers of African American law students are often ranked lower in the *U.S. News* rankings. Enrollment data from the 2020 academic year revealed that there were eight law schools with greater than 20% African American enrollment, and seven of them were either unranked or in the lowest-ranked tier.[270] Of the twenty-seven schools with greater than 10% African American enrollment, only four were ranked in the top fifty—two of which ranked forty-eight and fifty—and only six were ranked in the top 100.[271]

Persistent criticism regarding the impact of *U.S. News* rankings on priorities, like access to need-based financial aid and post-graduate public interest employment, led Heather Gerken, Dean of Yale Law School, to announce that Yale Law would withdraw from the rankings.[272] At the time of this article submission, forty-two other law schools have announced that they will no longer cooperate with the rankings, including twelve of the schools ranked among the top fourteen schools in the ranking.[273] This represents over 20% of all ABA-accredited law schools. Given that "[r]ankings have become part of the core infrastructure of law school status,"[274] withdrawal from the rankings has the potential to reduce, in part, the dominance of quantitative measures like the LSAT in law school admissions decisions. Because increasing minority enrollment necessarily involves using factors other than GPA and LSAT scores to determine admissions outcomes, withdrawal from cooperation with the rankings may be beneficial for African American law school enrollment.[275]

Rankings of U.S. universities started over a century ago with James Cattell's "American Men of Science" in 1910, which ranked schools based on the number of eminent scientists they produced.[276] In 1983, *U.S. News & World Report* published its first issue ranking colleges, which was later

270. *See* Rory Bahadur, *Law School Rankings and the Impossibility of Anti-Racism*, 53 ST. MARY'S L.J. 991, 1050 (2022).

271. *Id.*

272. Anemona Hartocollis, *Yale and Harvard Law Schools Withdraw from the U.S. News Rankings*, N.Y. TIMES (Nov. 16, 2022), https://www.nytimes.com/2022/11/16/us/yale-law-school-us-news-rankings.html.

273. *Pitt Law Becomes 42nd Law School to Pull Out of US News Rankings*, AM. LAW. (Feb. 13, 2023, 8:39 PM), https://www.law.com/2023/02/13/pitt-law-becomes-42nd-law-school-to-pull-out-of-us-news-rankings/.

274. ESPELAND & SAUDER, *supra* note 238, at 68.

275. *See id.* at 89-94 (discussing the connection between diversity in admissions and standardized test scores).

276. *Id.* at 9.

acquired by Mort Zuckerman in 1984 and became a yearly publication.[277] In 1990, the *U.S. News & World Report* started ranking graduate schools, including law schools, which became the most popular and controversial of the rankings.[278] The rankings were framed as a way to provide useful information about a specialized product market, legal education, to consumers who were facing the daunting prospect of paying upwards of $75,000 for a legal education.[279]

The *U.S. News* rankings were initially derived from a simple survey sent to deans asking them to name the ten best American law schools, but they later evolved into more sophisticated rankings that combined survey data on reputation with statistical measures.[280] The man behind this development was Robert Morse, who has been the director of data research at *U.S. News & World Report* since 1976 and who now oversees the production of the undergraduate and graduate school rankings.[281] There is precedent for the recent backlash against the rankings. For example, the *U.S. News & World Report* stopped ranking dental schools after an overwhelming majority of dental schools refused to participate.[282]

Admission offices are responsible for three of the critical metrics that drive the determinations for *U.S. News* rankings: (1) median GPA, (2) median LSAT score, and (3) rate of acceptance or the yield of accepted students.[283] Admissions directors are under constant pressure to improve these metrics, and accordingly increase the school's ranking.[284] Many law schools must also balance market concerns, such as anticipated tuition revenue, with constructing the most selective class as possible in terms of entering LSAT scores and GPAs.[285] The impact of the rankings pervades admissions practices because admissions statistics are viewed to be within administrative control, as opposed to more amorphous factors such as academic reputation.[286]

Historically, *U.S. News* rankings have been calculated using four indicators: (1) selectivity, (2) reputation, (3) placement success, and (4)

277. *Id.* at 10.
278. *Id.*
279. *Id.* at 11.
280. *Id.* at 10.
281. *Id.*
282. Bahadur, *supra* note 270, at 1054.
283. ESPELAND & SAUDER, *supra* note 238, at 60.
284. *Id.* at 62.
285. *Id.* at 63-64.
286. *Id.* at 67.

faculty resources.[287] Selectivity, which determines 25% of the ranking, is calculated using LSAT scores, GPAs, and acceptance rate of students.[288] Reputation, which accounts for 40% of the score, is based on surveys of academics and practitioners.[289] Placement success, accounting for 20% of the ranking, is based on employment rates of graduates and their bar examination pass rates.[290] Faculty resources, which make up the remaining 15% of the score, are determined by student-faculty ratio, spending per student, financial aid, and library size.[291] These scores are then standardized, weighted, and rescaled, with the top school receiving a score of 100. Unlike other professional fields, *U.S. News & World Report* ranks every ABA-accredited law school that has not opted out of the rankings.[292]

Many researchers have pointed out the flaws of the ranking methodology. One study found that LSAT scores and academic reputation account for 90% of the differences in ranks among schools.[293] Others have criticized the rankings for excluding information about faculty scholarship, having biases against large public schools, and lacking empirical support for the weights assigned to various components.[294] Another researcher writes that the rankings assess wealth and prestige as opposed to educational quality, and as a result, the rankings advance inequity over diversity.[295] She goes on to suggest that the ranking system creates competition to achieve the highest rankings, which exacerbates existing inequities in legal education.[296]

Many law school administrators echo the concerns of scholars who critique the methodology of the *U.S. News* rankings. Dean Gerken's withdrawal statement speaks to the fact that academic scores "don't always capture the full measure of an applicant. This heavily weighted metric imposes tremendous pressure on schools to overlook promising students, especially those who cannot afford expensive test preparation courses."[297] In

287. *Id.* at 14.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* at 14-15.
292. *Id.* at 15.
293. *Id.* at 16.
294. *Id.*
295. *See* Bahadur, *supra* note 270, at 1024-33 (connecting the ideologies of a meritocratic society to confirmation bias and entrenched inequitable outcomes).
296. *Id.* at 1030.
297. Press Release, Heather K. Gerken, Dean, Yale L. Sch., Dean Gerken: Why Yale Law School Is Leaving the U.S. News & World Report Rankings (Nov. 16, 2022), https://

their withdrawal statements from the *U.S. News* rankings, other law school deans noted how the rankings negatively impact the admission of diverse classes with some suggesting that the rankings methodology "fails to capture the full merit of candidates"[298] and "rewards schools that place undue weight on standardized test scores in the admissions process by treating small point differences as if they reflect meaningful distinctions in academic potential."[299] Others claim that "crucial aspects of the ranking criteria actively disadvantage schools . . . particularly those — like us — who value diversity as a central and indispensable component of our educational mission."[300] David Faigman, dean of the University of California College of Law San Francisco, describes the ranking methodology as a diversity penalty because by placing

> too much weight to standardized test scores (LSAT), the . . . methodology reinforces structural inequalities. Because entering metrics correlate with first-time bar pass rates, the rankings method doubly penalizes law schools committed to creating a bridge to practice for traditionally disenfranchised populations. It does not account for the important work of schools that admit students with lower scores and teach them the skills needed to overcome that disadvantage and achieve success as attorneys.[301]

Justin Schwartz, interim executive vice president and provost of Penn State University notes that the *U.S. News* rankings thwart equity and inclusion efforts "by deploying a methodology that functions to exclude minoritized

---

law.yale.edu/yls-today/news/dean-gerken-why-yale-law-school-leaving-us-news-world-report-rankings.

298. Press Release, Tamara F. Lawson, Dean & Professor, Univ. of Washington Sch. of L., Why UW Law Will Not Participate in U.S. News Rankings (Dec. 1, 2022), https://www.law.uw.edu/news-events/news/2022/uw-law-decision-on-rankings/.

299. Press Release, Kerry Abrams, Dean, Duke Univ. Sch. of L., Message from Dean Abrams Regarding Withdrawal from U.S. News Rankings (Nov. 21, 2022), https://law.duke.edu/news/message-dean-abrams-regarding-withdrawal-us-news-rankings/.

