

Race, Elite College Admissions, and the Courts

The Pursuit of Racial Equality in Education
Retreats to K–12 Schools



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Education's Impending Racial Crisis

The US Supreme Court appears poised to end the consideration of race and ethnicity in college admissions, creating an urgent need to undertake sweeping education reforms to prevent declines in enrollment of underrepresented minority students at selective colleges and universities.

Before the Supreme Court in its current term are cases challenging race-conscious admissions at Harvard University, a wealthy and venerable private institution that has long been in the thick of the affirmative action debate, and at the University of North Carolina at Chapel Hill (UNC), a once-segregated public institution that has often been a flashpoint in our nation's culture-war debates over race. The lawsuit against Harvard accuses it of illegally discriminating against Asian American applicants, while the lawsuit against UNC says it discriminates against both Asian American and white applicants in favor of those from underrepresented minority groups. Having recently handed down controversial decisions on abortion, gun rights, and the environment that betrayed a willingness to reject compromise for the sake of advancing its ideology, the high court's conservative majority should not be counted on to protect affirmative action, another perennial target of the right.

If the court rules as expected and calls for race-conscious admissions in American higher education to be drastically curtailed or ended outright, our nation's selective colleges and universities will find themselves at a loss for ways to maintain enrollments of Black/African American, Hispanic/Latino, and Native American students at current levels. Such a Supreme Court decision "would throw admissions decision-making in American higher education into upheaval," warns an amicus brief submitted to the Supreme Court by the College Board, the National Association for College Admission Counseling,



and other admissions and test-publishing organizations.¹ As a result of the expected ruling, the student bodies of selective higher education institutions almost certainly will become substantially less diverse, complicating efforts to diversify various professions. The expected decision likely will also reduce the chances of degree attainment among students from racial/ethnic minority groups because they will end up increasingly enrolling at less-selective institutions that tend overall to have fewer resources, a relative paucity of support services, and significantly lower graduation rates.

As a result of the expected ruling, the student bodies of selective higher education institutions almost certainly will become substantially less diverse.

If we are going to have any hope of minimizing or reversing such losses, we need to recognize that the campus diversity achieved through race-conscious college admissions practices has served to conceal, and divert attention from, much bigger problems in education and elsewhere. The Supreme Court will have ripped the bandage off the wound, leaving us no choice but to tend to the segregation, inequality, and bias in education and broader society that hinder Black/African American and Hispanic/Latino students' efforts to compete for seats in the entering classes of selective institutions.

In addition to dealing with educational inequities related to race, we'll have to address those related to class, as the end of race-conscious admissions will exacerbate the lack of socioeconomic diversity in selective higher education, where low-income students often are more underrepresented given their share of the population than are students who are Black/African American or Hispanic/Latino. Currently students from American families in the top two quintiles of socioeconomic status account for 75 percent of the total enrollment of selective colleges and universities, while students from the lowest two quintiles account for just 25 percent — a gap of 50 percentage points.² The students from underrepresented minority groups at such institutions are far more likely than white or Asian/Asian American students to come from families in which the parents are low-income³ or lack a college degree, evidence that race-conscious admissions practices have had the secondary effect of helping to bring class-based diversity to these campuses.⁴

Elite colleges argue that racially and ethnically diverse enrollments provide educational benefits to all students. "Indeed, it is particularly important that universities have racially diverse student bodies today in light of the increasing racial isolation in neighborhoods and in primary and secondary schools," the University of Michigan says in an amicus brief. Its brief bemoans the impact of a 2006 state ballot

1 *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Brief of the College Board, National Association for College Admission Counseling, American Association of Collegiate Registrars and Admissions Officers, and ACT, Inc., as *Amici Curiae* in Support of Respondents, 2022.

2 Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

3 Approximately half of Black/African American and Hispanic/Latino students attending selective colleges are from families in the bottom 60 percent of socioeconomic status, while less than 30 percent of white and Asian/Asian American students at selective colleges are from the same level of socioeconomic status. Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

4 For an in-depth discussion of the overlap between racial and socioeconomic diversity at selective colleges, see Massey et al., *The Source of the River*, 2003.

measure that barred Michigan’s public colleges and universities from giving any consideration to applicants’ ethnicity or race, saying race-neutral means of promoting diversity have failed to restore Black/African American and Native American enrollments to where they were before the measure’s passage. Black/African American students’ share of undergraduate enrollment at the University of Michigan dropped from about 7 percent in 2006 to just under 4 percent in 2021, a period during which the share of college-aged Michigan residents who are Black/African American rose from 16 percent to 19 percent.⁵

If race-conscious affirmative action is struck down, selective colleges and universities will be hard-pressed to maintain the levels of racial/ethnic diversity they have now, according to several admissions simulations run by the Georgetown University Center on Education and the Workforce.⁶ Using a number of different metrics in an attempt to model admissions behavior, we found that nothing substitutes for explicitly considering race or ethnicity in admissions when trying to promote racial and ethnic diversity. If colleges aggressively use proxies for ethnicity or race in admissions, such as whether applicants come from families in the lower tiers in terms of economic status, they might in some cases be able to increase the share of Hispanic/Latino and Black/African American students from current levels. But in all the models, the share of American Indian/Alaska Native/Native Hawaiian/Pacific Islander students would decline.

To the extent that selective colleges have become more racially/ethnically diverse, the main tool that helped them to achieve that goal — race-conscious admissions — seems about to go away. In order to maintain their newfound (albeit still limited) levels of diversity, selective colleges would have to take steps they have been loath to consider, such as eliminating admissions preferences for legacy students, student-athletes, and other groups now favored, such as wealthy students who won’t need financial aid. Every selective college and university would have to agree to participate in class-conscious admissions in order for it to collectively produce greater diversity across colleges. The colleges would also have to expand their recruitment efforts to include all of the nation’s high school graduates instead of cherry-picking students from high-achieving prep schools and high schools in wealthy communities.

The result would be that these colleges would have to admit many more students with lower standardized test scores and high school grade-point averages (GPAs). Having applicants with high test scores and GPAs helps colleges rise in rankings based on perceived prestige, and they are likely to reject any new approach which would threaten their precarious perch in the college hierarchy.

Analyses of the actual effects of bans on race-conscious admissions stemming from state laws or ballot measures, actions by state officials, and court decisions have been bleak. Studies of post-ban efforts to sustain enrollments of students from racial/ethnic minority groups at selective public universities in California, Florida, Texas, and other states have failed to find a single case where alternatives to race-conscious admissions succeeded in preventing declines in the representation of underserved minority

⁵ *Students for Fair Admissions Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Brief of the University of Michigan as Amicus Curiae in Support of Respondents, 2022.

⁶ Carnevale et al., *Race-Conscious Affirmative Action*, 2023.



students relative to their representation within the state's high schools.⁷

Moreover, many colleges and universities have resisted using the race-neutral alternatives devised so far. They argue that the alternatives fail to maintain sufficient enrollments of members of racial/ethnic minority groups and that requiring them to admit students based on class rank or socioeconomic status hinders their ability to assemble an optimal mix of students.⁸

In addition, such alternatives face legal challenges to the extent that they rely on the use of proxies for race or ethnicity to bolster enrollments of members of racial/ethnic minority groups. That's because the proxies themselves have come under fire for being discriminatory. Presaging a new generation of discrimination lawsuits against colleges is litigation that the conservative Pacific Legal Foundation has brought against elite public high schools that adopted admissions policies that, while making no direct reference to race, had the effect of increasing enrollments of Black/African American and Hispanic/Latino students at the expense of students from other racial and ethnic groups. The Pacific Legal Foundation hangs its cases on allegations that the school officials involved in the policies' adoption betrayed discriminatory intent through statements of racial animus or expressed desire for a specific racial balance in enrollment. Although the cases do not hinge simply on allegations that the policies had a disparate impact on disfavored students, they do cite such disparate impact as evidence that discrimination took place.⁹ It's not hard to imagine like-minded organizations and individuals regarding evidence of colleges' admissions policies having a similar disparate impact as grounds to, at the very least, apply heavy scrutiny to the process that led to the policies' adoption.

UNC's brief to the Supreme Court predicts that alternatives to race-conscious admissions policies would be challenged as part of a "flood of litigation" unleashed by the overturning of precedents allowing colleges' consideration of race. "In a bait-and-switch, would the kinds of race-neutral alternatives proposed by SFFA (Students for Fair Admissions) be the next targets of litigation, because they were designed with diversity in mind?" the brief asks. "The uncertainty triggered by overruling this Court's settled precedents would thus lead to continuing 'give-it-a-try' litigation, creating enormous instability in this area of the law."¹⁰

In the short term, we simply can't achieve elite college enrollments that reflect the demographic composition of American society without admissions policies that explicitly consider race.

7 Long and Bateman, "Long-Run Changes in Underrepresentation after Affirmative Action Bans in Public Universities," 2020. Kahlenberg and Potter found that at 7 of 10 universities they studied, race-neutral admissions policies resulted in shares of Black/African American and Hispanic/Latino students that were greater than when the universities considered race in admissions, but those findings did not account for the increase in the share of those racial/ethnic groups in the states during the period they studied. Kahlenberg and Potter, *A Better Affirmative Action*, 2012.

8 See, for example, Gordon, "California Universities Prepare for Possible Return of Affirmative Action in Admissions," 2020; Office of the President of the University of California, "UC Board of Regents Unanimously Endorses ACA 5, Repeal of Prop. 209," 2020; Schmidt, "New Twists Mark the Debate over Texas' Top 10-Percent Plan," 2008.

9 Pacific Legal Foundation, "[Cases](#)," (accessed March 29, 2023); Saul, "Conservatives Open New Front in Elite School Admissions Wars," 2022.

10 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief by University Respondents, 2022.

In the long term, achieving diverse enrollments without race-conscious admissions is going to take sweeping changes in our education system from preschool onward. It would require

- efforts in state legislatures and courts to ensure sufficient education resources are directed **toward the students who most need them;**
- **the reform** of college admissions practices, ending the misuse of standardized admissions tests **and admissions practices that are biased against underrepresented minority or low-income applicants or that offer side-door access to applicants who are wealthy and connected; and**
- **the overhaul** of school counseling related to college and careers to ensure that all high school **students know** how to avail themselves of the opportunities available.

Beyond selective colleges, we'll need to broadly overhaul our higher education system to dramatically improve the graduation rates of nonselective institutions and ensure that their students emerge well prepared to live productive, financially secure, and happy lives. Doing so will reduce the educational harm that might come from failing to gain admission to a selective college, where graduation rates currently are substantially higher than at other institutions.¹¹ It also will help keep students at less-selective colleges in the running for admission to graduate and professional schools that will no longer be able to consider ethnicity or race.

The tasks ahead will be daunting. We'll face major headwinds in today's political and social environment, as well as the resistance that inevitably comes when segments of the population that have benefitted from inequities fear that their advantage is threatened.¹² But at least our society will be honest with itself about the problems it faces and the consequences of ignoring them.

A broad reform agenda focused on providing equal education access has more capacity to unite people from different backgrounds and with different political views, because race-conscious admissions has become a wedge issue that peels working- and middle-class white people away from the Democratic Party. Calls to reform higher education to provide more access to people from all racial and economic backgrounds align the interests of Black/African American, Hispanic/Latino, and Native American people with the interests of those white and Asian/Asian American people who have felt shut out from selective colleges and the political, economic, and social elite. Framed correctly, such an agenda can appeal to the conservative belief in the value of a free market for talent and the need for strong economic growth just as it appeals to liberal interests in remedying discrimination and uplifting the poor.

The unavoidable truth is that access to selective colleges is unequal due to the race- and class-based inequality that permeates American society and begins shaping each generation's prospects of failure or success well before its members enter kindergarten. We've been relying on race-conscious admissions policies or various substitutes for them to smooth over vast disparities in college preparation stemming from residential and school segregation, gaps in family income and wealth, and inequities in K-12

¹¹ Bound and Turner, "Cohort Crowding," 2007.

¹² One study of state bans on race-conscious admissions found that they're most likely to be passed by voters in states where white enrollments at public flagship universities and other selective public institutions have markedly declined relative to those of students from underrepresented minority groups. See Baker, "Pathways to Racial Equity in Higher Education," 2019.

education. The transition from high school to college is far too late a point in life to expect to remedy the effects of such inequalities.

Simply doing nothing and giving up on efforts to diversify the enrollments of selective colleges is not an option. Sufficient representation of racial/ethnic minority groups at such institutions matters for a host of reasons, important not just to those underrepresented minority groups but to society at large. Elite institutions are gateways to wealth, power, and prominent positions in fields such as law and government.¹³

Black/African American and Hispanic/Latino students are both much less likely than white and Asian/Asian American students to attend selective institutions and to earn degrees that provide access to good jobs.¹⁴ Because parental education, income, and wealth all have been shown to play major roles in shaping the educational prospects of children, the race- and class-based segregation of higher education makes it a mechanism for perpetuating inequality from one generation to the next, cementing our society's disparities and divisions into place. It thwarts social mobility and erodes faith in the American Dream and in our political system, threatening to exacerbate our nation's already stark political and social divisions.¹⁵

Unless we act, the result of an end to race-conscious admissions will be a failure to educate more members of underserved minority groups at selective colleges at the very time their proportion of the population is dramatically increasing. This will only increase the racial segregation of our higher education system.

The penalties for inaction will be numerous, severe, and felt throughout society. They include locking racial segregation into place; thwarting social mobility and failing to reap its associated benefits; the economic inefficiencies that come from failing to identify and promote talent, train people for good jobs to the fullest extent possible, and maintain sufficient diversity in various occupations and professions; and increased social tension as members of marginalized groups perceive a lack of opportunity to advance to positions of economic and social power.

In upholding race-conscious admissions in the 2003 *Grutter v. Bollinger* ruling, Justice Sandra Day O'Connor wrote: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."

Simply doing nothing and giving up on efforts to diversify the enrollments of selective colleges is not an option.

¹³ The graduates of elite colleges have long been disproportionately represented among the lawyers at major firms, the top officials of large companies, and members of the Foreign Service. See, for example, Cappell and Pipkin, "The Inside Tracks," 1990; Useem and Karabel, "Pathways to Top Corporate Management," 1990. Seven of the nine Supreme Court justices serving in 2023 have undergraduate degrees from Columbia, Harvard, Princeton, or Yale, and eight have law degrees from an Ivy League institution. See Supreme Court of the United States, "[Current Members](#)," (accessed March 30, 2023).

¹⁴ Carnevale and Strohl, *Separate & Unequal*, 2013.

¹⁵ Carnevale et al., *The Merit Myth*, 2020; Carnevale et al., *The Role of Education in Taming Authoritarian Attitudes*, 2020.

Developments since then suggest she may have been engaged in wishful thinking when it comes to public faith in the legitimacy of our system. There's no question, however, that race-conscious admissions practices arose in response to the racial unrest of the 1960s, with their intent being to defuse Black/African American frustrations by offering greater hope of advancement. The likely result of their end — the reduction of enrollments of underrepresented minority students at the selective colleges that train much of our nation's elite — almost certainly will erode faith in our system. It's not an outcome we should welcome in a time of serious social division and political instability.

At the very least, the Supreme Court seems likely to force colleges to drastically curtail their race-conscious admissions practices, perhaps to the point where enrollments of underrepresented students would be nearly as threatened as under an outright ban.



The advocacy group that brought the lawsuits against Harvard and UNC, Students for Fair Admissions (SFFA), has urged the Supreme Court to not just strike down the institution's specific practices but also declare off-limits any consideration of race by the admissions offices of the nation's private and public colleges. It has called for the court to overrule its own 2003 decision in *Grutter v. Bollinger*, a landmark case involving the University of Michigan's law school, which held that considerations of race and ethnicity could factor into holistic admissions processes for the sake of fulfilling the government's compelling interest in maintaining educationally beneficial levels of diversity in enrollments.

In briefs submitted to the Supreme Court, lawyers for SFFA have argued that the *Grutter* ruling cannot be reconciled with the Fourteenth Amendment's guarantee of equal protection under the law. They have also argued that *Grutter* "abandoned the principle of racial neutrality" enshrined in the landmark *Brown v. Board of Education of Topeka* school desegregation decision and Title VI of the Civil Rights Act of 1964, and it improperly afforded broad deference to colleges "to pursue a diversity interest that is far from compelling." Universities have used *Grutter* "as a license to engage in outright racial balancing" because *Grutter* "endorsed racial objectives that are amorphous and unmeasurable and thus incapable of narrow tailoring" to ensure that colleges give no more consideration to the race or ethnicity of applicants than necessary to serve a compelling government interest, the briefs said.¹⁶

The briefs submitted in response by Harvard and UNC argue that SFFA's assertions that *Grutter* cannot be reconciled with the Fourteenth Amendment ignore that amendment's history and early application.

¹⁶ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Petition for Writ of Certiorari, 2021; *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Petition for Writ of Certiorari, 2021; *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief for Petitioner, 2022.

Adopted during the Reconstruction era that followed the Civil War, the amendment “was never intended to disregard the imperative of equal participation in society,” Harvard’s brief argues. The same Congress that adopted it passed several race-conscious measures specifically geared toward helping African Americans, and the amendment’s ratification was followed by several states’ passage of laws with the same goal, the brief notes.¹⁷

SFFA has accused Harvard of seeking to limit Asian/Asian American enrollments by systematically holding Asian/Asian American applicants to higher admissions standards and penalizing them “for supposedly lacking as much leadership, confidence, likability, or kindness as white applicants.” It accused both Harvard and UNC of shirking their obligation under *Grutter* and other precedents to give good-faith consideration to race-neutral alternatives to race-conscious admissions that would enable them to achieve sufficient levels of diversity.¹⁸

Both Harvard and UNC point to lower courts’ findings that they had given sufficient consideration to race-neutral alternatives, and that their policies were otherwise narrowly tailored. The universities claim that SFFA improperly seeks to relitigate the factual records in their cases.¹⁹

A chief figure behind the lawsuits against Harvard and North Carolina, conservative activist Edward Blum, was unsuccessful when he similarly took aim at the *Grutter* precedent in a legal challenge to the University of Texas’s race-conscious undergraduate admissions policy argued before the Supreme Court in 2013 and again in 2016. But the composition of the Supreme Court was more evenly split ideologically when it twice heard that case. Similarly, the high court’s 2003 *Grutter* ruling and its landmark 1978 decision establishing that the Constitution allows race-conscious admissions policies, *Regents of the University of California v. Bakke*, also were the products of courts with fairly even ideological splits, which necessitated hewing to precedent and striking a nuanced balance between the court’s opposing sides.

The shift in the Supreme Court’s composition under President Trump almost certainly has improved the odds of it firmly rejecting any use of race-conscious admissions this time around.²⁰ Conservative justices now hold a 6–3 majority of court seats. Moreover, the majority’s three longest-serving members, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, have shown hostility to race-

17 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Brief for Respondent, 2022; *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief by University Respondents, 2022.

18 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief for Petitioner, 2022.

19 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Brief for Respondent, 2022; *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief by University Respondents, 2022.

20 Coyle, “Gorsuch, Kavanaugh, Barrett Offer Few Clues on Affirmative Action’s Future,” 2022; *Fisher v. University of Texas at Austin*, 579 US (2016); Gluckman, “Supreme Court Will Hear Admissions Cases, Suggesting Conservatives May Target Affirmative Action,” 2022; *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002); Hoover and Gluckman, “The Supreme Court Has Upheld Race-Conscious Admissions Again and Again. Will This Time Be Different?” 2022; Schmidt, “Fisher” Ruling May Open a “Wave of Litigation against Colleges,” 2013.



conscious admissions practices in siding against colleges in past affirmative action cases. Although its three newest conservative members, Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, had not ruled on affirmative action cases as judges in lower federal courts of appeals, both Justice Gorsuch and Justice Kavanaugh had in other types of cases taken stands regarded by civil rights groups as hostile to the consideration of race.²¹

On the other side of the court's ideological divide, only two of the court's three liberal members can cast votes on the Harvard policy, because the newest of the three, Biden appointee Justice Ketanji Brown Jackson, is a former member of Harvard's Board of Overseers and said during her confirmation hearing that she would be recusing herself from hearing the case.²²

Even if the high court does not overturn *Grutter* and strike down race-conscious admissions policies outright, it appears likely to render decisions in the Harvard and UNC cases that will place new restrictions on such policies and make them harder to defend against legal challenges. The briefs filed by SFFA, as well as a host of amicus briefs submitted by conservative and libertarian advocacy groups, argue that evidence and testimony offered in the lower federal courts confirms a suspicion previously voiced by several of the court's conservative members: that colleges cannot be trusted to narrowly tailor race-conscious policies and seriously consider alternatives. "Harvard's and UNC's violations are basic and blatant. And other elite universities are likely no different," the SFFA alleges.²³

For their part, Harvard and UNC cite lower courts' findings that they have met the narrow-tailoring requirements established in Supreme Court precedents by using holistic admissions processes that consider race as one factor among many, by not accepting or rejecting students with the goal of achieving a specific racial balance, and by employing race-neutral alternatives regarded as effective and without costs or drawbacks that rendered them unworkable. Both institutions cite extensive outreach efforts and generous financial-aid programs, which help ensure that those underrepresented minority students who are offered admission can afford to attend, as among many strategies employed to minimize their need to consider applicants' ethnicity or race.²⁴

The American Council on Education and 38 other higher education associations argue in an amicus brief

21 Justice Gorsuch showed a tendency to rule against the plaintiffs in the employment discrimination cases that he heard before joining the Supreme Court. Justice Kavanaugh, in discussing voting-rights cases, has embraced the late Justice Antonin Scalia's argument in a 1995 employment ruling that under the Constitution "there can be no such thing as either a creditor or debtor race." Coyle, "Gorsuch, Kavanaugh, Barrett Offer Few Clues on Affirmative Action's Future," 2022. The Scalia opinion cited here is a concurring opinion in the Supreme Court's ruling in *Adarand Constructors, Inc. v. Peña*, 515 US 200 (1995).

22 Sneed and de Vogue, "Jackson Plans to Recuse from Harvard Affirmative Action Case If She's Confirmed," 2022.

23 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief for Petitioner, 2022.

24 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Brief for Respondent, 2022; *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief by University Respondents, 2022.

backing Harvard and UNC that striking down race-conscious admissions will create exactly what SFFA claims to oppose and the Supreme Court has long prohibited: “dual-track admissions that advantage one group over another based on applicants’ racial or ethnic identity.” On one track, it says, will be applicants who will be able to have colleges consider “the full range of their background and lived experiences.” On the other will be “applicants whose lives have been indisputably molded by their race or ethnicity” who must either leave that part of their background out of their application or see it ignored. The groups caution that the court will do even more damage if its decision reaches beyond admissions and bars the consideration of race or ethnicity in the funding of student organizations or in the provision of support services that help to ensure students from racial/ethnic minority groups can succeed and graduate.²⁵ A separate amicus brief submitted by 15 elite private colleges and universities, including Carnegie Mellon, Duke, Emory, Vanderbilt, and every member of the Ivy League other than Harvard, asserts that any decision prohibiting race-conscious admissions would represent “an extraordinary intrusion into the operations of private universities.”²⁶ More than 50 Catholic higher education institutions, including Georgetown University, have argued that race-conscious admissions policies serve their religious mission of promoting social justice, tolerance, and concern for others and therefore should be considered as covered by the First Amendment’s protections of religious freedom.²⁷ (The Supreme Court’s conservative members already have handed down several decisions strongly supportive of religion, but it remains to be seen whether that inclination will somehow enable the Catholic colleges’ brief to emerge as an unexpected game-changer.)

The only accepted legal rationale for race-conscious admissions policies — their asserted educational benefits — leaves them hanging by a thread.

Although race-conscious admissions policies arose for the sake of remedying societal discrimination — and many in higher education and elsewhere continue to argue that’s why they’re still crucial — that justification for them was explicitly rejected by a majority of justices in the Supreme Court’s first major affirmative action ruling, its 1978 *Bakke* decision. The controlling opinion in that case, written by Justice Lewis F. Powell, cited amicus briefs submitted by elite higher education institutions in positing a justification for race-conscious admissions that the defendant in the lawsuit, the medical school at the University of California at Davis, had not even argued: the educational benefits of diversity serve a compelling government interest.²⁸

25 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of American Council on Education and 38 Other Higher Education Associations as Amici Curiae in Support of Respondents, 2022.

26 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of Brown University, California Institute of Technology, Carnegie Mellon University, Columbia University, Cornell University, Dartmouth College, Duke University, Emory University, Johns Hopkins University, Princeton University, University of Chicago, University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Yale University as Amici Curiae in Support of Respondents, 2022.

27 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of Georgetown University, Boston College, the Catholic University of America, College of the Holy Cross, DePaul University, Fordham University, Marquette University, University of Notre Dame, Villanova University, and 48 Additional Catholic Colleges and Universities as Amici Curiae in Support of Respondents, 2022.

28 *Regents of the University of California v. Bakke*, 438 US 265 (1978).

Do race-conscious admissions policies to ensure diverse enrollments have drawbacks that offset diversity's benefits?

A quarter century later, Gary Orfield, codirector of the Civil Rights Project at Harvard, would lament that, as a result of the *Bakke* precedent, “We are trapped into an argument that basically dismisses the history of inequality in higher education as if it were irrelevant.”²⁹

The Supreme Court’s 2003 *Grutter* decision also spoke of the important role that race-conscious admissions play in ensuring access for members of underrepresented minority groups to various

professions and leadership positions, but its focus remained on the maintenance of sufficient diversity to fulfill educational objectives, such as students’ exposure to different worldviews, rather than any objectives explicitly tied to representation of racial/ethnic minority groups in the workforce.³⁰

Social science research shows that racial, ethnic, and other forms of diversity promote a better educational experience by increasing the intellectual quality of group interactions.³¹ But other questions remain unsettled: When and how does diversity provide such educational benefits? How much diversity is needed to reap them? And, do race-conscious admissions policies to ensure diverse enrollments have drawbacks that offset diversity’s benefits?

The Supreme Court so far has deferred to the judgment of college administrators on such matters, citing its precedents holding that the institutions’ discretion over whom to admit is an important element of academic freedom, a First Amendment concern. But the briefs submitted by the plaintiffs in the Harvard and UNC lawsuits argue that those institutions have abused such deference in maintaining admissions practices that would not withstand strict scrutiny by the courts, and the lower-court records of briefs and testimony in the cases contain myriad claims and counterclaims about factual assertions related to the need for the practices and their impact. Two of the Supreme Court’s conservative members, Justices Alito and Thomas, expressed strong opposition to showing “blind deference” to colleges when the Supreme Court last took up a challenge to race-conscious admissions, involving undergraduate admissions at the University of Texas at Austin, in 2016.³²

More importantly, the educational rationale for preserving race-conscious admissions policies leaves them divorced from America’s history of slavery, genocide, and systemic racism, and it lets colleges off the hook for remedying the effects of their own discriminatory policies and practices. It gives short shrift to social inequalities and the educational needs and disadvantages of underrepresented minority populations stemming from past and present mistreatment. It seeks to bolster such populations’ enrollments in higher-learning programs not for the sake of making them whole, but for the edification of the only population on campus that lacks much exposure to diversity: white students. And it leaves colleges free to neglect other important forms of diversity, such as diversity in economic background,

29 Schmidt, *Color and Money*, 2007.

30 *Grutter v. Bollinger*, 539 US 306 (2003).

31 Carnevale and Smith, “The Economic Value of Diversity,” 2016.

32 *Fisher v. University of Texas at Austin*, 579 US (2016).

causing many college campuses to be places where students are much more likely to encounter members of other races than students whose parents aren't rich.

The objective of race-conscious admissions policies based on the educational diversity rationale is to enroll a “critical mass”³³ of certain racial/ethnic minority groups. What amounts to a critical mass is not tied to fixed numbers or percentages, an objective precluded by the *Bakke* decision's rejection of racial quotas. Instead, critical mass is generally defined as a sufficient share of enrollment to prevent underrepresented minority groups from feeling isolated or pressured to function as spokespeople for their races. That's a very different objective than maintaining enrollments that reflect the demographic makeup of a given state or the nation as a whole. The University of North Carolina, for example, recently had an undergraduate enrollment that is 8 percent Black/African American in a state that is 22.3 percent Black/African American, 8.5 percent Hispanic/Latino in a state that is 10.2 percent Hispanic/Latino, and .0385 Native American in a state where 1.6 percent of the population is Native American.³⁴ Harvard, which draws students from throughout the nation, enrolls about two-thirds as many Hispanic/Latinos but four times as many Asian/Asian Americans as it would if its enrollments mirrored the demographics of the United States as a whole.³⁵

Richard Thompson Ford, a Stanford University law professor and critical race theorist, argued in a recent essay that “detering an honest discussion of racism seems to be much of the point of diversity talk.” He continued:

“Diversity has required colleges to finesse, if not obscure, the salience of racial injustice. It encourages us to focus on something pleasant — multicultural enrichment — rather than on racism; it is a topic fit for corporate retreats and alumni cocktail parties, where etiquette demands one avoid controversial topics. Diversity transforms what should be an indictment of social practices of exclusion into a plea for ‘tolerance,’ as if the issue were how to manage uncouth upstarts rather than how to correct centuries of deliberate subordination and violent exploitation. This mangles the historical record and softens the diagnosis of social injustice.”³⁶

33 Karabel (2005) documents an early use of the term *critical mass* by Harvard in the late 1960s, in his book *The Chosen*. The critical mass justification for race-conscious admissions factored prominently in legal briefs that the University of Michigan filed in defending its policies in *Grutter v. Bollinger* and *Gratz v. Bollinger*, in the University of Texas's defense of its policies in *Fisher v. University of Texas at Austin*, in amicus briefs that higher education researchers and associations filed in support of the universities in those cases, and in legal guidance given to colleges in the wake of decisions in those cases. See Schmidt, “Affirmative Action Remains a Minefield, Mostly Unmapped,” 2003; Schmidt, *Color and Money*, 2007.

34 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of the NAACP Legal Defense and Educational Fund, Inc., and the National Association for the Advancement of Colored People as *Amici Curiae* in Support of Respondents, 2022. The data cited here are from US Department of Education, Integrated Postsecondary Education Data System (IPEDS), 2022, and US Census Bureau, “QuickFacts: North Carolina,” 2022.

35 Based on freshman enrollment numbers found at Harvard College, “[A Brief Profile of the Admitted Class of 2026](#),” (accessed April 1, 2023).

36 Ford, “Derailed by Diversity,” 2022.

The harsh truth: 50 years of relying on race-conscious admissions policies has left us far short of having true racial equity in American higher education.

A lot of good has been achieved through American higher education's use of race-conscious admissions policies, which came into existence in the mid-1960s as a means of remedying societal discrimination and offering members of underrepresented minority groups hope of advancement to tamp down that era's racial unrest. Among their benefits, such policies have enabled colleges to offer students a richer academic environment, helped diversify both college enrollments and the ranks of various professional fields, and promoted both intra- and intergenerational social mobility by enabling people from disadvantaged backgrounds to improve their socioeconomic standing and pass their new advantages on to their children. But they quickly proved to have unintended consequences, such as low graduation rates of underrepresented minority students at colleges that did not provide adequate support services and heightened tensions on campuses where underserved minority students felt unwelcome. And it did not take long for race-conscious admissions policies — and affirmative action more broadly — to become the focus of unrelenting political backlash and legal challenges.

In hindsight, race-conscious admissions policies were never up to the task that we gave them: offsetting the effects of bias and inequality that are rife throughout American society and skew college admissions processes in favor of the privileged.

We've looked to college admissions offices to somehow assemble racially and ethnically diverse freshman classes when nearly everything happening in society — and in the higher education industry — pushes in the opposite direction. We've expected selective colleges' admissions offices to use narrowly tailored means, a thumb on the scale, to offset the effects of widespread and growing residential and educational segregation, increased economic inequality, and forces within their own industry pressuring them to enroll the advantaged.

We've settled for a paltry level of visible diversity rather than college campuses full of students representing a true cross section of the college-age population. In the words of civil rights theorist Lani Guinier, we've used the representation of racial/ethnic minority groups achieved through race-conscious admissions as a “fig leaf to camouflage privilege.”³⁷

It's time to tackle the bigger problems that affirmative action has tried to mask. Affirmative action may have helped open the gates of opportunity in selective colleges to Black/African American and Hispanic/Latino students, but it has failed to ensure equitable representation in the enrollments of the nation's most prestigious higher education institutions.

Even with affirmative action policies in place, we have not come close to achieving proportional representation of Black/African American and Hispanic/Latino students in selective institutions relative to their representation in the college-age population. Over the past 30 years, white students have

consistently held a significant advantage in terms of access to selective colleges, with their share of enrollment more than 10 percentage points above their share of the graduating high school class.³⁸ Over the same time frame, the Black/African American and Hispanic/Latino share of enrollment at such institutions has been one-quarter to one-half of their share of all of the nation's high school graduates.³⁹

Achieving proportional student racial/ethnic diversity at selective colleges would be a monumental task. About 290,000 first-time domestic students who graduated high school in 2020 entered colleges in the two top tiers of selectivity in the United States. For the enrollments of those colleges to mirror the racial/ethnic distribution of the college-aged population, the institutions would have had to enroll about 50,000 more Black/African American, Hispanic/Latino, and American Indian/Alaska Native/Native Hawaiian/Pacific Islander students. Assuming these colleges did not increase enrollment (which they almost never do), that would mean that about 50,000 fewer white and Asian/Asian American students and students of more than one race/ethnicity would be able to attend a selective college. In other words, attendance by members of the underrepresented groups would have had to increase by 86 percent while attendance by students in the overrepresented groups would have had to decrease by 22 percent to match the racial/ethnic distribution of the college-age population.⁴⁰

Despite selective colleges' rhetoric about their commitment to increasing diversity, white and Asian/Pacific Islander students collectively are more overrepresented at such institutions now than they were in the early 2000s (Figure 1). This may seem counterintuitive given that white students' share of the enrollments at selective institutions has dropped during that time. But their share of all graduates of our nation's high schools has dropped substantially faster, meaning that their share of the population that heads off to selective colleges for postsecondary education has grown.⁴¹ White and Asian/Pacific Islander students were collectively overrepresented by 9 percentage points in 2002 at selective colleges compared to their share of all high school graduates. In 2020, these students were overrepresented by 15 percentage points (they took up 72 percent of seats in selective colleges while making up 57 percent of all high school graduates).⁴²

Meanwhile, the underrepresentation of Black/African American, Hispanic/Latino, and American Indian/Alaska Native students has grown. Their overall share of enrollment at selective colleges has risen substantially, but that growth has not come close to keeping pace with the growth of these students' share of the nation's high school graduates. As a result, Black/African American, Hispanic/Latino, and American Indian/Alaska Native students collectively are even more underrepresented at selective colleges now than they were in 2002. Students from these groups make up 40 percent of all high school graduates but just 20 percent of the enrollment at selective colleges, meaning they are underrepresented by 20 percentage points. They were underrepresented by 14 percentage points in 2002.

