

Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action

Jonathan P. Feingold*

ABSTRACT

“The end of affirmative action.” The headline is coming. When it arrives, scholars will explain that a controversial set of policies could not withstand unfriendly doctrine and less friendly Justices. This story is not wrong. But it is incomplete. This account masks an underappreciated source of affirmative action’s enduring instability: elite universities, affirmative action’s formal defenders, have long been ambivalent advocates.

Elite universities are uniquely positioned to shape legal and lay opinions about affirmative action. They are named parties in affirmative action litigation and objects of public obsession. Yet schools like Harvard and the University of North Carolina at Chapel Hill—embroiled in litigation now before the Supreme Court—avoid the facts and theories that would buttress their own race-conscious programs against predictable lines of attack. As a result, affirmative action’s formal advocates enable the case against affirmative action.

In this Article, I examine how common institutional dynamics disincentivize elite universities from marshaling the most compelling case for their own policies. The consequences transcend discrete legal disputes. Affirmative action debates have long comprised sites of contestation over what, if anything, is necessary to overcome America’s legacy of white supremacy. When universities understate the case for affirmative action, they do more than compromise their own modest interventions. They also enable a resurgent right-wing campaign to discredit antiracism as the new racism and antiracists as the new racists.

INTRODUCTION	144
I. A PRIVILEGED VOICE ON AFFIRMATIVE ACTION	150
A. <i>The Source of Privilege</i>	151
1. <i>Public Preoccupation</i>	151
2. <i>Litigation Structure</i>	155
(i) <i>Procedure Disfavors Intervenors</i>	155
(ii) <i>Courts Defer to University Expertise</i>	159
B. <i>Opportunity Lost</i>	161
II. EXPLAINING AMBIVALENCE	163
A. <i>Commitment Gaps</i>	164
1. <i>Uncompromising Segregationists</i>	165

* Associate Professor of Law, Boston University School of Law. Jonathan Feingold holds a B.A. from Vassar College and a J.D. from UCLA School of Law. Many thanks to Vinay Harpalani and participants at the Boston University School of Law Faculty Workshop. Thanks as well to research assistant support from Marie Edouard, Yutong Zou, Michael Coleman, Julian Burlando Salazar, Phoebe Demeerleer, Sheridan Organ, and Nana Boateng. My thanks to the many members of the *Harvard Civil Rights-Civil Liberties Law Review* whose superb editing elevated the Article’s substance and readability. All mistakes are my own.

2.	<i>Compromising Integrationists</i>	169
	(i) <i>The Bakke Litigation</i>	169
	(ii) <i>SP-1 & Proposition 209</i>	175
B.	<i>Perceived Conflicts of Interest</i>	183
1.	<i>Brand Goals</i>	184
	(i) <i>Performing Racial Justice</i>	184
	(ii) <i>Pursuing Prestige</i>	189
2.	<i>Budget Goals</i>	192
	(i) <i>Search Costs</i>	193
	(ii) <i>Yield Costs</i>	194
	(iii) <i>Justification Costs</i>	195
	(iv) <i>Equal Learning Environment Costs</i>	195
	(v) <i>Borrowing Costs</i>	196
C.	<i>Risk Aversion</i>	197
1.	<i>Chill Lawful Behavior</i>	197
2.	<i>Chill Evidence Gathering</i>	199
3.	<i>Chill Theory Development</i>	200
CONCLUSION	202

INTRODUCTION

Harvard University (“Harvard”) and the University of North Carolina at Chapel Hill (“UNC”) belong to an exclusive club. In 2021, both triggered public backlash after denying tenure to a distinguished Black scholar. At Harvard, the university failed to tenure Cornel West, one of America’s most influential thought leaders.¹ West left Harvard for Union Theological Seminary—a move he attributed to Harvard’s “pattern” of denying tenure to scholars of color.²

¹ For an interview with West, see George Yancy, *Cornel West: The Whiteness of Harvard and Wall Street is “Jim Crow, New Style”*, TRUTHOUT (Mar. 5, 2021), <https://truthout.org/articles/cornel-west-the-whiteness-of-harvard-and-wall-street-is-jim-crow-new-style/> [<https://perma.cc/JG6V-8VZW>]. This followed another high-profile incident in which Harvard denied tenure to its only Black Latinx professor, Lorgia García Peña. See Graciela Mochkofsky, *Why Lorgia García Peña was Denied Tenure at Harvard*, THE NEW YORKER (July 27, 2021) <https://www.newyorker.com/news/annals-of-education/why-lorgia-garcia-pena-was-denied-tenure-at-harvard> [<https://perma.cc/54RC-LGAM>]. In February 2022, the Yale School of Management received widespread criticism after denying tenure to Michael Kraus, a celebrated scholar of racism and inequality. See Isaac Yu & Sanchita Kedia, *SOM Tenure Denial Sparks Debate on Diversity in Academia*, YALE DAILY NEWS (Feb. 23, 2022), <https://yaledailynews.com/blog/2022/02/23/som-tenure-denial-sparks-debate-on-diversity-in-academia/> [<https://perma.cc/C5DU-B6XC>] (noting that Kraus’s “body of work has been cited more than 10,000 times”).