300. Press Release, Anthony. E. Varona, Dean, Seattle Univ. Sch. of L., Seattle U Law Suspends Participation in U.S. News Law School Rankings (Jan. 24, 2023), https://law.seattleu.edu/about/newscenter/all-current-stories/seattle-u-law-suspends-participation-in-us-news-law-school-rankings.html.

301. Press Release, David L. Faigman, Chancellor & Dean, Univ. of California Coll. of the L. San Francisco, UC Law SF Will No Longer Provide Institutional Data to US News for Law School Rankings (Jan. 6, 2023), https://www.uchastings.edu/2023/01/06/uc-law-sf-will-opt-out-of-u-s-news-participation/.

communities from gaining access to and participating in legal education and the profession."[302]

Colin Diver, the former dean of the University of Pennsylvania Carey Law School, explains that "the rankings have encouraged admissions offices to give more weight to test scores . . . and to greatly increase merit (rather than need-based) financial aid—practices that favor wealthier applicants, often at the expense of their lower-income peers.[303]

Haider Ala Hamoudi, interim dean of the University of Pittsburgh School of Law, exclaims that the rankings "place a heavy emphasis on admissions criteria, including standardized tests, in a manner that is not welcoming to students from disadvantaged communities who have been systematically and historically marginalized in our legal system."[304] Dean Kevin Johnson, of the University of California, Davis, notes that "in a time when the nation combats systemic racism and law schools have attempted to embrace antiracist practices, all institutions should challenge structures that reproduce racial hierarchy in legal education and the legal profession."[305] Fordham University School of Law dean, Matthew Diller, states that "we all need to collectively lower the stakes around the *U.S. News* ranking. If we can achieve this goal, prospective students will make better choices and law schools will better serve the profession."[306]

The aforementioned efforts to reduce the influence of standardized tests and rankings on law school admissions decisions came at a propitious time, given that the Court's decision in *SFFA v. Harvard* will likely lead to a sharp decrease in African American enrollment in law schools and in higher

302. Press Release, Justin Schwartz, Interim Exec. Vice President & Provost, Pennsylvania State Univ., Interim Provost Justin Schwartz Statement on U.S. News Law School Rankings (Feb. 3, 2023), https://www.psu.edu/news/administration/story/interim-provost-justin-schwartz-statement-us-news-law-school-rankings/.

303. Colin Diver, *Are the U.S. News College Rankings Finally Going to Die?*, N.Y. TIMES (Nov. 22, 2022), https://www.nytimes.com/2022/11/22/opinion/us-news-world-report-rankings.html.

304. Susan Jones, *Pitt Law School Joins Others Leaving U.S. News Ranking*, UNIV. TIMES (Feb. 17, 2023), https://www.utimes.pitt.edu/news/pitt-law-school-joins.

305. Kevin Johnson, *UC Davis Law Withdraws from U.S. News Rankings*, DAVIS VANGUARD (Nov. 29, 2022), https://www.davisvanguard.org/uc-davis-law-withdraws-from-u-s-news-rankings/.

306. Press Release, Matthew Diller, Dean & Professor, Fordham L. Sch., U.S. News & World Report *Participation: A Message from Dean Matthew Diller* (Jan. 13, 2023), https://news.law.fordham.edu/blog/2023/01/13/us-news-and-world-report-participation-a-message-from-dean-matthew-diller/.

education generally. Part III discusses the Court's decision and outlines the new legal standard for admissions programs.

III. SFFA v. Harvard *and the Attack on Race-Conscious Admissions*

In *SFFA v. Harvard*, SFFA successfully asserted that the *Grutter* precedent was wrong and that Harvard's and UNC's admission policies failed strict scrutiny.[307] SFFA contended that Harvard's and UNC's practices failed strict scrutiny because they penalized Asian American applicants, engaged in racial balancing, and impermissibly overemphasized race in the process.[308] SFFA also argued that Harvard and UNC had workable race-neutral alternatives to achieve its diversity interests.[309] Before discussing the majority and dissenting opinions, the following section outlines the admissions programs at Harvard and UNC prior to the Court's decision.

A. Harvard's Admissions Program

Harvard's respondent brief in *SFFA v. Harvard* outlined its admissions process, which was far less testocratic than its critics prefer. Harvard conducted a rigorous review process based on a comprehensive assessment of an applicant's prospective contributions to the class.[310] Superior academic achievement was a necessary condition for admission, yet it was only one of many factors considered.[311] This is because a process based upon superior academic achievement would accept more students than Harvard has slots for. There were 6,100 students with a perfect math or verbal SAT score and 8,000 with reporting a 4.0 or above in terms of high school GPA among the 35,000 applicants fighting for 1,600 slots in the class of 2019.[312] As a result, test scores and grades alone could not be used to determine admissions.[313] Testing aptitude was not the only thing that Harvard was looking for.

Harvard initially evaluated an applicant based on four categories: academic, extracurricular, athletic, and personal information.[314] Applicants

307. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 214 (2023).

308. *Id.* at 218.

309. Brief for Petitioner at 80-86, *Students for Fair Admissions, Inc.*, 600 U.S. 181 (Nos. 20-1199, 21-707).

310. *See* Brief for Respondent at 6-10, *Students for Fair Admissions, Inc.*, 600 U.S. 181 (No. 20-1199).

311. *Id.* at 6.

312. *Id.*

313. *Id.*

314. *Id.* at 7.

were not accepted or rejected based on these numerical evaluations, rather, they served as an entry point for the Admissions Committee's eventual consideration of the applicant.[315] In addition to grades and test results, the academic rating considered recommendation letters, academic awards, previously submitted academic work, the caliber of the applicant's high school, and other indicators of intellectual accomplishment.[316] Harvard also considered subjective elements, such as an applicant whose letter describes them as the most gifted writer taught by the teacher even if their test results did not appear to be particularly impressive.[317] Harvard did this in recognition of the possibility that test results and grades may not accurately reflect an applicant's potential academic contributions.[318]

The applicant's potential to contribute outside of the classroom was evaluated using the extracurricular rating.[319] A high grade would have signified national or professional level of achievement.[320] The applicant's prospective athletic contributions were summed up in the athletic rating.[321] The personal rating indicated an initial "'assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities,' including 'integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit.'"[322]

In addition to a preliminary overall rating that represented the reader's initial impression, the first reader also awarded a school rating, indicating the quality of the recommendations made by teachers and guidance counselors.[323] Readers could have given extra points for characteristics not readily quantifiable when determining the overall grade, such as unusual intellectual prowess, exemplary character traits, and exceptional artistic or athletic skills.[324] The ability to increase the racial, economic, or geographic diversity of the class is also considered in this review.[325] Potential students classified as ALDCs (athletes, legacies, relatives of donors, and children of faculty and staff) can also receive extra points from readers.[326]

---

315. *Id.*
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.* at 8.
320. *Id.*
321. *Id.*
322. *Id.* (quoting Pet. App. 125).
323. *Id.*
324. *Id.* at 8-9.
325. *Id.*
326. *Id.* at 9.

Over several weeks, the forty-person Admissions Committee met to discuss admissions decisions.[327] Preliminary assessments of applicants became less relevant during these sessions as the Committee analyzed prospects and made judgments based on discussion rather than ratings.[328] Any admissions officer could bring up a particular applicant for debate, and the entire forty-person Committee would have discussed and voted on candidates in an open forum.[329] The Dean and Director of Admissions have access to summaries of the prospectively admitted class. These summaries include information about the prospective student's region, immigration status, socioeconomic status, legacy status, athlete status, and race.[330] The Admissions Committee occasionally reviewed information from the one-page summaries, but Harvard asserted that they are never used to achieve racial quotas or balance.[331]

Harvard further asserted that the one-page summaries were used to give extra attention to applicants from a racial group to avoid significant reductions in enrollment of that group.[332] Information regarding the racial composition of a class that is being considered for admission helps determine how many students Harvard could accept without overadmitting since racial groups have differing admissions yields. The Committee decreased the admitted class by reviewing applicants on a prospective cut list, which identified various aspects of each application, including race, if the predicted yield would be greater than the 1,600 available slots after the Committee has made initial judgments.[333]