38 Carnevale and Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," 2004; Carnevale and Strohl, "How Increasing College Access Is Increasing Inequality, and What to Do about It," 2010; Carnevale et al., "Achieving Racial and Economic Diversity with Race-Blind Admissions Policy," 2014.

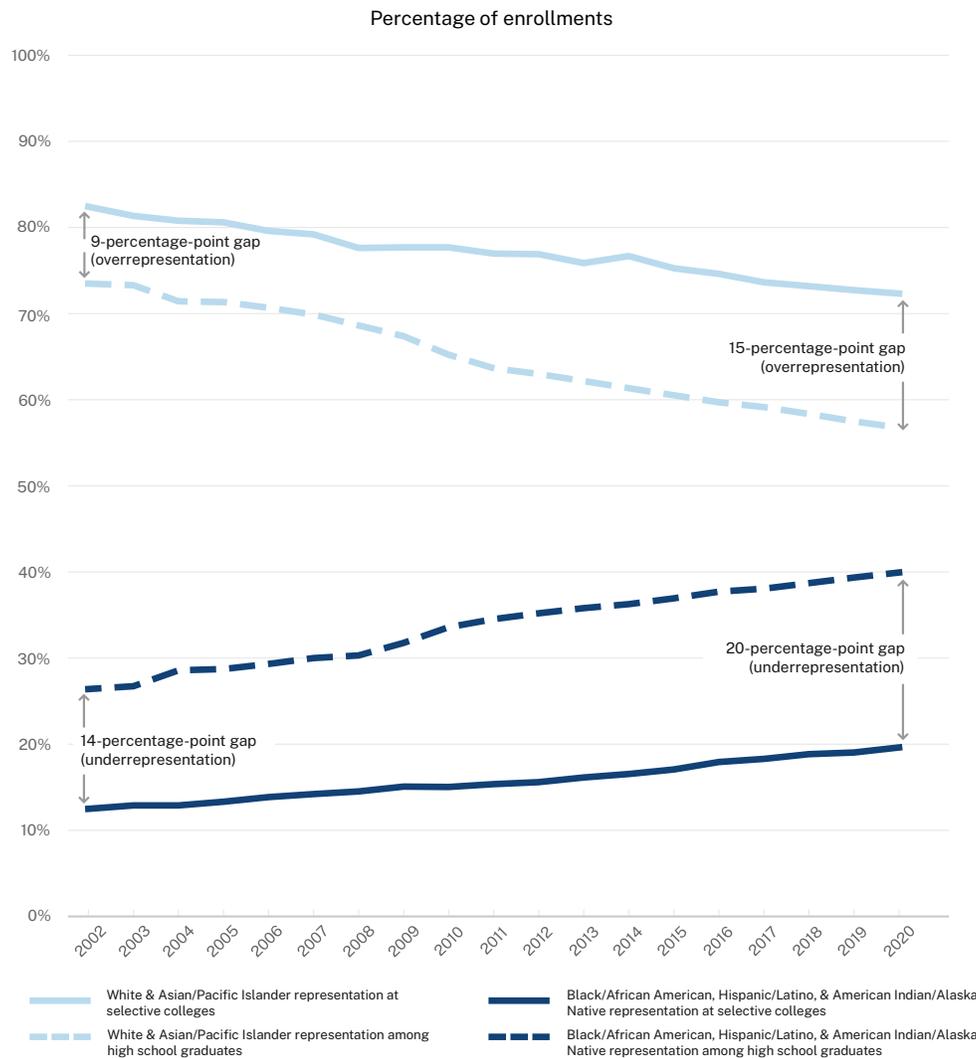
39 Carnevale and Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," 2004; Carnevale and Strohl, "How Increasing College Access Is Increasing Inequality, and What to Do about It," 2010; Carnevale et al., "Achieving Racial and Economic Diversity with Race-Blind Admissions Policy," 2014.

40 US Department of Education, Integrated Postsecondary Education Data System (IPEDS), 2020; US Census Bureau, Current Population Survey, 2020.

41 Between 2004 and 2019, white students saw a 14-percentage-point drop in their representation among high school graduates (falling from 66 percent to 52 percent), compared to a 12-percentage-point drop in their representation among selective college enrollments (falling from 73 percent to 61 percent).

42 Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

FIGURE 1 White and Asian/Pacific Islander students have become more overrepresented at selective colleges since 2002, while Black/African American, Hispanic/Latino, and American Indian/Alaska Native students have become more underrepresented.



Source: Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

Broader enrollment trends contribute to racial and ethnic gaps in representation at selective colleges. While all segments of the population have been growing and sending more young people to college, the overwhelming majority of additional white students heading to college have gone to selective institutions, while most of the overall college enrollment growth driven by Black/African American and Hispanic/Latino students has taken place at open-access institutions.⁴³

43 Between 1995 and 2009, 82 percent of net new enrollment of white students was in selective institutions, while 68 percent of net new Black/African American student enrollment was in open-access institutions, as was 72 percent of net new Hispanic/Latino student enrollment. See Carnevale and Strohl, *Separate & Unequal*, 2013. That analysis was based on considering the top three tiers of colleges in *Barron's Profiles of American Colleges* as "selective," while this report is based on analysis that considers the top two tiers in *Barron's* to be selective.

Race-conscious admissions by selective colleges have little impact anyway in smoothing over education gaps that start early in life. Our pre-K through 12th grade education system fails at every level to ensure that students have equal chances of success regardless of their race or class, and it does not provide enough Black/African American and Hispanic/Latino students with the rigorous academic preparation they need to qualify for admission to selective institutions.⁴⁴ Such gaps are rooted in racial and economic segregation. White students are far less likely than Black/African American or Hispanic/Latino students to attend schools with high populations of racial/ethnic minority groups and high levels of poverty. Approximately 6 percent of white students attend public elementary and secondary schools with student populations that are more than three-quarters from racial/ethnic minority groups, while 59 percent of Black/African American and 61 percent of Hispanic/Latino students do so.⁴⁵ Just 5 percent of white students, but nearly a third of Black/African American and Hispanic/Latino students, attend secondary and high schools in which more than 75 percent of students qualify for a free or reduce-priced lunch.⁴⁶

Such segregation matters because of related disparities in the quality of education schools provide, especially when it comes to college preparation. For example, just over half of high-poverty schools offer dual enrollment courses, compared to more than 70 percent of low-poverty schools.⁴⁷ More broadly, 76 percent of students from a low-socioeconomic-status (SES) background attend a high school that offers AP or IB Calculus, compared with 83 percent of students from a high-SES background.⁴⁸ An evaluation of the credentials of mathematics and computer science teachers found that high-poverty schools and schools with high percentages of students from racial/ethnic minority groups had the least-qualified teachers based on teacher certifications and degrees in the subjects they teach.⁴⁹

Such disparities can cause students with very similar levels of talent to have very different life trajectories. While being in a disadvantaged setting hinders talented students, being in an advantaged setting can prop up students who struggle academically. A white kindergartner with below-median test scores is more likely than a Black/African American kindergartner with above-median test scores to get a college degree and have high SES at age 25.⁵⁰ The inadequacies of our education system from pre-K through 12th grade result in too much lost talent to feasibly populate selective colleges with enrollments of prepared students who demographically match the current population.

A Supreme Court decision barring selective colleges from continuing to engage in race-conscious admissions will make it impossible to ignore our current education system's deepest problems and structural flaws. The most expansive critics of that system assert that colleges pay lip service to affirmative action for the sake of hiding their real motive in defending the status quo: a desire to preserve an unfair admissions process that caters to the wealthy.⁵¹

44 Caroline Hoxby makes a similar point in "The 2016 Martin Feldstein Lecture," 2016.

45 Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, National Center for Education Statistics (NCES), Digest of Education Statistics Table 216.50, 2021.

46 Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, National Center for Education Statistics (NCES), Digest of Education Statistics Table 216.60, 2021.

47 US Government Accountability Office (GAO), *K-12 Education*, 2018.

48 Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, High School Longitudinal Study of 2009 (HLS.09), 2009.

49 US Department of Education, "Qualifications of Public School Mathematics and Computer Science Teachers in 2017-18," 2022.

50 A white kindergartner with bottom-half test scores has a 45 percent chance of having a college degree and a 60 percent chance of being in the top half of socioeconomic status (SES) as a young adult. Meanwhile, a Black/African American kindergartner with top-half test scores has a 35 percent chance of having a college degree and a 45 percent chance being in the top half of SES as a young adult. College degrees include associate's degrees, bachelor's degrees, and graduate degrees. Georgetown University Center on Education and the Workforce analysis of data from Early Childhood Longitudinal Study-Kindergarten (ECLS-K), 2006 data, and Education Longitudinal Study of 2002 (public use data), 2013.

51 Carnevale et al., *The Merit Myth*, 2020.

Among such critics, Lani Guinier wrote:

If affirmative action has failed, it's not because it has admitted unmeritorious students of color at the expense of whites, or that it has failed to propel us into a post racial, color-blind society. Rather, affirmative action's weakness and vulnerability cooperate with, and perhaps unnecessarily legitimate a meritocracy that privileges test scores over other indicators of student potential in the first place. Affirmative action has fed into the societal vision we have of our citizens belonging to their place in a pyramid — some further up, some further down — our positions based to some degree on where we were born or how successfully we have clawed our way up over others.⁵²

Our nation tolerates substantial levels of inequality by clinging to the belief what we live in a meritocracy in which those who have talent and work hard can rise to positions of wealth and power. Our higher education institutions are widely seen as the social and economic sorting mechanisms that admit students based on their academic potential and prepare them for suitable careers.

The reality, however, is much more complicated. Market pressures and financial motives have prompted selective colleges and universities to adopt admissions processes that define “merit” in institutionally self-interested terms and systematically favor the privileged in purportedly selecting the able. Family wealth, or the lack thereof, plays a huge role in determining not only what level of college preparation young people will receive but also how colleges will rate them against other applicants who are similarly qualified. Rather than identifying and rewarding merit, selective colleges become mechanisms for perpetuating social and economic inequality from one generation to the next, leaving the United States with less social mobility than is found in many other similar nations.⁵³

Rather than challenging our faith in meritocracy, affirmative action seeks to ameliorate meritocracy's shortcomings enough to legitimize it in the eyes of those on the bottom of the pile. It circumvents or interferes with mechanisms of the sorting machine rather than overhauling the machine itself. It creates the appearance of equal opportunity where equal opportunity doesn't exist.

What remains to be seen is whether the Supreme Court's imminent rulings on Harvard and UNC — or in some other future challenge to race-conscious admissions — will provoke efforts outside the courts to do the real work that's needed: the reform of college admissions and sweeping, aggressive reform of the public education system. The alternative, a cementing in place of current segregation and inequality, would condemn this nation to a bleak future of unfulfilled human potential, growing racial division, and dwindling faith in the American dream.

52 Guinier, *The Tyranny of the Meritocracy*, 2015.
53 Carnevale et al., *The Merit Myth*, 2020.



How We Got to Where We Are

Advocates of racial integration and equity in education have long been on the defensive in the federal courts.

Should the Supreme Court abandon its past willingness to allow race-conscious admissions, that decision will represent far more than mere reversal of fortune for colleges invested in their current strategies of fostering racially and ethnically diverse enrollments. The conservative and libertarian forces that began fighting such policies in the 1970s will have delivered the coup de grâce — and perhaps not just to the policies themselves. They also might have eliminated, once and for all, any remaining faith in our nation’s Supreme Court’s willingness to safeguard education access and funding adequacy for low-income students and students from racial/ethnic minority groups.

This moment has been a long time coming. Portending it is a long list of Supreme Court precedents resulting from fierce legal battles in several arenas involving affirmative action, busing and other forms of school desegregation and integration, the distribution of tax dollars among schools, and the freedom of higher education institutions to take actions opposed by lawmakers and voters.⁵⁴ Among other things, the court has replaced an affirmative action rationale grounded in history with one grounded in educational theory, stripping the arguments for race-conscious admissions policies of much of the moral force that had buttressed them in the political arena.

The Supreme Court had offered great hope to advocates of race and class justice in K–12 education through its landmark mid-1950s school desegregation rulings in the five cases collectively known as *Brown v. Board of Education of Topeka*. By the end of the 1970s, however, such hope had faded. At the elementary and secondary level, Supreme Court decisions had limited the power of government and educational institutions to rectify past discrimination or redistribute education funds from rich school districts to poor ones. Among such rulings, the high court limited the reach of school desegregation plans by absolving any community that had not engaged in discrimination blatant enough to be proven in

court from having to participate in cross-district busing programs or other regional remediation efforts.⁵⁵ It left intact public school financing systems that tied the quality of public schools to the wealth of the communities they served, rejecting the idea that the US Constitution guaranteed a right to education in its pivotal 1973 decision *San Antonio Independent School District v. Rodriguez*.⁵⁶

With the notable exception of its 1982 ruling in the case *Plyler v. Doe*, in which it narrowly held that public schools cannot constitutionally turn away undocumented immigrant students seeking a free public education,⁵⁷ the Supreme Court has shown little interest in using the federal courts as an instrument for compelling state and local authorities to provide equitable K–12 education. Congress and the executive branch have pumped considerable amounts of federal money into the education of disadvantaged children, beginning with the National Defense Education Act of 1958 and increasingly in the form of targeted assistance programs or programs focused on bilingual education or the education of students with disabilities. But, because public education is primarily a state and local responsibility and federal dollars account for only a small portion of public school funds, such federal efforts have fallen far short of what it would take to remedy race- and class-based inequities in K–12 education.

In terms of postsecondary education, the Supreme Court has steadily made it easier for states to get out from under court orders to remedy the vestiges of racial segregation at public colleges. The court upheld state bans on the use of racial preferences by public colleges and left intact a federal circuit court ruling that barred colleges from operating financial-aid or student-support programs reserved exclusively for underrepresented minority students for the sake of getting more of them through college.⁵⁸ It imposed limits on why, when, and how much colleges can consider the race or ethnicity of applicants.

Throughout American society — in education, housing, criminal justice, and employment — legal and regulatory efforts to eradicate discrimination generally succeeded only where bias was too overt to be denied.⁵⁹ These efforts proved powerless in remedying the effects of unconscious or unspoken biases that continue to play a major role in perpetuating the race- and class-based segregation of public schools and the communities they serve.

To understand how we got to where we are, it's important to look at how our nation's history of racism and economic inequality has shaped educational access, and how our nation's basic principles complicate efforts to achieve necessary education reform.

The Supreme Court has shown little interest in using the federal courts as an instrument for compelling state and local authorities to provide equitable K–12 education.

55 Hertz, "You've Probably Never Heard of One of the Worst Supreme Court Decisions," 2014; *Milliken v. Bradley*, 418 US 717 (1974).
56 *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).
57 *Plyler v. Doe*, 457 US 202 (1982).
58 *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).
59 Cohen, *Supreme Inequality*, 2020.

Although the promotion of equality has always been a stated goal of American education, our definition of equality has often changed and inevitably left out certain populations.

In an influential 1972 essay describing the evolution of how Americans used the term “equality,” the Harvard sociologist Daniel Bell noted that among early New England colonists, “there was an equality, but in the Puritan sense of an equality of the elect,” an equality among virtuous men who shared religious beliefs and saw themselves as chosen by God.⁶⁰ Later, the founding fathers used egalitarian rhetoric but also embraced the liberal philosopher John Locke’s belief in the existence of a “hierarchy of intellect” in which some people are more intelligent and worthy of entrusting with leadership. Throughout the 19th century, Bell wrote, “the notion of equality was never sharply defined. In its voiced assertions it came down to the sentiment that each man was as good as another and no man was better than anyone else. What it meant, in effect, was that no one should take on the air of an aristocrat and lord it over other men,” and that “no formal barrier or prescribed positions” stood in the way of anyone’s chances of getting ahead.⁶¹

Well into the 20th century, however, those notions of equality covered only one subset of the population — white men — especially when it came to access to education and the advancement it offered. Nearly all colleges excluded women of any race. Most states of the antebellum South had outlawed teaching slaves, and northerners who sought to educate Black/African Americans were subject to being harassed, their schools torched.⁶² Antioch College, Berea College, and Oberlin College began admitting Black/African American students by the mid-1800s, but only 28 African Americans earned baccalaureate degrees in the 30 years leading up to the Civil War.⁶³ The decades following the Civil War did not usher in the integration of races and sexes at colleges as much as the creation of separate colleges for female or Black/African American students. Nineteen states that had belonged to or bordered the Confederacy enacted laws calling for public higher education to be racially segregated into all-white or all-black institutions.

The equal-protection clause of the Fourteenth Amendment, ratified just after the Civil War, seemed hard to square with such racial segregation, but the Supreme Court claimed to do just that by declaring that public accommodations could be “separate but equal” in its 1896 *Plessy v. Ferguson* decision involving racially segregated rail cars. State laws requiring the racial segregation of public colleges would persist until the middle of the 20th century, and some leading northern private colleges, including Notre Dame and Princeton, would continue to prohibit or restrict the admission of Black/African American students nearly until then.⁶⁴ Through the 1940s, public elementary and secondary schools remained legally segregated in the Old South, six of its border states, and the District of Columbia. School districts had

60 Bell, “On Meritocracy and Equality,” 1972.

61 Bell, “On Meritocracy and Equality,” 1972.

62 US Commission on Civil Rights, *Toward Equal Educational Opportunity*, 1978, as cited in Schmidt, *Color and Money*, 2007.

63 Bowen et al., *Equity and Excellence in American Higher Education*, 2005; Schmidt, *Color and Money*, 2007.

64 Karabel, *The Chosen*, 2005; Schmidt, *Color and Money*, 2007.

the option of maintaining segregated elementary and secondary schools in Arizona, Indiana, Kansas, and New Mexico.⁶⁵

Other racial/ethnic minority groups were similarly excluded from education. Native Americans, for example, often found themselves denied the schools they'd been promised in treaties, and were also barred by the federal government from receiving instruction in their tribes' languages. Both California and Texas operated separate schools for Mexican Americans, and California similarly put Chinese, Mongolian, and Japanese students in separate schools until the Supreme Court ended the practice in 1945.⁶⁶

Many of the admissions practices currently used by selective colleges — such as requirements of personal interviews and letters of recommendation — arose at Ivy League colleges as means to limit Jewish enrollments. In its current litigation against Harvard, Students for Fair Admissions evokes Harvard's past quotas limiting enrollments of Jewish students, and its denials of engaging in discrimination at the time, to argue that the courts cannot trust its current denials of discrimination against Asian/Asian American applicants.⁶⁷ It argues that Harvard and other colleges “should not be trusted with the awesome and historically dangerous tool of racial classification” because they will use any leeway that the Supreme Court gives them “to engage in racial stereotyping, discrimination against disfavored minorities, and quota setting to advance their social-engineering agenda.”⁶⁸

Even in states that did not require the racial segregation of public schools, such schools often ended up segregated anyway as a result of residential zoning ordinances and housing discrimination based on race, ethnicity, religion, or class. The suburbs that proliferated in response to the perceived ills of big cities often sought to keep out racial minorities and the less affluent by banning multifamily dwellings or requiring that lots be of a minimum size, rendering them unaffordable to many. Home sellers and buyers commonly entered into “restrictive land covenants” barring members of certain racial, religious, or ethnic groups from occupying the property. Although the practice was struck down by the Supreme Court in 1948, it continued to be perpetuated through unwritten “gentlemen's agreements.”⁶⁹ The federal government fostered race- and class-based residential segregation by building interstate highways that gave rise to new white suburbs, destroying working-class neighborhoods to promote “urban renewal,” and financing the construction of public housing complexes.⁷⁰ Stephen Richard Higley, a geographer who has extensively researched the housing patterns of the rich, has observed that our nation's laws related to property and municipal governance continue to function essentially as a formalized class system, creating “a stratified place based hierarchy with profound consequences for all of society.”⁷¹ Minneapolis officials explicitly acknowledged that reality in 2018 by making theirs the first major city in the United States to strike down single-family zoning based on that zoning category's longstanding ties to residential segregation.⁷²

65 Clotfelter, *After Brown*, 2004; Schmidt, *Color and Money*, 2007.
66 Clotfelter, *After Brown*, 2004; Schmidt, *Color and Money*, 2007; US Commission on Civil Rights, *Toward Equal Educational Opportunity*, 1978.
67 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Petition for Writ of Certiorari, 2021.
68 Schmidt, “Lawsuits against Harvard and UNC-Chapel Hill Urge an End to Race-Conscious Admissions,” 2014.
69 Cashin, *The Failures of Integration*, 2004; Higley, *Privilege, Power & Place*, 1995; Schmidt, *Color and Money*, 2007.
70 Cashin, *The Failures of Integration*, 2004.
71 Higley, *Privilege, Power & Place*, 1995.
72 Mervosh, “Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning,” 2018.

Race- and class-based disparities in access to higher education stem from the founding values of our nation.

The hard truth is that formidable obstacles to equal education access are built into our culture as well as our political and economic system. It's a mistake to expect this inequality to be remedied by our nation's courts any time soon.

The chief ideology underlying our nation's governance and resource distribution — liberal individualism — instinctively rejects any government effort to channel funds from the rich to the poor or to otherwise require fair educational access. This ideology leaves people with a tremendous amount of freedom to make personal choices that perpetuate segregation and inequality and throws roadblocks in the path of any court or government agency seeking to improve the situation.⁷³

Adherence to liberal individualism has left our nation with an education system that lacks cohesion, accountability, or anything close to consistent quality. At the elementary and secondary levels, this system — if it even can be called one — consists of a patchwork of public school districts governed by elected local boards and by the states, and of private schools that operate largely outside of the government's reach. At the college level, this system consists of institutions driven by competitive pressures in a cutthroat market, which resist government demands to better serve society by asserting their autonomy under Supreme Court rulings intended to protect academic freedom. Colleges operate largely beyond the government's reach when it comes to whom they admit or how they spend their funds, even though they're heavily subsidized by the public regardless of whether they're public or private institutions.

Our nation's deep faith in individualism creates a confined arena in which debates over educational access for racial and ethnic minorities and low-income students can take place. It tends to leave both sides feeling compelled to appeal to the same values — fairness and individual opportunity — while relegating other values, such as racial equality and civic responsibility, to the sidelines.

In the cases pending before the Supreme Court, the organization that brought the lawsuits, Students for Fair Admissions, accuses Harvard of discriminating against Asian American applicants and the University of North Carolina of unconstitutionally discriminating against those who are not Black/African American, Hispanic/Latino, or Native American. On the other side, Harvard and UNC have felt compelled to frame their defenses of their policies in individualistic terms, not daring to suggest that they've asked a single student to forego well-earned acceptance to their institutions for the greater good of ensuring opportunity for others. In addition to denying that they've trampled any students' individual rights, they characterize their policies as beneficial to every student at their institution and necessary to offset the obstacles students from racial/ethnic minority groups face in light of unfair access to college preparation. Past Supreme Court decisions have precluded them from arguing that the racial and ethnic composition of their enrollment needs to reflect that of broader society, or that it is necessary for them

to deny admission to some worthy white or Asian/Asian American applicants to make up for injustices in our nation's past.

In the courts and beyond, the actions of educational institutions are judged through a lens that values above all respect for individual rights. Pragmatic considerations related to efficiency and effectiveness factor into the mix, but primarily in the course of determining how best to protect and promote individual interests. Operating individualistically themselves, educational institutions look out for their respective interests rather than focusing on the common good. How they define their own interests depends on the balance they strike among their various constituencies, which include alumni, donors, parents, and administrators focused on the bottom line. When interests clash, it's the rich and powerful stakeholders who are better equipped to look out for themselves, and who most always get the upper hand.

The evidence of the power of individualism has always been obvious in public opinion on race-conscious admissions. A March 2022 survey of 10,441 American adults conducted by the Pew Research Center found that 74 percent of all respondents — and solid majorities of those identified as Black/African American, Hispanic/Latino, or Asian/Asian American — said race and ethnicity should not factor into colleges' admission decisions. While respondents who were white or politically identified as Republican or leaning Republican were by far the most likely to hold such a view, it was shared by 59 percent of Black/African American, 68 percent of Hispanic/Latino, and 63 percent of Asian/Asian American survey respondents, and by 62 percent of those who identified as Democrats or as Democratic-leaning.⁷⁴ Such opposition exists despite other survey-based research showing that a substantial majority of all American adults, including the majority of white respondents, express belief that racism against Black/African American people remains widespread in the United States.⁷⁵ It also exists despite a finding by other survey-based research that programs designed to bring diversity to college campuses are regarded as a good thing by solid majorities of every racial and ethnic group, despite their misgivings about the consideration of applicants' race.⁷⁶

The weak public support for race-conscious admissions policies stands in sharp contrast with the much stronger support for them that comes from major employers and other institutional elites. Businesses, the professions, and their representative associations have strongly supported such policies in legal briefs, public statements, and the context of debates over proposed racial-preference bans because they want a workforce that "looks like America," especially at senior professional levels. They regard such

Adherence to liberal individualism has left our nation with an education system that lacks cohesion, accountability, or anything close to consistent quality.

74 Gómez, "As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions," 2022.
75 Horowitz et al., "Amid National Reckoning, Americans Divided on Whether Increased Focus on Race Will Lead to Major Policy Change," 2020; Jones and Lloyd, "Larger Majority Says Racism against Black People Widespread," 2021.
76 Anderson et al., "Over 6 in 10 Americans Favor Leaving Race Out of College Admissions, Post-Schar School Poll Finds," 2022.

diversity as important not just because it helps them function in a diverse society but because it confers legitimacy upon them.

Like other challenges to race-conscious admissions policies that have come before the Supreme Court, the Harvard and UNC cases have inspired a flurry of amicus briefs describing those policies as essential to various fields. Among those submitting such briefs have been the American Bar Association,⁷⁷ media associations and foundations,⁷⁸ large corporations,⁷⁹ and the Association of American Medical Colleges and 45 other healthcare organizations.⁸⁰ The Biden Administration has argued in an amicus brief that race-conscious admissions policies are essential in ensuring representation of racial/ethnic minority groups and previous exposure to diversity among those hired into the workforces of various federal agencies. Moreover, it says, such policies serve national security interests by promoting diversity among the graduates of the military service academies and college-based Reserve Officers' Training Corps, which is essential to the US military's maintenance of enough diversity among officers to keep racial tensions from undermining cohesion in the ranks.⁸¹

The end of Jim Crow laws and other forms of legally mandated racial segregation marked only the beginning of a long and fitful healing process.

For a time during the mid-20th century, it seemed as though the nation might have gotten on the path to leaving racial segregation behind.

Black/African American students gained at least some access to previously all-white public colleges in the 1930s, as a result of a series of federal and state court rulings that, applying the logic of the 1896 *Plessy* decision, required such institutions to enroll those Black/African American students for whom no other options existed.⁸² The *Plessy* decision's language requiring equality in segregated public accommodations similarly played into 1940s court rulings demanding reductions in gaps in tax-dollar support for separate Black/African American and white public schools.⁸³

The "separate" part of "separate but equal" did not face serious legal challenge until the civil rights movement, which stirred to life among the demands for equal treatment from Black/African American veterans returning home from World War II. As part of that movement, the NAACP and sympathetic lawyers mounted efforts to secure access for Black/African American students to the same educational institutions that served white students. They scored a huge victory on June 5, 1950, when the US

77 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of the American Bar Association as *Amicus Curiae* in Support of Respondents, 2022.

78 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of Multicultural Media, Telecom and Internet Council, Inc., National Association of Black Owned Broadcasters, National Hispanic Foundation for the Arts, Emma Bowen Foundation for Minority Interests in Media, and National Newspaper Publishers Association as *Amici Curiae* in Support of Respondents, 2022.

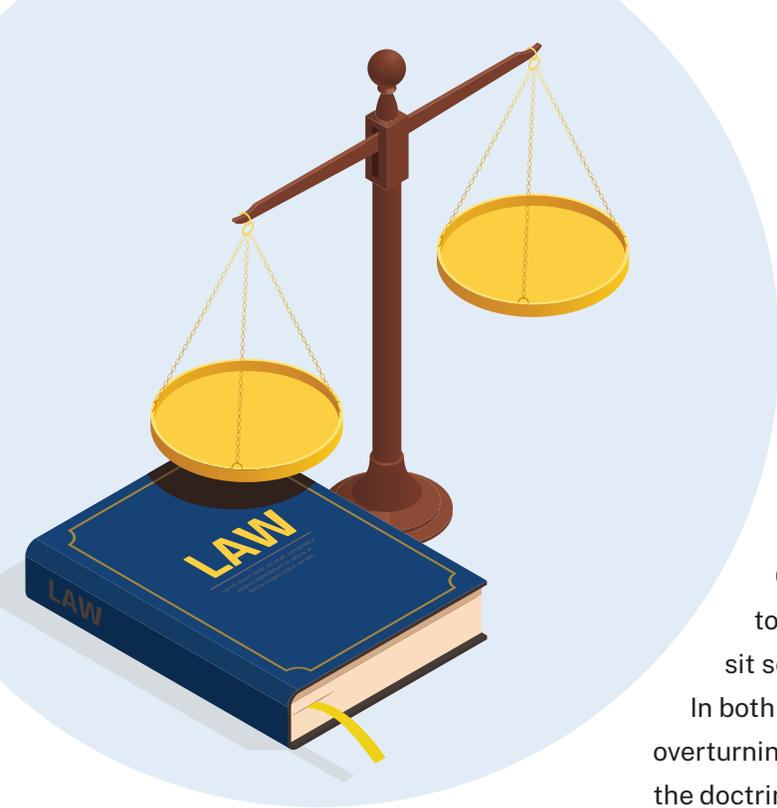
79 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief for Major American Business Enterprises as *Amici Curiae* Supporting Respondents, 2022.

80 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of the Association of American Medical Colleges et al. as *Amici Curiae* in Support of Respondents, 2022.

81 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Brief for the United States as *Amicus Curiae* Supporting Respondent, 2022.

82 Higley, *Privilege, Power & Place*, 1995.

83 Clotfelter, *After Brown*, 2004.



Supreme Court struck down the segregation of public higher education in a pair of decisions involving advanced-degree programs. One case, *Sweatt v. Painter*, dealt with a separate minority law school that Texas lawmakers had established to avoid asking the University of Texas's law school to admit a single Black/African American applicant, Heman Marion Sweatt. In the other case, *McLaurin v. Oklahoma State Regents*, the University of Oklahoma had admitted George W. McLaurin, a Black/African American student, to its doctoral program in education, but insisted that he sit separately in classrooms, the library, and the cafeteria.

In both cases the high court's majorities, while not explicitly overturning the *Plessy* "separate but equal" doctrine, declared that the doctrine was inapplicable to higher education as a practical matter. Their opinions strongly suggested that providing equal opportunities and resources in the context of racially separate higher education might be an impossible task.

The Supreme Court finally overturned *Plessy* with its 1954 decision in *Brown*, a case that consolidated legal challenges to the racial segregation of several school districts. The court majority's opinion held that the separate-but-equal doctrine "has no place" in public education, reasoning that racially segregated educational facilities "are inherently unequal," especially given their detrimental effects on Black/African American children, whom they stigmatize as inferior. The following year, the court handed down a follow-up *Brown* decision calling for school systems to desegregate "with all deliberate speed."

Members of the nation's elite saw the danger of frustration and alienation in the Black/African American population arising from thwarted demands for change. The Cold War then raging was a battle for hearts and minds, and the entrenched oppression of America's Black/African American citizens embarrassed the nation's leadership and undermined efforts to convince those at home and abroad that our political system represented an ideal. Former Harvard President James Bryant Conant, having spent more than a decade urging selective colleges to promote meritocracy to equip the best and brightest to fight the Cold War, fretted about how frustration with the lack of opportunity in big-city slums might undermine the patriotism of the young people living in them. In his 1961 book *Slums and Suburbs*, he asked: "What can words like 'freedom,' 'liberty' and 'equality of opportunity' mean to these young people? With what kind of zeal and dedication can we expect them to withstand the relentless pressures of communism?"⁸⁴

In *The Chosen*, his exhaustive history of admissions policies at Harvard, Princeton, and Yale, the sociologist Jerome Karabel says internal memos that circulated within those institutions show that their leaders regarded increasing Black/African American enrollments as necessary to cultivate the nation's Black/African American leadership. They believed that "a fateful struggle for the soul" of the nation's Black/

84 Conant, *Slums and Suburbs*, 1961.

African American population was being waged between advocates of militancy and advocates of nonviolence and integration, and selective colleges needed to enroll enough Black/African American students to send the message that they could achieve upward social mobility and gain power through nonviolent means.⁸⁵

Selective colleges began using affirmative action in admissions about a decade after *Brown*, making the decision on their own as it became apparent that simply ending Jim Crow–mandated segregation was not enough to end racism, bring about integration, and remedy the effects of hundreds of years of social and economic oppression of Black/African American people.⁸⁶ It had dawned on such institutions, some of which had been aggressively recruiting Black/African American students for several years, that undertaking such efforts in tandem with race-blind admissions policies would not be enough to integrate their campuses. The academic standards by which they judged applicants served as a bottleneck that left them competing with one another for the same highly qualified pool of Black/African American students, a pool too small to bring about meaningful integration on all of their campuses.

Among the institutions that adopted race-conscious admissions policies during this period was Yale University, where the admissions office decided during the 1965–66 academic year to begin giving a second look to Black/African American applicants with SAT scores below its usual standards. They blamed cultural deprivation — namely a lack of exposure to the academic and social opportunities that lead to success in predominantly white schools and professional environments — for the consistent gaps between the typical scores of Black/African American students and those of white applicants. Yale's Black/African American enrollment rose, inspiring other selective colleges to similarly use separate admissions criteria or processes in weighing applications from Black/African American students.⁸⁷

Race-conscious admissions policies proliferated at other selective colleges and took hold. Selective colleges characterized their efforts to increase enrollments of members of racial/ethnic minority groups as necessary to help remedy American society's racial injustice. Importantly, they did not speak to any need to remedy the effects of any discrimination on their own part.⁸⁸

As race-conscious college admissions policies became more common, the Supreme Court intensified the desegregation demands being placed on local school districts. In *Green v. County School Board of New Kent County*, a 1968 decision involving a rural Virginia school system, the high court held that simply opening public schools up to students of any race was not enough, and the district must actively desegregate and remedy discrimination “root and branch.” In its 1971 *Swann v. Charlotte-Mecklenburg Board of Education* decision, the Supreme Court upheld the controversial mandatory school busing plans that lower courts had been ordering to help remedy school segregation that had arisen in tandem with housing segregation. Although such busing plans would be shown to have educational benefits for Black/African American children, they'd infuriate many white parents who hated seeing their children bused off to schools they regarded as dangerous and academically inferior, alleged characteristics that had not seemed as bothersome when the schools served only the children of people with darker skin.

85 Karabel, *The Chosen*, 2005.

86 Schmidt, *Color and Money*, 2007; Skrentny, *The Ironies of Affirmative Action*, 1996.

87 Karabel, *The Chosen*, 2005.

88 Karabel, *The Chosen*, 2005.

It did not take long for efforts to promote racial integration and equal opportunity to meet a fierce backlash.