² Mochkofsky, *supra* note 1; Meera S. Nair & Andy Z. Wang, *Cornel West to Depart Harvard, Return to Union Theological Seminary*, HARV. CRIMSON (Mar. 9, 2020), <https://www.thecrimson.com/article/2021/3/9/cornel-west-to-leave-to-union/> [<https://perma.cc/2NVZ-DSWA>].

A similar script unfolded at UNC. Also in 2021, UNC's Board of Trustees ("Board") voted not to tenure Nikole Hannah-Jones,³ whose resume includes a MacArthur Fellowship and the heralded 1619 Project.⁴ Following public pressure spearheaded by UNC's Black student leaders,⁵ the Board reversed course.⁶ Hannah-Jones, in a move that paralleled West, accepted a position at Howard University—one of the nation's most renowned Historically Black Colleges and Universities. Hannah-Jones criticized UNC for failing to reckon with its own legacy of racial exclusion:

It is not my job to heal this university, to force the reforms necessary to ensure the Board of Trustees reflects the actual population of the school and the state, or to ensure that the university leadership lives up to the promises it made to reckon with its legacy of racism and injustice.⁷

These episodes are noteworthy in themselves. But they are not what places Harvard and UNC in an exclusive club.⁸ That "distinction" comes from the context in which these incidents occurred. In the same moment Harvard and UNC faced scrutiny for mistreating preeminent Black scholars, they also comprised—and remain—the last line of defense between *affirmative ac-*

³ Reporting traced the tenure decision to a powerful donor critical of Hannah-Jones's 1619 Project. See Margaret Sullivan, *Why It's So Important that UNC Trustees Give Nikole Hannah-Jones the Tenure She Deserves*, WASH. POST (June 29, 2021), https://www.washingtonpost.com/lifestyle/media/unc-nikole-hannah-jones-tenure/2021/06/28/cb51a03e-d82a-11eb-bb9e-70fda8c37057_story.html [<https://perma.cc/E42H-QE7B>]. This incident tracks a history, at UNC and elsewhere, of influential donors intervening in university governance to oppose antiracist efforts—including race-conscious admissions. See *Petition to Intervene at 6, Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516) ("Defendants may face additional pressure from alumni of the University—often key donors and fundraisers—who might oppose race-conscious admissions programs or who might seek to maintain preferential admissions for their children—even if to the detriment of African-American and Latino students.").

⁴ The Board disregarded Hannah-Jones's colleagues and academic department, many of whom supported her tenure case. See Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html> [<https://perma.cc/3Z84-FCT3>].

⁵ See Annie Ma, *Black Students, Faculty: UNC Needs Self-Examination on Race*, ASSOC. PRESS (July 7, 2021), <https://apnews.com/article/business-racial-injustice-race-and-ethnicity-education-7fca1c1b2c97788d409a34c63e149afd> [<https://perma.cc/8823-8CBD>].

⁶ See David Folkenflik, *After Contentious Debate, UNC Grants Tenure to Nikole Hannah-Jones*, NPR (June 30, 2021), <https://www.npr.org/2021/06/30/1011880598/after-contentious-debate-unc-grants-tenure-to-nikole-hannah-jones> [<https://perma.cc/SN5C-LSBV>] (reporting that the UNC Trustees voted to grant Hannah-Jones tenure "several months after refusing to consider her proposed tenure.").

⁷ Press Release, Legal Defense Fund, *Nikole Hannah-Jones Issues Statement on Decision to Decline Tenure Offer at University of North Carolina-Chapel Hill and to Accept Knight Chair Appointment at Howard University* (July 6, 2021) <https://www.naacpldf.org/press-release/nikole-hannah-jones-issues-statement-on-decision-to-decline-tenure-offer-at-university-of-north-carolina-chapel-hill-and-to-accept-knight-chair-appointment-at-howard-university/> [<https://perma.cc/GPB4-S7CV>].