B. UNC's Admissions Process

Robert Blouin, the Executive Vice Chancellor at the University of North Carolina, Chapel Hill, outlined UNC's admissions decisions process in a declaration submitted to the District Court.[334] At UNC Chapel Hill, each entering freshman class was limited to admitting 18% of non-North Carolina

327. *Id.*
328. *See id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.* at 10.
333. *Id.*
334. Declaration of Robert Blouin, Joint App. Vol. 1 at JA313, JA320, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14-CV-954 (M.D.N.C. Sept. 29, 2018), https://www.supremecourt.gov/DocketPDF/20/20-1199/222330/20220502150330963_21-707%20JA%20Vol%201.pdf.

residents.[335] The Board of Governors has the authority to lower UNC's operational budget for the next year if it goes above this cap.[336] Approximately twice as many out-of-state applicants as in-state applicants apply each year.[337] At least one of the thirty to forty application readers who make up the admissions committee examined each application for admission.[338] Readers include both full-time and temporary personnel of the admissions office.[339]

Application readers assessed applications and recommended admissions choices.[340] All applications, except for those from students abroad, were distributed to the readers at random.[341] For reviewing applications for admission, the Reading Document offered application readers instructions.[342] More than forty factors, categorized into eight major areas, were used by readers to assess each candidate, including academic achievement, academic program, standardized test scores, extracurricular activity, exceptional skills, essays, background, and personal qualities.[343] Five factors—"academic program, academic performance, extracurricular activity, essays, and personal qualities"—are rated by readers.[344] The reader provided a provisional admissions judgment after thoroughly reviewing the application and rating the application based on these five factors.[345]

To make a provisional admissions judgment, the reader considered the ratings in the five areas as well as the application as a whole, including the applicant's strengths and shortcomings in relation to the candidate pool at the University.[346] There were no minimum rating requirements or entrance

335. *Policy on Non-Resident Undergraduate Enrollment*, UNC POL'Y MANUAL & CODE, ch. 700.1.3, § II(A) (Jan. 19, 2023), https://www.northcarolina.edu/apps/policy/doc.php?type=pdf&id=789.

336. *Id.* ch. 700.1.3, § III.

337. *Students for Fair Admission, Inc.*, 600 U.S. at 219 n.6.

338. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment at 10, Students for Fair Admissions, Inc. v. Univ. of N.C., No. 1:14-CV-954 (M.D.N.C. Sept. 30, 2019), 2019 WL 294284.

339. Joint Statement of Undisputed Facts, Joint App. Vol. 1 at JA343, JA349, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-CV-954), https://www.supremecourt.gov/DocketPDF/20/20-1199/222330/20220502150330963_21-707%20JA%20Vol%201.pdf.

340. *Id.*

341. *Id.*

342. *Id.* at JA349-50.

343. *Id.* at JA350.

344. *Id.*

345. *Id.*

346. *Id.*

criteria.[347] The admissions decision was tentatively final after the first read so long as an application did not require a second read.[348] Senior admissions staff members, also known as Tier 2 readers, oversaw second reads.[349]

Tier 2 readers independently evaluated the applicant in each of the predetermined criteria.[350] The Tier 2 reader then provided their own selection of candidates for admittance.[351] Tier 2 readers' recommended admissions judgments were rendered temporarily final for that application.[352] These readers normally finished their reviews three to four weeks before applicants received admissions decisions for that admissions cycle.[353] Every provisional admissions decision was subject to a procedure called the School Group Review ("SGR").[354] SGR occurred during the three weeks before candidates were notified of their admissions status.[355] A group made up of seasoned employees from the admissions office oversaw SGR.[356]

Every provisional admissions decision was subject to reconsideration during the SGR based on the applicant's high school.[357] Decisions involving candidates from the same high school were made in accordance with context through the SGR method.[358] The SGR method enabled the admissions office to prevent over or underenrollment.[359] A set of applications from the same high schools was sent to each member of the SGR committee for examination.[360] Reports were created during the SGR for each high school with admissions candidates.[361] The reports listed each candidate from that specific high school's application deadline and each candidate's "provisional admission decision, class rank, GPA, test scores, subjective admissions ratings, residency status, legacy status, recruited student athlete status, and applicable recruiting category."[362]

---

347. *Id.*
348. *Id.*
349. *Id.* at JA351.
350. *Id.*
351. *Id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at JA352.
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *Id.*

Decisions during the SGR were partly informed by "the predicted number of spaces in the entering class that students who have been provisionally selected for admission" would likely fill.[363] "The Admissions Office runs a yield assessment projection to predict enrollment."[364] "Upon completion of the SGR process, the yield assessment projections are updated; it may be necessary to adjust the number of applicants who will receive an offer of admission to avoid over- or under-enrollment."[365] "The University does not consider an applicant's ability to pay all or part of the cost of their education when making admissions decisions."[366]

C. Majority Opinion/Legal Standard

Chief Justice Roberts penned the Court's majority opinion, ruling that the Harvard and UNC admissions programs violate the Equal Protection Clause of the Fourteenth Amendment.[367] According to Roberts, the programs fail a strict scrutiny analysis because the compelling interest in the educational benefits of diversity cited by the universities, such as preparing graduates to participate in an increasingly diverse society or expanding interracial understanding, were not sufficiently defined and measurable enough for judicial review.[368] The Court further held that the connection between the universities' diversity goals and their admissions practices was not strong enough because the racial categories employed were imprecise or overly broad.[369]

The Court's reasoning reflects a myopic, testocratic conception of merit, in that the Court's justification for ending affirmative action focuses only on academic ratings. The academic index appears to be the only recognizable form of merit for SFFA and the Court's majority; in its view, personal ratings and plus factors for underrepresented minorities are only pretexts for discrimination.[370] This is despite the fact that the overwhelming majority of students who apply and are rejected from Harvard have stellar academic credentials.[371] Central to SFFA's argument is that Asian American and African American students with similar academic-index scores have widely

363. *Id.*
364. *Id.*
365. *Id.* at JA353.
366. *Id.*
367. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 213 (2023).
368. *Id.* at 214.
369. *Id.* at 216.
370. *See id.* at 220.
371. *See* Brief for Respondent, *supra* note 310, at 3.

varying prospects of admission to Harvard.[372] However, Harvard does not use the academic index in making admissions decisions.[373] Harvard's admissions process is, in fact, far less centered on standardized test scores and high school grades than its opponents seem to prefer, due to the exceptionally strong academic profile of Harvard's applicant pool.

Because the Court only recognizes the academic index and testocratic merit, it cannot reconcile why African American students in the fourth decile have similar admission prospects as Asian Americans in the top decile.[374] The dissent asserts the fact that applicants in the fourth decile at Harvard have superior academic scores, and Harvard rejects nearly half of the African American applicants who have academic ratings that would be in the top decile of students accepted to the university.[375] Simply looking at Harvard's admissions practices with a testocratic prism, where nontestocratic admissions indicators are viewed with suspicion, leads to spurious results.

The Court further ruled that Harvard's and UNC's programs involved racial stereotyping because the programs were based on the premise that all members of a racial group think similarly, employed race in a negative way because the District Court found that race-conscious admissions practices led to fewer Asian American and white students being admitted, and that the admissions programs were not time limited as required by the majority's reading of *Grutter*.[376] The core purpose of the Equal Protection Clause was at the heart of the Chief Justice's ruling. The majority noted that *Brown v. Board of Education* outlawed all racial distinctions in education, including affirmative action, despite four decades of precedent saying otherwise.[377] As Chief Justice Roberts reasoned in an earlier case restricting the use of race in K-12 admissions schemes, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[378]

Citing Justice Powell in *Bakke*, the *SFFA v. Harvard* majority patently rejected the idea that the Fourteenth Amendment allows for remedying state-based discrimination through race-conscious state actions, and it also rejected the claim that ending societal discrimination is a compelling government interest.[379] Similarly, the Court rejected analogies comparing the admissions

372. *See* Brief for Petitioner, *supra* note 309, at 23-24.
373. Brief for Respondent, *supra* note 310, at 4 n.1.
374. Brief for Petitioner, *supra* note 309, at 24.
375. *See Students for Fair Admissions, Inc.*, 600 U.S. at 348 (Sotomayor, J., dissenting).
376. *See id.* at 218, 219, 224 (majority opinion).
377. *See id.* at 204.
378. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007).
379. *See Students for Fair Admissions, Inc.*, 600 U.S. at 226.