The power of the courts extends only as far as the willingness of other branches of government to comply with their rulings, and many politicians and white members of the public responded to the Supreme Court's desegregation rulings in ways that tested the government's resolve.

The second *Brown* decision's call for school desegregation with "all deliberate speed" was soft enough to allow for foot-dragging stemming from white resistance. Many states similarly fought the desegregation of their public colleges, with lawmakers inciting angry white mobs rather than holding them in check. The 1962 unrest surrounding efforts by James Meredith, an African American man, to enroll in the University of Mississippi resulted in two deaths and 160 injuries. Congress responded to resistance to desegregation by passing the Civil Rights Act of 1964, which established within the federal government an enforcement structure capable of pressuring state and local compliance with civil rights laws. But it immediately became apparent that the act could not repair the country's racial divides. Just 16 days after the act's passage New York experienced the first of hundreds of violent urban uprisings that would rock American cities during the middle and late 1960s, with the precipitating event being the shooting death of an African American ninth-grader by a New York police lieutenant responding to an altercation.⁸⁹

In the midst of ongoing racial tensions, the work of the enforcement structure that the Civil Rights Act established would become politicized, and its priorities and interpretation of civil rights laws would vary greatly from one administration to the next. But its existence meant that educational institutions that violated civil rights laws faced the threat of federal lawsuits or the loss of federal funds. Over the coming decades, federal agencies and the courts would repeatedly crack down on states, school districts, and colleges that engaged in discrimination, and would demand that states with formerly segregated public-college systems spend enough on historically black colleges and universities (HBCUs) to make them attractive options for white students. The approach, while often helping HBCUs secure big infusions of tax-dollar support, met with mixed success in achieving meaningful racial integration.⁹⁰

State and local efforts to integrate public education were further undermined by a bedrock reality of American politics: the government cannot control the actions of individuals if doing so infringes on their constitutionally guaranteed freedoms. Black/African American families' Fourteenth Amendment right to send their children to desegregated schools bumped up against the First Amendment-guaranteed freedom of white families to transfer their children into overwhelmingly white schools that were private and, in many cases, also religious. Virtually all-white Christian fundamentalist schools cropped up in rural areas of the South, and the robust economic growth of many of that region's cities enabled a growing share of their white residents to afford private academies.⁹¹

Similarly, nothing could stop white opponents of racial integration from expressing their displeasure over it in the voting booth. As a result, the tide turned against it at the federal level. Richard Nixon won the

89 Skrentny, *The Ironies of Affirmative Action*, 1996; Schmidt, *Color and Money*, 2007.

90 Harris, "They Wanted Desegregation," 2018; Schmidt, "Historically Black Colleges Seek Congress's Help in Desegregation Disputes," 2007.

91 Clotfelter, *After Brown*, 2004; Schmidt, *Color and Money*, 2007.

1968 presidential election partly by opposing busing and other liberal policies that helped Black/African American people. In doing so, he co-opted the political strategy that then third-party candidate George C. Wallace had been using to win over both southerners and blue-collar whites in the North, and helped remake the Republican Party of Abraham Lincoln into a big tent bringing together opponents of liberal social policies and advocates of big business.⁹²

Political opposition to colleges' use of affirmative action arose in 1972, sparked by academics who were irked when the federal government threatened to withhold research dollars from universities that failed to come up with plans to hire more women to comply with Title IX, a new federal law prohibiting educational institutions that receive federal funding from engaging in discrimination based on sex. About 500 professors formed the Committee for Academic Nondiscrimination and Integrity, a group opposed to colleges' use of affirmative action preferences. One, Harvard sociologist and emerging neoconservative leader Nathan Glazer, would write the 1975 book that served as the framework for the right's critique of affirmative action, *Affirmative Discrimination: Ethnic Inequality and Public Policy*.⁹³ In it he argued that the promotion of equality through affirmative action "has meant that we abandon the first principle of a liberal society," the primacy of individual rights. He warned that the outcome would be rising levels of divisiveness in our society as a result of minorities' growing consciousness of their belonging to separate racial or ethnic groups and growing resentment among those disfavored by affirmative action policies.⁹⁴

Importantly, Glazer and other neoconservative critics of affirmative action did not fit the stereotype of the racist southern reactionary blocking the schoolhouse door. For the most part, they instead were northern intellectuals.⁹⁵ In sharp contrast to conservatives who had opposed the civil rights movement, they cited, rather than challenged, the rejection of discrimination and unequal treatment that had been enshrined in the Civil Rights Act of 1964 and espoused in much of the narrative of the civil rights movement.⁹⁶ They characterized the preferential treatment of racial and ethnic minorities as "reverse discrimination" against white people, constitutionally suspect and morally wrong in ways that distinguished it from the special treatment of veterans or people with disabilities. They would co-opt not just the rhetoric of the civil rights movement but its tactics, forming advocacy groups that would recruit like-minded lawyers to fight their battles.⁹⁷



92 Edsall and Edsall, *Chain Reaction*, 1992; Phillips, *The Emerging Republican Majority*, 1969; Skrentny, *The Ironies of Affirmative Action*, 1996; Skrentny, *The Minority Rights Revolution*, 2002.
93 Anderson, *The Pursuit of Fairness*, 2004; Schmidt, *Color and Money*, 2007.
94 Glazer, *Affirmative Discrimination*, 1975; Schmidt, *Color and Money*, 2007.
95 Horton, *Race and the Making of American Liberalism*, 2005.
96 Horton, *Race and the Making of American Liberalism*, 2005.
97 Schmidt, *Color and Money*, 2007.

The Supreme Court chose to leave intact inequitable school financing and any racial segregation of schools not caused by government actions.

Advocates of equal educational opportunity learned early on that our judicial system would be reluctant to demand any remedying of disparities in school quality. In a series of decisions dating back to the early 1970s, the US Supreme Court has limited the impact of its 1954 *Brown* ruling and cemented into place the inequities in public school quality rooted in our nation's history, hamstringing efforts to increase the supply of highly qualified Black/African American, Hispanic/Latino, and low-income students knocking on selective colleges' doors.

Most devastating for the cause was the Supreme Court's ruling in *San Antonio Independent School District v. Rodriguez*, a class-action lawsuit challenging as unconstitutional Texas's system of financing public schools. The plaintiffs in that case were members of an association of parents from a predominantly Mexican American school district with resources and infrastructure far inferior to those of nearby districts. In suing several other districts and the Texas Board of Education, they argued that students had a fundamental right to equal educational opportunity, and that equal opportunity depended on equal funding. They prevailed in federal district court and anticipated a similar decision in their favor when the US Supreme Court agreed to hear the case on appeal. Looking back at the Supreme Court's *Brown* decision, the plaintiffs fully expected the high court to take the next step and declare that equal educational funding amounted to a constitutional right.⁹⁸

Instead, the Supreme Court's 5–4 ruling, handed down in 1973, interpreted the US Constitution as lacking any reference to a fundamental right to educational equity — or, for that matter, education at all. It acknowledged the need to reform state tax systems “which may well have relied too long and too heavily on the local property tax,” but said the Constitution requires that such change must come from state legislatures, not the federal government. And it found no evidence that Texas had systematically and deliberately discriminated against poor people.⁹⁹

For many, the *Rodriguez* decision would come to represent a turning point in the history of constitutional law — the first in a series of post-*Brown* decisions through which the courts have placed obstacles in front of those who want to secure educational equity.

The Supreme Court held that school systems that had not themselves been found guilty of racial discrimination could not be compelled to remedy racial segregation that was not their own doing.

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Ayala, "Rodriguez, Who Fought for Equality, Dies at 87," 2013; Isensee, "How a Dad Helped Start the Fight for Better Public School Funding in Texas," 2015. *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).

Civil rights lawyers' efforts to bring about the racial desegregation of K–12 public schools hit an insurmountable wall in 1974, as a result of the Supreme Court's ruling in *Milliken v. Bradley*, a case involving the Detroit school system and 53 neighboring districts. In the lawsuit, the NAACP had called for federal courts to order the State of Michigan to carry out a desegregation plan involving all of those districts, many of which the NAACP accused of fostering school segregation through housing discrimination. In rejecting that demand, the Supreme Court held that school systems that had not themselves been found guilty of racial discrimination could not be compelled to remedy racial segregation that was not their own doing. The ruling sharpened the Supreme Court's distinction between racial segregation that had been *de jure*, or required under law, and segregation that was *de facto*, or caused by other forces such as individual parents' school choices and individual home buyers' decisions. It had the effect of leaving many suburban school districts outside the reach of court-ordered metropolitan desegregation plans, and it enabled white families to ensure their children would continue to attend overwhelmingly white schools by moving to the suburbs.¹⁰⁰

Later Supreme Court decisions further curtailed the racial desegregation of public education. They included a 1991 ruling, involving the Oklahoma City schools, holding that school systems need only eliminate vestiges of past segregation "to the extent practicable," signaling that desegregation plans had an ending point short of what many Black/African American families might see as ideal.¹⁰¹ In a 1992 decision dealing with the DeKalb County, Georgia, school district, the court let school systems that seemed to have racially balanced their schools off the hook for remedying subsequent segregation resulting from changed housing patterns.¹⁰² In a 1995 ruling involving the Kansas City, Missouri, public schools, the court held that remediating past segregation does not require closing gaps in teacher salaries or student achievement.¹⁰³

In 2007, the court struck a blow to voluntary integration efforts by holding that the school systems of Seattle and metropolitan Louisville, Kentucky, had violated the equal-protection rights of students by using race-based school assignments to promote racial integration in the absence of any court order to desegregate. Writing for the court's majority, Chief Justice John G. Roberts Jr. famously said, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁰⁴

The focus of selective colleges' efforts to enroll underrepresented minority students quickly evolved from lifting up the downtrodden to competing over the relatively privileged.

It did not take long for selective colleges to realize that getting students from racial/ethnic minority groups on campus was one thing, but ensuring they stayed there and earned degrees was another.

100 Hertz, "You've Probably Never Heard of One of the Worst Supreme Court Decisions," 2014.

101 Board of Education of Oklahoma City v. Dowell, 498 US 237 (1991).

102 Freeman v. Pitts, 498 US 1081 (1992); Schmidt, "Desegregation Study Spurs Debate over Equity Remedies," 1993.

103 Missouri v. Jenkins, 515 US 70 (1995).

104 Parents Involved in Community Schools v. Seattle School District No. 1, 551 US 701 (2007); Schmidt, "Supreme Court Leaves Affirmative-Action Precedents Intact in Striking Down School-Integration Plans," 2017.

Among the institutions that learned this lesson the hard way was Yale University. After Yale relaxed its standards for Black/African American applicants, a significant number of those accepted for the fall of 1966 found adjusting to life at Yale difficult. More than a third left before their sophomore year began.¹⁰⁵

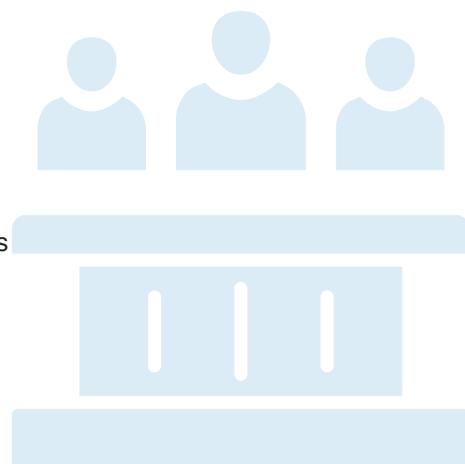
By 1970, many leaders of selective colleges concluded that their institutions had been admitting too many Black/African American students from low-income backgrounds who lacked the academic preparation to handle demands placed on them. Harvard's admissions dean wrote that his institution had learned "that we cannot accept the victims of social disaster however deserving of promise they might have been, or however romantically or emotionally an advocate (or a society) might plead for them."¹⁰⁶

The share of Harvard's Black/African American students coming from low-income families dropped from nearly 40 percent in 1969 to under 25 percent by 1973. Other selective colleges similarly retreated from recruiting low-income Black/African American students from big cities, opting instead to compete with each other for the comparatively smaller pool of middle-class Black/African American students whose relative advantages had left them better prepared.¹⁰⁷

This pullback by Harvard, Yale, and other elite institutions predated the realization that less-prepared students require substantial academic, social, and economic support to succeed.

When they adopted race-conscious admissions policies beginning in the late 1960s, elite colleges ignored how the policies' beneficiaries would be more likely to graduate if provided sufficient support services. Rather than creating pathways for disadvantaged minority students to succeed, selective colleges retreated en masse from recruiting and enrolling them and settled for trying to find Black/African American students with qualifications as close as possible to those of their white students. Many enticed Black/African American students away from less-prestigious colleges and HBCUs in what one top College Board official described as the dawning of "an all-out recruiting war."¹⁰⁸ When middle-class students from racial/ethnic minority groups struggled, some higher education leaders blamed the students' perceived inability to overcome discrimination rather than acknowledging colleges' lack of support for them.¹⁰⁹ A shifting of selective colleges' recruitment efforts to focus almost solely on race and ethnicity, independent of class, caused their enrollments of students from racial/ethnic minority groups to skew toward those from higher socioeconomic status (SES) over time.¹¹⁰

An analysis of Harvard and UNC admissions data made public as a result of the lawsuits against those institutions found that that the Black/African American and Hispanic/Latino students whose admissions prospects were most bolstered by consideration of race were "those who come from higher socioeconomic status homes." Consideration of socioeconomic disadvantage, in itself, did little or nothing to improve the admissions prospects of Black/African American or Hispanic/Latino students, even though it helped some white students — a result the study termed "consistent with universities trying to satisfy diversity constraints



105 Karabel, *The Chosen*, 2005.
106 Karabel, *The Chosen*, 2005.
107 Karabel, *The Chosen*, 2005; Schmidt, *Color and Money*, 2007.
108 Jacobson, "Admissions Help Urged," 1967.
109 See, for example, Douglass, "Anatomy of a Conflict," 2001; Schmidt, *Color and Money*, 2007.
110 Posselt et al., "Access without Equity," 2012.

on the basis of racial classification alone.”¹¹¹ The rising SES of the underrepresented minority students who were attending selective colleges helped shield such institutions from allegations that their race-conscious admissions policies were rooted in a desire to promote social justice rather than promote diversity. But it also might have eroded public support for such policies among people left confused as to why a Black/African American applicant from an upper-middle-class background had been deemed more worthy of extra consideration than a white applicant raised in poverty.

The Supreme Court’s *Bakke* decision stripped race-conscious admissions policies of their social-justice rationale and made their legality contingent on arcane education policy considerations.

The first direct major legal challenge to race-conscious college admissions policies came in 1971, when a white student, Marco DeFunis, sued the University of Washington’s law school for rejecting him through an admissions process with a separate track for applicants from racial/ethnic minority groups. The Supreme Court took up his case in 1974 but ducked deciding it by declaring it moot.¹¹² (A lower court had ordered the law school to admit DeFunis while the case was pending, and his graduation was just months away.) That same year another white student, Allan Bakke, filed a lawsuit challenging his rejection by the medical school at the University of California at Davis. In deciding that dispute in 1978, the Supreme Court established a legal rationale for such policies that caught much of higher education off guard and would limit the scale of race-conscious admissions policies in the decades to come.¹¹³

Even before the Supreme Court took up the *Bakke* case, colleges had been overhauling their race-conscious admissions policies to try to make them more legally defensible. Many followed the advice of a national advisory panel, the Carnegie Council on Policy Studies in Higher Education, and established a two-stage admissions process intended to shield them from accusations of holding underrepresented minority students to lower standards. In the first stage, they’d require that all applicants meet absolute minimum academic standards set “no higher than is necessary” — typically at a level calibrated to screen out those who would be unable to graduate. Consideration of applicants’ race and ethnicity would factor into the second stage, in choosing among applicants who’d gotten past the first cut.¹¹⁴

The University of California at Davis medical school stood as a singularly unlikely example of a higher education institution that might be accused of discrimination as then commonly defined. The medical school had opened in 1966 and, from the start, reserved set numbers of seats for applicants from racial/ethnic minority groups. In defending the school’s admissions policies in lower courts, the University of California’s lawyers had not pinned their case on the educational benefits of diversity, instead

¹¹¹ Arcidiacono et al., “What the Students for Fair Admissions Cases Reveal about Racial Preferences,” 2022.

¹¹² *DeFunis v. Odegaard*, 416 US 312 (1974).

¹¹³ *Regents of the University of California v. Bakke*, 438 US 265 (1978).

¹¹⁴ Carnegie Council on Policy Studies in Higher Education, *The Relevance of Race in Admissions*, 1977; Schmidt, *Color and Money*, 2007.

The Bakke decision allowed colleges to consider applicants' race as a "plus factor" to promote diversity in enrollments, but it rejected the use of outright racial quotas.

characterizing the school's quotas as necessary to provide underrepresented minority students educational opportunities that they otherwise might be denied due to societal discrimination. Some racial/ethnic minority groups that ordinarily would have supported such efforts had regarded the medical school's policy as so difficult to justify that they'd urged the University of California to accept a defeat in the state's highest court rather than giving the US Supreme Court a chance to rule on the dispute.¹¹⁵

Among those filing briefs that urged the Supreme Court to rule in favor of Bakke were groups representing white ethnic populations — Jews, Poles, Italians, Greeks, and Ukrainians — who complained

that they should not be called upon to make sacrifices to remedy discrimination because they'd historically been its victims rather than its perpetrators.¹¹⁶

Justice Lewis F. Powell Jr. ended up as the key swing vote among the nine justices who heard the *Bakke* case. Although he agreed with the court's four-member conservative faction that the medical school's racial quota system was too heavy-handed to pass constitutional muster, he hesitated to cause upheaval in higher education by going along with them in rejecting any consideration of race by colleges not under desegregation orders. At the same time, he refused to embrace the four-member liberal faction's defense of race-conscious admissions as necessary to remedy broader societal discrimination, based on his conviction that our government should not be in the business of trying to decide which segments of American society owe debts to others for past oppression.¹¹⁷

Justice Powell ultimately found a path to upholding race-conscious admissions policies without accepting the liberals' social-justice rationale. It came via an amicus brief submitted by Columbia, Harvard, Stanford, and the University of Pennsylvania. They jointly argued that race-conscious admissions policies should be preserved because diversity "makes the university a better learning environment," and that many faculty members reported "that the insights provided by the participation of minority students enrich the curriculum, broaden the teachers' scholarly interests, and protect them from insensitivity to minority perspectives." Praising the brief, Powell articulated a rationale for race-conscious admissions that had not even been on the table. His opinion said colleges were justified in giving some modest consideration to applicants' race given the educational benefits of enrolling students with diverse experiences and perspectives.¹¹⁸

With the court so divided that its nine members issued six different opinions, Powell ended up playing the tie-breaker role and issuing the controlling opinion of the court. It allowed colleges to consider

115 Schmidt, "Bakke' Set a New Path to Diversity for Colleges," 2008.

116 Schmidt, *Color and Money*, 2007.

117 Schmidt, *Color and Money*, 2007.

118 Schmidt, *Color and Money*, 2007.

applicants' race as a "plus factor" to promote diversity in enrollments, but it rejected the use of outright racial quotas. In replacing an affirmative action rationale grounded in history with one grounded in educational theory, it established "diversity" as both a buzzword and goal in higher education and beyond. While affirming the value of diversity, the opinion had unintended consequences: Colleges cited Powell's rationale in extending affirmative action to applicants from racial/ethnic minority groups without long histories of suffering serious oppression on American soil. Business groups talked about the need to have workforces that reflect the diversity of society instead of doing the hard work of righting historical wrongs. Advocates for underrepresented minority students lamented that the decision diverted attention from the pursuit of racial equality and social justice.¹¹⁹

Supreme Court rulings on matters unrelated to college admissions made affirmative action policies harder to carry out and defend.

Several subsequent Supreme Court decisions, in cases not directly involving colleges, weakened the legal underpinnings of race-conscious admissions policies and emboldened those hoping to challenge them. They included a 1986 employment-law decision that rejected the idea that public agencies can take adverse actions against white workers to remedy broader societal discrimination, and a 1989 ruling that rejected public agencies' favoritism of racial/ethnic minority contractors in the absence of any remedial need.¹²⁰ Most crucially, in its 1995 decision in *Adarand Constructors v. Peña*, involving federal minority contracting requirements, the court held that any consideration of race by state or federal agencies must pass a three-pronged "strict scrutiny" test established under decades-old court precedents: it must seek to fulfill a compelling government interest, it must be narrowly tailored to consider race no more than is necessary to fulfill that interest, and it must exist in the absence of any "less drastic means" of fulfilling that interest.¹²¹

On the higher education front, the Supreme Court essentially pinned a bullseye on any college scholarships or programs reserved for students from racial/ethnic minority groups. It let stand a 1994 federal circuit court decision that, in striking down a University of Maryland scholarship program reserved for Black/African American students, held that racially exclusive programs cannot pass strict scrutiny.¹²² In the coming years, conservative advocacy groups and federal civil rights officials under Republican administrations would pressure more than 100 colleges to open race-exclusive scholarships or programs up to students of any race.¹²³ At least a few colleges opted to shut down the programs rather than continue them with diluted missions.¹²⁴ Corporations and philanthropies that had generously funded programs that prepared students from racial/ethnic minority groups for the workforce were less inclined to support programs also open to economically disadvantaged white students.¹²⁵

119 Schmidt, *Color and Money*, 2007.
120 *City of Richmond v. J.A. Croson Co.*, 488 US 469 (1989); *Wygant v. Jackson Board of Education*, 476 US 267 (1986).

121 *Adarand Constructors, Inc. v. Peña*, 515 US 200 (1995); Schmidt, *Color and Money*, 2007.

122 *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994); Schmidt, *Color and Money*, 2007.

123 Schmidt, "From 'Minority' to 'Diversity,'" 2006.

124 Golden, "Colleges Cut Back Minority Programs after Court Rulings," 2003; Kladko, "Princeton Cuts Minority-Only Summer Program," 2003; Schmidt, "As Colleges Open Race-Exclusive Programs to All, Some Minority Students May Be Left Out in the Cold," 2006.

125 Schmidt, *Color and Money*, 2007.

Paradoxically, some major civil rights victories have complicated efforts to improve access to selective colleges.

The Supreme Court's enshrinement of academic freedom as a right protected under the First Amendment armed colleges with a double-edged sword in relation to student access. It distanced them from court interference in their efforts to increase enrollments of racial/ethnic minority groups, but it also left them free to keep in place admissions practices biased in favor of the wealthy.

The Supreme Court rulings that embraced academic freedom as a core right were a clear win for one type of campus diversity: diversity of thought. They arose from litigation challenging state laws and policies adopted in the 1950s for the sake of thwarting the spread of communist ideology via college campuses. The Supreme Court tackled the question of whether faculty speech on campus deserved constitutional protection in the case *Sweezy v. New Hampshire*, centered around a University of New Hampshire lecturer suspected of being a communist. In a 1957 ruling that came down in favor of the lecturer, the court's majority embraced Justice Felix Frankfurter's argument that the free speech of college faculty members deserves particular constitutional protection. In a concurring opinion that would be cited by the Supreme Court in later cases involving race-conscious admissions, Justice Frankfurter, quoting a statement previously published by scholars in South Africa in opposition to its segregation of colleges, held that every university has "four essential freedoms," those being "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹²⁶ Ten years later, in holding that the State University of New York had violated the constitutional rights of faculty members who were fired for refusing to sign documents formally denying any involvement with the communist party, the Supreme Court declared academic freedom to be "a special concern of the First Amendment."¹²⁷

Such precedents would serve as the basis for the Supreme Court's later inclination to defer to colleges' judgments on admissions matters. They would factor prominently in later legal victories for affirmative action in which the courts declined to second-guess universities' conclusions that they needed to consider applicants' race to achieve sufficient levels of diversity for educational purposes.

Precedents that served to protect people accused of communist sympathies also would serve to protect the unfair advantages of the wealthy by shielding selective colleges from any court demands that they abandon their systemic favoritism toward affluent applicants to achieve diversity without race-conscious admissions.

Paradoxically, efforts to increase Black/African American enrollments at selective colleges were complicated by hard-won civil rights victories for women and for other racial/ethnic minority groups — victories that had the effect of greatly expanding the field of competitors for limited numbers of seats in colleges' entering classes.

126

Sweezy v. New Hampshire, 354 US 243 (1957).

127

Keyishian v. Board of Regents, 385 US 589 (1967).

The arrival of coeducation had the effect of intensifying competition for access and complicating efforts to increase enrollments of low-income and underrepresented minority students.



Among the civil rights victories that increased competition for seats at competitive colleges were the opening of previously all-male colleges to women and the dramatic expansion of the nation's immigrant stream through the passage of the Immigration and Nationality Act of 1965.¹²⁸ In addition, the 1967 Supreme Court ruling that struck down state bans on interracial marriage helped give rise to an increase in the nation's biracial and multiracial population, which made it harder to sort students into traditional racial categories to determine their eligibility for race-conscious admissions policies and track the educational progress of historically oppressed minority groups.

A number of elite colleges began admitting women in the 1960s as part of a strategy to attract the best male applications — a change that eventually gained the support of wealthy alumni as their daughters and granddaughters began to benefit from the decision.¹²⁹ Those colleges that hesitated to admit women were strongly compelled to do so by the passage of Title IX in 1972.

The opening of colleges' doors to women clearly was a development to be cheered, and it benefited women of all races and ethnicities. It's worth noting, however, that women continue to struggle to be treated equitably by many colleges, especially when it comes to their participation in athletics programs; their access to male-dominated fields of study such as mathematics, engineering, philosophy, and physics; and their right to be educated in a non-hostile environment free from the threat of sexual harassment and assault. But because gender transcends all racial, ethnic, and socioeconomic backgrounds — and women are equally represented among the children of wealthy white families that have long dominated selective colleges — the arrival of coeducation had the effect of intensifying competition for access and complicating efforts to increase enrollments of low-income and underrepresented minority students. Simply put, it eventually doubled the number of applications colleges received from the white children of families with enough wealth and power to prep them for admission and pull strings on their behalf. Today, women account for a disproportionate share of college applicants with strong academic profiles, and some elite colleges actually lower the bar for male applicants to maintain gender balance.¹³⁰

Hispanic/Latino and Asian/Asian Americans won a major civil rights victory with the passage of the 1965 Immigration and Nationality Act, which would greatly increase their numbers among college applicants.

128 Schmidt, *Color and Money*, 2007.

129 Malkiel, "Keep the Damned Women Out," 2016.

130 Anderson, "The Gender Factor in College Admissions," 2014; Carnevale et al., *Women Can't Win*, 2018; Ross, "What Gender Inequality Looks Like in Collegiate Sports," 2015.

For several decades before the act's passage, the regions of the world that their families came from had not accounted for major shares of the nation's immigrant stream. With its passage, immigration from these regions rose dramatically, accelerating the growth of Hispanic/Latino and Asian/Asian American families and communities and helping these populations gain more political representation and clout. The Supreme Court would enshrine immigrants' right of access to effective educational services in its 1974 *Lau v. Nichols* ruling, which held that the San Francisco school system had been violating the Civil Rights Act of 1964 by failing to provide supplemental language instruction to Chinese students with limited English proficiency. In recognition of the discrimination suffered by a wide variety of racial/ethnic minority populations, selective colleges began widening the scope of their affirmative action programs to include Native Americans as well as Asian/Asian American and Hispanic/Latino applicants. Included were some recent immigrant populations without the same long histories of being oppressed in the United States.¹³¹

Some conservative critics of affirmative action argued that the racial and ethnic classification scheme that selective colleges developed to decide eligibility were arbitrary and irrational. It arose from categorization schemes that federal bureaucrats developed for recordkeeping, without input from experts such as anthropologists, sociologists, and ethnologists, and has given rise to absurdities such as the classification of a highly culturally and linguistically diverse 60 percent of the world's population as "Asian," or the lumping together as "Hispanic" of both white people from Spain and indigenous people from Central America. Relying on people to self-identify their race or ethnicity, this type of classification scheme also is vulnerable to inaccuracy, fraud, and exaggeration.¹³²

Rather than expanding enough to accommodate new populations of qualified applicants, most colleges have opted to restrain enrollments to maintain selectivity. As a result, the share of seats given to members of a new population was, and remains, a share taken from members of old ones, a dynamic which has inspired alumni and other insiders to develop back-channel admissions routes or otherwise find ways to preserve their advantage.

Surges in the number of highly qualified Asian/Asian American applicants, some from ethnic groups that quickly ascended to the top of the economic pile, posed a threat to enrollments not just of Black/African American and Hispanic/Latino students, but the children of wealthy white families who had been selective colleges' bread and butter. Under pressure to keep generations-old constituencies happy while also maintaining racial and ethnic diversity, colleges adopted admissions criteria and policies that led them to enroll far fewer Asian/Asian American students than might be expected given such students' share of all highly qualified applicants.¹³³

Asian/Asian American applicants began in the 1980s to complain that they were suffering discrimination as a result of race-conscious admissions policies. Such complaints would eventually prompt some selective colleges to admit to bias and pledge reform.¹³⁴ Some colleges, however, would argue

131 Schmidt, "Bakke' Set a New Path to Diversity for Colleges," 2008.

132 *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner, 2022.

133 Golden, *The Price of Admission*, 2006; Karabel, *The Chosen*, 2005.

134 Takagi, *The Retreat from Race*, 1992; Karabel, *The Chosen*, 2005.

that Asian/Asian American underrepresentation stems not from any deliberate bias, but from such students' relative lack of certain qualities not easily measured by grades or standardized admissions test scores, such as leadership potential. In addition, very few Asian/Asian American students fell into categories of applicants routinely afforded preferential treatment, such as legacies and athletes.¹³⁵ The US Department of Education's Office for Civil Rights investigated Harvard for bias against Asian/Asian American students in the late 1980s, but cleared it in 1990 after accepting Harvard's arguments that Asian/Asian American applicants fared relatively poorly against white students in its admissions process because they were less likely to be legacies and tended to have unimpressive records of involvement in extracurricular activities in high school.¹³⁶ SFFA, in pursuing its current lawsuit against Harvard, uncovered documents showing that the university's admissions officers had dinged Asian/Asian American applicants for lacking personality traits associated with extroverts — such as likability or the ability to command respect — despite the absence of any evidence that extroverts are more intelligent or successful.¹³⁷ In asking the Supreme Court to take up the case, SFFA argued that Harvard only began admitting Asian/Asian American applicants at rates equal to or higher than white applicants after its lawsuit was filed.¹³⁸

Asian American people are deeply divided on the affirmative action issue. Organizations that represent Asian/Asian American interests have weighed in on both sides of the issue in amicus briefs submitted whenever the Supreme Court has taken up cases involving race-conscious college admissions policies. Those groups that support race-conscious admissions accuse conservatives of seeking to use their population for their own ideological purposes. They point out that many ethnic groups that fall under the broad "Asian/Asian American" label, such as people from Cambodia and Laos, are struggling in our education system and are underrepresented on elite college campuses, making them worthy beneficiaries of race-conscious admissions decisions. They also note that Asian/Asian American students account for much larger shares of selective colleges' enrollments than might be expected given their share of the overall college-going population.¹³⁹ Asian/Asian American groups opposed to race-conscious admissions policies point to the higher average grades and standardized test scores of Asian/Asian American students admitted to selective colleges, and their higher rate of rejection, as evidence of their being held to higher standards and otherwise subjected to outright discrimination.¹⁴⁰

The accusations of anti-Asian/Asian American bias levelled against Harvard are strenuously disputed in an amicus brief submitted to the Supreme Court by more than 1,200 social scientists and scholars of college access, Asian American studies, and race in postsecondary education. Along with defending Harvard's admission practices as appropriate, they accuse SFFA of exploiting the "model minority" stereotype and ignoring crucial differences between various Asian/Asian American ethnic groups. They also suggest that the average personal ratings that Harvard assigns to Asian/Asian American applicants

135 Schmidt, *Color and Money*, 2007.

136 Takagi, *The Retreat from Race*, 1992.

137 Hartocollis, "Harvard Rated Asian-Americans Lower on Personality Traits, Suit Says," 2018; Zimmerman, "One Group That Definitely Faces Prejudice in College Admissions," 2018.

138 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Petition for Writ of Certiorari, 2021.

139 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Petition for Writ of Certiorari, 2021.

140 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.* Brief of the Asian American Coalition for Education and the Asian American Legal Foundation as *Amici Curiae* in Support of Petitioner, 2022. See also Schmidt, "Asian-Americans Give U. of California an Unexpected Fight over Admissions Policy," 2009.

might be marginally lower simply because Asian/Asian American students have been shown to be disproportionately likely to apply to such elite institutions, perhaps with less regard for fit.¹⁴¹

Our recent research also casts doubt on whether Asian/Asian American applicants are indeed subject to undue discrimination. The likelihood of Asian American/Pacific Islander applicants being admitted to Harvard has mirrored the likelihood of all applicants of any other race/ethnicity getting admitted to Harvard since at least 2010. One reason that rejection rates for Asian/Asian American students are higher is that they are far more likely to apply to selective colleges than other students. Among students who scored 1300 or higher on the SAT, 65 percent of Asian/Asian American students applied to one of the most selective colleges in the country, compared to 50 percent of students who are not Asian/Asian American. Even among students who scored below 1300, 12 percent of Asian/Asian American students applied at one of the nation's most selective colleges, but only 5 percent of all other students did. Since more Asian/Asian American students apply to these top colleges, more get rejected, but that is not evidence of bias.¹⁴²

Since the 1990s, opponents of race-conscious admissions policies have chipped away at them in the courts and decimated them at the ballot box.

The legal battle over race-conscious admissions flared up again in the early 1990s, when a libertarian legal-advocacy group, the Center for Individual Rights, took up a lawsuit brought against the University of Texas's law school by a rejected white applicant, Barbara Hopwood.

In a ruling that sent shockwaves through higher education, the US Court of Appeals for the Fifth Circuit ruled in Hopwood's favor in 1996. Citing several Supreme Court rulings from the 1980s and 1990s dealing with affirmative action in other contexts, the court repudiated the *Bakke* decision's diversity rationale as not representing settled law, and held that the law school was engaging in illegal discrimination because its consideration of applicants' race was not tied to any effort to remedy past segregation.¹⁴³

Political battles over affirmative action flared up as well. The year 1996 marked the opening of an entirely new front in the battle against the use of race-conscious affirmative action in college admissions. That November, California voters approved Proposition 209, a ballot initiative that amended the state's constitution to ban public colleges and other public agencies from using racial, ethnic, or gender preferences in admissions, hiring, or contracting. Among the leaders of that effort was Ward Connerly, who a year before, as a member of the University of California's Board of Regents, had helped persuade fellow Republicans who dominated the board to pass a resolution banning the use of such preferences throughout the university system.¹⁴⁴

141 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Brief of 1,241 Social Scientists and Scholars on College Access, Asian American Studies, and Race as *Amici Curiae* in Support of Respondent, 2022.

142 Carnevale and Quinn, *Selective Bias*, 2021.

143 *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

144 Lively, "University of California Ends Race-Based Hirings, Admissions," 1995; Schmidt, "Cal. Vote to Ban Racial Preferences Sparks Lawsuits, Protests," 1996; Schmidt, "An End to Affirmative Action? Californians Prepare to Vote," 1996.