⁸ The episodes track a broader phenomenon of anti-Black bias in higher education. See generally Meera Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441 (2015).

tion⁹ and a Supreme Court more hostile to civil rights than any since before *Brown v. Board of Education*.¹⁰ There is little reason to believe the line will hold.¹¹

⁹ The term “affirmative action” has been used to describe a range of policies and practices that promote access and inclusion within employment, education, and other domains of American society. Cf. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1118 (2006) (“[Affirmative action] includes a broad range of policies and practices that are designed to respond to past discrimination, prevent current discrimination, and promote certain societal goals Affirmative action programs may be facially race- or gender-neutral (for example, broadcasting widely a particular employment opportunity) or race- or gender-contingent (for example, providing some resource to a woman or racial/ethnic minority under circumstances in which that person would not have received the resource but for that person’s status as a woman or minority.)”); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 926 (1996). Within this Article, unless otherwise stated, I employ “affirmative action” interchangeably with the term “race-conscious admissions” as shorthand for policies that permit reviewers to consider an applicant’s race during a selection process.

¹⁰ On January 24, 2022, the Supreme Court agreed to hear admissions lawsuits at Harvard and UNC. See Order Granting Writ of Certiorari, 142 S. Ct. 895 (Mem.) (No. 20-1199). Harvard and UNC prevailed below. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472 (1st Cir. 2015) (upholding Harvard’s race-conscious admissions policy); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (upholding UNC’s race-conscious admissions policy). The Supreme Court’s right-wing majority has already rolled back civil rights in domains spanning voting, reproductive justice, and racial inclusion. See Kermit Roosevelt III, *The Supreme Court Has Been Engaged in a Rollback of Rights. Abortion Would Just Be the Latest*, TIME (May 16, 2022), <https://time.com/6176168/supreme-court-overturned-rights-history/> [<https://perma.cc/X72T-QP3R>].

¹¹ See *Harvard Race Case Punctuates Supreme Court’s Turn to Right*, BLOOMBERG NEWS (Jan. 24, 2022), <https://news.bloomberglaw.com/us-law-week/harvard-race-case-punctuates-supreme-courts-sharp-turn-to-right> [<https://perma.cc/T2GF-APQK>] (“‘They really are in this sort of moment where they can do whatever they like,’ said Melissa Murray, a constitutional law professor at New York University. The decision to hear the admissions case suggests that ‘they’re just checking things off their list and affirmative action will be next.’”). Under existing Supreme Court precedent, a university may consider applicant race if its policy is narrowly tailored to promote the educational benefits of student body diversity. See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (establishing the “diversity rationale” first articulated by Justice Powell in *Regents of California v. Bakke*, 438 U.S. 265 (1978)); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016) (reaffirming *Grutter*). *Stare decisis* is the principle that the Supreme Court will adhere to existing precedent absent extraordinary circumstances that counsel otherwise. See *Stare Decisis*, CORNELL L. SCH. LEGAL INFO. INST. (last visited May 31, 2022), https://www.law.cornell.edu/wex/stare_decisis [<https://perma.cc/33GD-ZJHB>]. The Supreme Court’s current right-wing majority has shown little respect for *stare decisis*—particularly when the relevant precedent advances racial and gender justice. See Alison Frankel, *With Supreme Court Poised to Ditch Roe, Does Precedent Matter Anymore?*, REUTERS (May 3, 2022), <https://www.reuters.com/legal/government/with-supreme-court-poised-ditch-roe-does-precedent-matter-anymore-2022-05-03/> [<https://perma.cc/84UJ-JC5B>]. It is not difficult to count five Justices ready to conclude that affirmative action violates the Constitution or federal law. Chief Justice Roberts, now the closest to a “swing” Justice, has noted his antipathy for any race-conscious government action. See *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”). At least three other Justices appear ready to prohibit schools from even considering an admissions policy’s racial impact. See *Coalition for TJ v. Fairfax Cty. Sch. Bd.*, No. 21A590, 142 S. Ct. 2672 (Apr. 25, 2022) (mem.) (denying request to vacate stay in case challenging Virginia school board’s facially-neutral decision to alter admission criteria in order to promote racial diversity with Justices Thomas, Alito, and Gorsuch dissenting).

Elite universities have long embodied this duality. They constitute sites of institutionalized racism, on the one hand, and stand as affirmative action's formal champions, on the other. This dynamic is not new.¹² But it remains underappreciated and undertheorized.¹³ As a result, standard accounts overlook a key source of affirmative action's perpetual precarity: *elite universities*—affirmative action's formal, but ever-ambivalent, advocates.