programs that were challenged in *SFFA v. Harvard* to the top 10% program upheld in *Fisher II* because neither Harvard nor UNC asserted that they were seeking a critical mass of underrepresented minorities as in *Fisher I*.[380]

Notably, the Court stressed that moving forward, universities are permitted to consider "an applicant's discussion of how [much] race affected his or her life, be it through discrimination, inspiration, or otherwise."[381] The majority, however, warned universities not to simply re-establish current race-conscious admissions practices through the use of essays.[382] From an equal protection standpoint, the Court also acknowledged that universities can use race-neutral factors, such as where a student lives, because disparate treatment of an applicant who is "from a city or suburb" is distinguishable from disparate treatment according to race.[383]

D. The Dissent

Justice Sotomayor's dissent serves as a powerful critique of the majority's take on race and testocracy, and it is a potent defense of holistic, race-based admissions practices. She began by pointing out that, without any new factual information or legal rationale, the Court reversed decades of precedent in determining that diversity in higher education is not a compelling interest.[384] She added that the majority's focus on the measurability of the universities' diversity goals is not a credible legal standard or test.[385] She then countered the majority's assertion that race-conscious admissions disadvantage Asian American and white students[386] by pointing out that universities use race among a host of other factors, such as athletic prowess, artistic ability, musical talent, academic interests, disability, socioeconomic background, and geographic location, to build their incoming classes.[387] She noted that the

380. *Id.* at 228 (citing *Fisher II*, 579 U.S. 365, 377 (2016); *Fisher I*, 570 U.S. 297, 297 (2013)).

381. *Id.* at 230.

382. *Id.*

383. *Id.* at 220.

384. *See id.* at 318, 319 (Sotomayor, J., dissenting).

385. *See id.* at 357-58.

386. *See supra* Section III.A. "Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes," even though "only about 6% of the United States Population is Asian American." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 203 (D. Mass. 2019).

387. *Students for Fair Admissions, Inc.*, 600 U.S. at 359 (Sotomayor, J., dissenting).

majority and SFFA could not identify a single student who was admitted to Harvard or UNC based upon their race alone.[388]

Justice Sotomayor rejected SFFA's assertion that testocratic, academic metrics should be the sole criteria for higher education admissions, noting that focus on class rank or test scores alone would limit "multidimensional diversity in higher education."[389] A system with a "myopic focus on academic ratings" would exclude the talented pianist, a prodigious poet with average math grades, or a student who trended upward after a slow academic start.[390]

Justice Sotomayor's dissent also gave a full-throated endorsement of using contextual, race-neutral practices following the Court's ban on affirmative action. She stated:

> To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race.[391]

Important to this Article's discussion of contextual admissions, she noted that SFFA's filings and the opinions of Justices Thomas, Kavanaugh, and Gorsuch all suggest that race-neutral alternatives that focus on the individual qualities of applicants, like parental income, socioeconomic status, first-generation status, and geographic diversity, would pass constitutional muster.[392] And programs that focus on aggregate-admissions goals, like increasing community college transfers and developing partnerships with low-opportunity high schools, would also survive judicial scrutiny.[393]

---

388. *Id.* at 363.
389. *See id.* at 366.
390. *Id.*
391. *Id.* at 365.
392. *Id.* at 365-66 (citing Brief for Petitioner, *supra* note 309, at 81-86 (Thomas, J., concurring; Kavanaugh, J., concurring; Gorsuch, J., concurring)).
393. *Id.*

E. SFFA v. Harvard *and Race-Neutral Admissions Mechanisms*

The third question presented by *SFFA v. Harvard* was whether the universities could "reject a race-neutral alternative because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student body diversity."[394] Hence, race-neutral alternatives to achieving diversity were heavily discussed across the filings in *SFFA v. Harvard* as part of the strict scrutiny analysis assessing whether universities had viable alternatives to race-conscious admissions practices.

At trial, both Harvard and SFFA deployed expert economists to conduct simulations of various race-neutral admissions alternatives.[395] SFFA proposed several race-neutral admissions programs, many of them focusing on evaluating applicants' socioeconomic status.[396] SFFA asserted that if Harvard ended admissions preferences for athletes, legacies, and the children of donors, alumni, and faculty—while increasing preferences for socioeconomically disadvantaged students—the total number of admissions of underrepresented minorities would increase and academic scores would remain superior.[397] However, in this simulation, African American enrollment decreased.[398]

Another of SFFA's proposed alternatives was a model referred to as the "Modified Hoxby Simulation."[399] This model was developed by making small adjustments to a simulation originally created by UNC's expert, Caroline Hoxby.[400] The concept involves UNC reserving 750 seats in each incoming class for high-achieving students who have experienced socio-economic disadvantages.[401] The rest of the class would be admitted based upon the strength of their academic indicators, irrespective of their race or socioeconomic status.[402] The simulation demonstrated that Latino admissions could potentially increase, while African American admissions would decrease slightly.[403] In addition to the ALDC and the Hoxby model, SFFA proposed at least three other socioeconomic-based admissions models

394. *See* Brief for Petitioner, *supra* note 309, at i.
395. *See id.* at 20, 40.
396. *See, e.g.*, *id.* at 83.
397. *Id.* at 33-34.
398. *Id.* at 34.
399. *Id.* at 44.
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*

that eliminated preferences favoring the advantaged, such as legacy admissions, many of which led to decreases in African American enrollment while maintaining steady enrollment of other minority groups.[404]

Harvard and UNC, as well as other proponents of race-conscious admissions, raised several objections to SFFA's proposed methods.[405] These critics argued that race-neutral admissions policies like those proposed by SFFA could lead to significant decreases in the diversity of student bodies at elite universities.[406] For instance, after states that banned affirmative action implemented race-neutral policies, they faced a decrease in the enrollment of underrepresented students at their flagship universities.[407]

Opponents of SFFA's proposals also contended that the proposals may adversely impact academic competitiveness.[408] Harvard expressed concerns that a move to race-neutral admissions could cause a drop in overall academic standards and standardized test scores among admitted students.[409]

The First Circuit accepted Harvard's justifications for rejecting race-neutral alternatives, acknowledging that changes in admissions policies would require modifications to the university's operations that may be difficult to implement.[410] Similarly, the district court in North Carolina accepted UNC's reasons for rejecting race-neutral alternatives.[411]

Another crucial point raised by proponents of race-conscious admissions was the University of California's challenges with race-neutral methods. As stated previously, following the state's ban on race-based admissions in 1996, the University of California system struggled to maintain the levels of racial and ethnic diversity that had been achieved through race-conscious admissions decisions.[412] Despite its best efforts, the system has not been able to regain the same level of racial and ethnic diversity among its student body

404. *Id.* at 84.

405. *See, e.g.*, Brief for Respondent, *supra* note 310, at 35.

406. *See id.* at 35-36.

407. *See id.* at 34-35 (citing Zachary Bleemer, *The Impact of Proposition 209 and Access-Oriented UC Admissions Policies on Underrepresented UC Applications, Enrollment, and Long-Run Student Outcomes*, U.C. OFF. PRESIDENT, https://ucop.edu/institutional-research-academic-planning/_files/uc-affirmative-action.pdf (last visited Dec. 18, 2023)).

408. *See id.* at 24.

409. *See id.*

410. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 192-93 (1st Cir. 2020).

411. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 666 (M.D.N.C. 2021).