Along with legally buttressing the university board's resolution, the success of the California ballot measure demonstrated the viability of a new populist strategy for attacking such preferences: circumventing lawmakers who had supported them or shown a reluctance to take a stand against them by letting the voting public decide the matter. In contrast to politicians whose public opposition to affirmative action preferences was likely to get them accused of racism or alienate business interests concerned with workforce diversification, citizens in the privacy of voting booths could act to eliminate such preferences without fear of personal repercussions. Again and again over the following decades, the race-conscious admissions policies of public colleges would be abolished nearly every time voters were given a chance to weigh in on them.

In 2001, a federal circuit court embraced the *Hopwood* decision's reasoning in striking down the race-conscious admissions policy at the University of Georgia, a development that prompted the public university to end its admission preferences for legacies.¹⁴⁵ The Center for Individual Rights, victorious in Texas with *Hopwood*, then headed up lawsuits challenging the race-conscious admissions policies used by the law school at the University of Washington, the law school at the University of Michigan, and the chief undergraduate program at Michigan. Federal circuit courts ruled in the universities' favor in the two law school cases.¹⁴⁶ With the federal circuits split, the Supreme Court decided to take up the Michigan cases.

In its June 2003 rulings in the two Michigan cases, the Supreme Court upheld the ability of colleges to consider applicants' race and ethnicity but also imposed new limits on race-conscious admissions practices. The majority opinion in the law school case, *Grutter v. Bollinger*, embraced the diversity rationale that Justice Powell had used in *Bakke*, putting to rest a long-running debate among judges and legal scholars over whether Powell's opinion had truly represented the holding of the court. In refusing to second-guess the law school's judgment regarding the viability of race-neutral alternatives or how much minority representation it needed, the majority invoked Justice Felix Frankfurter's opinion in the court's 1957 *Sweezy* ruling, citing his assertion that autonomy over admissions decisions is one of a university's essential academic freedoms under the First Amendment.¹⁴⁷

In its ruling in the undergraduate case, *Gratz v. Bollinger*, the Supreme Court struck down the policy at issue — a point-based applicant scoring system that conferred a substantial bonus to applicants from racial/ethnic minority groups — concluding that such a mechanistic system transgressed the narrow-tailoring requirement from the *Adarand Constructors v. Peña* decision. Taken together, the rulings reiterated the court's view that race-conscious admissions policies serve a compelling interest, but made clear that applicants' race can be considered only as part of a holistic evaluation process.¹⁴⁸

In the lead-up to the Supreme Court's *Grutter* and *Gratz* rulings, even colleges that did not fall within the boundaries of federal judicial circuits that had rejected the use of race-conscious admissions had taken note of the defeats their peers had suffered. They had responded by modifying their practices to reduce

145 *Johnson v. Board of Regents of the University System of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000); Schmidt, *Color and Money*, 2007.
146 *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002); *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000).
147 *Sweezy v. New Hampshire*, 354 US 243 (1957).
148 Schmidt, *Color and Money*, 2007.

the risk of running afoul of federal civil rights offices or facing expensive lawsuits.¹⁴⁹ Surveys of colleges showed that the legal pressure on them had taken a toll, and fewer gave special treatment to applicants from racial/ethnic minority groups than had been the case 20 years earlier.¹⁵⁰ As of 2003, the year when the Supreme Court ruled on the Michigan cases, about a third of colleges considered race and ethnicity in evaluating applicants. More than two-fifths continued, however, to operate programs intended to help ensure that students from underrepresented minority groups graduated, nearly half employed a multicultural recruitment staff, two-thirds had incorporated commitments to racial and ethnic diversity in their mission statements, and nearly three-fourths engaged in recruitment activities intended to increase enrollments of racial/ethnic minority groups.¹⁵¹ While retreating on some fronts, these colleges had hardly surrendered.

But the defeats in court kept coming. Ten years after the Michigan decisions, the Supreme Court required lower courts to reconsider *Fisher v. University of Texas at Austin*, a lawsuit challenging that institution's undergraduate admissions practices. The Supreme Court emphasized that strict scrutiny requires that race-conscious admissions policies undergo close examination.¹⁵² Three years after that, the Supreme Court revisited the case and, in its 2016 ruling in Texas's favor, emphasized that courts should give substantial deference to colleges' judgments on matters such as whether the policies were needed.¹⁵³

Large shares of Black/African American and Hispanic/Latino students now live in states where public colleges are barred from considering applicants' race.

Beyond the courts, many public colleges' consideration of race has been taken off the table by state ballot initiatives banning the use of racial and ethnic preferences. Such measures are now law in Arizona, California, Michigan, Nebraska, Oklahoma, and Washington, reversing the gains that public colleges in Michigan and Washington had made in federal court battles. The voter ban in Michigan was upheld by the US Supreme Court in 2014, when it rejected the argument that such bans discriminate against racial and ethnic minorities by leaving them distinctly precluded from lobbying for the same sort of extra consideration in admissions that other constituencies, such as alumni or people from underrepresented regions of the state, successfully lobby for and obtain on a routine basis.¹⁵⁴

In addition, race-conscious admissions were banned by state lawmakers in New Hampshire in 2011 and Idaho in 2020,¹⁵⁵ and by the governing board of Florida's state university system in early 2000.¹⁵⁶

149 Schmidt, *Color and Money*, 2007.

150 See also Grodsky and Kalogrides, "The Declining Significance of Race in College Admissions Decisions," 2008.

151 National Association for College Admission Counseling, *Diversity and College Admission in 2003*, 2003.

152 Schmidt, "Fisher' Ruling May Open a Wave of Litigation against Colleges," 2013.

153 *Fisher v. University of Texas at Austin*, 579 US (2016).

154 Schmidt, "Supreme Court Upholds Bans on Racial Preferences in College Admissions," 2014.

155 Idaho Legislature, House Bill 440, 2020; Schmidt, "New Hampshire Ends Affirmative-Action Preferences at Colleges," 2012.

156 Schmidt, *Color and Money*, 2007.

The upshot is that today more than 40 percent of the nation's Hispanic/Latino residents and nearly 20 percent of its Black/African American residents live in a state that prohibits public colleges from considering applicants' race.¹⁵⁷ The actual number whose access to selective colleges has been hurt by such state bans is almost certainly higher, as a 2014 study found that bans also affect underrepresented minority students in adjacent states that lack highly selective colleges. Racial/ethnic minority students in Nevada, for example, became less likely to enroll in selective colleges after race-conscious admissions were banned in neighboring California.¹⁵⁸

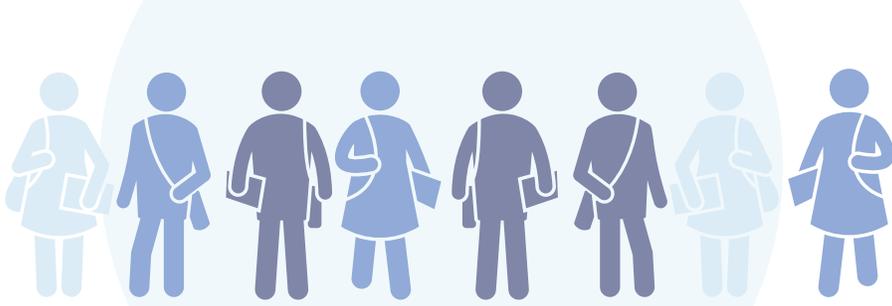
Today more than 40 percent of the nation's Hispanic/Latino residents and nearly 20 percent of its Black/African American residents live in a state that prohibits public colleges from considering applicants' race.

The repeated defeats at the ballot box defy polls that show support for race-conscious admissions. For example, a new Associated Press-NORC Center for Public Affairs poll showed 63 percent of Americans are opposed to the Supreme Court prohibiting the consideration of race in college admissions, although 68 percent say that race and ethnicity should have minimal or no importance in admissions decisions. Voters seem deeply ambivalent about the issue, and might be drawing a distinction between what they want the court to do, and what they want to see happen where they live. In California, consistently one of the most politically progressive states, voters overwhelmingly rejected a proposed repeal of that state's racial-preference ban in November 2020. This defeat came despite supporters of the repeal outspending opponents by more than 19 to 1 at a time of widespread demands to remedy racial inequality in response to the police killing of George Floyd.¹⁵⁹



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Analysis based on 2020 population data for the nation and individual states from the US Census Bureau.
Blume and Long. "Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings." 2014.
AP-NORC Center for Public Affairs Research. "Most Oppose Banning the Consideration of Race and Ethnicity in College and University Admissions." 2023; Nieves.
"California Voters Reject Affirmative Action Measure despite Summer of Activism," 2020.



Some advocacy groups argue that race-conscious admissions policies stigmatize and harm the populations they purport to help.

In an amicus curiae brief submitted to the Supreme Court in support of those challenging the Harvard and UNC admissions policies, Project 21, a network of Black/African American conservatives, summarized many of the misgivings about race-conscious admissions policies that have turned a substantial share of African Americans against them. It argued that such policies treat racial minority members as instruments for providing a better education to other students, can cause students who believe they may have been admitted because of their race to feel pressure to represent their race in academic discourse, and stigmatize racial minorities by calling into question whether they were admitted based on their merits.¹⁶⁰

In a separate amicus brief, the Asian American Legal Foundation, a San Francisco–based group that has played a central role in opposing University of California policies seen as hindering Asian/Asian American students’ access, and the Asian American Coalition for Education, a national alliance of 368 groups, argue that race-conscious admissions policies cause the Asian/Asian American community “real and tangible harm.” Such policies, the brief says, leave Asian/Asian American children “feeling a sense of inferiority, anger, and hopelessness in their academic endeavors, knowing they will face additional hurdles to college admission just because of their ethnicity,” and contribute “to the view that people of Asian descent are ‘other’ and not fully American, a view that, among other things, has led to violence against members of the Asian American community.”¹⁶¹

Colleges and universities barred from using race-conscious admissions policies — as well as some that have simply wanted to reduce their reliance on consideration of applicants’ race or ethnicity — have sought to bolster enrollments of racial/ethnic minority group members through a host of other means. These include stepping up recruitment efforts, offering more financial aid, expanding outreach to high schools with large racial/ethnic minority group populations, working to improve teacher preparation, and pushing states to expand access to college preparatory courses. In addition, some institutions have experimented with class-based affirmative action and reconsidered their use of preferences for legacies and other subsets of the applicant population that are disproportionately made up of white people.

Most prominently, some states where affirmative action has been banned have created “percent plans” to try to assure continued diversity on the campuses of selective public flagship universities. When

¹⁶⁰ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of Project 21 as Amicus Curiae in Support of Petitioner, 2022.

¹⁶¹ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of Amici Curiae the Asian American Coalition for Education and the Asian American Legal Foundation in Support of Petitioner, 2022. See also Schmidt, “Asian-Americans Give U. of California an Unexpected Fight over Admissions Policy,” 2009.

Texas’s public colleges were blocked in 1996 from considering applicants’ race, state lawmakers there passed a measure effectively guaranteeing Texas students in the top 10 percent of their high school class admission to the Texas public college of their choice. Following the passage of Proposition 209 in California that same year, the University of California adopted an admission guarantee for students in the top 4 percent of their classes, similar to the Texas top 10 percent plan.¹⁶² After Florida ended the use of race-conscious admissions, the system’s governing board adopted a policy guaranteeing a seat on some campuses to Florida students in the top 20 percent of their high school classes. It took the action at the behest of Florida Governor Jeb Bush, whose brother, George W., a fellow Republican, was running for president that year, and allegedly wanted to head off a possible affirmative action referendum that could mobilize Black/African American voters that fall.¹⁶³

The efficacy of such alternatives to race-conscious admissions has been hotly debated before the Supreme Court. In its most recent *Fisher* ruling, in 2016, the court stressed its reluctance to second-guess colleges’ judgments on such matters, effectively giving them tremendous leeway to consider or reject alternatives to race-conscious admissions. It also, however, expressed doubts that percent plans that draw the top students from overwhelmingly white, Black/African American, or Hispanic/Latino public schools are in any meaningful way race-neutral — a tacit acknowledgement that the promise of *Brown* never has been realized and schools remain far from racially integrated.¹⁶⁴

In briefs submitted to the Supreme Court, SFFA argues that public colleges in states that ban the use of race-conscious admissions have found other ways to remain elite and diverse, through mechanisms that include socioeconomic preferences, percent plans, a greater focus on geographic diversity, and the elimination of preferences for legacies and the children of faculty and staff. It cites the success of these alternative approaches to undermine UNC’s claim that it has no option but to consider race.¹⁶⁵

Among those submitting briefs to the Supreme Court in support of SFFA, the attorney generals of 19 states with Republican administrations argue that “the flagship public universities of states that have banned consideration of race in university admissions are no less diverse than comparable universities in the states that permit such discrimination.”¹⁶⁶ Richard Sander, an economist, law professor, and scholar of affirmative action at the University of California at Los Angeles, argues in a separate brief that, unless race-conscious admissions policies are banned nationwide, public colleges that had found workable race-neutral means will succumb to pressure to quietly revive race-conscious admissions policies for the sake of competing for top Black/African American and Hispanic/Latino students. “Colleges and universities do not behave autonomously,” his brief argues. Their actions are “actively constrained by a variety of external forces that create enormous pressures on university officials to conform to generalized notions of appropriate diversity policies.” Pressure from diversity advocates, as well as negative media coverage of colleges’ lack of diversity, factor into the mix.¹⁶⁷

¹⁶² Schmidt, *Color and Money*, 2007.

¹⁶³ Schmidt, *Color and Money*, 2007.

¹⁶⁴ *Fisher v. University of Texas at Austin*, 579 US (2016).

¹⁶⁵ *Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Petition for Writ of Certiorari, 2021; *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Brief for Petitioner, 2022.

¹⁶⁶ *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Brief of Oklahoma and 18 Other States as Amici Curiae in Support of Petitioner, 2022.

¹⁶⁷ *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College and Students for Fair Admissions, Inc., v. University of North Carolina, et al.*, Brief of Richard Sander as Amicus Curiae in Support of Petitioner, 2022.

More recently, elite public high schools have faced lawsuits challenging policies that seek to ensure access for underrepresented minority students through race-neutral means, spelling potential legal trouble for colleges down the road.

The Pacific Legal Foundation, a well-financed and prominent conservative legal advocacy group, has sued to force elite public high schools in Boston, New York, Fairfax County, Virginia, and Montgomery County, Maryland, to abandon admissions policies that indirectly favor Black/African American or Hispanic/Latino students. A federal judge in February 2022 struck down the Fairfax County policy, which had sought to diversify enrollments at the Thomas Jefferson High School for Science and Technology through mechanisms such as the elimination of an admissions test, guarantees of admission for at least 1.5 percent of the students in each middle school's eighth-grade class, and the awarding of bonus points for students from schools previously underrepresented there. An appeals court reversed that decision, but the Pacific Legal Foundation said it will try to take the case to the Supreme Court.¹⁶⁸ The Montgomery County policy under challenge adjusts the admissions test for elite high schools to account for whether students came from elementary schools with high poverty levels, and disfavors students who come from settings in which they had been surrounded by substantial numbers of high-achieving peers. The New York policy in dispute shrank the share of students admitted to one of eight elite high schools through an admissions test, and restricted admission through an alternative channel to students from relatively high-poverty backgrounds. A federal district court in April 2021 dismissed the challenge to Boston's policy, which used admissions quotas tied to zip codes to increase underrepresented minority student enrollments at three prestigious high schools that draw students from throughout the city, but that decision has been appealed.¹⁶⁹

Efforts to desegregate state public-college systems have not experienced the same sort of severe setbacks in the Supreme Court, but leaders of historically black colleges and universities (HBCUs) often have complained that a lack of federal enforcement left their institutions inadequately funded and vulnerable to having their integration efforts undermined by competitive moves by historically white institutions.¹⁷⁰ Private citizens who might file federal lawsuits accusing states of discriminating against Black/African American students had a major hurdle placed in front of them by the Supreme Court's 2001 ruling in *Alexander v. Sandoval*, involving allegations that Alabama had engaged in illegal discrimination by requiring that driver's license examinations be administered only in English. In ruling against the plaintiff in that lawsuit, the Supreme Court held that such privately brought challenges to state actions must show that the alleged discrimination was intentional and cannot hang their arguments solely on findings that state actions had a "disparate impact" on members of underrepresented minority groups.¹⁷¹

168 Raymond, "U.S. Court Skeptical of Challenge to Elite Virginia School's Admissions Policy," 2022; Elwood, "Appeals Court Upholds Thomas Jefferson High School's Admission Policy," 2023.

169 Pacific Legal Foundation, "[Cases](#)," (accessed March 29, 2023); Saul, "Conservatives Open New Front in Elite School Admissions Wars," 2022.

170 Schmidt, "Historically Black Colleges Seek Congress's Help in Desegregation Disputes," 2007.

171 *Alexander v. Sandoval*, 532 US 275 (2001).

Some affirmative action opponents claim that race-conscious admissions policies inevitably result in “mismatches” which harm students who attend selective colleges.

Some conservative opponents of race-conscious admissions policies contend that they hurt the educational environment by, for example, pressuring faculty members to lower academic standards to be sure struggling students can get by. A related assertion, holding that underrepresented minority students are “mismatched” at elite colleges, found its way into arguments offered by Supreme Court Justices Clarence Thomas and Antonin Scalia. In his dissent to the 2003 decision in *Grutter v. Bollinger*, Thomas wrote: “The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”¹⁷² Justice Antonin Scalia, in arguments preceding the second *Fisher* decision, revived the theory, stating, “There are those who contend that it does not benefit African Americans to get them into the University of Texas, where they do not do well, as opposed to having them go to a less advanced school...a slower-track school, where they do well.”¹⁷³

For the most part claims of mismatch are false or overblown. The data show that the overwhelming majority of students admitted to selective higher education institutions welcome the challenge of meeting the standards set for their peers and end up graduating at comparable rates. This applies to Black/African American and Hispanic/Latino students as well as white ones. The chances of graduating improve as students move up in tiers of selectivity: for example, Black/African American and Hispanic/Latino students who score above 1000 on the SAT and go on to one of the top 500 colleges or universities in the nation have a graduation rate more than 30 percentage points higher than those who enroll in open-access colleges.¹⁷⁴

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While overall graduation rates are high, research suggests that some students without strong academic preparation do not do as well in fields, such as mathematics or science, where falling

172 *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

173 Carnevale et al., *The Concept of ‘Mismatch’ at Play in the Supreme Court Fisher Decision Is Empirically Unsound*, 2016.

174 Black/African American and Hispanic/Latino students who score above 1000 on the SAT graduate at a rate of 73 percent at the 500 most selective colleges, compared to 40 percent at open-access colleges. Carnevale and Strohl, *Separate & Unequal*, 2013.



behind early can spell long-term academic trouble.¹⁷⁵

Less settled is the question of whether race-conscious admissions policies set students up for failure in fields such as medicine or law where they must pass rigorous tests in order to earn professional degrees and eventually practice.¹⁷⁶

Liberal supporters of race-conscious affirmative action argue that enrollments of racial/ethnic minority groups need to be large enough to ensure that diversity permeates the institution, because it has educational benefits even in classrooms where students learn subjects where race has little or no direct relevance to the curricula. Careful educational research paints a more nuanced picture, suggesting that diversity has educational benefits when achieved without heavy-handed preferences that stigmatize

its beneficiaries, and when educators actively take steps to ensure students learn from it.¹⁷⁷

A Supreme Court decision to end or greatly curtail race-conscious admissions would remove one of the few counterbalances to the political and market forces that have left selective colleges lacking in racial and economic diversity, worsening and helping to cement into place inequities in education and American society as a whole.

With liberals invested in promoting the idea that race-conscious admissions remains the only viable means of achieving our society's interest in racially diverse college enrollments, and conservatives generally opposed to any government remediation of inequities that they attribute to individual competition, neither side of the battle over race-conscious admissions has demonstrated much desire to broadly challenge admissions policies that favor the wealthy and well-connected.

175 See, for example, Glenn, "Minority Students Fare Better at Selective Colleges, Sociologists Find," 2004; Kiley, "Civil-Rights Panel Weighs In on Where Minorities Fare Best in STEM Fields," 2010; Schmidt, "New Study Fuels Debate over 'Mismatch' Theory in Race-Conscious Admissions," 2015; Schmidt, "What Color Is an A?" 2007.

176 Campbell, "Minority Applications to Medical School Drop in States without Affirmative Action," 1997; Mangan, "Does Affirmative Action Hurt Black Law Students?" 2004; Mangan, "The Unusual Rules for Affirmative Action in Medical Schools," 2000.

177 Charles et al., "Affirmative-Action Programs for Minority Students," 2009; Schmidt, "New Research Complicates Discussions of Campus Diversity—in a Good Way," 2010; Schmidt, "Study Offers Mixed Assessment of Race-Conscious Admissions Policies," 2005.

Looking at the Alternatives

A Supreme Court decision striking down race-conscious admissions will leave selective colleges scrambling to find effective and workable alternatives, a task many have resisted and often claim to be impossible.

Debates over the efficacy of various race-neutral means of promoting racial and ethnic diversity on campus have been at the center of the Harvard and North Carolina cases pending before the Supreme Court as well as other legal battles over such policies since the mid-1990s. The quest for effective alternative methods of promoting diversity has become even more urgent wherever the use of race-conscious admissions has been taken off the table and selective colleges have found themselves scrambling to avert drops in enrollments of members of underrepresented minority groups.

If the Supreme Court hands down a decision ending race-conscious admissions, new ways of bolstering enrollment of racial/ethnic minority groups will become a matter of national concern. Without such efforts, Black/African American, Hispanic/Latino, and Indigenous enrollments at selective colleges and universities are likely to plummet, particularly when compared to the proportion of these students in the college-age population. That will potentially reverse much of the progress our nation has made in racially and ethnically integrating higher education and various professional fields.

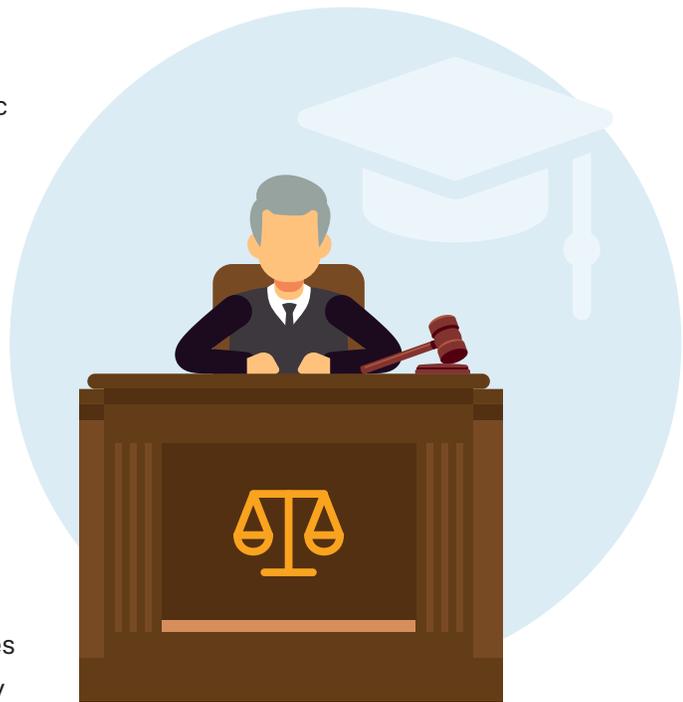
Higher education has yet to come up with an alternative to race-conscious admissions that selective colleges widely view as effective and workable. That is because new alternatives often have undesirable side effects. For example, although research has shown that a guarantee of admission like the Texas top 10 percent model could increase enrollment of underrepresented minority students if implemented nationally, the University of Texas long has objected to the requirement that it automatically admit a large share of its freshmen based on high school class rank. It has complained that the requirement, imposed under a state law passed in response to the Fifth Circuit's 1996 *Hopwood* ruling, excessively limits its discretion in seeking to enroll the right mix of students and leaves it without enough racial diversity. It resumed its use of race-conscious admissions, which it characterized as a much more

efficient and effective means of maintaining racial and ethnic diversity in its enrollment, soon after the Supreme Court's 2003 *Grutter* decision cleared the way for it to do so. The university then, however, became the target of a new lawsuit, which eventually led to the Supreme Court's 2013 and 2016 *Fisher* decisions.¹⁷⁸ Having prevailed before the Supreme Court, it has steadily sought to limit how many students it accepts under the state's class-rank-based admissions guarantee, and currently admits only those in the top 6 percent of their class at a Texas high school.¹⁷⁹

Accepting applicants based on high school class rank tends to result in a decrease in the average standardized test scores of selective colleges' entering classes, an outcome that many colleges loathe because it threatens their ranking in *US News & World Report*. In an amicus brief submitted to the Supreme Court when it first took up the *Fisher* case, UNC said it had rejected using a percent plan calibrated to maintain enrollments of members of underrepresented minority groups equal to those it had derived through race-conscious admissions. What had deterred it, the University of North Carolina said, were its projections that going through with the plan would cause its average SAT scores to decline by 56 points and average first-year GPAs of its students to drop from 3.26 to 3.16.¹⁸⁰ The university has made similar arguments as its own policies have come before the Supreme Court, with its briefs saying it has yet to identify a workable alternative to its current race-conscious admissions process that would not compromise its educational and diversity goals.¹⁸¹

Records from lower-court proceedings show that among the race-neutral alternatives that UNC had considered and rejected was a plan to set aside 750 seats in each entering class for high-scoring, socioeconomically disadvantaged applicants, with the remaining seats to be filled by the most academically qualified students left in its applicant pool. The university found that this alternative would increase socioeconomic diversity but nonetheless declared it unworkable because, along with requiring admissions based solely on academic criteria, it would cause enrollment of racial/ethnic minority groups to decline from 16.5 percent to 16.0 percent of the entering class and its average freshman SAT score to drop from the 92nd percentile to the 90th.¹⁸²

SFFA has urged the courts to reject the argument that the prospect of such changes in the composition and profile of entering freshman classes justifies the rejection of alternatives to race-conscious



178 Kahlenberg, "Economic Affirmative Action in College Admissions," 2003; Schmidt, "New Twists Mark the Debate over Texas' Top 10-Percent Plan," 2008.
179 Watkins, "UT-Austin Changes Automatic Admissions Threshold from 7 to 6 Percent," 2017.
180 Schmidt, "Lawsuits against Harvard and UNC-Chapel Hill Urge an End to Race-Conscious Admissions," 2014.
181 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief in Opposition by University Respondents, 2021.
182 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, [Trial Findings of Fact and Conclusions of Law](#), 2021.

admissions. “If strict scrutiny has any teeth, then these tiny dips cannot justify the use of explicit racial classifications,” it says in its brief to the Supreme Court.¹⁸³

The use of race-conscious admissions policies remains widespread. Race was being considered in admissions by about 60 percent of the 338 selective public or private four-year colleges whose admissions or enrollment-management officers responded to a survey on their practices covering the 2014–15 academic year.¹⁸⁴

A separate national survey of colleges of varying degrees of selectivity found that 41.5 percent had assigned at least some weight to the race or ethnicity of applicants in admitting freshmen entering in the fall of 2018. The influence that race and ethnicity had on their decisions was described as “considerable” by 6.8 percent, “moderate” by 17.8 percent, and “limited” by 16.9 percent of the colleges responding to the survey by the National Association for College Admission Counseling (NACAC). Nearly 52 percent reported giving at least some additional consideration to applicants classified as “first-generation” because their parents lacked a college degree — a practice shown to help boost diversity in terms of both race and class.¹⁸⁵

At the same time, many of the institutions responding to the NACAC survey engaged in admission practices that work *against* diversity. Nearly 48 percent took a desire to maintain good relations with alumni into account in admissions decisions, a consideration that puts admissions officers under pressure to avoid rejecting legacy applicants. In addition, a large share of colleges assigned considerable importance to how applicants fared on measures that tend to favor those from privileged backgrounds, such as the strength of their high school curriculum and their scores on standardized admissions tests.¹⁸⁶

If precluded by the Supreme Court from continuing to consider applicants’ race, selective colleges will need to broadly rethink their admissions practices — identifying and potentially weeding out those that systematically favor privilege tied to class, race, or ethnicity — to maintain diverse enrollments and promote equal opportunity for all. As is made clear by research and by the experiences of selective colleges that already have attempted such an undertaking, it won’t be an easy task.

183 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief for Petitioner, 2022.

184 Espinosa et al., *Race, Class, and College Access*, 2015.

185 Clinedinst, *2019 State of College Admission*, 2019.

186 Clinedinst, *2019 State of College Admission*, 2019.

No college barred from using race-conscious admissions has found alternatives that staved off declines in enrollments of students from underrepresented racial/ethnic minority groups relative to their share of the population.

The successful legal or political challenges to race-conscious admissions have given rise to several natural experiments testing the efficacy of alternatives. A 2020 study of all 10 states where race-conscious admissions is banned or restricted found that every one of their public flagship institutions has experienced declines in enrollments of underrepresented racial/ethnic minority groups when compared to those groups' share of the population. Moreover, these declines have occurred even while the number of high school graduates from racial and ethnic minority groups has risen.¹⁸⁷ A separate 2008 study covering flagship public universities in California, Florida, and Texas found that it was mainly Asian/Asian American students — not white students — whose enrollments surged in the aftermath of bans in those states.¹⁸⁸

Among states where alternatives to race-conscious admissions have been tried is California, which became the first state to ban public colleges from considering applicants' race or ethnicity with its 1996 passage of Proposition 209. The ballot measure's impact was significant and far-reaching. After Proposition 209 passed, the University of California–Berkeley admissions rate for underrepresented minority groups dropped from 52 percent to 25 percent, while the admissions rate for all other students declined much more modestly, from 32 percent to 28 percent.¹⁸⁹

California tried using 14 different proxies for race, including considerations of applicants' neighborhood or family income, to achieve racial diversity. None had a significant effect on the overall racial composition of subsequent classes.¹⁹⁰

The proxies did bring some shifts in how underrepresented minority students were distributed among campuses in the system, and had some positive results for students. The University of California's adoption of its class-rank-based admission guarantee, for example, appears to have increased the likelihood that those applicants who were barely eligible for admission, half of whom came from underrepresented minority groups, would enroll at one of its mid-tier campuses as opposed to a campus of the state's less-selective California State University system or one of California's public community colleges. Being routed to one of the University of California campuses increased students' likelihood of earning a degree within five years by more than 30 percentage points and their likelihood of going to graduate school by about 20 percentage points. These advantages likely explain why their early-

187 Long and Bateman, "Long-Run Changes in Underrepresentation after Affirmative Action Bans in Public Universities." 2020. The 10 states examined included Georgia, where the University of Georgia was barred from using race-conscious admissions by the US Court of Appeals for the Eleventh Circuit in 2001 and opted to continue operating that way even after the US Supreme Court's *Grutter* ruling overturned the Eleventh Circuit's ruling. The study also included Texas, where Texas A&M University similarly eschewed race-conscious admissions even after the *Grutter* decision cleared the way for it to resume using it and where the University of Texas at Austin's post-*Grutter* use of race-conscious admissions was restrained by its continued need to admit students under Texas's top 10 percent plan. Also covered in the study were the flagship public universities of Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington.

188 Colburn et al. "Admissions and Public Higher Education in California, Texas, and Florida." 2008; Schmidt. "Bans on Affirmative Action Help Asian Americans, Not Whites, Report Says." 2008.

189 Antonovics and Backes. "The Effect of Banning Affirmative Action on Human Capital Accumulation Prior to College Entry." 2014. The authors use the University of California–Berkeley's definition of underrepresented minority, which includes Black, Hispanic, and Native American students.

190 Peele and Willis. "Dropping Affirmative Action Had Huge Impact on California's Public Universities." 2020.

career wages ended up being higher.¹⁹¹ More broadly, Prop 209 caused enrollments of underrepresented minority students to cascade downward to less-selective institutions; they fell dramatically at the University of California system's most selective campuses — Berkeley and Los Angeles — while declining slightly at the mid-tier campuses — Davis, Irvine, San Diego, and Santa Barbara — and increasing slightly at the least selective campuses — Merced, Riverside, and Santa Cruz. This effect left underrepresented minority students less likely to earn graduate degrees or degrees in STEM fields, according to an analysis of University of California data.¹⁹²



Such changes corresponded with significant declines in the early-career wages later earned by Hispanic/Latino students who applied to the University of California for admission. In addition, many underrepresented minority students were deterred from applying to the University of California at all. The total number of Black/African American and Hispanic/Latino applicants to the system dropped by 12–13 percent, or about 1,200 students per year. The ranks of those who no longer sought admission included a large number of applicants very likely to gain admission to one of its more-selective campuses and an even larger subset likely to have been admitted at least somewhere in the University of California system.¹⁹³

The Texas top 10 percent plan has similarly failed to fully counter the negative effects of the Fifth Circuit Court's 1996 *Hopwood* ruling, which banned race-conscious admissions practices for several years and inspired long-term limits on their use. The class-rank-based admission guarantee was followed by a shift of underrepresented minority students out of selective state universities and a corresponding decline in persistence and graduation rates among these students.¹⁹⁴ Moreover, high schools with large enrollments of students from racial/ethnic minority groups did not send enough additional students to the state's flagship universities to meaningfully increase Black/African American or Hispanic/Latino enrollments.¹⁹⁵

Class-rank-based admission guarantees receive much higher levels of public support than race-conscious admissions, just like other forms of preferences tied to economic disadvantage — those focused on geographic location, parental education, or family income or wealth. Americans are far

191 Bleemer, "Top Percent Policies and the Return to Postsecondary Selectivity," 2021.

192 Bleemer, "Top Percent Policies and the Return to Postsecondary Selectivity," 2021. These data are restricted to use by specific researchers. Other researchers have noted that they were not able to verify these findings because they could not get access to the data themselves.

193 Bleemer, "Affirmative Action, Mismatch, and Economic Mobility after California's Proposition 209," 2020.

194 Cortes, "Do Bans on Affirmative Action Hurt Minority Students?" 2010.

195 Cortes and Klasik, "Uniform Admissions, Unequal Access," 2021.

more likely to say that being the first in one's family to go to college should be considered in college admissions than they are to say that race should be a factor.¹⁹⁶ But the use of such class-based preferences to promote racial diversity morally troubles some because it assumes and relies upon the continued influence of racism and discrimination on our economy, schools, and residential patterns. Moreover, class-rank-based guarantees of admission — in assuming that colleges can diversify enrollments by skimming the top of graduating classes of geographically dispersed high schools — amount to an acknowledgement that we won't have the sorts of public school integration envisioned in the Supreme Court's *Brown* ruling any time soon. Class-rank-based plans make the best of a bad situation rather than squarely confronting it. Pragmatically speaking, they're limited in their ability to bolster enrollments of members of racial/ethnic minority groups simply because the nation's low-income white population is far greater than the population of low-income Black/African American, Hispanic/Latino, and Indigenous people, even if larger shares of those underrepresented minority groups are economically disadvantaged.¹⁹⁷

The Supreme Court has been sympathetic to selective colleges' protests that class-rank-based admissions guarantees force them to ignore other important student characteristics and hinder their efforts to assemble the right student mix. "A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class," the majority opinion in the Supreme Court's 2016 *Fisher* opinion said.