Two high-profile lawsuits challenging race-conscious admissions at Harvard and UNC reinforce this dynamic.¹⁴ Even as Harvard and UNC defend their right to consider an applicant's race, they omit facts and theories that would fortify their own policies against doctrinal and normative attacks.¹⁵

But this problem transcends the arguments that Harvard and UNC leave on the table.¹⁶ Consistent with past university defendants,¹⁷ Harvard and

¹² See *infra* section II (discussing the University of California's ambivalence toward affirmative action in *Regents of California v. Bakke*, the first race-conscious admissions case to receive substantive Supreme Court review); see also Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 309 (1999) (identifying facts and theories that affirmative action advocates often leave on the table).

¹³ As one indication of the dearth of scholarship examining this dynamic, an August 4, 2022, Westlaw search of secondary sources that cited to *Grutter v. Bollinger* and included the search term "(ambivalent OR ambivalence) /s (universit! OR school!)" yielded forty-nine results. Two existing threads of scholarship have engaged components of this dynamic. One thread has explored how procedural rules privilege the voice of university defendants over third-party stakeholders—even when those stakeholders would better defend affirmative action. See, e.g., Jenkins, *supra* note 12. The other thread has critiqued how university defendants tend to reproduce conservative frames that portray affirmative action as a "racial preference." See, e.g., Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of "Preferential Treatment"* in *SEEING RACE AGAIN* 246–66 (Kimberlé Williams Crenshaw ed., 2019). This Article is the first to integrate these distinct threads within a single piece of scholarship.

¹⁴ See *supra* note 11.

¹⁵ See Jonathan Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949, 1956 (2022) (explaining, for example, that Harvard and UNC have failed to foreground the many facially race-neutral dimensions of their respective admissions processes that confer racial advantages on white students—racial advantages that affirmative action is well-suited to mitigate).

¹⁶ See, e.g., Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1149 (2019) (arguing that liberals tend to defend affirmative action "in lukewarm and defensive terms as a 'preference' whose costs are begrudgingly justifiable").

¹⁷ See, e.g., Cheryl I. Harris, *What the Supreme Court Did Not Hear in Grutter and Gratz*, 51 DRAKE L. REV. 697, 697 (2003) (identifying intervenor efforts in *Grutter* and *Gratz*); see Jenkins, *supra* note 12, at 309 ("[A]n affirmative action defendant cannot advance a vigorous defense of its program on remedial grounds without risking liability to beneficiaries and others under the Constitution [or Title VI] . . . for defendants who are recipients of federal funds."). Scholarly debates about affirmative action have also sidelined scholars of color. See Derrick Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 4 (1979) ("The exclusion of minorities from meaningful participation in the *Bakke* litigation and, for that matter, from much of the scholarly debate over the case, was more polite, but no less firm. Minority interests were not represented on either side of the counsel table as the *Bakke* case wound its way through the court. Allen Bakke's counsel opposed the interests of minorities; attorneys for [the University], except perhaps by comparison with Mr. Bakke's position, could hardly claim to speak for minorities.").

UNC have resisted third-party efforts to develop a more robust factual record and compelling legal narrative.¹⁸ Affirmative action's formal defenders, in turn, are obstructing evidence that would strengthen the case for affirmative action.

Beyond resisting beneficial evidence, Harvard and UNC employ arguments that enable and normalize the case against affirmative action.¹⁹ This includes framing their own practices as *justifiable discrimination* that benefits Black and brown students over "more qualified" and "deserving" white (and, at times, Asian) applicants.²⁰ This framing, which casts affirmative action as "preferential treatment," is ubiquitous. But it is not inevitable. Harvard and UNC could champion race-conscious admissions as *necessary antidiscrimination* that mitigates preferential treatment for white applicants.²¹ Neither university defends its policy as a modest tool to counter

¹⁸ In both cases, student intervenors tried to introduce evidence of past and present racial discrimination attributable to the university and to frame affirmative action as a necessary countermeasure that produces a more neutral admissions process. *See, e.g.*, Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (No. 1:14-cv-954) (seeking "to present evidence showing that UNC-Chapel Hill's current admissions policy is necessary in part because it helps remedy the long history of segregation and discrimination in North Carolina, including within the University itself"); *see also id.* ("This [unfavorable] outcome could result if the Court does not consider or weigh (or cannot consider or weigh because the record is insufficiently developed) the history of discrimination at UNC-Chapel Hill, the inextricable link between that history and UNC's current compelling interest in student body diversity, and the adverse effect that elements of the current admissions process have on the diversity of the student population."). Harvard and UNC both objected to the students' attempt to intervene. *See* Harvard's Response to Motion to Intervene, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472 (No. 15-1823); Defendants' Response to Motion to Intervene, *Students for Fair Admissions, Inc. v. Univ. of N.C.* 319 F.R.D. 490 (No. 1:14-cv-954).