412. *See supra* notes 161-62, 165-66 and accompanying text.

as before the ban, even after more than two decades.[413] Nor has the system been able to counteract the declines in minority enrollment following Proposition 209; this fact is true despite the system's comprehensive review that gauged "multiple measures of achievement and promise while considering the context in which each student has demonstrated academic accomplishment."[414] The system also spent millions deploying an outreach plan to disadvantaged neighborhoods and created an automatic admissions program for students in the top 9% of California high school classes; while these programs increased geographic diversity, they did not increase racial diversity.[415]

SFFA and its supporters countered the proposition that race-neutral methods will not yield diversity by arguing that diversity and academic competitiveness can be maintained without race-conscious admissions.[416] One of the main proponents of this viewpoint was the state of Oklahoma, along with eighteen other states, as revealed in their jointly filed amicus brief.[417] They highlighted data from colleges where race-conscious admissions decisions have been banned and suggested that these schools *had* managed to sustain diversity and competitiveness.[418] The states highlighted flagship universities in states with race-neutral systems that had similar enrollment levels of underrepresented minorities as flagship universities in states with race-conscious admissions.[419] For example, in Oklahoma and Nebraska—states that have banned affirmative action—both the Hispanic population overall and Hispanic enrollment at flagship public universities—are similar to the corresponding demographics in North Carolina, Maryland, and Massachusetts—states that have not banned affirmative action.[420] The amicus brief also referenced flagship universities in states with similar African American populations to Oklahoma, like Massachusetts, Minnesota,

413. *See* Brief for the President & Chancellors of the University of California as Amici Curiae Supporting Respondents at 16, Students for Fair Admission, Inc., v. President & Fellows of Harvard Univ., 600 U.S. 181 (2023) (Nos. 20-1199, 21-707).

414. *Id.* at 18.

415. *Id.* at 16.

416. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 193-94 (1st Cir. 2020).

417. *See generally* Brief of Amici Curiae Oklahoma and 18 Other States in Support of Petitioner, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707).

418. *Id.* at 10.

419. *Id.* at 11.

420. *Id.*

and Wisconsin, that have not prohibited race-conscious admissions but do not admit substantially more African American students.[421]

Following *SFFA v. Harvard*, the question is not whether universities should deploy race-neutral admissions methods but rather what type of race-neutral methods should be deployed. None of the experts who submitted testimony in *SFFA v. Harvard* were able to identify a race-neutral method that increased African American enrollment without reducing academic selectivity. The admissions models and simulations in *SFFA v. Harvard* were focused on parental income instead of metrics measuring access to opportunity, yet many nonsocioeconomic factors impact access to higher education. Part IV, which provides an overview of the U.K.'s contextual admissions model, highlights why focusing on access to opportunity is a stronger approach for increasing African American enrollment post-*SFFA v. Harvard*.

IV. Contextual Admissions and the Future of African American Law School Enrollment

Why is a race-neutral admissions approach that considers disparities in access to opportunity and higher education more favorable for African American applicants than an approach that is centered solely on parental income? Because economic disadvantage does not account for other factors, such as levels of racial segregation, that can account for low higher education participation rates that are location specific. Families with similar economic prospects can experience significant differences in neighborhood school outcomes, neighborhood adult education levels, the availability of easily accessible higher education institutions, and the availability of post-secondary pipelines to well-paying jobs that do not involve college. These differences often fall on racial lines. Additionally, evaluating parental economic levels does not account for how differences in cost of living throughout the country can yield vastly different outcomes in terms of access to opportunity for families who earn similar amounts of income.[422] An advantage of the contextual admissions model is that admissions decisionmakers do not rely on inferences and assumptions based upon parental income.[423] Instead, the model relies on verifiable evidentiary

421. *Id.* at 12.

422. *See* Tara Siegel Bernard, *FAFSA Says How Much You Can Pay for College. It's Often Wrong.*, N.Y. TIMES (Dec. 30, 2020), https://www.nytimes.com/2019/11/15/your-money/fafsa-financial-aid-student-loans.html.

423. *See supra* note 33 and accompanying text.

measures that assess the likelihood of participation in higher education at the neighborhood and school level.[424] This Part provides an overview of the contextual admissions model.

A. Contextual Admissions in the United Kingdom

Students that come from disadvantaged social or economic backgrounds continue to be underrepresented in the United Kingdom's higher education system.[425] Moreover, students from underrepresented and disadvantaged social groups are less likely to attend the most selective Russell Group universities, and the student profile at these universities skews towards students educated in private schools.[426] As a result, students from traditional public schools who receive free school lunch and live in areas of significant economic disadvantage are almost ten times less likely to attend selective universities than students with the highest levels of economic advantage.[427] Much like in the United States, there are stark differences in the quality of primary and secondary education across socioeconomic lines.[428] The Office of Students, the higher education regulator in the U.K., seeks to set the conditions in which students from all backgrounds can access higher education, succeed once admitted, and advance towards employment and positive life outcomes.[429]

The Office for Students considers underrepresented groups to include some students who are Black, Asian, or minority ethnic (BAME); students from areas with low participation in higher education; students from areas with low household-income and socioeconomic status; students who are disabled; students who are under or leaving state care, students who are refugees; students from Roma and Traveller communities; and students from military families.[430] Universities in the U.K. are required by the Office for

424. *See supra* note 5 and accompanying text.

425. *See* LINDSEY BOWES ET AL., CFE RSCH., DEP'T FOR BUS., INNOVATION & SKILLS, BIS RES. PAPER NO. 229, UNDERSTANDING PROGRESSION INTO HIGHER EDUCATION FOR DISADVANTAGED AND UNDER-REPRESENTED GROUPS 17-18 (2015), https://assets.publishing.service.gov.uk/media/5a80876f40f0b6230269409a/BIS-15-462-understanding-progression-into-higher-education-final.pdf.

426. *See generally* Anna Mountford-Zimdars & Joanne Moore, *Identifying Merit and Potential Beyond Grades: Opportunities and Challenges in Using Contextual Data in Undergraduate Admissions at Nine Highly Selective English Universities*, 46 OXFORD REV. EDUC. 752 (2020).

427. *Id.*

428. *Id.* at 753.

429. *Id.*

430. *Id.*

Students to publish an access- and widening-participation plan that outlines the ways in which the university will expand equitable access for students from underrepresented backgrounds and promote successful completion and outcomes for said students.[431] In 2018, the Office of Students set out to eliminate the gap in degree outcomes between Black and white students, the gap in admissions rates at the most selective schools between the most- and least-represented groups, the gap in attritions rates between the most- and least-represented groups, and the gap in graduation rates between disabled and nondisabled students.[432]

To achieve these goals, universities in the U.K. deployed the contextual admissions model, which is "the practice of using additional information, such as where a potential student lives or which school they go to, to assess their attainment and potential."[433] Furthermore, "This allows providers to identify applicants with the greatest potential to succeed in higher education, rather than relying on exam results alone."[434] A 2004 U.K. government commissioned report laid the foundation for implementing contextual admissions through a recognition that "equal examination grades do not necessarily represent equal potential."[435] The report therefore noted that "it is fair and appropriate to consider contextual factors as well as formal educational achievement, given the variation in learners' opportunities and circumstances."[436] A 2015 survey of U.K. universities revealed that 84% of universities were using contextual admissions practices.[437] Each school has the latitude to determine their own contextual admissions policies.[438]

In the U.K., many students applying for higher education sit for three or four A-level subject-based examinations during their final two years of

431. *Id.*

432. *Id.*

433. *Contextual Admissions*, OFF. FOR STUDENTS (July 27, 2020), https://www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/effective-practice/contextual-admissions/.

434. *Id.*

435. HIGHER ED. STEERING GRP., FAIR ADMISSIONS TO HIGHER EDUCATION: RECOMMENDATIONS FOR GOOD PRACTICE 22 (2004), https://dera.ioe.ac.uk/id/eprint/5284/1/finalreport.pdf.

436. *Id.* at 30-31.

437. Katriona O'Sullivan et al., *Academic Identity, Confidence and Belonging: The Role of Contextualised Admissions and Foundation Years in Higher Education*, 45 BRIT. EDUC. RSCH. J. 554, 558 (2019).

438. *See id.*

secondary studies.[439] Students then apply to higher education using a common application that is administered by the Universities and Colleges Admissions Service.[440] Degree programs promulgate admission requirements (termed tariffs in the U.K.) that are typically based on the performance on three A-level examinations.[441] For example, the most competitive programs may require three A's for admission. As a result, a school that is making a contextual offer may make an offer that is one grade or two grades below the standard offer. For example, a student with results of AAB or ABB can be admitted into a program that generally requires an AAA. The use of minimum entry requirements recognizes that demand for admission spots can skew the scores required for entry to a level that exceeds the qualifications that are necessary for success in the course; this is referred to as entry requirement inflation.[442] Contextual admissions practices allow higher education institutions in the U.K. to admit disadvantaged applicants who meet these minimum entry standards.