We've never had a nationwide prohibition of race-conscious admissions, so we don't know what impact it will have on college admissions. The best predictions come from simulations of various race-blind admissions systems that use national student data.

Among the simulation-based research conducted so far is a 2010 study that examined how a nationwide ban on race-conscious admissions at four-year colleges might affect applications, admissions, and enrollment. The analysis concluded that such a ban would reduce Black/African American and Hispanic representation by 2 percent at all four-year colleges and by just over 10 percent at the most selective ones. The report simulated the replacement of race-conscious admissions with admissions models that relied on intensified recruitment of underrepresented minority students, on programs intended to improve the reputation of a college within communities of racial/ethnic minority groups, or on guarantees of admission to students in the top 10 percent of their graduating class. It concluded that none of these alternatives successfully restored representation of underrepresented minority groups at the most selective campuses.¹⁹⁸

196 Seven percent of Americans say that race should be a major factor in college admissions, and 19 percent say it should be a minor factor. In comparison, 18 percent say being the first in the family to go to college should be a major factor, and 28 percent say it should be a minor factor. Gómez, "As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions."

197 Singleton, *Courageous Conversations about Race*, 2014.

198 Howell, "Assessing the Impact of Eliminating Affirmative Action in Higher Education," 2010.

Our admissions simulations based on recent student data suggest that certain aggressive policies theoretically could produce enrollments of underrepresented minority students that equal or exceed current levels.

In order to analyze possible admissions to selective colleges, we created six models using a variety of criteria to evaluate applicants.¹⁹⁹ We then used the models to fill the approximately 290,000 enrollment slots available at the 193 colleges in the top two tiers of selectivity.²⁰⁰ Of our models, four do not consider the applicants' race/ethnicity. Two models simulate results if all colleges adopted a standardized, race-conscious admissions process. We included these models because not all colleges currently consider race/ethnicity in their admissions processes and its influence varies across institutions that do. We don't expect the Supreme Court to continue to allow race-conscious admissions, but we wanted to demonstrate what would be possible if all colleges took race/ethnicity into consideration in the same way.

Our set of criteria for admissions decisions included the following:

- **Academic merit:** We created a composite index based on high school grades, SAT/ACT scores,²⁰¹ and Advanced Placement (AP) exam participation and performance.
- **High school class rank:** We estimated whether applicants were in the top 10 percent of their graduating high school class.²⁰² In models that considered applicants' class rank, we admitted applicants ranked in the top 10 percent of their class first.
- **Socioeconomic status (SES):** We approximated class-conscious admissions by giving a boost to applicants whose academic performance (measured using the academic merit index) exceeded the performance we would expect based on prediction models that included the SES of their family of origin.^{203,204}
- **Race/ethnicity:** We approximated race-conscious admissions by giving a boost to applicants whose academic performance exceeded the performance we would expect based on prediction models that included the racial/ethnic background of each student.

199 For full results, see Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

200 Not all students admitted to selective colleges actually attend the colleges to which they are admitted. We accounted for yield rates by admitting approximately 1.5 times more students than these colleges could accommodate and estimating the final enrolling class based on differences in yield rates for different demographic groups of admitted students. For details, see Appendix A, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

201 Because the majority of colleges do not require standardized test scores in applications, we estimated the applicants' likelihood of disclosing their SAT/ACT scores when constructing the academic merit index. For details, see Appendix A, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

202 We had to estimate if applicants were in the top 10 percent of their class because high school class ranks are not reported in the data set we used (High School Longitudinal Study of 2009 [HLS:09]). In addition, many high schools do not calculate class ranks. A nationally representative data set of 12th graders might lead to slightly different class ranks but would not likely change the substantive conclusions drawn from models that consider the effects of a nationwide top 10 percent plan.

203 We also accounted for a variety of other factors associated with educational advantage and disadvantage, such as high school type (regular, magnet, or private school), the share of students' high school peers receiving free or reduced-price lunch, and the share of their peers planning to attend a four-year college. For a complete list of these additional factors, see Appendix A, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

204 We predicted the academic merit score for each student using SES and the other nonrace-based factors associated with educational advantage and disadvantage. We then calculated the difference, or residual, between each student's actual and predicted score, and granted admission to a selective college in our model to those with the highest residual values. For additional details, see Appendix A, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.



We used these metrics in various combinations in our models. In addition, we modeled two different levels of adoption by colleges of race-neutral approaches to admissions: (1) partial adoption across selective colleges, which takes into account the proportion of these institutions that consider race/ethnicity in admissions today;²⁰⁵ and (2) universal adoption across all selective colleges. Across both of these approaches, we also filled the slots at selective colleges using two different samples of students: (1) only applicants to selective colleges, in an effort to show how the student body composition at selective colleges would likely change if white students, Asian/Asian American students, and students from high-SES backgrounds remained overrepresented among applicants to selective institutions, as they are today;²⁰⁶ and (2) all

high school graduates, to illustrate the diversity gains that could be realized from greatly expanding and diversifying the pool of applicants to selective colleges.

Currently the students at selective colleges are 57.1 percent white, 17.0 percent Asian/Asian American, 14.1 percent Hispanic/Latino, 5.9 percent Black/African American, 5.7 percent two or more races, and 0.3 percent American Indian/Alaska Native/Native Hawaiian/Pacific Islander (AI/AN/NH/PI). Under the most realistic assumptions that only some colleges would adopt alternative admissions policies and the applicant pool would look similar to the pool of today if race-conscious admissions is prohibited, all four of the models that do not consider the race/ethnicity of applicants resulted in increased shares of seats at selective colleges for Hispanic/Latino students and two of the models led to an increased share of Black/African American students. The share of white students would increase in the academic-merit-only models. The share of Asian/Asian American students would decrease if only some colleges adopted alternative admissions policies, but the share would increase if all selective colleges made changes to their admissions practices in response to a nationwide ban on race-conscious admissions and colleges admitted students on the basis of academic merit alone, high school class rank and academic merit, or on the basis of high school class rank, academic merit, and SES.

Only two models significantly moved the needle toward admitting a more representative share of the college-age population in the United States, assuming that only some colleges adopt alternative admissions policies and the applicant pool does not substantially change: those that factored race/ethnicity into the admissions process. For example, the model that admitted students based on academic merit, SES, and race/ethnicity would be expected to yield a group of students at selective colleges that is 52.9 percent white, 12.9 percent Asian/Asian American, 16.9 percent Hispanic/Latino, 9.6 percent Black/African American, and 0.4 percent AI/AN/NH/PI.²⁰⁷ These results are significant gains in the share of Black/African American and Hispanic/Latino students, with proportional declines in the shares of white and Asian/Asian American students, and are much larger than the gains that could be realized from race-neutral admissions practices.

205 Our partial-adoption results assume that 60 percent of selective colleges would adopt alternative admissions policies in response to a nationwide ban on race-conscious admissions. This estimate is based on survey findings reported in Espinosa et al., *Race, Class, and College Access*, 2015. It reflects the fact that some institutions operate in states that already impose a ban on race-conscious admissions, while others currently choose not to consider race in admissions. For details, see Appendix A, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

206 We adjusted the applicant sample to account for expected changes in applicants in response to two possible policy changes: (1) a nationwide ban on race-conscious admissions, and (2) a nationwide top 10 percent guaranteed admission policy. For details, see Appendix A, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

207 See Model 1 in Table 1, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

The simulations illustrate what is possible, but likely not practical, in college admissions.

If selective colleges were banned from considering race in admissions, achieving an enrolled class that most closely resembles the college-age population would require fundamental changes to their admissions process. For example, the results assume that colleges would no longer give preferences to legacy candidates — applicants who are the children or grandchildren of alumni — or to recruited athletes or the children of faculty or staff. We cannot precisely model the impact of these preferences because data sets do not include the number of students who are admitted in these ways. However, research has shown that many of these preferences tend to favor wealthy white applicants.²⁰⁸

Colleges would also need to greatly expand and diversify the pool of students they consider for admission. We show how important this change is to realizing gains in racial representation if race/ethnicity cannot be factored into admissions decisions by examining the demographic composition of students at selective colleges if those institutions could consider all high school graduates for admission, not just those who historically apply to selective colleges.²⁰⁹

The reality, however, is that thousands of academically qualified students from underrepresented racial/ethnic groups and families of lower SES never even apply to elite colleges. If these colleges could consider all students, rather than just those who historically have sought admission to them, they would soon be greatly diversified by class as well as by race/ethnicity. Considering all high school graduates would help selective colleges answer one of the most fraught questions likely to arise from a ban on race-conscious admissions: how to maintain or increase the number of applicants from historically underrepresented groups.²¹⁰

If colleges considered all high school graduates for admission and accepted students purely on the basis of academic merit, the change in socioeconomic diversity would be dramatic: the share of students from families in the top SES quintile would decrease from 58.1 percent to 45.5 percent, while the share of students from the lowest SES quintile would increase from 8.2 percent to 10.4 percent.²¹¹ The change in racial/ethnic diversity for some groups would also be notable: the white enrollment share would decrease from 57.1 percent to 52.6 percent, the Asian/Asian American enrollment share would increase from 17.0 percent to 17.7 percent, the Hispanic/Latino enrollment share would increase from 14.1 percent to 16.8 percent, the Black/African American enrollment share would decrease from 5.9 percent to 5.8 percent, and the AI/AN/NH/PI enrollment share would stay steady at 0.3 percent.²¹²

If colleges considered all high school graduates for admissions and considered both academic merit and SES in combination, the enrollment share for students from families in the lowest SES quintile would increase from 8.2 percent to 16.8 percent (only 0.4 percentage points below their representation in the

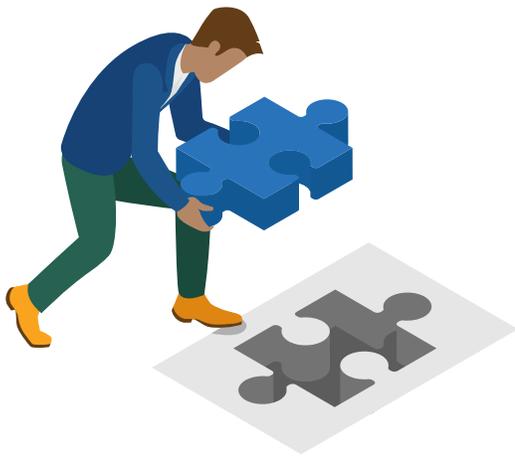
208 Arcidiacono et al., "Legacy and Athlete Preferences at Harvard," 2022.

209 White and Asian/Asian American applicants are more likely to be from higher-SES families than Black/African American and Hispanic/Latino applicants. See Table B1 in Appendix B, Carnevale et al., *Race-Conscious Affirmative Action*, 2023, for a detailed breakdown of the SES distribution within racial/ethnic groups in the high school class, the selective college applicant pool, and the student body at selective colleges.

210 Korn, "Colleges Weigh New Admissions Strategies," 2022.

211 See Model 3 in Table 5, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

212 See Model 3 in Table 3, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.



high school graduating class) while the enrollment share for students from families in the top SES quintile would decrease from 58.1 percent to 34.0 percent.²¹³ The changes by race/ethnicity would also be significant for some groups: the share of white students would decline from 57.1 percent to 51.9 percent, the share of Asian/Asian American enrollment would decline from 17 percent to 15.5 percent, the Hispanic/Latino enrollment share would increase from 14.1 percent to 18.5 percent, the Black/African American enrollment share would increase from 5.9 percent to 6.6 percent, and the AI/AN/NH/PI enrollment share would rise from 0.3 percent to 0.4 percent.²¹⁴

This increased class and racial/ethnic diversity at selective colleges would, however, come with a trade-off: the resulting class of enrolled students would have lower grades and test scores. Among students entering selective colleges in fall 2020, the median SAT score was 1240 (out of 1600) and the median honors-weighted high school GPA was 4.03 (out of 5.0).²¹⁵ Admitting students from the entire high school graduating class on the basis of academic merit, SES, and race/ethnicity, which would achieve the greatest racial/ethnic and class diversity possible, would lower the median SAT score to 1160 and the median high school GPA to 3.81.²¹⁶ Even with these lower entrance exam scores and GPAs, the overall performance of selective colleges would be unlikely to decline.²¹⁷

Our models illustrate the potential for increasing racial/ethnic and class diversity at selective colleges, but they also envision an idealized world that ignores the way that selective colleges now compete: on the basis of prestige and exclusivity. Given the decades that colleges have invested in their brands and attaining their advantages in admissions, they are not at all likely to throw away that model and start anew.

213 See Model 4 in Table 5, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

214 See Model 4 in Table 3, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

215 Honors weighting assigns greater value to advanced coursework, such as honors, Advanced Placement (AP), and International Baccalaureate (IB) classes. For example, a student earning a B in a non-AP biology course will typically receive 3 grade points toward their GPA, whereas a student earning a B in an AP biology course will typically receive 4 grade points toward their GPA. See Table B3 in Appendix B, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

216 Researchers have found that among high-achieving, lower-income students attending selective colleges, 92 percent graduate, exactly matching the completion rate of higher-income students. See Giancola and Kahlenberg, *True Merit*, 2016. In addition, our previous research showed that Black/African American and Hispanic/Latino students had graduation rates of 81 percent at the top three tiers of selective colleges, compared to 86 percent for white students. Carnevale et al., *Our Separate & Unequal Public Colleges*, 2018.

To achieve the greatest racial/ethnic and socioeconomic diversity at selective colleges, race-conscious admissions needs to be expanded, not contracted.

At present, white students, Asian/Asian American students, and students of two or more racial backgrounds are overrepresented at selective colleges, and students of Black/African American, Hispanic/Latino, and American Indian/Alaska Native/Native Hawaiian/Pacific Islander (AI/AN/NH/PI) backgrounds are underrepresented compared to their respective shares of the high school graduating class. For example, white students made up 57.1 percent of first-time, degree-seeking students at selective colleges in fall 2020 but only 52.3 percent of high school graduates in the 2019–20 class. Meanwhile, Black/African American students are severely underrepresented: they made up 5.9 percent of students entering selective colleges in fall 2020 but 13.2 percent of high school graduates in the previous year.²¹⁸

Of the six models we tested under the most reasonable assumptions (partial adoption of class-conscious proxies and few changes to the applicant pool), none would be expected to enroll a group of students at selective colleges that perfectly reflects the racial/ethnic composition of the high school graduating class. Most notably, Asian/Asian American students would remain overrepresented and Black/African American, Hispanic/Latino, and AI/AN/NH/PI students would remain underrepresented at selective colleges across all six alternative admissions models.

Nonetheless, race-conscious admissions practices are essential to achieving levels of racial/ethnic diversity on selective college campuses that reflect the overall levels of diversity in society as closely as possible. None of four models we tested that ignored race/ethnicity as a factor in admissions came close to achieving the levels of racial/ethnic diversity that could be realized if all selective colleges considered this information in their admissions decisions.²¹⁹

The bottom line is that if we are to have any hope of increasing the representation of *all* historically marginalized racial/ethnic groups on selective college campuses, we will have to consider race and ethnicity in the admissions process. Moreover, the potential to increase representation for Black/African American and Hispanic/Latino students is greater when institutions uniformly consider class in admissions. Achieving more racial/ethnic diversity at selective colleges through class-conscious-admissions proxies likely hinges on abandoning the use of legacy preferences in admissions practices. Banning the use of race-conscious admissions while preserving the privileges afforded to legacy applicants would almost surely result in a system that is less racially and ethnically diverse than today because legacy applicants are less racially and ethnically diverse than nonlegacy applicants.²²⁰ If race can be considered in admissions practices, achieving a student body at selective colleges that most closely mirrors the racial/ethnic composition of the high school class would require changing how

218 Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, National Center for Education Statistics (NCES), Digest of Education Statistics Table 219.30, 2021; NCES–Barron’s Admissions Competitiveness Index Data Files, 2014; and Integrated Postsecondary Education Data System (IPEDS) Fall Enrollment Data, 2002–20.

219 See Models 1 and 2 in Table 1, Carnevale et al., *Race-Conscious Affirmative Action*, 2023.

220 Arcidiacono et al., “Divergent,” 2022; Castilla and Poskanzer, “Through the Front Door,” 2022.

institutions evaluate applicants for admission. But to achieve the same progress if race is prohibited from consideration, institutions would need to change both *how* they evaluate applicants for admission and *whom* they evaluate.

Race-conscious admissions policies also increase the diversity of students from a socioeconomic standpoint. In other words, race-conscious and SES-conscious admissions practices complement one another. If they were to be used in tandem by selective colleges, those institutions would achieve levels of racial/ethnic and socioeconomic diversity that most closely mirror the makeup of all high school graduates in the United States.

A five-member team of higher education researchers who conducted simulations intended to more closely model the idiosyncratic behavior of individual applicants and institutions reached conclusions very similar to ours. These researchers assumed that students strategically apply to a small group of colleges based on imperfect assessments of college quality and their admissions prospects. They constructed a system of 40 hypothetical higher education institutions representing all tiers of selectivity, an approach geared toward measuring how policy choices and enrollment trends at some institutions might affect enrollment trends at others. (They note, for example, that Texas’s top 10 percent plan led to an increase in the average test scores of applicants to non-flagship institutions as the flagships spurned some students with high test scores but class rankings too low to qualify for automatic admission.)²²¹

The researchers’ simulations measured how the composition of enrollments at the simulated colleges — especially the four they’d modelled to be most selective — were affected by the degree to which institutions employed race-conscious admissions and two alternatives: class-based affirmative action and targeted, race-based recruitment.²²²

The researchers found that even the most heavy-handed class-based affirmative action policy would only produce about half as much racial diversity at the most selective institutions as a race-conscious admissions policy like those currently used. “This is not to say that SES-based affirmative action would not be valuable in its own right — it would increase socioeconomic diversity on university campuses and would benefit low-income college applicants — but only that it is not an



221 Reardon et al., “What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action?” 2018.

222 Reardon et al., “What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action?” 2018.

effective or efficient means of achieving racial diversity,” the researchers wrote. Race-based recruitment, by itself, similarly failed to yield Black/African American and Hispanic/Latino enrollments like those realized through the consideration of race in admissions.²²³ It was only through the institutions’ use of class-based affirmative action and race-based recruitment in tandem that their Black/African American and Hispanic/Latino enrollments matched those produced by race-conscious admissions.

The study noted, however, that cost would be a significant barrier to selective colleges adopting a system of considering race-based and class-based recruitment simultaneously. In the real world, colleges would be hard-pressed to actually enroll and retain the additional low-income students admitted through class-based affirmative action without expenditures on financial aid far beyond the level they’re currently willing and able to make.

When it comes to ensuring racial and ethnic diversity in selective colleges’ enrollments, race-conscious admissions, although imperfect, “may be the best strategy we currently have,” the study concludes.²²⁴

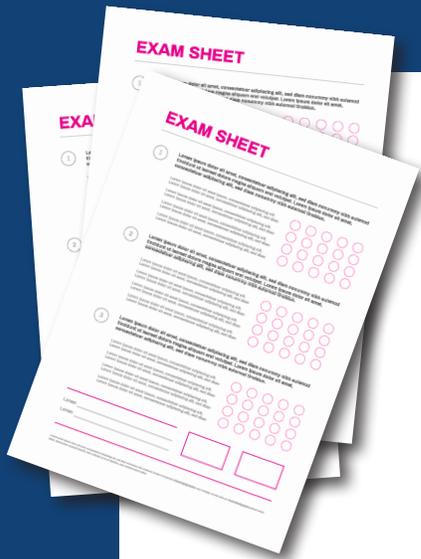
The pressing question before us is how to proceed if the Supreme Court takes that strategy off the table.

The bottom line is that if we are to have any hope of increasing the representation of all historically marginalized racial/ethnic groups on selective college campuses, we will have to consider race and ethnicity in the admissions process.



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Reardon et al., “What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action?,” 2018.
Reardon, et al., “What Levels of Racial Diversity Can Be Achieved with Socioeconomic-Based Affirmative Action?,” 2018.



How an SAT-Only Model Would Affect College Admissions

In a separate thought experiment conducted in 2019, we investigated what would happen if scores on standardized admissions tests were the sole criterion for admission to selective colleges.²²⁵ In the face of a rapid rise in the number of colleges that don't require applicants to submit standardized test scores, some higher education leaders have called for the return of mandatory standardized admissions tests, reasoning that they are the best way to compare the academic preparation of wildly disparate students.²²⁶ But standardized test scores are not meant to be absolute measures of who is best qualified to attend college. They are meant to be probability statements about the likelihood of college success. Even so, they explain no more than 30 percent of the variation in college graduation rates.²²⁷ We suspected that the enrollments at the most selective colleges were more dependent on who applied than who was “most qualified.”

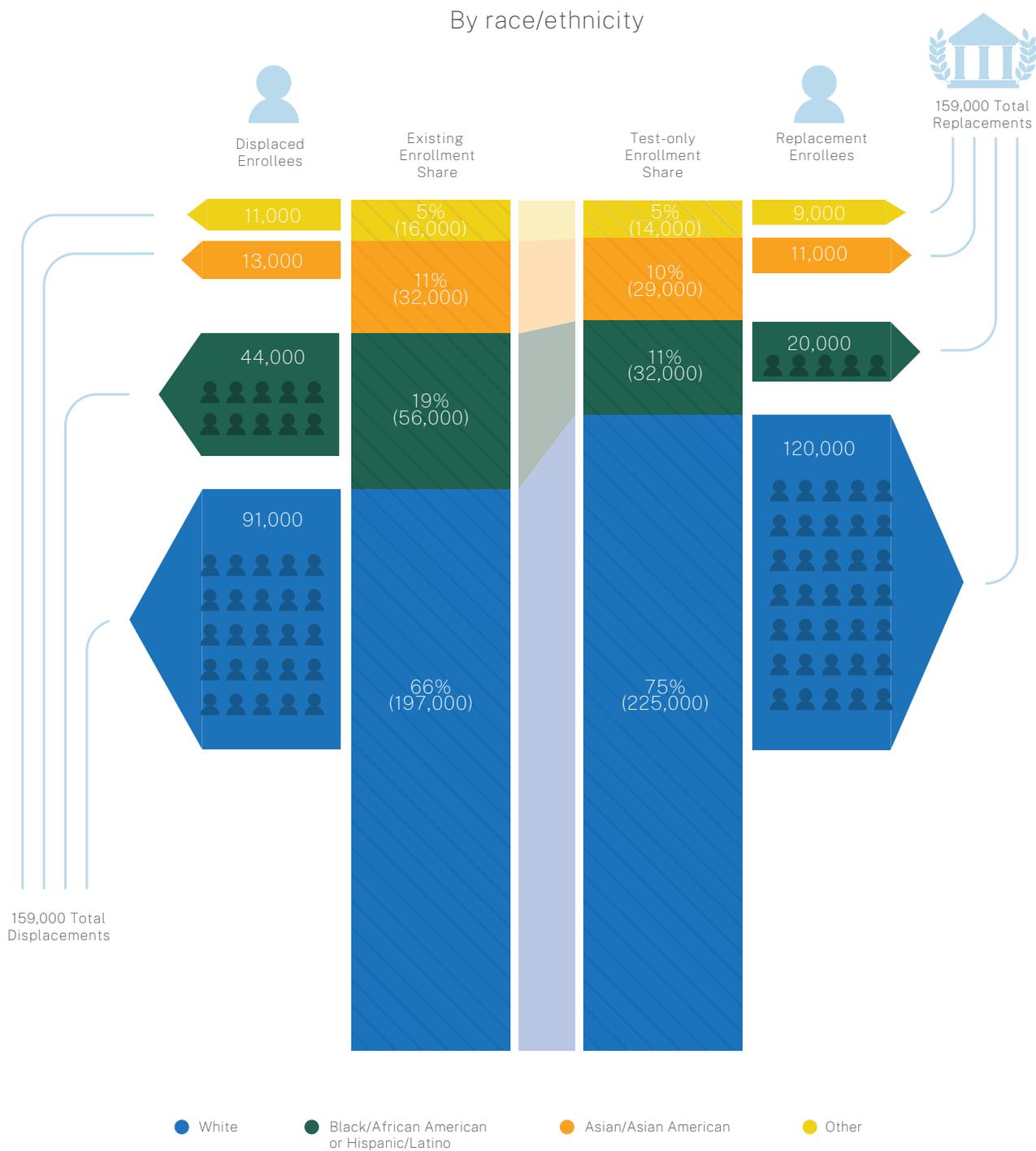
Using data from the 200 most selective colleges, we found that a theoretical admissions process that relied solely on SAT scores in filling available seats would result in turnover of more than half of the students who were then attending selective colleges: 53 percent of the institutions' current students would have been deemed unqualified to attend. By race, test-only admissions would lead to an overall increase in white enrollments (from 66 percent to 75 percent of enrolled students) and a decrease in the collective share of Black/African American and Hispanic/Latino students (from 19 percent to 11 percent) (Figure 2).

While the proportion of enrollments held by white students would increase overall, significant numbers of white and Asian/Asian American students — 91,000 and 13,000, respectively — would be displaced from selective institutions and replaced by students with higher scores. This suggests that the current admissions system provides substantial leeway to colleges and universities in their decision-making and also benefits many current white and Asian/Asian American students alongside their underrepresented Black/African American and Hispanic/Latino peers.

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Carnevale et al., *SAT-Only Admission*, 2019.
Bloomberg, “Colleges Should Bring Back Testing Requirements,” 2022.
See Burton and Ramist, *Predicting Success in College*, 2001.

FIGURE 2 An SAT-only admissions model would lead to decreases in racial diversity at the 200 most selective colleges.



Source: Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, High School Longitudinal Study of 2009 (HSL:09), restricted use data, 2018.

Note: Numbers in figure may not sum due to rounding.

A Path Forward

Selective higher education institutions' enrollments will not reflect the diversity of American society without sweeping reforms to equalize early and ongoing access to educational opportunity.

If the Supreme Court overturns its 2003 *Grutter* precedent and prohibits race-conscious admissions, it will leave our nation having to face up to the many problems that such admissions practices have papered over.

No longer will selective colleges and universities be able to maintain a façade of being providers of equal educational opportunity by giving enough extra consideration to Black/African American and Hispanic/Latino applicants to ensure their visible presence on campus. Gone will be a chief means by which colleges maintained large enough enrollments of such students to keep them from feeling racially isolated.



One of the few exceptions to elite higher education institutions' systemic bias in favor of wealthy applicants will be gone. Low-income Black/African American, Hispanic/Latino, and Native American applicants will end up stuck outside the same walls that long have kept out low-income white and Asian/Asian American applicants.

Often criticized as bastions of privilege, selective colleges and universities will have to own up to that label, stop claiming to be able to expose students to diversity, and weather the potential resulting losses of prospective students and of public and private support.

In the short term, only sweeping reforms of the admissions processes of selective colleges and universities can stave off the loss of a significant part of this generation of top Black/African American,

Hispanic/Latino, and Indigenous students at these institutions. Given the opposition that such reforms are likely to encounter from those invested in the status quo, some setbacks on this front are almost inevitable.

In the long term, the only way to ensure diversity at selective higher education institutions is to do the hard work of facing up to segregation and inequity in K-12 education and society at large. So long as unacceptably large segments of our nation's population lack access to adequate college preparation for reasons having to do with race, ethnicity, or family income, elite colleges and universities will confront a daunting lack of diversity in the pool of applicants whose academic records suggest they can meet the demands required to graduate.

Doing nothing will carry heavy long-term costs, helping to cement in place our nation's divides between races, the rich and poor, and education's haves and have-nots. The result almost surely will be social and political instability and the intergenerational perpetuation of wealth in some families and communities, and poverty in others. Our nation's economy will suffer due to a lack of diversity in our workforce, the leakage of talent from the education pipeline, and workers' growing lack of faith in the promise of upward social mobility as a reward for hard work.²²⁸

In the long term, the only way to ensure diversity at selective higher education institutions is to do the hard work of facing up to segregation and inequity in K-12 education and society at large.

Make no mistake: tackling the problem head-on will have heavy costs as well. It will require substantial new investments in education, grappling with thorny social and educational problems, and weathering resistance and backlash. In the end, however, that hard work will leave us in a better place.

It's an effort worth embarking upon even if the Supreme Court somehow spares race-conscious admissions policies in its upcoming Harvard and UNC rulings. After all, a Supreme Court rejection of such policies almost certainly will happen eventually. And the answers we come up with in our quest to navigate a future without race-conscious admissions are relevant as well for public colleges in states where race-conscious admissions policies have been banned. This effort also may help other institutions diversify their enrollments without having to rely as much on consideration of applicants' race or ethnicity — a strategy that has always been divisive and involved legal risks.

The author of the Supreme Court's *Grutter* decision, Justice Sandra Day O'Connor, had expressed hope that things would not be this way, that by now American society would have remedied much of the segregation and inequity that leaves colleges dependent on race-conscious admissions. In the majority opinion joined by four other justices, she wrote, "We expect that 25 years from now, the use of racial

preferences will no longer be necessary to further the interest approved today.”²²⁹ Four years later, in a speech delivered after her retirement, she said the court’s majority “had tried to be careful in stressing that affirmative action should be a temporary bandage rather than a permanent cure.”²³⁰

The justices in the *Grutter* majority would prove wildly overoptimistic in their expectations of social progress. Even at the time, the trend lines clearly pointed in discouraging directions. The income gaps between Black/African American and white families had narrowed little over the previous three decades. The gap between Black/African American and white children’s scores on learning assessments and standardized admissions tests remained large and persistent, even within the same income groups. There was little reason to expect increased outreach and recruitment efforts to have a big impact given the paucity of Black/African American students with high SAT scores and how Black/African American students already had been applying to selective colleges at much higher rates than white students with similar scores.²³¹

The racial integration of K–12 education seemed unlikely to solve the problem, and it had already stalled anyway. Even the complete integration of the nation’s secondary schools “would produce only a small fraction of the test score gains that would be needed to make Justice O’Connor’s prediction a reality,” three leading social-science researchers, Alan Krueger, Jesse Rothstein, and Sarah Turner, concluded in a simulations-based study of college admissions published three years after the *Grutter* decision. They argued that a different objective, “substantial progress in increasing black students’ pre-collegiate performance,” was “critical to any hope of eliminating the need for affirmative action within the next generation.” Without it the elimination of race-conscious admissions “will lead to substantial declines in black representation at the nation’s most selective colleges and universities.”²³²

By many measures, the economic gaps between the nation’s various racial and ethnic groups have only widened since 2003, partly due to people lacking the resources and education needed to weather and recover from economic crises such as the Great Recession and the COVID-19 pandemic. Since the 1970s the income gap between the white population and the Black/African American population has narrowed only modestly, while the income gap between those who are white and those who are Hispanic/Latino has grown. In terms of wealth, a measure which includes investments and savings, the gap has widened between the white population and both the Black/African American and Hispanic/Latino segments of the population. The Asian/Asian American population has surpassed the white population in many financial respects, but that progress has come partly through immigration policies favorable to Asian/Asian American people with high levels of education and professional training. Moreover, within the Asian American population, large and rapidly growing economic divides exist.²³³

The racial integration of public schools peaked in 1988 and has lost ground ever since, due largely to the termination of court-ordered desegregation plans and the influx of Hispanic/Latino students into schools with large Black/African American enrollments. The share of all Black/African American children

229 *Grutter v. Bollinger*, 539 US 306 (2003).

230 Schmidt, “Sandra Day O’Connor Says Affirmative Action Faces Uncertain Future,” 2007.

231 Krueger et al., “Race, Income and College in 25 Years,” 2006.

232 Krueger et al., “Race, Income and College in 25 Years,” 2006.

233 Aladangady and Farde, “Wealth Inequality and the Racial Wealth Gap,” 2021; Kochbar and Cilluffo, “Income Inequality in the U.S. Is Rising Most Rapidly Among Asians,” 2018; Long and Van Dam, “The Black-White Economic Divide Is as Wide as It Was in 1968,” 2020.

enrolled in majority-white public schools has dropped from more than a fourth to less than a fifth. The share of Black/African American children attending schools with enrollments that are overwhelmingly members of racial/ethnic minority groups has grown, so that about 40 percent now learn in environments where fewer than 10 percent of students are white. Black/African American children are more likely to have low-income students seated around them in classrooms than are children from any racial or ethnic group other than American Indians. The average Black/African American child attends a school where 60 percent of students qualify for lunch subsidies based on family income level.²³⁴

In judging whether their efforts to increase enrollments of underrepresented minority students had gone far enough, selective colleges set themselves a somewhat unambitious goal: enrolling a “critical mass” of students from each such population. These institutions had begun speaking of the concept of critical mass in the late 1960s, roughly defining the term as enough students from any given underrepresented minority group to ensure that members of that population do not feel racially isolated and feel supported by others of their race or ethnicity.²³⁵ Precluded by the Supreme Court’s 1978 *Bakke* decision from having race-conscious admissions policies tied to the goals of promoting social justice or having enrollments that mirror the demographic makeup of society,²³⁶ the University of Michigan relied on critical-mass theory in defending how much weight it gave to applicants’ race when its race-conscious policies were challenged before the Supreme Court in 2003. In its *Grutter* decision upholding race-conscious admissions at Michigan’s law school, the Supreme Court formally enshrined as the only allowable goal of race-conscious admissions policies the enrollment of critical masses of Black/African American, Hispanic/Latino, and Native American students to secure the educational benefits of diversity.²³⁷ A decade later in the *Fisher* lawsuits against the University of Texas, the Supreme Court reiterated that position in determining whether Texas could achieve sufficient underrepresented minority enrollments without considering ethnicity or race. It trusted the university itself to determine when a critical mass was reached.²³⁸

In hindsight, elite colleges’ focus on enrolling a critical mass of various underrepresented minority populations served as a dodge, a means of absolving themselves from any obligation to help remedy our society’s segregation and inequality. Striving for critical mass allowed their admissions offices to express satisfaction with student bodies far less diverse than American society, both in terms of their enrollments of underrepresented minority students and their enrollments of low-income students. For Indigenous students, the concept of critical mass was all but meaningless given that this underrepresented minority group makes up less than 1 percent of the college-age population. Outside of a few Western and Southwestern states where the nation’s Indigenous population is heavily concentrated, it’s extremely

234 Orfield and Jarvie, *Black Segregation Matters*, 2020.

235 Harvard began speaking of “critical mass” as the goal of its policies, partly to reject the use of quotas, as early as 1968. Karabel, *The Chosen*, 2005.

236 *Regents of the University of California v. Bakke*, 438 US 265 (1978).

237 *Grutter v. Bollinger*, 539 US 306 (2003).

238 *Fisher v. University of Texas at Austin*, 579 US (2016).

difficult for selective colleges to enroll enough Indigenous students for them to have more than a token presence on campus.

In a sense, critical mass also was a deeply cynical measure, rooted largely in the desire to enroll enough underserved minority students to provide the educational benefits of diversity to white students who, for the most part, had been exposed to little diversity before. Most underrepresented minority students arrive at selective college campuses with plenty of previous exposure to members of other racial and ethnic minority groups. It's the white students on such campuses who typically come from wealthy, predominantly white schools and communities where they had been sheltered from exposure to diversity as children, and are seen as needing exposure to people who don't look like them during their college years to function successfully in a pluralistic society.

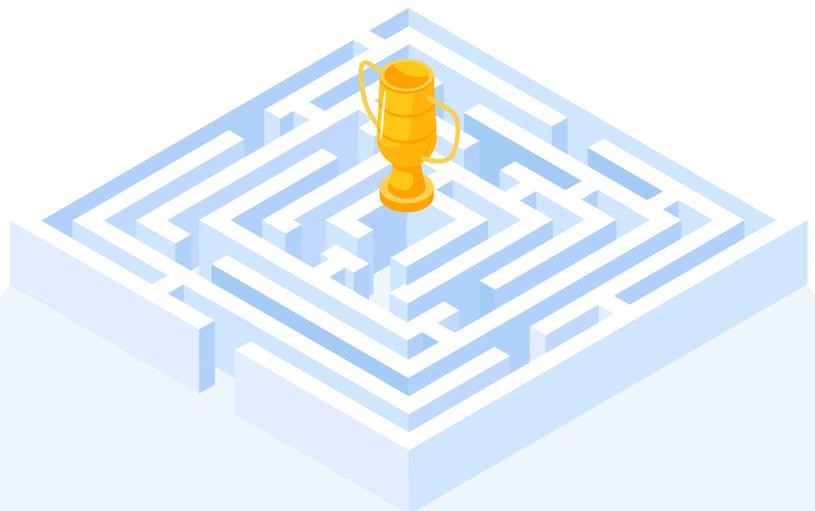
If the Supreme Court overturns *Grutter* and abandons the diversity rationale for race-conscious admissions, the goalpost of critical mass will be rendered largely irrelevant, and any professed efforts to reach that goal will raise suspicions of illegal racial discrimination. As discussed previously in this report, the Supreme Court already has barred selective higher education institutions from setting racial quotas or from using race-conscious admissions policies to racially balance their enrollments to reflect demographics.

In an ideal world, diversity on selective college campuses would happen organically through the provision of equal opportunity and the elimination of biases and barriers that stand in the way of students who are members of underrepresented minority groups or otherwise lack privilege.

The pursuit of critical mass on selective colleges' campuses has distracted attention from considerations of justice and fairness and from the hard work that needs to be done. Seeking equal educational opportunity is a far more ambitious goal, requiring reforms throughout the entire education system, from preschool onwards.

Such reforms won't just benefit selective colleges and universities. They'll broadly benefit higher education, helping to ensure that more students graduate from open-access colleges and community colleges. They'll also benefit K-12 institutions, by shoring up schools that had lacked the resources required to provide all children with the educations they need.

The question, then, is this:
How can we bring about
these reforms?



The quest for race-neutral alternatives to race-conscious admissions has produced valuable insights on how to promote equal educational opportunity.

The research and thought processes that have gone into devising race-neutral alternatives have required assessments of what stands between various segments of the population and access to higher education. It has functioned as a lens giving us a clearer picture of what obstacles exist and how they might be removed or circumvented. Although many of the alternatives to race-conscious admissions considered by education researchers and policymakers have been deemed unworkable, the evaluation process has had tremendous value.

Research on class-based affirmative action, for example, has illuminated how economic inequality translates into unequal educational access. Efforts to calibrate how much extra consideration is needed to bolster enrollments of low-income students have shed light on the extent to which colleges' admissions processes systematically reward family wealth and penalize its absence.

Research on percent plans has helped map out the race- and class-based segregation of high schools and forced public colleges to acknowledge that their recruitment efforts had been narrowly focused on high schools with enrollments that were disproportionately wealthy and white.

Research asking how much additional racial diversity can be achieved through the elimination of admissions preferences for applicants tied to alumni, donors, and faculty members and administrators has helped quantify the extent to which diversity and access are compromised by systemic favoritism toward people with cash and connections. Close examinations of how admissions preferences for recruited athletes affect diversity have exposed how most collegiate sports programs primarily draw onto campus young white people whose families could afford expensive athletic equipment and coaching and who grew up surrounded by well-funded athletics programs and facilities.

Research on whether more generous financial-aid programs could ensure more diversity on campuses has shed light on the prohibitively high costs of attending selective colleges and universities. It also has drawn attention to the growth at such institutions in merit-based aid and tuition discounts to students who don't need the financial help.

Underlying most race-neutral strategies were acknowledgements of the social and educational problems that get in the way of diversity on campuses. Percent plans, for example, assume the continuation of race- and class-based segregation of public schools and the neighborhoods those schools serve. Class-based affirmative action plans amounted to a recognition of how much access to selective colleges hinges on family income and wealth.

It's worth examining, also, which of the race-neutral options colleges had declared off-limits, to ascertain what those refusals say about our higher education system and how it is financed. In many cases, for example, selective colleges rejected options that would have resulted in declines in the number of students with the means to pay full tuition. They rejected percent plans or class-based affirmative action

projected to lead to declines in the average SAT or ACT scores of entering classes that were almost certainly too marginal to be noticed by anyone but the number-crunchers behind the *US News & World Report* college rankings.

The reality is that there are far more students who could succeed at the most selective colleges than those institutions currently admit, and that artificially constrained capacity is part of most elite institutions' business model.²³⁹

The effort to blunt the impact of the end of race-conscious admissions will need to begin with major reforms in higher education.

Although the overall lack of Black/African American, Hispanic/Latino, and AI/AN/NH/PI students at selective colleges and universities is rooted in broader educational and social problems, higher education bears plenty of responsibility itself. Blame colleges for admissions standards and practices that consistently reward privilege, for their skewed priorities in distributing financial aid, for their failure to unite around systemic approaches to getting more young people into and through college, and for their unwillingness to rid themselves of their own biases and maintain welcoming and supportive environments for all students.

Imagine being able to wave a magic wand at our K–12 education system and produce a huge increase in the share of members of underrepresented racial/ethnic or low-income groups with stellar academic profiles. It all would come to naught if those students were to apply to selective colleges only to lose out to applicants with cash or connections, or to find out that the cost of enrolling is beyond their reach, or to end up dropping out after encountering a hostile or uncaring environment on campus.

A Supreme Court ruling ending race-conscious admissions will punch a hole in the education pipeline that will need to be patched quickly. Students from racial/ethnic minority groups and low-income students expected to graduate from high schools within the next several years almost certainly won't reap the benefits of any new reforms in K–12 education aimed at improving college preparation. The adoption and implementation of such reforms can take years, if they happen at all.

Broad reforms in higher education are likely to enjoy much more political support than race-conscious admissions ever did, especially if they are framed as promoting fairness, affordability, social mobility, and efficiency. If done right, such reforms have the potential to bolster not just racial and ethnic diversity but also socioeconomic diversity at selective colleges, and to shore up public support for such institutions.

The American public subsidizes higher education through appropriations, tax breaks, and the government operation of student loan programs, and they have every right to demand that selective colleges are accessible to talented young people of all races, ethnicities, and economic backgrounds. Parents who pay college costs and application fees have a right to demand that colleges deal with them

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Carnevale et al., "Achieving Racial and Economic Diversity with Race-Blind Admissions Policy," 2014; Carnevale et al., *The Merit Myth*, 2020.

squarely, without exposing their children to rejection due to hidden admissions preferences or biases or giving false hope of admission to students just to reject them to appear more selective.

If selective colleges are unwilling to expand access on their own, multiple points of leverage exist for bringing about needed reforms. Federal and state legislatures can exercise their purse-string powers, for example. Big donors can make their support for selective colleges contingent upon broad access, and advocates can mount legal challenges to the nonprofit status of colleges based on arguments that they neglect their associated obligations to serve the common good.

Colleges, universities, and higher education associations would be wise to be on an emergency footing even before the Supreme Court hands down its Harvard and UNC decisions, so they can respond to a ruling ending race-conscious admissions with the appropriate sense of urgency, without needing to be prodded by outside entities such as legislatures or the courts.

Selective colleges should first root out systemic biases against applicants who are poor or from underrepresented minority groups.

Selective colleges and universities often have defended race-conscious admissions practices as needed correctives for admissions standards that are insurmountable barriers to many underrepresented minority students. But those barriers — admissions standards that favor the wealthy and white — were created and perpetuated by the colleges themselves.

This is not to say that selective colleges and universities should stop being selective. Such institutions do no favors for anyone in admitting students who will be unable, even with the help of support services, to do the work and graduate. But selective institutions' admissions policies don't arise solely from a desire to ensure students can succeed. They're also motivated by obsessive pursuits of prestige and higher rankings, as well as an associated hunger for institutional wealth that they sate largely by enrolling students from families who are rich enough to pay full tuition and donate generously.

Selective higher education institutions achieve their desired student mix through a process called enrollment management, an opaque, data-driven approach to admissions that involves using computer simulations to fine-tune admissions standards to get specific mixes of students that advance institutional interests. It enables admissions offices to treat various policies and practices as knobs that can be turned to get specific results with little obvious connection to the knobs themselves. For example, by placing more weight on SAT or ACT scores, a college gains more than just an entering class with higher average standardized test scores; cascading effects would include an increase in the share of entering students from economically privileged backgrounds, given how much performance on such tests reflects family wealth.²⁴⁰ Enrollment managers can end up so focused on achieving specific numerical outcomes that they lose sight of how their decisions are affecting students and the broader society.

Admissions standards and practices that favor privileged applicants remain widespread and, in some cases, are growing in prevalence, as evident from a 2019 report published by the National Association for College Admission Counseling. A national survey of four-year college administrators cited extensively in that report research found the following:²⁴¹

- About two out of five respondents assigned considerable or moderate importance to students' demonstrated interest in attending. The most important gauge is whether a student visited campus, a measure that places at a disadvantage those whose parents cannot afford the cost of travel or are unable to take time off.
- Nearly half assigned at least moderate importance to students' records of involvement in extracurricular activities. Although legitimately seen as predictive of students' likelihood to engage in campus life, this consideration places at a disadvantage those students who had to work at jobs after school or attended high schools with little funding for extracurricular programs.²⁴²
- Nearly three out of five assigned at least some importance to students' scores on tests of knowledge from Advanced Placement tests and enrollment in International Baccalaureate programs. Such programs are most abundant at exclusive private schools or public high schools in wealthy communities where substantial shares of children enter high schools with eighth-grade test scores far above average.²⁴³
- More than four out of five assigned at least some importance to high school counselors' recommendations. Researchers have found vast race- and class-based disparities in students' access to counselors who produce such statements.²⁴⁴

Meanwhile, the share of survey respondents who assigned considerable importance to applicants' class rank — a measure of students' success in the context of their environment — had shrunk from 23 percent in 2007 to 9 percent in 2018. That is not surprising: class rank is no longer reported by more than half of American high schools, many of which worried that some very good students were being overlooked by colleges if they fell just short of the top 10 percent, or some other subjective tier, of their high school class.²⁴⁵

While plausible arguments can be made for all such admissions policy decisions, college administrators need to be mindful of how each affects access and diversity. If choices such as assigning less weight to class rank result in the enrollment of fewer underrepresented minority and low-income students, college administrators need to take responsibility — and be held accountable — for that outcome. Through advances in enrollment management, we know too much about the expected impact of various admissions policy choices to feign surprise over their results.

241 Clinedinst, *2019 State of College Admission*, 2019.

242 Bennett et al., "Beyond the Schoolyard," 2012; Carnevale et al., *Learning While Earning*, 2015; Carnevale and Smith, *Balancing Work and Learning*, 2018; McDonough, *Choosing Colleges*, 1997; Stearns and Glennie, "Opportunities to Participate," 2010.

243 Iatarola et al., "Determinants of High Schools' Advanced Course Offerings," 2011; Klugman, "The Advanced Placement Arms Race and the Reproduction of Educational Inequality," 2013; Klugman, "How Resource Inequalities among High Schools Reproduce Class Advantages in College Destinations," 2012; Perna et al., "Unequal Access to Rigorous High School Curricula," 2015.

244 Barton, *One-Third of a Nation*, 2005; Clinedinst and Korentang, *2017 State of College Admission*, 2017; Persell and Cookson, "Chartering and Bartering," 1990.

245 Richman, "Maryland Districts Join National Trend in Eliminating Class Rank," 2019.

Reduced reliance on SAT and ACT test scores could increase diversity, but only if selective institutions don't fall back on other considerations that disfavor underrepresented minority and low-income applicants.

The SAT and ACT have long been billed as great equalizers by virtue of how they identify academically talented students from humble backgrounds or distant schools who otherwise would be off selective colleges' radar. In the first half of the 20th century the tests did, in fact, play a major role in selective colleges' transformation from educators of students from exclusive nearby feeder schools into sorting machines responsible for identifying and training the leadership class of a perceived national meritocracy.

The shine has come off of standardized tests as more than half of colleges are now test-optional. But the tests themselves and what they are expected to illuminate have been suspect for some time. The SAT's origins are inextricably intertwined with our nation's history of racism. The psychologist who developed the SAT after World War I, Carl Campbell Brigham, was an outspoken eugenicist who initially characterized the test as a measure of "native intelligence."²⁴⁶ The SAT has always been criticized as racially biased in its questions — especially in its verbal portion — and the results of each year's administration of the SAT and ACT inevitably show performance gaps associated with race, ethnicity, and class. Contributing to such disparities is unequal access to expensive private test-preparation programs that coach students on test-taking techniques and help them get much higher scores.²⁴⁷

Selective colleges historically have given far more weight to standardized admissions test scores than was justified. Students at selective colleges with an SAT score of 1000–1099 have a 79 percent graduation rate, only 6 percentage points lower than the 85 percent graduation rate of students with an SAT score of 1200 or above. In the upper half of the score distribution, SAT score differentials of 100 or even 200 points do little to predict differences in later earnings or access to occupations.²⁴⁸ Yet small variances in SAT or ACT scores often mean the difference between students' admission or rejection, an outcome far out of line with what is known about the accuracy and reliability of the tests as predictors of graduation rates or career success.²⁴⁹

Over the last decade, most four-year colleges have adopted test-optional policies allowing applicants to choose not to submit their SAT or ACT scores. The trend started to gain hold in the 2010s at less-selective institutions and within a small subset of selective liberal arts colleges, but remained rare among big public universities and elite private colleges.²⁵⁰

246 Karabel, *The Chosen*, 2005; Lemann, *The Big Test*, 1999.

247 Carnevale and Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," 2004; Carnevale and Strohl, "How Increasing College Access Is Increasing Inequality, and What to Do about It," 2010; Carnevale et al., *The Merit Myth*, 2020; Lemann, *The Big Test*, 1999; Owen and Doerr, *None of the Above*, 1999; Santelices and Wilson, "Unfair Treatment?," 2010.

248 Carnevale and Rose, "Socioeconomic Status, Race/Ethnicity, and Selective College Admissions," 2004.

249 Carnevale et al., *The Merit Myth*, 2020; Carnevale et al., *Our Separate & Unequal Public Colleges*, 2018.

250 Selingo, "The Future of Admissions," 2021.

The onset of the pandemic, which rendered in-person administration of the SAT and ACT impossible, caused the number of colleges with test-optional policies to explode. Many more four-year institutions ended up going test-optional, even though they previously had had no plans to do so.²⁵¹ More than 1,800 colleges now are either test-optional or don't accept standardized test scores at all in admissions, according to the National Center for Fair & Open Testing (FairTest), a nonprofit dedicated to supporting test-optional admissions and "attacking the false notions that test scores equal merit."²⁵²

The members of this new cohort of adopters were evenly split on whether they saw the change as permanent or as merely a pilot or stopgap effort, and many continued to require test scores in awarding some scholarships or admitting students into certain academic programs.²⁵³ Nevertheless, there is no question that the pandemic has given rise to a national experiment shedding light on what universal rejection of the SAT and ACT might look like. And the list of universities that ended up completely abandoning their SAT and ACT requirement included the multi-campus University of California, which often sets the tone for other selective higher education institutions around the nation.²⁵⁴

Reports from the field offer some hope that widespread adoption of test-optional policies is making selective colleges' enrollments more diverse. In 2021 the enrollment-management consulting firm Maguire Associates surveyed college administrators with at least indirect responsibility for admission and enrollment and found that at least half of the public institutions that had gone test-optional reported increases in applications from each of three key categories — underrepresented minority, low-income, and first-generation students.²⁵⁵ A separate 2021 ACT survey found that selective institutions had experienced surges in the number of applications they received.²⁵⁶ Jon Burdick, Cornell University's vice president for enrollment, said that the number of applications received by his institution had jumped from 50,000 to 71,000 after four of the university's undergraduate colleges went test-optional and three others went test-blind. Most of the growth in applications had come from "students that have felt historically excluded" and would have been unlikely to apply in the past based on the assumption their low scores precluded their admission, he said.²⁵⁷

The Maguire and ACT surveys also found, however, that the surge in test-optional policies revealed a number of shortcomings and generated some cause for concern. Colleges that reported increases in applications from previously underrepresented populations were slightly less likely to report increases in actual enrollments from these populations. Private institutions were less likely to report increases in applications and enrollments from underrepresented minority, low-income, and, especially, first-generation students. Large shares of survey respondents from both private and public institutions voiced worries that test-optional policies would leave their institutions less likely to predict student success, especially when it came to first-year retention. "It's not obvious that test-optional is here to stay," the Maguire Associates report summarizing such findings said.²⁵⁸ The separate ACT survey found that

251 ACT, *Summary Findings, 2021*; Maguire Associates, *The Future of Test-Optional, 2021*.

252 National Center for Fair & Open Testing (FairTest), "Current Work," 2023.

253 Maguire Associates, *The Future of Test-Optional, 2021*.

254 Boyette et al., "University of California System Will No Longer Require SAT and ACT Scores for Admission after Settlement Reached," 2021.

255 Maguire Associates, *The Future of Test-Optional, 2021*.

256 ACT, *Summary Findings, 2021*.

257 Einhorn, "Inside the Vast National Experiment in Test-Optional College Admissions," 2022.

258 Maguire Associates, *The Future of Test-Optional, 2021*.

many colleges that had just gone test-optional were scrambling to tweak their recruitment efforts and criteria for awarding merit-based scholarships, which had heavily relied on standardized test scores.²⁵⁹ On the other hand, many colleges, including the University of Chicago, have made test-optional policies permanent, while others have extended the policy for up to three additional years. “We’ve concluded that test-optional is here to stay,” Janet Godwin, chief executive of the ACT testing organization, told *The Washington Post*.²⁶⁰

The cynical take on those test-optional policies adopted by elite colleges before the pandemic was that they had two unsavory ulterior motives: (1) driving up application numbers by not requiring test scores would allow colleges to reject more applicants and, therefore, appear more selective; and (2) discouraging applicants with low scores from submitting them would artificially inflate the average score of entering freshmen classes.²⁶¹ Research on such policies has found that either their impact on diversity had been modest or they had no impact at all. Among the studies finding no impact was one that examined federal student data from four-year colleges before and after their adoption of test-optional policies and compared them to four-year colleges that had not gone test-optional. The study found that the adoption of test-optional policies led to a brief increase in applicants but had no statistically significant effect on enrollments of underrepresented minority-group members or Pell Grant recipients.²⁶² A separate study of 100 private institutions that had adopted test-optional policies and made associated adjustments in recruitment and admissions practices found 10 to 12 percent increases in enrollments of students from underrepresented racial or ethnic groups and 3 to 4 percent increases in enrollments of Pell Grant recipients. Given the small sizes of such populations to begin with, however, this growth amounted to about a 1-percentage-point increase overall in the representation of these populations at the colleges.²⁶³ A third study, covering 180 selective liberal arts colleges, concluded that “test-optional admissions policies, as a whole, have done little to meet their manifest goals of expanding educational opportunity for low-income and minority students.” It blamed this disappointing result partly on test-optional colleges’ shift to relying on other admissions criteria that generally favor advantaged populations, such as involvement in extracurricular activities or enrollment in honors, Advancement Placement, and International Baccalaureate classes. It concluded that test-optional colleges “may be inadvertently trading one inequitable policy for another.”²⁶⁴

“We’ve concluded that test-optional is here to stay,” said Janet Godwin, chief executive of the ACT testing organization.

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ACT, *Summary Findings*. 2021.
Anderson, “Harvard Won’t Require SAT or ACT through 2026 as Test-Optional Push Grows.” 2021.
Saboe and Terrizzi, “SAT Optional Policies.” 2019.
Saboe and Terrizzi, “SAT Optional Policies.” 2019.
Bennett, “Untested Admissions.” 2022.
Belasco et al., “The Test-Optional Movement at America’s Selective Liberal Arts Colleges.” 2015.

At least one elite institution that had adopted a test-optional policy in response to the pandemic, the Massachusetts Institute of Technology, has reinstated its requirement that students submit SAT and ACT scores, partly for reasons that evoke the early role of such tests as equalizers of opportunity.²⁶⁵ In a 2022 blog post announcing the reversal, Stu Schmill, MIT's dean of admissions and student financial services, said the standardized admissions tests "help us identify academically prepared, socioeconomically disadvantaged students who could not otherwise demonstrate readiness because they do not attend schools that offer advanced coursework, cannot afford expensive enrichment opportunities, cannot expect lengthy letters of recommendation from their overburdened teachers, or are otherwise hampered by educational inequalities."²⁶⁶

The upshot of all this? The SAT and ACT can help colleges predict students' first-year performance or identify talented students in advantaged settings, but students' scores on these measures have proven to be closely tied to race and class. Although selective colleges have undermined their efforts to achieve diversity by giving excessive weight to students' scores, they should be mindful that they won't be able to substantially increase enrollments of underrepresented minority or low-income students simply by dialing back their dependence on standardized tests or by going test-optional. They will need to avoid falling back on alternative measures that similarly disfavor such populations, and they will need to undertake broader reforms.

Ensuring equal access requires that elite colleges be mindful of the environments that applicants come from and the advantages or disadvantages they had.

Every college applicant pool includes young people who have overcome obstacles and ended up with much better academic profiles than might be expected given their circumstances. Let's say a young person who grew up disadvantaged in just about every respect, who generally might be expected to have an SAT score of about 550 out of 1600, instead submits a score of 1050. Education researchers call these people "strivers," and have found that the traits that have enabled them to beat the odds, such as resilience and strong work ethic, tend to serve them well in the face of challenges at college.²⁶⁷

At most selective colleges, however, an applicant with a score of 1050 would quickly be dismissed from consideration.

Increasing enrollments of disadvantaged students who have beaten the odds represents one of the easiest ways to increase diversity at selective colleges. Such institutions need to consider applicants' grades, test scores, and other qualifications in the context of what might be expected of those with such a background. They should look for information shedding light on any obstacles faced by applicants and

²⁶⁵ Purdue University is one of the few other large higher education institutions to reinstate the requirement for SAT or ACT scores. Bauer-Wolf, "Purdue University Reinstates Admissions Test Requirements for Fall 2024," 2022.

²⁶⁶ Schmill, "We Are Reinstating Our SAT/ACT Requirement for Future Admissions Cycles," 2022.

²⁶⁷ Kahlenberg, *Rewarding Strivers*, 2010.

consider it in assessing the applicants' merits. Doing so will reward character and promote upward mobility. It also is a sound move educationally, as personal qualities can predict college success.²⁶⁸

A 2014 experiment in which admissions officers considered fictitious applicants found that those who had been given detailed background information about fictitious applicants' high schools were more willing to recommend the admission of students from low-income backgrounds. Just having more information on students' backgrounds helps. The problem is that colleges seldom systemically gather it.²⁶⁹

A failure to think broadly about students' backgrounds and to look for talent beyond the usual places similarly constricts colleges' recruitment efforts. Many focus their recruitment efforts on students in their region with high standardized test scores, a dynamic that has left most scrapping over students on the nation's coasts and neglecting the disproportionate numbers of high-ability, low-income students concentrated in several Midwestern states.

It remains to be seen whether the growth in test-optional policies will produce associated shifts in the focus of recruitment efforts.²⁷⁰ Many highly qualified low-income students don't even consider applying to elite institutions because they're unaware that enrolling in them is a possibility, a problem that can be rectified through steps as simple and inexpensive as sending letters telling students they won't need to pay the full listed price for tuition and fees.²⁷¹ The essential first step in enrolling underrepresented students is simply contacting them through recruitment and outreach. If they can't be persuaded to apply, other steps to bolster their enrollments are in vain.²⁷²

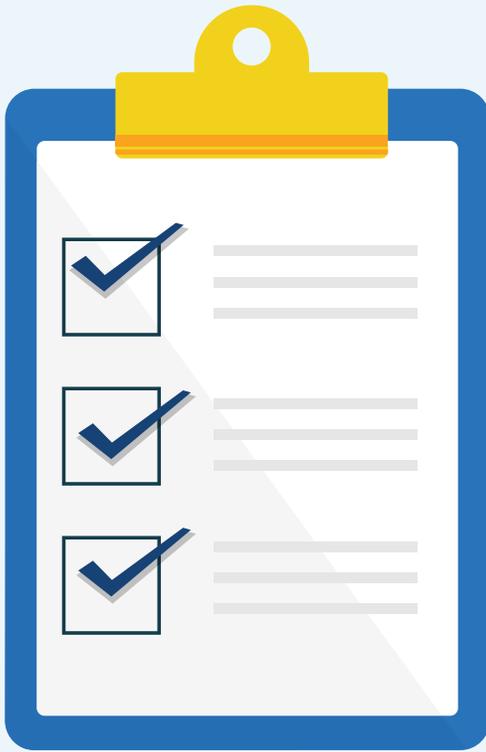
The College Board, the nonprofit organization which oversees the SAT, already has developed a tool that provides valuable data on the backgrounds of high school students. Branded as Landscape and piloted in 2019, it shows how an applicant's SAT or ACT score compares with those of students from the same high school and provides extensive information about the applicant's high school and neighborhood. Colleges wishing to use Landscape must agree to consider the data only as a supplement to individual information about an applicant and never as a replacement for student-specific application information or as the sole determinant of an admissions decision.

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Willingham, *Success in College*, 1985; Willingham and Breland, *Personal Qualities and College Admissions*, 1982.
Bastedo and Bowman, "Improving Admission of Low-SES Students at Selective Colleges," 2017; Schmidt, "In Admission Decisions, the Deciders' Own Backgrounds Play a Big Role," 2016.

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Hill and Winston, "Low-Income Students and Highly Selective Private Colleges," 2010.
Hoxby and Avery, "The Missing 'One-Offs,'" 2013; Hoxby and Turner, "Expanding College Opportunities for High-Achieving, Low Income Students," 2013.
Belasco et al., "The Test-Optional Movement at America's Selective Liberal Arts Colleges," 2015.



Drawing from various federal data sources, Landscape offers colleges the following background information:

- whether an applicant’s high school is in a city, a suburb, a town, or a rural area, as well as the average size of recent graduating classes from that high school
 - the average SAT scores at four-year colleges attended by that high school’s graduates
 - data on the availability of AP courses and student performance on AP tests at the applicant’s high school
 - in the case of an applicant from a public school, the percentage of the school’s students eligible for free or reduced-price lunch based on family income
 - the likelihood of a student from an applicant’s neighborhood or high school enrolling in a four-year college
- data on family structure, child poverty rates, median family income, housing stability, and educational attainment levels broken down by the applicant’s school and neighborhood
 - the predicted probability of being a crime victim in the neighborhood or neighborhoods from which the applicant’s high school draws its students²⁷³

Notably, the Landscape tool does not gather or provide information dealing with race or ethnicity, meaning that for colleges seeking to bolster enrollments of underrepresented minority students it represents both an inexact tool and a somewhat legally safe one.

Even colleges that don’t use the Landscape tool can benefit from the insights it offers on the environmental factors that shape students’ college preparation and educational opportunity.

More broadly speaking, both class-based affirmative action and guarantees of admission based on high school class rank represent mechanisms compelling colleges to consider applicants in the context of their home and school environment. Polls have suggested that both approaches — as well as considerations of other race-neutral measures of disadvantage such as whether applicants’ parents went to college — have far more popular support than the consideration of applicants’ race.²⁷⁴

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College Board, Landscape, 2023.
Gómez, “As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions,” 2022.

We must put an end to secretive side-door admissions practices that let applicants with wealth or connections bypass the regular competition for seats at selective colleges and universities.

It has long been well-documented by researchers and various media reports that selective colleges and universities operate two admissions tracks — a highly publicized one for outsiders and a separate, largely hidden one for insiders. Those on the outside track must survive intense competition and be judged worthy of acceptance based on academic preparation, overall merit, and likely contribution to the academic environment. Those on the inside track are shielded from competition, held to lower standards, and admitted based largely on consideration of whether they'll contribute to the institution's finances.

On the inside track are “legacies,” or those with family connections to alumni, as well as applicants with ties to big current or potential donors; the children of administrators, faculty, and staff members; and applicants tied to government officials with some say over the institution or its funding from public tax dollars.²⁷⁵ Recruited athletes typically gain admission via the inside track because successful sports programs generate revenue, attract applicants, and help keep alumni emotionally invested in their alma maters.

Systematic bias against applicants who lack ties to wealth and power occurs not just at the undergraduate level but also in admissions to graduate and professional schools.²⁷⁶ That bias, in turn, plays an outsized role in determining who gets to become a doctor, a lawyer, a professor, a government official, or a top business executive.²⁷⁷

Having a similar impact as such side-door admissions preferences are the early action and early decision policies intended to improve colleges' yield — the share of admitted students who actually end up enrolling. Early action admissions policies let students apply early and receive early word on the college's decision. Early decision applicants must meet an early deadline and agree to enroll if accepted. Both early action and early decision policies give an edge to applicants from families with the savvy to know about them — generally people with access to good counselors or inside knowledge of the institution. One analysis of data from 14 selective colleges found that applicants with SAT scores ranging from 1300 to 1390 on a 1600-point scale increased their chances of admission by 50 percent when they applied under early action and by 70 percent when they applied under early decision.²⁷⁸ As of 2016, 49 percent of colleges that accepted fewer than half of applicants gave students the option of applying early decision, which would preclude needy students from considering other colleges' financial aid offers before enrolling.²⁷⁹

Race-conscious admissions policies have, in essence, served to extend honorary insider status to Black/African American, Hispanic/Latino, and Native American applicants, generally putting them on

275 Schmidt, "In State Capitals, Public Colleges Adapt to a Tough Game," 2004.
276 Ashburn, "UCLA Denies Student Newspaper's Charge of Preferential Admissions," 2017; Elam and Wagoner, "Legacy Admissions in Medical School," 2012; Levmore, "Surprising Admissions," 2002; Milkman et al., "What Happens Before?," 2015; Schmidt, "A History of Legacy Preferences and Privilege," 2010.
277 Zweigenhaft and Domhoff, *Diversity in the Power Elite*, 1998.
278 Avery et al., "What Worms for the Early Bird," 2001; Avery, et al., *The Early Admissions Game*, 2003.
279 Clinedinst and Korentang, *2017 State of College Admission*, 2017.

roughly the same footing as populations admitted through side doors when it comes to their admissions probabilities. If race-conscious admissions policies are barred by the Supreme Court, applicants from racial/ethnic minority groups will be shuttled back onto the outside track for admissions, where they'll have to scrap with other outsiders over the seats in entering classes that insiders don't claim.

Colleges and universities that maintain inside admissions tracks cheat talented applicants out of educations that would enable them to reach their full potential as professionals and citizens. They create disincentives for hard work, reassuring young people from privileged backgrounds that they can coast through life on entitlement while sending those from modest backgrounds the message that effort won't get them ahead. As exposed by the Varsity Blues admissions scandal and others, side doors to admissions encourage and reward bad behavior, giving applicants whose families use bribery, cheating, and string-pulling to game the admissions process an edge over applicants who apply honestly and count on fair consideration.²⁸⁰

Blatant exchanges of offers for admission in exchange for cash or political favors have sparked major public controversies and calls for such practices to be halted. When the University of Illinois at Urbana-Champaign was busted in 2009 for operating a shadow admissions system favoring applicants connected to state politicians and its own trustees, its leaders ended up adopting a policy that required admissions officials to track all inquiries by anyone other than an applicant, parent or guardian, or high school counselor.²⁸¹ Preferences for recruited athletes are a subject worthy of an entire book, but abuses in this area can be minimized through the establishment of firewalls that protect admissions offices from interference from other administrative units, including those in charge of fundraising, alumni relations, government relations, employee relations, and athletics.

Reform has not occurred more broadly because admissions practices viewed as corrupt and tantamount to outright bribery by other Western nations are tolerated in the United States as an entrenched part of higher education's culture. In addition, most officials and constituencies with the power to undertake needed reforms have conflicts of interest that leave them invested in preserving the status quo. Among them, government officials who could be using laws or regulations to pressure colleges to do the right thing benefit from having the power to pressure colleges to admit certain applicants, such as the children of powerful constituents.²⁸²

Alumni can be counted on to rise up in opposition to any effort to end legacy preferences, with their chief weapon being threats to withhold donations, because they regard their alma maters' preferences for even the most lackluster legacy applicants as a well-deserved reward for families' institutional loyalty rather than, more accurately, a threat to academic standards and reputation.²⁸³ They're invested in defending current admissions policies more broadly because to do otherwise raises doubts about the

280 Golden, *The Price of Admission*, 2006. For extensive coverage of the Varsity Blues scandal and its key players, see *Chronicle of Higher Education*, "[Admission through the Side Door](#)," 2020.

281 Stripling and Hoover, "In Admissions, the Powerful Weigh In," 2015.

282 For coverage of state scandals resulting from the exposure of such political interference, see Mytelka, "New Allegations in Admissions Controversy at U. of Illinois Suggest Ex-Provost Played a Role," 2009; Schmidt, "An Admissions Scandal Shows How Administrators' Ethics Fade," 2015; Schmidt, "U. of California Board Acts to Limit VIP Admissions," 1998; Schmidt and Fain, "Backlash over U. of Illinois 'Clout' Scandal Spreads to Trustees and News Media," 2009; Stripling, "Admissions Report Chips at Austin Chief's Uncompromising Reputation," 2015. See also Schmidt, *Color and Money*, 2007; Golden, *The Price of Admission*, 2006.