Vikki Boliver, a contextual admissions scholar, found that students entering the most selective universities with AAB grades on the A-level have an 88% likelihood of graduating from higher education institutions, whereas students with grades of BCC only have an 80% likelihood to graduate.[443]

Applications are flagged based upon contextual indicators designed to measure and categorize disadvantage.[444] These measures of disadvantage are standardized, verifiable, and accessible to all universities throughout the U.K.[445] The use of verified metrics and measures of disadvantage are the aspects of the contextual admissions model that the United States should adopt to attain diversity using race-neutral means. Individual, area level, school level, and outreach-program participation are the four types of indicators that are used in the contextual admissions model.[446] The following subsections detail how these types of indicators are used.

---

439. *See, e.g.*, *A-Levels 101 – An A-Level Guide for Students*, OXFORD LEARNING COLL., https://www.oxfordcollege.ac/news/a-levels-101/ (last visited Dec. 29, 2023).

440. O'Sullivan et al., *supra* note 437, at 558.

441. *See Qualifications*, UNIV. OF OXFORD, https://www.ox.ac.uk/about/facts-and-figures/admissions-statistics/undergraduate-students/current/overall-numbers/qualifications (last visited Dec. 29, 2023).

442. *See* Mountford-Zimdars & Moore, *supra* note 426, at 753.

443. Vikki Boliver et al., *Reconceptualising Fair Access to Highly Academically Selective Universities*, 84 HIGHER EDUC. 85, 94 (2022).

444. BOLIVER ET AL., *supra* note 31, at 3, 10-11.

445. *Id.*

446. *Id.*

1. The Use of Area Level Data

Community-level data metrics seek to account for disadvantages in access to opportunity by measuring the mean level of access of opportunity in a given neighborhood.[447] Metrics such as ACORN, Output Area Classification, Index of Multiple Deprivation (IMD) for England, the Scotland Index of Multiple Deprivation, and the Communities First protocol in Wales, are used to track socioeconomic disadvantage at the neighborhood level.[448] Alternatively, they may relate to "the rate at which young people in the locale progress to higher education," as measured by POLAR or TUNDRA.[449] Administrative and survey data sources are used to determine the mean level of circumstances in a community and individual community members are linked to a community using their home zip code.[450] Some contextual measures may refer to a relatively small number of households, such as ACORN, while others, like IMD and POLAR, are less detailed and may be more likely to flag individuals as being personally disadvantaged, even when they are not.[451]

If higher education institutions in the United States had access to verifiable indices and databases measuring socioeconomic disadvantage and higher education participation levels, such as POLAR, ACORN, and TUNDRA, they would be empowered to consider the navigation of structural disadvantage in admissions decisions. These systems are used to categorize areas in the quintiles based upon level of disadvantage or participation in higher education. Students can be easily compared based upon the area quintile rank related to socioeconomic disadvantage or the area quintile rank in terms of higher education participation.

a) POLAR

POLAR is a metric that measures higher education participation rates at the zip code level.[452] The Office for Students employs POLAR as the main indicator to assess the progress that U.K. universities make in expanding access and higher education participation for those who have experienced

447. *Id.* at 10.
448. *Id.*
449. *Id.*; *see infra* Sections IV.A.1.a, IV.A.1.b.
450. BOLIVER ET AL., *supra* note 31, at 10.
451. *Id.*
452. JOHN JERRIM, SUTTON TRUST, MEASURING DISADVANTAGE 6 (2021), https://www.suttontrust.com/wp-content/uploads/2021/05/Measuring-Disadvantage-Report.pdf.

social disadvantage.[453] Almost all universities that deploy contextual admissions practices use POLAR to flag applications.[454]

The young participation rate is used to calculate POLAR by dividing the number of students in college from a neighborhood by the total number of college aged youth in a community.[455] The area used is the Middle Super Output Area (MSOA), which contains around 7,500 individuals of all ages.[456] The resulting index is then categorized into five quintiles to obtain the POLAR classification.[457] A student's zip code can be verified through school and government sources, even though zip code is often self-reported.[458] Disadvantaged students are typically identified as the students who are categorized in quintiles 1 or 2, reflecting the zip codes with the lowest rates of higher education participation.[459] These areas contain 40% of the most significantly disadvantaged students.[460]

POLAR is used to determine areas in the U.K. that should be targeted for outreach. POLAR is designed to be used in concert with metrics related to socioeconomic disadvantage, as POLAR only considers participation rates in higher education.[461] Although there is often correlation between socioeconomic disadvantage and participation rates in higher education, other non-socioeconomic factors can often influence participation rates. ACORN and TUNDRA, which use a different method to categorize areas in England only, are designed to account for the non-socioeconomic factors that drive participation in higher education.[462]

b) TUNDRA

TUNDRA is a newer tool developed by the Office of Students as a supplementary indicator of university participation by local area.[463] Unlike POLAR, which divides the number of eighteen- and nineteen-year-olds in an area by the number of eighteen- and nineteen-year-olds from that area

453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.*
458. *Id.*
459. *Id.*
460. *Id.*
461. *Young Participation by Area: About POLAR and Adult HE*, OFF. FOR STUDENTS, https://www.officeforstudents.org.uk/data-and-analysis/young-participation-by-area/about-polar-and-adult-he/ (last updated Sept. 30, 2022).
462. JERRIM, *supra* note 452, at 6-7.
463. *Id.*

participating in higher education, TUNDRA tracks individuals from the age of sixteen and links data from their final years of high school to their participation in higher education at eighteen and nineteen years old.[464] This data only uses students from public schools to calculate the higher education participation levels of a given neighborhood.[465] The idea is that private school students can skew the true higher education participation rate of a given neighborhood.

Accordingly, TUNDRA only covers students at traditional public schools, and this approach responds to critiques of POLAR which point to how "low participation of state school students in an area could be masked in areas where a high proportion of households send their children to private schools with better [higher-education-progression] rates than the area at large."[466]

TUNDRA measures the public-school participation rate in an areas that contain about 7,500 residents, although an experimental version measures the rate using a smaller number of residents.[467] Like POLAR, the population is divided into five quintiles.[468]

TUNDRA is not currently widely used by universities and is only available in England, as opposed to POLAR which is available throughout the U.K.[469] Like POLAR, the information can be collected through self-reporting or governmental and school-based sources.[470]

c) ACORN

ACORN is a geodemographic classification system that assesses the socioeconomic status of households and postcodes across the U.K.[471] It uses a range of data, including accommodation type, household income, population density, and lifestyle habits to generate estimates of the characteristics of individual households and postcodes.[472] ACORN categorizes the U.K. population into six categories, eighteen groups, and sixty-two types.[473] "The data are proprietary," so universities and employers

464. *Young Participation by Area: About the TUNDRA Area-Based Measures Data*, OFF. FOR STUDENTS, https://www.officeforstudents.org.uk/data-and-analysis/young-participation-by-area/about-tundra/ (last updated Sept. 30, 2022).

465. *Id.*

466. JERRIM, *supra* note 452, at 6.

467. *Id.*

468. *Id.*

469. *Id.*

470. *Id.*

471. *Id.* at 7.

472. *See id.*

473. *Id.*

must pay for access to the data.[474] The ACORN classification system "is only used by a handful of [U.K.] universities in deciding contextual admissions [decisions]."[475] Nonetheless some notable universities, like Oxford and the University of St. Andrews have added ACORN to its neighborhood disadvantage metrics.[476]

2. School Level, Individual Level, and Outreach-Based Data

School-level contextual indicators are measures that serve as proxies for an individual's circumstances, by measuring the mean level of educational attainment and achievement of students in a given school.[477] These indicators can allow admissions officers to ascertain the average grades and test scores of students at the end of their high school career, the higher education participation rate, and the mean economic conditions of students in the school "such as the percentage of students . . . [receiving] free school meals."[478] The school level metrics use administrative data records that are verifiable. An individual is matched to the records using their self-reported identifying information, which can also be verified.[479] Data may not be available for older applicants or for those who were homeschooled or educated abroad.[480] There is the potential for false positives and data skewing with school level data since they are based on group level data rather than specific information on the circumstances of the individual applicant.[481]

Individual-level contextual indicators are measures that pertain to the circumstances of the individual applicant. These indicators can include various forms of socioeconomic disadvantage as well as serious personal challenges that may affect their educational performance. Examples of such challenges include having a low household income, receiving free school meals, lacking parental higher education, or having spent time in foster care, among others.[482] While most of these indicators are self-reported by the applicants themselves, a few can be verified administratively or through