283 Ashburn, "At Elite Colleges, Legacy Status May Count More Than Was Previously Thought," 2011; Espenshade et al., "Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities," 2004; Hurwitz, "The Impact of Legacy Status on Undergraduate Admissions at Elite Colleges and Universities," 2011; Kahlenberg, ed., *Affirmative Action for the Rich*, 2010; Schmidt, *Color and Money*, 2007.

worthiness of their own educational credentials that helped them secure their advantages in life. As Evan Mandery, the author of the book *Poison Ivy*, notes based on his research on highly selective colleges and social inequality, “elite colleges disproportionately let in affluent applicants who are predisposed to denying inequality, surround them with similar people, teach them in a system that confirms their belief in merit, and, finally, steer them into careers that cement this worldview.”²⁸⁴

Faculty members who should be voicing concerns about the mediocrity of students admitted through side doors remain silent to retain their own insider admissions advantage, which stems from colleges’ willingness to lower the bar for the children of employees promised tuition remission as a job perk. Colleges and universities could end this admissions preference and make it far more palatable to employees by entering into partnerships with similar institutions to make the tuition remission benefits portable, so that a faculty member’s child denied admission to their parent’s institution nonetheless could get a discount to attend a college somewhere else. But such agreements remain both relatively uncommon and limited in scope, and their adoption seldom inspires a higher education institution to end its admission preferences for employees’ children.²⁸⁵

For their part, the governing boards and top executives of selective colleges express fear that they’ll threaten their institutions’ endowments and bottom lines if they switch to admissions practices that promote the public good over institutions’ self-interests. They assert that ending legacy preferences will cause alumni donations to their institutions to plunge, despite research showing that no decline in such support has occurred among the few colleges that stopped giving favorable treatment to legacies.²⁸⁶

Reform has not occurred more broadly because admissions practices viewed as corrupt and tantamount to outright bribery by other Western nations are tolerated in the United States as an entrenched part of higher education’s culture.

Many make such arguments even though they lead colleges that have huge endowments, healthy budgets, and little to worry about financially.²⁸⁷

Other leaders are taking the easy way out, choosing to sustain institutions’ budgets by accepting the children of influential donors rather than doing the difficult, but necessary, work of rethinking institutional expenditures and, in the case of public institutions, appealing for more government financing. They defend admissions practices that bring short-term enrichment but, in the long run, leave the general public alienated from selective higher education and less willing to give colleges more tax-dollar support.

Selective higher education institutions face plenty of political pressure when it comes to their admissions practices, but nearly all of it pushes them in the wrong

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Mandery, “University of Hypocrisy,” 2022.
Golden, *The Price of Admission*, 2006; Randall, “The Other Legacies,” 2005; Schmidt, “Affirmative Action, Relatively Speaking,” 2005; Schmidt, *Color and Money*, 2007.
Coffman et al., “An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities,” 2010.
Grassley, “Wealthy Colleges Must Make Themselves More Affordable,” 2008; Nichols and Santos, *A Glimpse inside the Coffers*, 2016; Supiano and Bauman, “For the Wealthiest Colleges, How Many Low-Income Students Are Enough?,” 2016.

direction, toward being *less* representative of society and doing *less* to promote equal opportunity, social mobility, and meritocracy.²⁸⁸

Such obstacles to reform are not going away anytime soon. But the Supreme Court's abolition of race-conscious admissions will lend more urgency to calls for reform and transform them into a civil rights issue, stirring into action families whose underrepresented children have been cast back out onto admissions offices' outside track.

The task of finding alternative means of promoting diversity and equal educational opportunity will only be rendered more difficult if the decisions made by higher education institutions are met with justified suspicion that they stem from ulterior, selfish motives and with the perception that admissions processes remain fundamentally unfair. Transparency, integrity, and fairness must be the guiding principles of selective college and university admissions processes. They need to end admissions practices that are secretive, dishonest, and biased.

Just how much side-door admissions shape enrollment and undermine diversity at elite institutions has become evident in the course of the legal battle over admissions at Harvard University. Harvard was required to surrender a substantial amount of admissions data as part of the lawsuit's discovery process, and its release offered higher education researchers an opportunity to study just how Harvard assembles a class. They found that more than 43 percent of white applicants admitted to Harvard were athletes, legacies, or the children of faculty and staff, or had been on a "dean's list" of applicants with ties to donors or who otherwise were high priority admits. By contrast, less than 16 percent of admitted applicants from racial/ethnic minority groups, including Asian/Asian American students, fell into one of these special groups. A white applicant who ordinarily would have had a 10 percent probability of admission saw their chance of being admitted rise to 49 percent if a legacy, and 75 percent if on the dean's list, but only 36 percent if categorized as disadvantaged. None of this is to say that applicants from one of these special categories had disproportionately weak credentials. Unsurprisingly given the advantages they'd had in life, their academic profiles tended to be stronger than the national norm. But compared to their Harvard classmates, accepted students from the special categories actually had weaker profiles than average, betraying how Harvard had lowered the bar to take in as many of them as possible, including those who were not strong contenders for admission through regular channels.²⁸⁹

The researchers analyzing the Harvard data conducted simulations to study how the elimination of the various side-door admissions preferences would affect diversity. They projected that ending its legacy preferences would cause a 4 percent drop in the number of white students admitted while producing increases of 4 percent for Black/African American and Asian/Asian American students and 5 percent for Hispanic/Latino students. Ending preferences for athletes was projected to cause a 6 percent drop in the number of white students admitted, while boosting admissions of Hispanic/Latino and Asian/Asian American applicants by 7 and 9 percent, respectively, and leaving Black/African American numbers unchanged. The researchers cautioned that their findings should not be interpreted as implying that all

288 Defenders of race-conscious admissions practices described the political pressures that alumni and other constituencies exert on admissions policies and practices in briefs submitted to the US Supreme Court in a 2013 case challenging Michigan's ban on the use of racial preferences by public colleges. See Schmidt, "Supreme Court Upholds Bans on Racial Preferences in College Admissions," 2014.

289 Arcidiacono et al., "Legacy and Athlete Preferences at Harvard," 2022.

white students are hurt by the removal of legacy and athlete preferences or that all members of various underrepresented minority groups benefit. Underlying the aggregate changes for various racial and ethnic groups are shifts in admissions probabilities for various types of students within those populations.²⁹⁰

The researchers projected that eliminating all of the side-door preferences studied would produce a decline in the average family income level of admitted Harvard classes. They noted that, among students admitted in 2015, more than 40 percent of legacies and more than 25 percent of athletes had parents earning in excess of \$500,000 annually, placing them in the top 1 percent income bracket.²⁹¹ Although many selective colleges that give extra consideration to applicants whose families can contribute to institutional wealth describe doing so as a matter of financial survival, Harvard, with an endowment in excess of \$50 billion, hardly seems financially needy. Its behavior raises the question of whether any amount of institutional wealth will ever be seen as enough.

The researchers also analyzed student and admissions data obtained from UNC, where they found that a substantial boost was given to those out-of-state applicants who were legacies — second only to the boost given to out-of-staters who were Black/African American, and greater than the boost given out-of-state applicants who were Hispanic/Latino or first-generation. Out-of-state applicants to UNC who ordinarily could be predicted to have a 25 percent chance of admission saw that chance rise to 97 percent if they were legacies.²⁹²

Legacy preferences, along with being among the most common means of gaining side-door access to selective colleges, are among the most damaging to equal educational opportunity. By definition they perpetuate educational privilege from one generation to the next because white and Asian/Asian American children are far more likely to have a parent with at least a bachelor's degree.²⁹³ Along with hindering efforts to remedy the effects of past racial discrimination, they result in the admission of less-qualified students and enable certain families to dominate colleges to which the broader public expects fair access.

Preferences for applicants with a familial connection to alumni play a role not just in undergraduate admissions, but also in admissions to graduate and professional schools, including medical schools.²⁹⁴ Research conducted for the 2010 book *Affirmative Action for the Rich* found that almost three-quarters of selective research universities and virtually all elite liberal arts colleges systematically afforded legacy applicants some edge.²⁹⁵ A 2011 analysis of data from 30 highly selective colleges found that, all things being equal, legacy status resulted in a 23.3-percentage-point increase in the probability of admission. If the applicant was a primary legacy, meaning that their parent attended the college as an undergraduate, the probability of admission was 45.1 percentage points above the norm.²⁹⁶ Legacies are substantially

290 Arcidiacono et al., "Legacy and Athlete Preferences at Harvard," 2022.

291 Arcidiacono et al., "Legacy and Athlete Preferences at Harvard," 2022.

292 Arcidiacono et al., "What the Students for Fair Admissions Cases Reveal about Racial Preferences," 2022.

293 As of 2021, 59 percent of white children and 78 percent of Asian/Asian American children had at least one parent who had completed a bachelor's degree or higher. By comparison, just 33 percent of Black/African American, 25 percent of Hispanic/Latino, and 23 percent of Native American children had a parent who had earned at least a bachelor's degree. US Department of Education, "Characteristics of Children's Families," 2022.

294 See Elam and Wagoner, "Legacy Admissions in Medical School," 2012.

295 Coffman et al., "An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities," 2010; Golden, "An Analytic Survey of Legacy Preference," 2010.

296 Ashburn, "At Elite Colleges, Legacy Status May Count More Than Was Previously Thought," 2011; Hurwitz, "The Impact of Legacy Status on Undergraduate Admissions at Elite Colleges and Universities," 2011.

likelier than other applicants to come from the wealthiest quarter of society, and Black/African American and Hispanic/Latino students are about half as represented among legacies as they are in the broader applicant pool.²⁹⁷

To be sure, there are good arguments on both sides of the debate over legacy preferences. Their defenders point to the “bonds of community” that are forged when multiple generations of the same family feel a connection to the same college.²⁹⁸ But the chief institutional rationale for legacy preferences — that they result in increased alumni giving — has been challenged by research showing that they produce little overall gain in contributions. Instead, the perceived connection between such preferences and alumni giving stems mainly from how they lead colleges to over-select applicants from wealthy families.²⁹⁹ On balance, their costs outweigh the gains. Moreover, there is no good reason for the federal government to allow wealthy people to make large payments to a college to obtain something of value — the admission of an applicant with borderline qualifications — and then write off the money exchanged as a charitable donation. As higher education scholar Richard Kahlenberg has noted, Internal Revenue Service regulations put colleges that use legacy preferences in a Catch-22: “Either donations are not linked to legacy preferences, in which case the fundamental rationale for ancestry discrimination is flawed; or giving is linked to legacy preferences, in which case donations should not be tax deductible.”³⁰⁰

A few selective institutions, such as Cal Tech and MIT, have never used legacy preferences. Others, such as the University of California, the University of Georgia, and Texas A & M University, abandoned them to try to level the playing field in response to ballot measures or court decisions precluding their admissions offices’ consideration of race.³⁰¹ Amherst College announced its decision to end legacy admissions preferences in an October 2021 press release in which it acknowledged that legacies had accounted for 11 percent of each entering class. Its press release also announced that it was increasing its spending on financial aid by \$71 million per year to provide financial support for 60 percent of its students. “We want to create as much opportunity for as many academically talented young people as possible, regardless of financial background or legacy status,” its then-president, Biddy Martin, said.³⁰² Johns Hopkins University acted quietly, to ensure its decision was sustainable, when it ended its use of legacy preferences in 2014. In a 2020 essay about that decision, Ronald J. Daniels, the university’s president, said the abandonment of legacies has contributed to his institution’s efforts to become more accessible. When he took its helm in 2009, the 12.5 percent share of its freshman class who were legacy students outnumbered the 9 percent who were eligible for Pell Grants. Among the freshmen who entered in 2019, by contrast, 3.5 percent had a legacy connection to the institution and 19.1 percent were eligible for Pell Grants. “These efforts are not a panacea for the structural inequities that plague our society. But they are necessary if American universities are truly to fulfill their democratic promise to be ladders of mobility for all,” he wrote.³⁰³

297 Howell and Turner, “Legacies in Black and White,” 2004.

298 New York Times Editorial Board, “End Legacy College Admissions,” 2019.

299 Coffman et al., “An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities,” 2010.

300 Kahlenberg, “10 Myths about Legacy Preferences in College Admissions,” 2010.

301 Schmidt, “A History of Legacy Preferences and Privilege,” 2010.

302 Amherst College, “Amherst College to End Legacy Preference and Expand Financial Aid Investment to \$71 Million,” 2021.

303 Daniels, “Why We Ended Legacy Admissions at Johns Hopkins,” 2020.

In some cases, lawmakers have sought to force colleges to stop granting legacy preferences. They've encountered intense opposition from selective colleges and universities and higher education associations, however. Federal measures calling for an end to legacy preferences have gone nowhere, and state efforts on this front have had mixed results.

In 2021, Colorado became the first state to pass a law that bars officials at state-supported higher education institutions from granting legacy preferences in admissions. State Representative Kyle Mullica, one of the bill's sponsors, said that "we are making sure students get into school based on merit and their hard work, not their family relationship with the school."³⁰⁴ In other states' legislatures, however, similar measures failed to get far. In Texas, for example,

lawmakers failed to act on a proposed ban on legacy preferences in the wake of the Fifth Circuit's 1996 *Hopwood* decision.³⁰⁵ Bills that would have banned legacy preferences in Connecticut and New York died in 2022.³⁰⁶

On the federal level, legacy preferences came under attack in Congress in 2002, in response to the Supreme Court's decision to take up the *Grutter* and *Gratz* cases. Intense opposition from higher education associations, however, doomed a measure calling for colleges to annually report what share of entering classes were legacies or had been admitted through early decision.³⁰⁷ More recently, legacy preferences were targeted in Congress in February 2022 with the introduction by Senator Jeff Merkley of Oregon and Representative Jamaal Bowman of New York of the Fair College Admissions for Students Act. The bill would have prohibited institutions of higher education that participate in federal student-aid programs from giving preferential admissions treatment to applicants based on their ties to donors or alumni. It authorized the Department of Education to carve out exemptions to the legacy preference ban for HBCUs and other minority-serving institutions, but nonetheless faced opposition from higher education associations as a threat to institutional autonomy,³⁰⁸ and it failed to advance out of committee.³⁰⁹



304 Kaur and Boyette, "Colorado Is Banning Legacy Preferences in College Admissions." 2021.

305 Schmidt, "A History of Legacy Preferences and Privilege." 2010.

306 Bamberger, "CT Colleges Push Back on Proposed Legacy Admission Ban," 2022; Saul, "The Quiet Fight to Keep Legacy Admissions," 2022.; New York State Senate, Senate Bill S8498, 2022.

307 Schmidt, *Color and Money*, 2007.

308 Donaldson, "Why 2 Federal Lawmakers Decided to Target Legacy Admissions." 2022.

309 US Congress, *Fair College Admissions for Students Act*, 2022.

Colleges should be required to enroll at least a minimum number of low-income students and help them secure enough need-based financial aid.

Elite nonprofit colleges and universities can and should do much more than they are currently doing to educate low-income and disadvantaged students. Every year about 240,000 high-achieving low-income high school graduates who could succeed in a selective college or university do not attend one. Focusing on low-income high achievers would help elite colleges balance recognizing merit with providing students an opportunity for upward mobility.³¹⁰

Nearly one-third of all of the nation's undergraduates receive financial assistance from the Pell Grant program, established to help low-income students pay tuition and other college costs.³¹¹ But at about one-third of the nation's 500 most selective colleges, less than 20 percent of students receive Pell Grants. Some such colleges have student bodies in which less than 9 percent of students are Pell Grant recipients. Meanwhile, at more than half of all colleges and universities — primarily community colleges, for-profit colleges, and regional public universities — more than 50 percent of undergraduates receive Pell Grant funds.³¹²

The federal government should mandate that every college enroll at least 20 percent Pell Grant recipients. Such a floor would give 72,000 additional Pell students a chance to attend a high-spending selective college and would make these colleges more diverse not only by class, but also race, as more than half of Pell Grant recipients are non-white.³¹³

There are more than enough Pell Grant recipients with SAT scores above the median for all students at selective colleges to increase their presence at those colleges without any decrease in student quality. Moreover, despite their protests of being too institutionally poor to do so, many private colleges can easily afford to meet the financial aid needs of low-income students. The most competitive have an average endowment of \$1.2 billion and an average annual budget surplus of \$139 million.³¹⁴

Elite colleges have the means to make change, they just lack the will. Currently, far too large a share of overall spending on student financial assistance is squandered on “merit-based” aid intended to entice affluent students to attend public colleges in their own state or to sweeten the deal for affluent families considering a private college.

More than a fourth of state spending on grant aid for undergraduate students is in the form of awards tied to considerations other than need, according to data collected by the National Association of State Student Grant and Aid Programs.³¹⁵ There's no good reason for states to channel such a large share of public expenditures on student aid toward students who don't need the money. It would be far more productive to offer additional need-based financial aid so that disadvantaged students are better able to

310 Carnevale and Strohl, *Separate & Unequal*, 2013.

311 Baum et al., *Trends in Student Aid 2018*, 2018.

312 Carnevale and Van Der Werf, *The 20% Solution*, 2017.

313 Carnevale and Van Der Werf, *The 20% Solution*, 2017.

314 Carnevale and Van Der Werf, *The 20% Solution*, 2017.

315 National Association of State Student Grant and Aid Programs, *52nd Annual Survey Report on State-Sponsored Student Financial Aid*, 2021.

afford the colleges that admit them. A policy of offering publicly financed assistance only to the students who need it would use public dollars for a public good: higher graduation rates among students who are not affluent.

As for private colleges and universities, much of their purported lack of funds for financial aid is artificial, the result of them using merit aid and other forms of tuition discounts to try to outbid one another for a small set of high-achieving affluent students. As the education researchers Donald Hossler and David Kalsbeek have noted, higher education associations have been “increasingly calling for reductions in the so-called merit aid arms race” as senior enrollment officials realize that competing via merit aid becomes costlier and less effective when colleges counter each other’s offers.³¹⁶ To the extent that they can do so without violating antitrust laws, colleges should call off their bidding wars to free up financial aid for students who can’t afford college without financial assistance.

A mandate that Pell Grant recipients account for at least 20 percent of enrollment at every college and university cannot be enforced without accompanying requirements that such institutions be transparent about the socioeconomic backgrounds of their students and the distribution of their aid dollars. Such transparency requirements will have benefits well beyond enabling enforcement of the law. They’ll help expose which institutions use admissions practices that systematically favor wealthy applicants. And they’ll enable foundations and individuals who philanthropically support higher education to make more informed decisions about which institutions are worthy of their dollars.³¹⁷



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Hossler and Kalsbeek, “Enrollment Management and Managing Enrollments,” 2013.
Ezeugo and McCann, “Chetty vs. Pell,” 2017.

Colleges and universities need to confront their own biases and racism on campus if they want more students from underrepresented minority groups to apply, enroll, and stick around to earn degrees.

Higher education institutions that are perceived as unwelcoming to Black/African American, Hispanic/Latino, and AI/AN/NH/PI students have a much harder time recruiting and enrolling them. Yet research and media coverage of racist incidents on campuses suggest that unwelcoming campus climates for underrepresented students are the rule, rather than the exception, among selective colleges and universities.³¹⁸

In many ways, selective colleges and universities have acted as if they were absolved from confronting their own institutional racism or the racism in broader American society by the Supreme Court's 1978 *Bakke* decision and its language establishing diversity as the only legally accepted rationale for race-conscious admissions policies. As the Stanford University law professor Richard Thompson Ford has observed, the term *diversity* has become "a lazy stand-in for any discussion of the generations of race-based exclusion and exploitation that make race-conscious hiring and college admissions necessary," and it "has encouraged us to ignore and minimize past injustices and distorted our understanding of what justice requires today."³¹⁹

An amicus brief submitted in the UNC case describes in detail how racism continues to be evident on a campus that once excluded Black/African American students under North Carolina's Jim Crow laws. Black/African American students there feel unsafe and undervalued as a result of routinely finding themselves in the presence of Confederate relics that have drawn the Sons of Confederate Veterans to assemble on the campus, according to the brief submitted by underrepresented minority students who had intervened in the case on UNC's behalf. The brief described how students of color there testified in lower courts of feeling "isolation and tokenism" on the campus.³²⁰ In the US District Court's decision upholding UNC's race-conscious admissions policies as constitutional, Judge Loretta C. Biggs cited testimony by David Cecelski, a historian of the South, that UNC had been "a strong and active promoter of white supremacy and racist exclusion for most of its history" and that efforts by its faculty, administration and trustees to reform its racial outlook and policies "have fallen short of repairing a deep-seated legacy of racial hostility and disrespect for people of color."³²¹

A 2007 study based on a synthesis of 15 years of published research on racial climate and interviews with students at five predominantly white universities concluded that institutional rhetoric about creating welcoming campus climates had failed to translate into action, and racial and ethnic minority students continue to feel excluded and marginalized. Such perceptions affect how prospective students view the campus as well as the educational, extracurricular, and social experiences of underrepresented students

318 Harper and Hurtado, "Nine Themes in Campus Racial Climates and Implications for Institutional Transformation," 2007.

319 Ford, "Derailed by Diversity," 2022.

320 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief for Respondent-Students, 2022.

321 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Trial Findings of Fact and Conclusions of Law, 2021.

once enrolled. Throughout the reviewed studies, students from racial/ethnic minority groups reported being on the receiving end of hostility, racist remarks, stereotyping, discrimination by the faculty, and insensitivity in the classroom. One interviewed sophomore said: “Everything is so White. The concerts: White musicians. The activities: catered to White culture. The football games: a ton of drunk White folks. All the books we read in class: White authors and viewpoints. Students on my left, right, in front and in back of me in my classes: White, White, White, White. I feel like there is nothing for us here besides the [cultural] center, but yet [this university] claims to be so big on diversity. That is the biggest white lie I have ever heard.” Many of the students interviewed by the researchers reported being warned away from their institution in response to its reputation for racism. “My parents, sister, aunt, and just about every African American in my hometown couldn’t understand why I came here,” one student said.³²²

Reports of hate crimes on college campuses, visits to campuses by hate groups, and the distribution of white supremacist propaganda on campuses surged as the nation became more racially polarized leading up to, and then after, the 2016 election.³²³

More than half of the 757 hate crimes that colleges and universities reported to the federal government in 2019 were motivated by racial or ethnic bias. Intimidation, vandalism, and assault ranked as the most common means by which these crimes were carried out.

Although four-year private colleges and universities enrolled less than half as many students as four-year public

institutions in fall 2019, they reported 90 percent more hate crimes, giving them a much higher rate of incidents per student.³²⁴ The *Journal of Blacks in Higher Education* cautions that such statistics barely scratch the surface, as a large share of hate crimes go unreported to federal officials, and federal statistics “do not reflect the thousands of microaggressions and the use of racial slurs by students that are directed against African Americans that go unreported.”³²⁵

Cultural issues and representational issues cannot be treated in isolation. A change in the proportion of students from underrepresented minority groups would change the college culture, and a changing college culture might attract more such students. Yet colleges don’t pay culture and its link to representation enough heed. The Education Trust, a nonprofit organization working to close education’s opportunity gaps, has called for college accreditors to be required to examine the racial climate on a college’s campus. Arguing that poor racial climates “can negatively influence students’ academic and

A change in the proportion of students from underrepresented minority groups would change the college culture, and a changing college culture might attract more such students. Yet colleges don’t pay culture and its link to representation enough heed.

322 Harper and Hurtado, “Nine Themes in Campus Racial Climates and Implications for Institutional Transformation,” 2007.

323 Anti-Defamation League, “White Supremacist Propaganda Nearly Doubles on Campus in 2017–18 Academic Year,” 2018; Kezar et al., *Speaking Truth and Acting with Integrity*, 2018.

324 US Department of Education, “Hate Crime Incidents at Postsecondary Institutions,” 2022.

325 *Journal of Blacks in Higher Education*, “Department of Education’s Latest Data on Campus Hate Crimes,” 2022.

social engagement, sense of belonging, and chances of completing a degree,” it says accreditors should examine a number of additional factors in their reviews. These include how students of color feel about the campus racial climate, whether diverse perspectives and materials are included in the curricula, the prevalence of racist incidents and how the institution responds to them, and whether all students have the forms of support they need to succeed.³²⁶

Colleges and universities should not need pressure from accreditors or other outside entities to attend to such matters. It is incumbent upon them to review their policies, curricula, and provision of support services, and also to undertake honest assessments of their campus climate and institutional reputation with respect to race to ensure that nothing is deterring underrepresented students from applying, enrolling, and persisting through graduation.

Our entire higher education system needs to be reformed to ensure that all students have access to an education that will enable them to land good jobs and live fulfilling lives.

Much of the controversy surrounding race-conscious admissions stems from the perception that competition for admission to selective colleges is a zero-sum game, with one person losing every time another wins. The stakes are seen as incredibly high because elite colleges and universities are regarded by much of the public — as well as many employers and providers of graduate and professional education — as superior providers of education. Degrees from these colleges carry prestige that helps open doors later in life.

Such a mindset distorts our priorities and distracts us from the need to be providing a much larger share of Americans with a postsecondary education. It leads our nation to lavish a disproportionate amount of attention, government funding, and philanthropic support on a relatively small subset of its higher education institutions (enrolling about 1 in 10 college freshmen) while neglecting the nonselective four-year institutions, community colleges, and proprietary colleges that together serve the vast majority of students. It distracts us from the tremendous costs to our society when talented young people don’t enroll in postsecondary education at all or drop out before earning a degree or credential.

Every year, at least 500,000 American students graduate in the top half of their high school class but never go on to earn a postsecondary credential. As a result, the nation misses out on a total of \$400 billion in income that these students would have earned with a college education, representing tremendous lost potential for our society and economy.³²⁷

Because selective colleges simply lack enough seats to serve all of the deserving less-advantaged students they currently exclude, we need to bring more quality programs — and the money to pay for them — to the community colleges and less-selective four-year colleges where the least-advantaged postsecondary students are currently enrolled. These colleges spend far less per student than selective

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Jones and Nichols, *Hard Truths*, 2020.
Carnevale, “Every Year, Half a Million Top-Scoring Students Never Get a College Credential,” 2018.

colleges do, and, as a result, they have far lower graduation rates. We need an all-hands-on-deck effort to improve quality that acknowledges the hard work already being done at these institutions and that significantly expands efforts that yield demonstrable improvements. Community colleges and less-selective four-year colleges are truly underresourced, and larger investments will be required to improve the work they do for students at the margins.

Elementary and secondary education must also be part of this discussion. The age of 18 is awfully late in the game to take stock of a person's preparation for college. At the same time, it is too early for most students to commit to a lifetime career track. Higher education needs to take a greater interest in quality and equity in education from preschool onward, overhauling teacher training and promoting public awareness of what success in college requires. High school leaders continue to claim they're making students "college and career ready," but there is no direct relationship between the basics learned in high school and careers, and almost half of high school sophomores don't go on to earn a postsecondary degree or certificate by the age of 26.³²⁸ Federal and state officials need to be doing more to ensure universal access to a college preparatory curriculum — for example, by requiring and financing the coursework needed for college entry.

Colleges and universities must be more mindful of how their policies and practices end up skewing the priorities of K-12 schools. SAT and ACT scores, which have long held a prominent place in college admissions, have no connection with teaching and learning in the K-12 systems. The standards-based

K-12 education reform movement emphasizes the development of core academic knowledge throughout the population, not the identification of innate aptitude among a select few. By relying more on achievement tests and less on tests that supposedly measure general aptitude, colleges and universities could establish a much more solid connection between their requirements and K-12 education's standards-based teaching and learning.

Throughout our nation's history, we've repeatedly raised the bar in defining how much education Americans need. Students are no longer assured a living wage with just a high school education. The nation should face the fact that people now need at least two years of college to have access to economic opportunity in a complex modern society. It's time to make the leap and think of two years of college the same way we once thought about four years of high school: as the minimum amount of education that all Americans should receive at government expense. We need to embark on a reform drive with the slogan "14 is the new 12." Getting policymakers to regard two years of college as essential will inspire efforts to patch the holes in our talent pipeline.



We must overhaul and shore up high school counseling related to college and careers so that all students receive comprehensive information on how to prepare for and seek available educational opportunities.

One of the largest gaps between the haves and have-nots in our education system can be found in the high school counseling office.

Private and public schools in affluent communities tend to have much better staffed counseling offices with more time to guide students through the college application process and write glowing recommendation letters about them. At the most elite private schools, counselors cultivate cozy relationships with the admissions offices of selective colleges and actively sell them on specific students.³²⁹ Outside school, students from wealthy families often get sound advice on preparing for and applying to college from their parents and their parents' personal networks. For a price, their families can hire freelance school counselors who, according to the 2,500-member Independent Educational Consultants Association, spend an average of 18 hours with each of their clients.³³⁰

Meanwhile, students who attend ordinary public schools and come from lower-income families with little experience related to higher education can end up completely in the dark when it comes to the educational opportunities available to them or how to prepare for and obtain college admission.

While the National Association for College Admission Counseling does not break down its data on counselors by the wealth of schools or families served, it has been able to quantify notable gaps between private and public schools. It has found, for example, that 48 percent of private schools report employing at least one counselor, and that the counseling staff at private schools spend an average of 31 percent of their time on college counseling. By contrast, only 29 percent of public schools employ at least one counselor, and their counselors spend an average of only 19 percent of their time on college counseling.³³¹

On average, each of our nation's public school counselors oversees 455 students, well above the 250:1 maximum ratio recommended by the American School Counselor Association.³³² With caseloads like that, any attempts by counselors to connect students' individual knowledge, skills, abilities, values, interests, or personality traits to programs of study or careers can only be primitive at best.³³³

We need to spend much more on counseling services to give students better access to sound advice on college and careers. But, perhaps most importantly, we need to rethink how counseling services are provided, with external entities empowering counselors to advocate for the needs of students over those of both secondary and postsecondary institutions. Counselors at colleges must feel confident they will not jeopardize their jobs by providing students with candid advice on various academic programs and

329 See, for example, Persell and Cookson, "Chartering and Bartering," 1990; Golden, *The Price of Admission*, 2006.

330 Figures based on Independent Educational Consultants Association literature.

331 Clinedinst, *2019 State of College Admission*, 2019.

332 American School Counselor Association, *The Role of the School Counselor*, 2016; Clinedinst, *2019 State of College Admission*, 2019.

333 Carnevale, "All One System," 2007.

their outcomes. They should have the power to promote the interests of the students over the priorities set by the academic deans and the institutional leadership. Such a student-centered approach to counseling has enormous potential to shed light on various flaws in our education system, including college admissions, and drive needed reform.

Our K–12 education system needs to become much more equitable if we are to have any hope of seeing selective college enrollments reflect the composition of our broader society.

If we hope to create equitable access to college and careers, we must begin by fully addressing educational disparities in our system from pre-K through 12th grade. We must address the structural problems that leave too few underrepresented minority students with sufficient college preparation. Doing so will require not just bringing equity concerns to bear in shaping federal and state K-12 policy, but also getting the courts to crack down on school-finance systems that distribute funds inequitably. Simply put, our current system is not producing enough college-ready Black/African American and Hispanic/Latino high school students to have enrollments in selective higher education that reflect the composition of American society.

A Supreme Court decision to strike down race-conscious admissions will send a clear signal that we can no longer rely on our judicial system to support efforts to diversify higher education. To make any progress through litigation, advocates of equal educational opportunity will need to focus on challenging inequities in K–12 education, a course of action that remains viable because it draws upon a different body of law than the civil rights measures that conservatives have been chipping away at for the past 50 years.

We'll need to get the courts and state legislatures to establish and enforce a right to equitable access to an adequate K–12 education. Although this cause has long been pursued with uneven results, the Supreme Court's rejection of race-conscious admissions will lend it urgency, by making the consequences of inadequate schooling and college preparation much more apparent and irreversible.

One avenue could be to reverse the Supreme Court's narrow 1973 *San Antonio Independent School District v. Rodriguez* decision, which denied the existence of any provision in the US Constitution establishing any federal right to an education, much less a right to educational equity or adequacy. The *Rodriguez* decision left the federal Constitution out of step with the

A Supreme Court decision to strike down race-conscious admissions will send a clear signal that we can no longer rely on our judicial system to support efforts to diversify higher education.

constitutions of many states that recognize the provision of education as a government responsibility. It also left the United States out of step with other nations that regard the provision of universal education access as a vital national interest. If the Supreme Court won't revisit *Rodriguez* and affirm a federal right to education, other alternatives for bringing about change exist, but they are daunting: the passage of federal laws or an amendment to the US Constitution establishing that an education for all is a fundamental right.

In the meantime, we'll need to renew and reinvigorate fights for educational equity in the courts and in state legislatures, most of which include in their state constitutions an obligation to educate their citizens or to provide public services equitably.

A window into how much inequalities in K–12 education hinder efforts to diversify selective colleges was offered by an amicus brief submitted to the Supreme Court by the NAACP Legal Defense and Educational Fund Inc. and the National Association for the Advancement of Colored People. In defending the use of race-conscious admissions by UNC, the two organizations noted that in 2020 the total enrollment of North Carolina's public schools was about 24 percent Black/African American and 19 percent Hispanic/Latino. But Black/African American students accounted for less than 5 percent and Hispanic/Latino students just under 6 percent of students enrolled in advanced or intellectually gifted courses labeled honors, Advanced Placement, or International Baccalaureate.³³⁴ This lack of access to high-level preparation hinders students' preparation for college and their ability to compete for seats in the entering classes of selective institutions.

A 2020 study of the impact of racial preference bans blamed a lack of racial/ethnic diversity among applicants to the University of California-Berkeley for that institution's failure to have enrollments that reflected the diversity of the state's overall population, even back when it could consider applicants' race. "The composition of a university's enrollees is driven by the composition of its applicants, whether or not the university practices affirmative action," said the report. "Although some progress has been made in narrowing economic and K–12 educational disparities, such disparities are still large and will take decades to improve. If we expect flagship public universities to reflect the racial and ethnic diversity of their states, then policymakers must work harder and better to alleviate these precollege disparities and thereby improve the college readiness of Black, Hispanic, and Native American students." It especially urged policymakers to work to close racial gaps in kindergarten readiness which continue to hinder students as they progress through the education system. It argued that "without sustained, focused attention on mitigating gaps that emerge in the first years of life, we should expect persistent racial inequality in higher education," and such gaps "will not fix themselves without continued policy intervention and experimentation."³³⁵

334 *Students for Fair Admissions, Inc. v. University of North Carolina, et al.*, Brief of the NAACP Legal Defense and Educational Fund, Inc., and the National Association for the Advancement of Colored People as *Amici Curiae* in Support of the Respondents, 2022. Data cited are from the North Carolina Department of Public Instruction, *DPI AIG Child Count, Statewide Overview, 2019–2020*.

335 Long and Bateman, "Long-Run Changes in Underrepresentation after Affirmative Action Bans in Public Universities," 2020.

Inequitable spending on K–12 schools leaves too many underrepresented minority students at a disadvantage in competing for college admission.

There is no escaping the fact that resources matter when it comes to preparation for college. On the whole, it's better to be born rich than smart in America. A kindergartner with top-half test scores and a family in the bottom quartile of socioeconomic status (SES) has a 31 percent chance of being in the top half of SES as a young adult. Meanwhile, a kindergartner with bottom-half test scores and a family in the top quartile of SES has a 71 percent chance of being in the top half of SES as a young adult.³³⁶ These differences are similarly visible along racial/ethnic lines. A white kindergartner with bottom-half test scores has a 47 percent chance of having a college degree and a 60 percent chance of being in the top half of SES as a young adult. Meanwhile, a Black/African American kindergartner with top-half test scores has a 35 percent chance of having a college degree and a 45 percent chance being in the top half of SES as a young adult.³³⁷

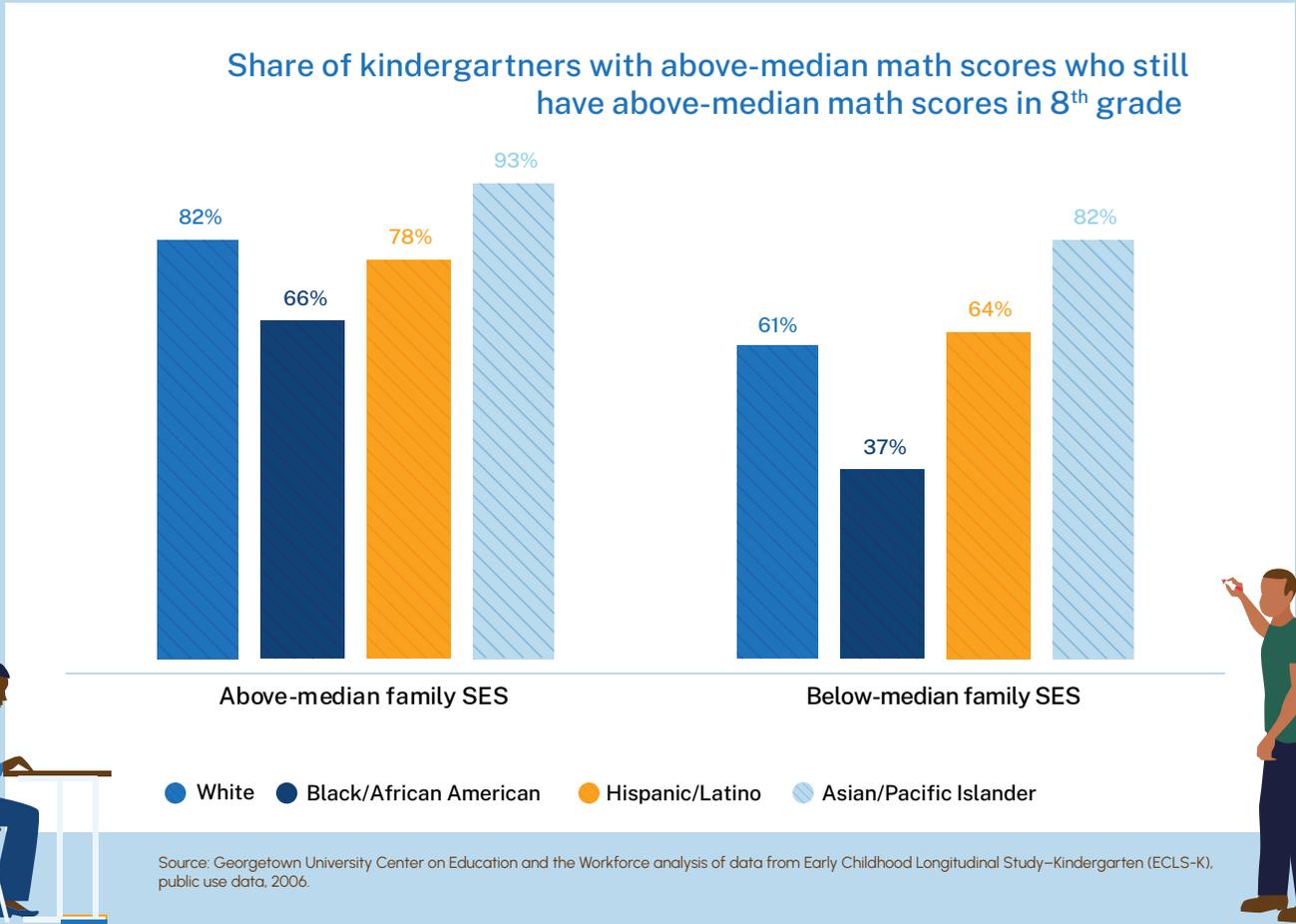
Analyses of federal data show how the race- and class-based segregation of schools and the failure to provide sufficient resources to our K–12 system cause low-income or underrepresented minority students who initially show great promise to fall behind. Across racial and ethnic backgrounds, among children with high scores on standardized math tests as kindergartners, those from higher SES backgrounds are more likely than students from lower SES backgrounds to maintain high scores into eighth grade. Likewise, across SES backgrounds, Black/African American kindergartners who earned high math scores are less likely to still have high math scores in eighth grade than white, Asian/Pacific Islander, and Hispanic/Latino students (Figure 3).



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Carnevale et al., *Born to Win, Schooled to Lose*, 2019.
Georgetown University Center on Education and the Workforce analysis of data from Early Childhood Longitudinal Study–Kindergarten (ECLS–K), 2006 data, and Education Longitudinal Study of 2002 (ELS 2002), public use data, 2013. College degrees include associate's degrees, bachelor's degrees, and graduate degrees.

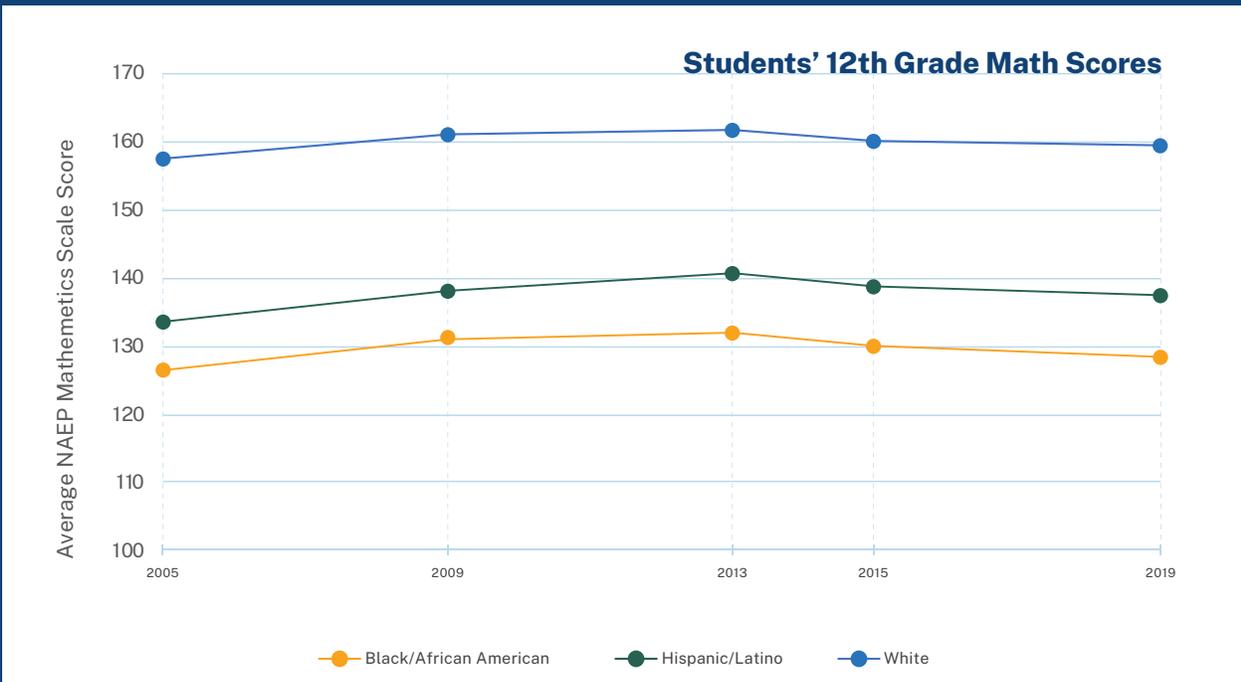
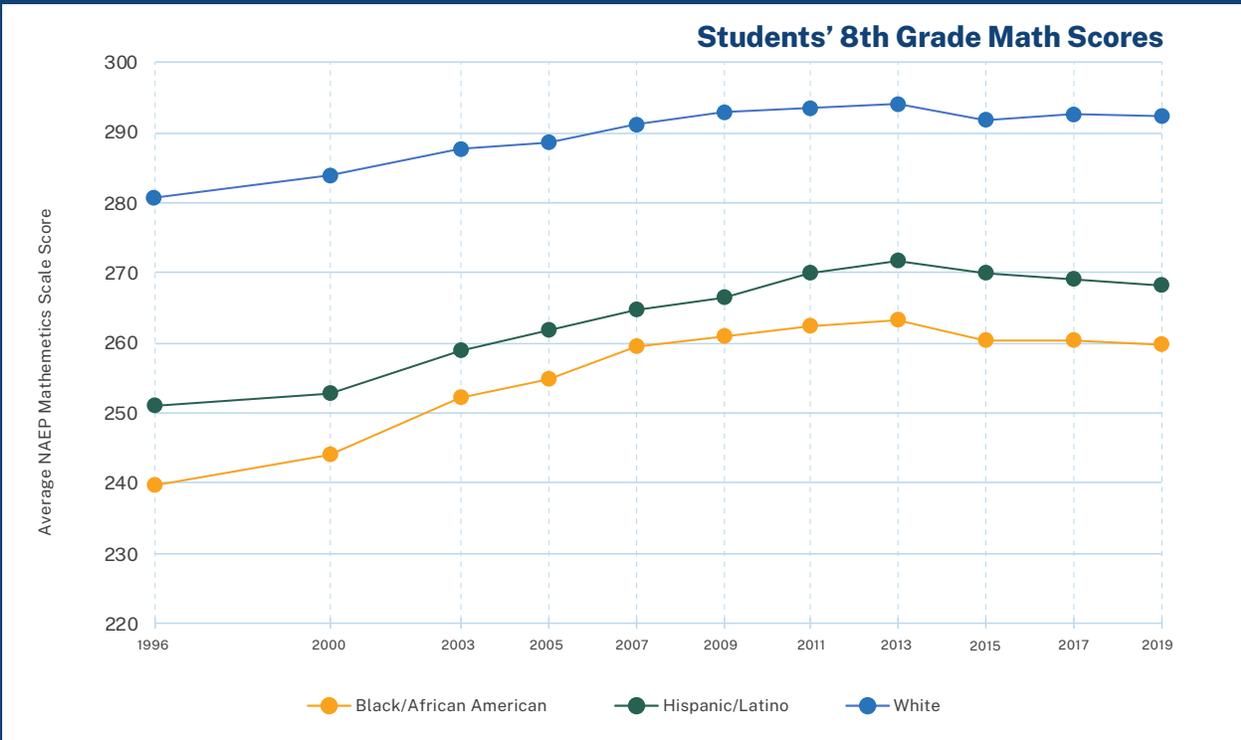
FIGURE 3 Black/African American kindergartners who have above-median math scores are much more likely than children of other races and ethnicities to fall behind by eighth grade.



We need to build a better-functioning education system that equalizes students' chances of succeeding in college well before their high school years end.

Moreover, the education reforms attempted over the past 30 years have failed to do much to close test-score gaps among either 8th or 12th graders as measured by the congressionally mandated National Assessment of Educational Progress (Figure 4).

FIGURE 4 Gaps in test scores on math exams between white students and Black/African American and Hispanic/Latino students have remained relatively stable over the years.



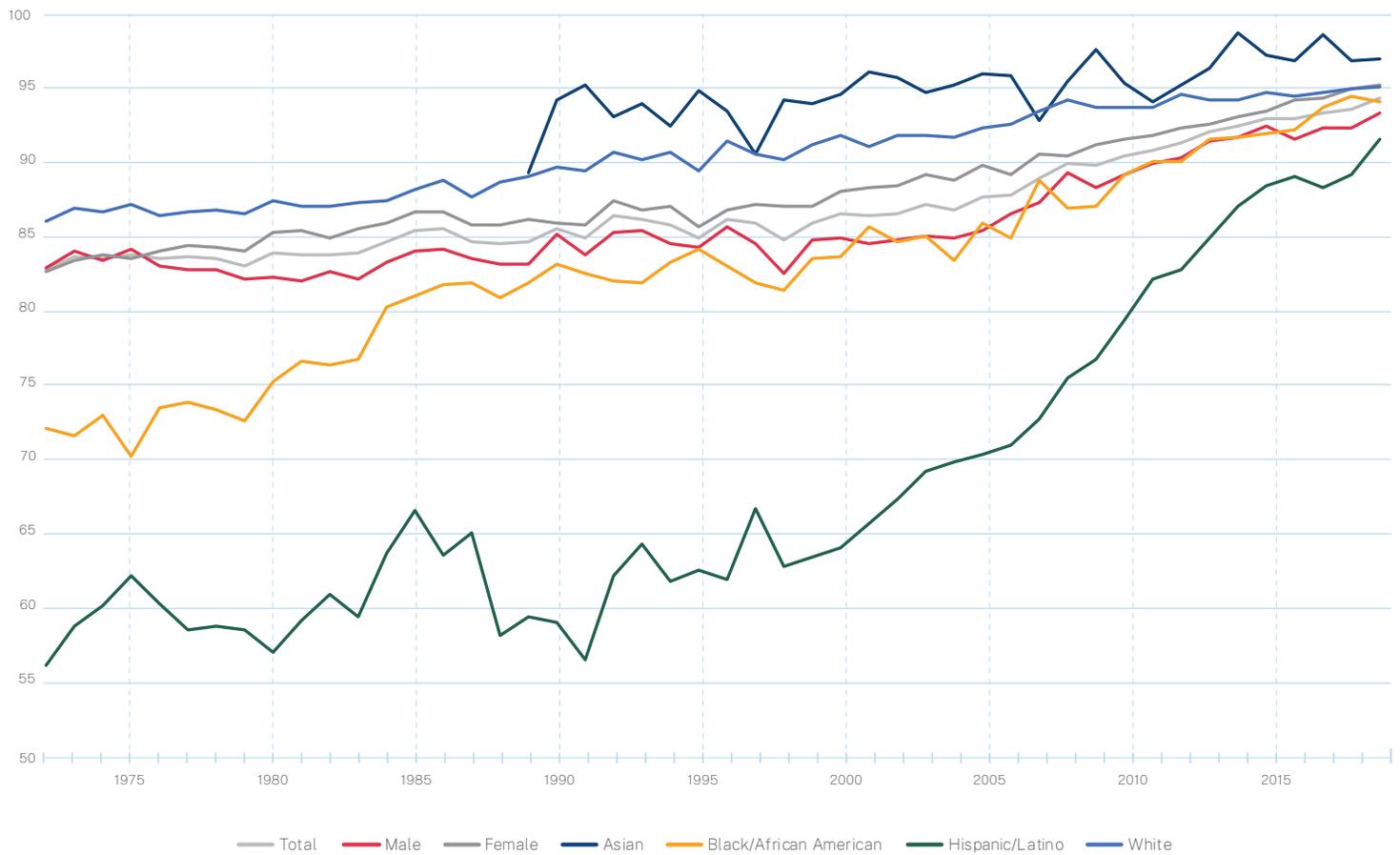
Source: Georgetown University Center on Education and the Workforce analysis of data from US Department of Education, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), 1996, 2000, 2003, 2005, 2007, 2009, 2011, 2013, 2015, 2017, and 2019 Mathematics Assessments.

Note: Average mathematics scale score results based on the NAEP mathematics scale, which ranges from 0 to 500 for 8th grade and 0 to 300 for 12th grade.

The gaps in students' scores have remained fairly constant over time even as the high school graduation rates of various populations have converged (Figure 5). It used to be that gaps in high school graduation rates explained differences in college enrollments. Now that high school graduation rates are very similar for all racial/ethnic groups, the lack of college preparation is clearly a large factor in differences in college enrollment across groups.

FIGURE 5 High school graduation rates used to vary widely among racial/ethnic groups, but they are now very similar for all groups.

High school graduation rates of 18- to 24-year-olds, 1972 to 2019



Source: Georgetown University Center on Education and the Workforce analysis of data from US Department of Education, National Center for Education Statistics, Digest of Education Statistics Table 219.65, 2022.

The racial and economic segregation of K–12 education is at the root of the gaps in educational resources and education quality that leave low-income and underrepresented minority students at a clear disadvantage.

White students are far less likely than Black/African American or Hispanic/Latino students to attend schools with high populations of racial/ethnic minority groups and high levels of poverty. Only 6 percent of white students attend public elementary and secondary schools with student populations that are more than 75 percent underrepresented minority groups, compared to 59 percent of Black/African American students and 61 percent of Hispanic/Latino students.³³⁸ Also, white students are far less likely than Black/African American or Hispanic/Latino students to attend public secondary and high schools in which more than 75 percent of students receive free or reduced-priced lunch. Just 5 percent of white public secondary and high school students attend these high-poverty schools, compared to 32 percent of Black/African American students and 33 percent of Hispanic/Latino students (Table 1).

TABLE 1 White students are concentrated in low-poverty schools, while Black/African American and Hispanic/Latino students are concentrated in high-poverty schools.

Percentage of students attending public secondary and high schools categorized by the percentage of students who received free or reduced-price lunch (FRPL) in 2019

Share receiving FRPL	Total	Black/ African American	Hispanic/Latino	White
0-25%	23.1%	9.3%	9.8%	33.1%
25.1-50%	34.3%	25.1%	23.8%	43.1%
50.1-75%	24.8%	33.1%	33%	17.9%
Over 75%	17%	31.6%	32.8%	4.8%

Source: Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, National Center for Education Statistics, Digest of Education Statistics Table 216.60, 2021.

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Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, National Center for Education Statistics (NCES), Digest of Education Statistics Table 216.50, 2021.

Educational quality differs dramatically between these schools. Evaluation of the credentials of mathematics and computer science teachers suggests that schools with high percentages of students who are impoverished or who are members of racial/ethnic minority groups (or both) have the least-qualified teachers based on teacher certifications and degrees in the subjects they teach.³³⁹ Just over half of high-poverty schools offer dual enrollment courses, compared to more than 70 percent of low-poverty schools.³⁴⁰ More broadly, 76 percent of low-SES students attend a high school that offers AP or IB Calculus, compared with 83 percent of high-SES students.³⁴¹

On a national level, funding differences are stark: on average, school districts with the most students who are Black/African American, Hispanic/Latino, or Native American receive 16 percent less funding than school districts with the fewest students from those racial/ethnic groups. In addition, the highest-poverty school districts receive 5 percent less in state and local funds than low-poverty school districts.³⁴²

The failures in the pre-K–12 system also feed a horrendous college completion crisis. More than two-thirds of Black/African American and Hispanic/Latino students end up attending open-access colleges.³⁴³ Among students who entered open-access four-year colleges in 2014, fewer than one in five Black/African American students and one in three Hispanic/Latino students graduated within six years.³⁴⁴ Two-year institutions have equally discouraging outcomes in terms of degree attainment rates — only about 34 percent of all students who started at a community college in 2017 received an associate’s degree within three years, but the degree attainment rate lagged even more for Black/African American students (25 percent) and Hispanic/Latino students (32 percent).³⁴⁵ This problem extends beyond open-access institutions. Although college graduation rates increase with college selectivity, Black/African American and Hispanic/Latino students consistently graduate at lower rates than white students at every selectivity tier.³⁴⁶

We need to build a better-functioning education system that equalizes students’ chances of succeeding in college well before their high school years end. While activists have won a series of lawsuits at the state level seeking to more equitably distribute school funding, none of those cases have resulted in a challenge to the Supreme Court’s *Rodriguez* decision, in which the five-member majority said: “Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”³⁴⁷ That holding stood on the wrong side of history and is inconsistent with our nation’s reliance on education as the foundation of a functioning and fair democracy.

339 US Department of Education, National Center for Education Statistics, “Qualifications of Public School Mathematics and Computer Science Teachers in 2017–18,” 2022.
340 US Government Accountability Office, *K-12 Education*, 2018.
341 Georgetown University Center on Education and the Workforce analysis of data from the US Department of Education, High School Longitudinal Study of 2009 (HSL:09), 2009.
342 Morgan, *Equal Is Not Good Enough*, 2022.
343 US Department of Education, Integrated Postsecondary Education Data System (IPEDS), 2019.
344 US Department of Education, National Center for Education Statistics, Digest of Education Statistics Table 326.10, 2021.
345 US Department of Education, National Center for Education Statistics, Digest of Education Statistics Table 326.20, 2021.
346 US Department of Education, National Center for Education Statistics, Digest of Education Statistics Table 326.10, 2021.
347 *San Antonio Independent School District v. Rodriguez*, 411 US 1 (1973).

State courts represent the primary arena in which efforts to reduce inequity in K–12 education have any prospects for near-term success.

Although the Supreme Court’s *Rodriguez* decision got federal courts out of the business of dealing with inequity in K–12 education, state courts remain very much involved in this issue. Most recently a Pennsylvania judge ruled in February 2023 that the state’s system of funding schools violates the constitutional rights of students in poorer districts that receive less money in the state’s funding formula.³⁴⁸ State-level litigation remains a viable avenue for advocating equal educational access because the state constitution provisions and laws that state courts are citing in their decisions related to K–12 spending are separate from the civil rights laws that have been under assault since the 1970s.

Moreover, the state court jurisprudence in this area has shown a capacity to evolve. The 50-year history of such litigation shows a pattern of judgments occurring in distinct waves, with each wave embracing a new strategy for ensuring that all students, regardless of class or color, get the educations they need. State court decisions have evolved from requiring equality in spending on different public schools to demanding that resource distribution recognize disadvantaged students’ greater needs to holding that all students should be provided an adequate education, however that might be defined.

The state-level pursuit of equity and adequacy in K–12 education bumps up against many of the same debates over policy efficacy that have complicated the broader education reform movement. Moreover, at least for the time being, rather than having any hope of prevailing through a single legal victory akin to the Supreme Court’s 1954 *Brown* decision, the pursuit of education equity at the state level involves fighting in 50 different arenas, each with distinct rules stemming from differences in states’ constitutions and laws. As the journal *Education Law and Policy Review* recently observed in a volume devoted to such litigation, “the battle for adequate and equitable schooling continues to be fought on the front lines, state by state, case by case.”³⁴⁹ But, importantly, it has met with some considerable successes and shows promise as a means of helping to increase the number of Black/African American, Hispanic/Latino, AI/AN/NH/PI, and low-income students with the college preparation needed to succeed at selective institutions.

On average, school districts with the most students who are Black/African American, Hispanic/Latino, or Native American receive 16 percent less funding than school districts with the fewest students from those racial/ethnic groups.

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Scalforo et al., “Poorer Districts Win Challenge to Pa. Public School Funding,” 2023.
Kiracofe and Weiler, “As Serrano Turns 50,” 2021.

Since the early 1970s state courts in 48 of 50 states have heard challenges to state education finance systems, according to a 2021 overview of such litigation by Michael A. Rebell, executive director of the Center for Educational Equity at Teachers College of Columbia University. “The courts’ involvement in these cases, and the legal doctrines and remedial mechanisms they have developed, constitute the most extensive and dynamic area of state court constitutional jurisprudence in American history,” Rebell writes. In the win column, courts in 31 states had declared that students have an enforceable right to education under their state constitutions, and courts in 24 of those states had issued orders to enforce such rights. In the loss column, 14 state courts had declared that they lack jurisdiction over such matters under state law.³⁵⁰

A landmark Kentucky ruling established a standard of sufficiency based on the purposes of K–12 education, posing questions such as: Did students graduating from high school have sufficient oral and written communication skills to function in a complex and rapidly changing society?

The legal challenges to states’ public school systems typically hinge on one of two types of clauses in state constitutions: education clauses requiring states to establish and maintain public school systems — often of a specific quality — and state equality guarantees that bar legislatures from discriminating against certain classes of citizens.³⁵¹ Education clauses, a large share of which were incorporated into state constitutions as part of the common schools movement of the 19th century, often contain language requiring states to provide some level of education, often defined using terms such as *adequate*, *basic*, *sound*, and *quality*.³⁵² Eighteen states’ education clauses require educational systems of specific quality, while 21 others simply mandate the establishment of public school systems. Whether state courts regard education as a fundamental right covered by a state constitution’s equality guarantee typically boils down to semantics. If the education clause describes education as a fundamental right, it’s likely to be covered, but an education clause simply calling for the creation of an education system generally is not interpreted as establishing a right that can be abridged through unequal treatment.³⁵³

The first successful legal challenge to a state school finance system, *Serrano v. Priest*, actually hinged on the US Constitution and a claim that California’s financing system violated the 14th Amendment’s equal-protection guarantee. The California Supreme Court sided in 1971 with those who had brought the lawsuit,³⁵⁴ but its decision and logic were essentially overturned by the Supreme Court’s *Rodriguez* decision two years later. The California plaintiffs then went back to the California Supreme Court and challenged that state’s school-finance system as violating *state* equal-protection guarantees. The California Supreme Court sided with them again, holding in 1976 that the financing system violated the

350 Rebell, “State Courts and Education Finance,” 2021.

351 Thro, “Problems of Proof,” 2021.

352 Rebell, “State Courts and Education Finance,” 2021.

353 Thro, “Problems of Proof,” 2021.

354 *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

California constitution's equal-protection clause and setting the stage for a lower state court to require that the state's per-pupil expenditures be reduced to "insignificant differences" interpreted as less than \$100 per pupil.³⁵⁵

The second decision in the *Serrano* case inspired state courts elsewhere to take a similar proactive stance, and in the three years following it, state courts struck down the education finance systems of Connecticut, Washington, and West Virginia as violating state constitutions. It did not take long, however, for such challenges to education finance systems to lose steam, with only 2 of 11 decisions rendered by state courts from 1979 through 1988 going in the reformers' direction. Courts became discouraged by the realization that achieving equal educational opportunity was no easy task.³⁵⁶ Many borrowed the Supreme Court's ruling in *Rodriguez* in declining to weigh in on the question of whether school finance systems violated equal-protection clauses. The state courts that did step in struggled to establish clear links between differences in funding levels and differences in educational outcomes and quality. They had trouble defining educational spending equity without a sense and measure of what would be sufficient for a specific intended purpose. The plaintiffs had some success in creating spending floors, but no luck in lowering spending ceilings.

As Joshua Weishart, an associate professor of law and public policy at West Virginia University, noted in a 2018 overview of such litigation, the early court decisions called for either the equalization of per-pupil expenditures across the state or a formal severance of the link between school districts' per-pupil spending and property wealth. "These remedies were abandoned, however, in no small part because leveling up or leveling down educational spending to achieve absolute fiscal equalization, though possible, was not sustainable politically," he writes. More consequentially, such equalization remedies did not in themselves end inadequate funding or improve the quality of education — they simply required inadequacy to be shared. In addition, they failed to address the educational needs of disadvantaged children who enter school on an unequal footing and actually need more, rather than the same amount, spent on them to catch up with their peers.³⁵⁷

It began dawning on advocates for disadvantaged children and state courts that what was needed was not *horizontal equity* — the equal treatment of all students irrespective of need — but *vertical equity*, which acknowledges that some students may require more resources to overcome disadvantages and end up on an equal footing.³⁵⁸

A turning point came with the Kentucky Supreme Court's 1989 decision in *Rose v. Council for Better Education*, which marked a shift away from a narrow focus on equity in K-12 financing in favor of the goal of ensuring that K-12 schooling meets standards of sufficiency in terms of its purposes and outcomes. Invalidating Kentucky's entire state system of education, the state supreme court held that whether a state education system met the Kentucky constitution's requirement to provide an efficient education should be measured in terms of the ability of the system's graduates to achieve certain learning and labor-market outcomes. The court's ruling established a standard of sufficiency based on the purposes

355 Rebell, "State Courts and Education Finance," 2021; *Serrano v. Priest*, 18 Cal.3d 728 (1976); *Serrano v. Priest*, 226 Cal. Rptr. 584 (Cal. Ct. App. 1986).
356 Rebell, "State Courts and Education Finance," 2021.
357 Weishart, "Aligning Education Rights and Remedies," 2018.
358 Weishart, "Aligning Education Rights and Remedies," 2018.

of K-12 education, posing questions such as: Did students graduating from high school have sufficient oral and written communication skills to function in a complex and rapidly changing society? Did they have sufficient knowledge of economic, social, and political systems to make informed choices? Did they have sufficient understanding of governmental processes to understand the issues that affect their community, state, and nation? Were they sufficiently prepared for advanced training in either academic or vocational fields?³⁵⁹

The *Rose* decision shifted state courts' focus from *equity* to *adequacy*. In contrast to demands for educational equity brought about through the redistribution of resources, which posed a threat to wealthy and relatively powerful communities and thus proved politically unworkable, demands for adequacy stressed common sense, common-good priorities such as maintaining a workforce educated and skilled enough to meet the state's economic needs. Rather than raising fears of leveling down educational opportunities currently available to affluent students, it offered the promise of leveling up academic expectations for all. This emphasis on adequacy as a legal standard dovetailed well with the standards-based K-12 reform movement that had gotten underway nationally after the 1983 publication of the *Nation at Risk* report and had spurred efforts to substantively quantify what constituted educational opportunity.

Beginning with the *Rose* decision, the tide turned in favor of the plaintiffs in lawsuits challenging K-12 education systems in state courts. Those who challenged such systems based on adequacy considerations prevailed in about three-fourths of the decisions that state courts handed down in such cases from 1989 to 2006.³⁶⁰ At least seven plaintiff victories came in states where the high courts had ruled in favor of the defendants just a few years earlier in lawsuits challenging K-12 systems as inequitable.³⁶¹

Unfortunately, getting a state court to declare a K-12 education system to be inadequate proved much easier than getting state lawmakers to address such concerns. State courts initially gave state legislatures and executive branches substantial leeway to define an adequate education and then devise remedial plans to provide it. When those other branches of government dragged their feet, the courts stepped in, in many cases establishing their own definitions of adequacy, vetoing remedial plans they viewed as inadequate, or ordering that expert consultants be retained to define what an adequate education would cost. Concerns about spending equity crept back into the discussion, undermining one of the adequacy approach's key strengths. When legislatures still resisted taking sufficient steps to deal with adequacy concerns, state courts tended in some fashion to throw up their hands, whether by refusing to evaluate education appropriations, declining to issue further remedial guidance, or declaring school funding schemes that continued to deprive some students of an adequate education to be "reasonably calculated" given other legislative prerogatives. A recognition of how difficult it is to remediate concerns about adequacy discouraged courts from going down the road of trying to require it, and after 2008 plaintiffs began losing such cases about two-thirds of the time.³⁶²

359 Weishart, "Aligning Education Rights and Remedies," 2018.

360 Weishart, "Aligning Education Rights and Remedies," 2018.

361 Rebell, "State Courts and Education Finance," 2021.

362 Weishart, "Aligning Education Rights and Remedies," 2018.

The preeminence of adequacy over equity as a goal of school-finance litigation also troubles some advocates for disadvantaged children because the effort fails to tackle disparities in educational opportunity head-on. As the Stanford University scholars William S. Koski and Rob Reich noted in a 2006 essay, the pursuit of adequacy ignores the fact that education is a *positional good* — the education one receives relative to others matters more than the level of education received. Yes, it's important that all students be able to meet certain standards, but at the end of the day, a state court decision requiring adequate education won't do much to close the gap between students from a rich community and a poor one in terms of their prospects of beating out competitors for admission to selective colleges. Calls for adequacy can secure educational resources for students who are unable to meet certain minimum standards, but they don't require additional spending to get students to perform beyond that level. They might establish floors, but they don't close gaps between floors and ceilings.³⁶³ As poor-performing schools push back against the standards by which they are being judged, notions of adequacy can end up being of little use in terms of measuring preparation for college and good jobs.

Calls for all students to receive an adequate level of education do nothing to prevent wealthy schools and districts from spending more on education to maintain their students' relative advantage, as became clear in the early 2000s when California officials responded to their state's ban on race-conscious admissions by seeking to expand access to the Advanced Placement courses to help ensure that underrepresented minority students could get into the University of California. High schools serving disadvantaged or less-advantaged students began offering more AP courses, but schools serving the relatively advantaged increased their AP offerings even more to keep their students ahead in the game.³⁶⁴ Beyond that, demands for adequacy can spur some of the same unwanted behaviors associated with the broader educational accountability movement: increased residential segregation from homebuyers avoiding communities where schools perform poorly and teachers feeling pressure to teach to tests or avoiding taking jobs in low-scoring districts.³⁶⁵

Even some advocates of adequacy-focused litigation have begun to argue that the term *adequacy* is misleading, in that it suggests some minimal level of education even while courts have begun requiring much more, such as the educational skills that students need to function as citizens and productive workers in our era. (Rebell, for example, favors the term *sound basic education*, as used by courts in New York and a handful of other states.)³⁶⁶

The largest obstacle to requiring that states provide educational opportunity to all, however, may be economic, as state courts proved reluctant to shield efforts to promote adequacy from spending cutbacks necessitated by the Great Recession of 2008. Fortunately, although the plaintiffs have experienced some setbacks in courts since then, most state courts that previously ruled in favor of plaintiffs have turned back state efforts to claim that fiscal constraints would prevent them from living up to their obligations.³⁶⁷

363 Koski and Reich, "When 'Adequate' Isn't," 2006.

364 Klugman, "The Advanced Placement Arms Race and the Reproduction of Educational Inequality," 2013.

365 Koski and Reich, "When 'Adequate' Isn't," 2006.

366 Rebell, "State Courts and Education Finance," 2021.

367 Rebell, "State Courts and Education Finance," 2021.

The COVID-19 pandemic and the school lockdowns it triggered have both worsened and exposed educational disparities, forcing policymakers and educators to rethink how education is provided and prompting a new California lawsuit alleging that the state failed to provide an equal education to low-income students during the health crisis.³⁶⁸

A Supreme Court decision to ban race-conscious admissions is likely to further transform the state-level legal landscape, making abundantly clear the need for state court rulings and state laws ensuring all students access to a quality education that, among other things, prepares them for college.

We must acknowledge that education is not the panacea for our nation's problems.

On the left, in the center, and to the right, a broad consensus exists that education is the most effective and appropriate armor against economic change and the fairest way to allocate opportunity and encourage upward mobility. Faith in the power of education has long served to reconcile our nation's fundamental value of democratic equality with the inevitable economic disparities that arise from differences in talent, effort, and luck. We rely on education as the arbiter of economic opportunity because, in theory, education allows us to expand merit-based opportunity without surrendering individual responsibility. In a nation with strong preferences for an open economy and limited government, we see education as what helps us navigate between the economic instability that comes with runaway world markets and the individual economic dependency that we associate with the welfare state.

Treating education as a panacea, however, makes too much of a good thing, assigning it a role that it cannot possibly fulfill given our education system's inequities and inefficiencies. Our belief in education's power to remedy our social and economic problems borders on fundamentalism. Such a belief allows the nation's elites to offer education bromides instead of remedies on hard issues like unemployment, residential segregation, widening income gaps, and inadequate access to healthcare.

Clearly there is a vacuum in the nation's economic and social policy that education alone cannot fill. If education is to continue in its increasingly powerful role as the principal arbiter of opportunity in America, much needs fixing. The critics of education as our core economic and social strategy are correct when they say that, by itself, education is not enough to create a fair or workable social contract. We need to think of our education programs, social programs, and the economy as all one system. The end of race-conscious admissions should serve as a wake-up call opening our eyes to the conditions that made race-conscious admissions necessary in the first place.

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