474. *Id.*
475. *Id.*
476. *Id.*
477. *See* Vikki Boliver et al., *Will the Use of Contextual Indicators Make UK Higher Education Admissions Fairer?*, 5 EDUC. SCIS. 306, 309 (2015).
478. *Id.*
479. *Id.*
480. *Id*.
481. *See id.*
482. *See* BOLIVER ET AL., *supra* note 31, at 12.

other means.[483] These factors include low household income, refugee or asylum status, disability, or being a mature student.[484]

Students who participate in widening-participation outreach programs are also flagged for contextual admissions purposes.[485] These outreach programs lead to consistent engagement with the university before the application process. This engagement allows for additional academic assessments, which can be used to supplement or adjust the standard academic standards for a program in context of the student's academic potential.[486] Eligibility for these programs is generally based on if an individual has measurable disadvantage at the neighborhood or individual level, or if they attend a school that has been identified as a school with low higher education participation.[487] Oftentimes, these programs may be targeted and limited to students that helm from schools located near the university.[488]

B. Contextual Admissions in Practice

A *Sutton Trust* commissioned study of thirty of the most selective universities in the U.K. revealed that twenty-two schools use area level metrics, with POLAR being used by sixteen of these schools to target students from quintiles 1 and 2.[489] ACORN was used by ten of the schools, to target students in categories 4 and 5 which indicate the lowest levels of socioeconomic opportunity.[490] Six schools use the index of multiple deprivation or the Scottish index of multiple deprivation.[491] The index of multiple deprivation (IMD) and its Scottish equivalent (SIMD) were mentioned as well or instead by six universities.

The study also reveals that

> Twenty universities mentioned school-level contextual indicators in their guidance to applicants in general. The most common was attendance at a school with a low average level of achievement at Key Stage 4, Key Stage 5, or both (16 universities). Seven universities used attendance at a school with a low rate of progression to higher education in general or to Oxbridge in

483. *See* JERRIM, *supra* note 452, at 7.
484. *See* Boliver et al., *supra* note 477, at 309.
485. *See id.*
486. *See* BOLIVER ET AL., *supra* note 31, at 11.
487. *Id.*
488. *Id.*
489. *Id.* at 13.
490. *Id.*
491. *Id.*

> particular, and two universities referred to schools with a high percentage of pupils in receipt of free school meals.[492]

Ireland and Scotland deploy contextual admissions slightly differently than England. In Ireland, contextual admissions flags are applied centrally by the Higher Education Authority.[493] All courses in Ireland have a point requirement for admission, which is based on the demand for the course.[494] Ireland's approach allows for contextualized entry at a 10-15% lower level of points.[495] This approach has led to increased diversity in the Irish higher education system.[496] The Scottish government requires all universities to determine minimum entry requirements, which would allow for disadvantaged applicants to be admitted without undue risk of attrition and academic failure.[497]

The University of Oxford's webpage on contextual admissions states that "[a]pplicants from the most disadvantaged backgrounds will be strongly recommended to be shortlisted for interview, provided that evidence suggests [they] are likely to achieve the standard conditional offer for the course, and that [they] perform to a suitable standard in any required admissions test."[498] Oxford looks at average A-level scores at the high school level, the percentage of students eligible for free lunch at one's high school, ACORN and POLAR4 data, whether students have spent time in the foster care system, and whether a student is eligible for free school lunch, to determine which students to shortlist for interviews.[499]

The University of Cambridge's contextual admissions website states that it does not use "contextual data to systematically make conditional offers at lower grades, or to make allowances for a poor academic record. This information is simply intended to provide academic assessors with the fullest possible picture of an applicant, and the context in which their achievements occurred."[500] Cambridge uses flags to look at applications more carefully

---

492. *Id.*

493. O'Sullivan et al., *supra* note 437, at 558.

494. *Id.*

495. *Id.*

496. *See id.*

497. *See* SCOTTISH COMM'R FOR FAIR ACCESS, FAIR ACCESS TO HIGHER EDUCATION: PROGRESS AND CHALLENGES 4 (2020), https://perma.cc/9AU5-6HEL.

498. *Contextual Data*, UNIV. OF OXFORD, https://www.ox.ac.uk/admissions/undergraduate/applying-to-oxford/decisions/contextual-data (last visited Jan. 2, 2024).

499. *Id.*

500. *Contextual Data*, UNIV. OF CAMBRIDGE, https://www.undergraduate.study.cam.ac.uk/apply/after/contextual-data (last updated Oct. 2023).

during the initial application stage, but unlike Oxford, it does not guarantee interviews to all flagged applicants.[501] Like Oxford, Cambridge uses similar information about an applicant's school, geodemographic metrics, and information about individual circumstances to contextualize applications.[502] Cambridge uses POLAR4 and a proprietary postcode classification system, creates adjusted and contextualized standardized-test scores, and assesses the frequency at which a high school sends students to Cambridge and Oxford to flag applicants.[503]

At the University of Bristol, applicants from disadvantaged backgrounds can receive a contextual offer that is set "two grades below the standard entry requirements."[504] Bristol began issuing contextual offers in 2009.[505] Bristol's central admissions software flags students who attend schools identified as low attainment or low progression, who live in a postcode in the lowest two POLAR4 quintiles, who have participated in a Bristol-guaranteed contextual offer preadmission outreach program, or who have spent time in foster care.[506] Students who participate in Bristol outreach programs may be eligible for larger grade reductions.[507] In 2016, Bristol admitted 1000 students through contextual offers.[508] Students admitted on contextual offers, except those coming from outreach programs, do not receive any "targeted support."[509]

At Newcastle University, students who either attended a low A-level attainment school; who received free school meals; who live in a neighborhood with higher levels of financial, economic, or social disadvantage; or who have both parents without a college degree are eligible to participate in the PARTNERS post-high school summer school.[510] Participation in PARTNERS leads to contextual offers that are up to two

501. *Id.*
502. *Id.*
503. *Id.*
504. *Contextual Offers*, UNIV. OF BRISTOL, https://www.bristol.ac.uk/study/undergraduate/entry-requirements-qualifications/contextual-offers/ (last visited Jan. 2, 2024).
505. *Contextual Admissions*, OFF. FOR STUDENTS (July 27, 2020), https://www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/effective-practice/contextual-admissions/examples/.
506. *Contextual Offers*, *supra* note 504.
507. *Id.*
508. *Contextual Admissions*, *supra* note 505.
509. *Id.*
510. *PARTNERS Programme Eligibility Criteria*, NEWCASTLE UNIV., https://www.ncl.ac.uk/partners/how-to-apply/eligibility/ (last visited Jan. 2, 2024).

grades below standard offers.[511] Students can apply for the PARTNERS program at the same time that they make an application to Newcastle University.[512] Participation in the program has grown from forty students in 1997 to more than 800 students in 2017.[513] Retention rates for PARTNERS students exceed the overall student retention rate, due to tracking and monitoring of participants.[514]

C. Constitutionality of Contextual Admissions

Despite efforts by SFFA and its proponents to forward an expansive reading of the Court's decision—making most efforts to expand racial diversity in higher education constitutionally impermissible—the Court has not outlawed the intentional pursuit of racial diversity by higher educational institutions. The Court's only requirement is that universities achieve racial diversity through race-neutral means. Many conservative advocates and commenters called for the Court to draw a bright line banning all efforts, including race-neutral efforts, to achieve racial diversity.[515] The Court's majority refused to draw such a bright line. In fact, the Court's endorsement of preferences based upon individualized expressions that reference overcoming race-based discrimination significantly weakens efforts to advance an expansive view of the Court's decision in *SFFA*.

Does the use of data related to neighborhood-, school-, or individual-based disadvantage amount to an impermissible race proxy? Not in my view. Obviously, antidiscrimination laws would be severely weakened if actors could deploy racial proxies to avoid outright discrimination based upon race.[516] We have seen the use of residential data such as zip codes form the

511. *Contextual Lower Offer*, NEWCASTLE UNIV., https://www.ncl.ac.uk/partners/benefits/lower-offer/ (last visited Jan. 2, 2024).

512. *Newcastle University's PARTNERS Programme Supported Entry Route*, NEWCASTLE UNIV. (Apr. 2022) https://www.ncl.ac.uk/mediav8/partners-and-outreach/files/What%20is%20PARTNERS%20(April%202022).pdf.

513. *Id.*

514. *See Social Mobility: The Importance of Post-Entry Support to Achieve Non-Differential Outcomes Across All Student Groups*, NEWCASTLE UNIV., https://blogs.ncl.ac.uk/ltdev/files/2019/04/Social-Mobility-to-upload.pdf (last visited Jan. 2, 2024).

515. Jess Bravin & Melissa Korn, *Supreme Court Hears Arguments on Race in College Admissions*, WALL. ST. J. (Oct. 31, 2022, 8:25 PM), https://www.wsj.com/articles/supreme-court-to-hear-arguments-on-race-in-college-admissions-11667167908.

516. *See* Brian T. Fitzpatrick, Essay, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277, 279-80 (2007).

centerpiece of discriminatory redlining regimes.[517] In this instance however, it is important to recognize that it is likely that more white students will be eligible for contextual offers in aggregate than any other racial group given the plurality of white Americans in the population. It is more difficult to make the argument that a factor acts as a race proxy when the factor yields more white students in aggregate than racial minorities.

I do predict that minorities will over-index in terms of eligibility on a percentage or per capita basis. Contextual data related to access to opportunity on the individual, school, and neighborhood level are admissions factors that are race neutral yet are racially disparate. Does the fact that a facially neutral factor yields racially disparate results make use of such factor constitutionally impermissible? Not necessarily. Some might make the argument that such an approach amounts to surreptitious race balancing.[518]However, those who make such arguments fail to recognize that universities have legitimate rationales for seeking to expand socioeconomic diversity. If universities lacked a cognizable rationale (besides advancing racial diversity) for deploying contextual data, the constitutional argument against the use of contextual data would be stronger. Does the use of standardized tests to make admissions decisions amount to a racial proxy because of racially disparate results? No, because universities have a legitimate rationale of identifying students who signal academic excellence and capability. The same logic applies to the use of access to opportunity and higher educational metrics that can be used to identify students with significant academic potential.

Contextual data can be instrumental in identifying students whose academic potential would be obscured when looking at their academic achievements without acknowledging the structural conditions in which the results were obtained.[519] Universities certainly have an interest in identifying students with the most academic potential, which contextual admissions allows. Additionally, it will be difficult to argue that universities do not have a legitimate interest in increasing higher-education participation in areas and schools where participation is lacking. These legitimate rationales for using contextual data, outside of the ancillary benefit of increasing racial diversity, will help shield the approach from constitutional scrutiny.

---

517. *See* Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 622-23 (1999).

518. *Race Has No Place in College Admissions*, STUDENTS FOR FAIR ADMISSIONS (Oct. 30, 2022), https://studentsforfairadmissions.org/race-has-no-place-in-college-admissions/.

519. JERRIM, *supra* note 452, at 1-2.

Race-neutral approaches to achieving diversity may be at issue in the next line of legal attacks related to racial diversity and admissions, despite SFFA's advocacy for the use of socioeconomic metrics.[520] As such, universities seeking to deploy contextual admissions in the United States should implement controls to limit any potential liability. If I were advising an American university that was using contextual admissions, I would certainly suggest removing the racial checkbox from admissions applications. And to avoid the appearance of unconstitutional racial balancing, I would also recommend that the university not measure the racial backgrounds of applicants or potential admits in the aggregate. I suggest that universities avoid measuring the aggregate racial makeup of their classes until students enroll and arrive on campus.

Universities certainly have the responsibility to use contextual admissions metrics in a constitutionally permissible manner. This involves using the metrics as an honest broker to expand the enrollment of students of all races who display measurable disadvantage. Universities cannot simply extend the benefits of contextual admissions to neighborhoods or schools with significant numbers of racial minorities without extending the benefits to similarly situated neighborhoods that lack the "desired' racial diversity. To this end, I also recommend masking identifying information related to neighborhoods to avoid the appearance of unconstitutional racial balancing. In this case, admissions decisionmakers would only have access to the contextual scores of the neighborhood to avoid such cherry picking.

D. Lessons for the United States

One primary lesson is that the UK's approach is systemwide, not ad-hoc. The United Kingdom's higher education regulator, the Office for Students, mandates universities to publish an access and participation plan, outlining how they intend to enhance access for underrepresented groups.[521]

The United Kingdom's commitment to contextualizing academic indicators in a system that overemphasizes standardized tests strengthens the argument for contextual admissions; that commitment demonstrates that the value of testing is enhanced through an understanding of the structural

520. Edwin Rios, *Race-Neutral Admissions Are Next in Line of Fire After Affirmative Action Ruling*, GUARDIAN (Aug. 23, 2023), https://www.theguardian.com/us-news/2023/aug/23/school-race-neutral-admissions-affirmative-action.

521. *Access and Participation Plans*, OFF. FOR STUDENTS, https://www.officeforstudents.org.uk/advice-and-guidance/promoting-equal-opportunities/access-and-participation-plans/ (last visited Apr. 5, 2024).

conditions that influence individualized academic achievement.[522] This focus on using contextual indicators to identify students with the most academic promise can serve as the primary rationale for use of similar metrics here in the United States. The contextual-admissions metrics and educational databases are available system wide, yet the system is flexible—in that each institution adopts their own contextual-admissions policies. Following the end of affirmative action, universities ought to move towards enhanced collective action to build a systemwide approach to increasing racial diversity. Moving forward, increasing transparency could yield improved diversity results in a post-affirmative-action environment.

E. Contextual Admissions in the Law School Context

How should contextual admissions be applied in the law school context? The argument for the use of residential or school-based data to contextualize academic indicators at the law school level is weakened by the potential equalizing effect of undergraduate education. Nonetheless, a student's socioeconomic background and exposure to opportunity at the neighborhood/school level impacts academic performance at the collegiate level.[523] As a result, law schools can and should use appropriate factors to assess the impact of structural disadvantage on academic indicators.

Professor Eboni Nelson's research tested whether there were race-neutral factors that could be used to assemble racially diverse classes.[524] She suggested that law schools expand their conceptions of merit to consider the ways that students have overcome structural challenges.[525] Her research found a statistically significant relationship between race and some race-neutral identify factors.[526] She found that African-American and Hispanic students were more likely than white and Asian/Pacific Islander students to have qualified for free or reduced school lunch, worked for more than ten hours during undergraduate education, received a Pell Grant, attended an HBCU or an Hispanic Serving Institution ("HSI"), or had a parent that received public assistance during youth.[527]

---

522. JERRIM, *supra* note 452, at 1-2.

523. Wojtek Tomaszewski et al., *Differences in Higher Education Access, Participation and Outcomes by Socioeconomic Background: A Life Course Perspective*, *in* FAMILY DYNAMICS OVER THE LIFE COURSE 133, 133 (Janeen Baxter et al., 2022), https://link.springer.com/chapter/10.1007/978-3-031-12224-8_7.

524. *See* Nelson et al., *supra* note 41, at 2218.

525. *Id.* at 2196.

526. *Id.*

527. *Id.* at 2195-96.

Law schools could use these factors and factors related to first generation status to achieve racial diversity in a race-neutral manner. In addition, law schools could assess the academic quality and graduate higher education participation levels of undergraduate institutions to contextualize LSAT scores. Finally, law schools should increase recruitment efforts, partnerships with HBCUs and HSIs, and collective action to achieve diversity in a race-neutral manner.

Conclusion

The Court's decision in *SFFA v. Harvard* clearly signifies that African Americans' struggles for access to higher education are far from over. Race neutrality in admissions is the law of the land; "colorblindness" is the order of the day. The coming years will require creativity and initiative from those who desire to achieve the compelling benefits of diversity at their higher education institutions. Maintaining diversity requires a reexamination and redefinition of merit away from a testocratic conception and toward a conception of merit that considers the context in which academic success was achieved. The law school ecosystem seems to be making important strides in that direction. Moving forward—to maintain and grow African American enrollment in higher education and in law schools—contextual admissions, which use geodemographic data in tandem with information about a student's school and individual levels of disadvantage, is a race-neutral admissions approach that deserves serious consideration.