¹⁹ *See* Feingold, *supra* note 15.

²⁰ In a companion project, I detail how university defendants reproduce colorblind logics that anchor the case against affirmative action. *See id.* This includes the common reflex to frame affirmative action as "preferential treatment" that injects race into an otherwise race-neutral process. *See* Luke Charles Harris & Uma Narayan, *Affirmative Action As Equalizing Opportunity: Challenging the Myth of "Preferential Treatment,"* 16 NAT'L BLACK L.J. 127, 132 (2000) ("[Affirmative action] defenders continue to characterize these policies as 'preferential treatment,' but argue that these preferences are justified, either as forms of 'compensation' or on grounds of 'social utility.'"); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220 (2002) ("Yet an increasing source of frustration was the inadequacy of the liberal response that too often accepted the premise that race consciousness amounted to racism and that too often argued for race-conscious remediation as temporary, exceptional, and aberrational within an otherwise neutral legal frame.").

²¹ *See* Harris, *supra* note 17, at 701 ("The mainstream press has thus framed affirmative action as a hot issue about race in which opinion is polarized over whether racial preferences are fair or not It assumes the position or conclusion regarding the very thing that is under debate: Is a particular policy reverse discrimination or a racial preference, or is it a justifiable measure to eliminate the effects of past and current discrimination."). Reframing affirmative action as "necessary antidiscrimination" repositions race-conscious admissions as a modest tool to mitigate racial advantages that white students enjoy and racial disadvantages that students of color confront during and after the admissions process. *See, e.g.*, Brief of Experimental Psychologists as Amici Curiae in Support of Respondents at 5, *Fisher v. Univ. of Texas* (Aug. 13, 2012) (No. 01-1015) ("[S]tandardized test scores and high school GPAs systematically underestimate the true talents of many members of minority groups stigmatized as intel-

white racial advantages. Worse still, Harvard and UNC resist third-party attempts to do so.²²

The tendency to defend affirmative action as justifiable discrimination tracks decades of advocacy from university defendants and liberal Justices.²³ The consequences transcend discrete legal disputes.²⁴ Affirmative action litigation has long functioned as a proxy for broader debates over the relevance of race and racism in America—and what, if anything, is needed to remedy a national legacy of racialized subordination. When elite universities understate the case for affirmative action, they do more than compromise their own policies. They also normalize contestable narratives that delegitimize present-day antiracist projects.²⁵ In a moment marked by unrelenting backlash to racial justice—including targeted disinformation campaigns against Critical Race Theory and antiracist reform—elite universities’ enduring ambivalence requires scholarly attention.²⁶

lectually inferior . . . [A race-conscious] admissions policy that takes proper account of stereotype threat is not a departure from merit-based admissions, but is rather an effort to achieve more accurate merit-based admissions.”); Defendant-Intervenors’ Response to Plaintiff’s Proposed Findings of Fact and Conclusions of Law at 7, *Students for Fair Admissions, Inc. v. Univ. of N.C.* (No. 14-CV-954) (“Student-Intervenors testified that UNC’s race-conscious policy helps to counteract the lingering effects of UNC’s legacy of exclusion by impacting their perception of UNC as welcoming to underrepresented minority students.”).

²² See *infra* section I.2(1) (outlining Harvard and UNC’s opposition to intervenors).

²³ Cf. Carbado, *supra* note 16, at 1131 (“At bottom, I am urging liberal members of the Court to do what, for the past forty years, they have not done—force conservative justices to affirmatively defend, rather than merely take for granted, their claim that affirmative action is a racial preference.”).

²⁴ Others have noted that the stories we tell about affirmative action can be as important as the policies themselves. See Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 57–58 (2016) (“[P]ursuant to our thick understanding of racial justice, it is not enough that racial minorities merely are present at schools from which they have been excluded. Equally if not more important are the stories that we tell about *why* they are there.”); Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827, 851 (2004) (“[M]y own assessment is that the discursive damage done by *Grutter* is at least equal in significance to its concrete benefits.”).

²⁵ See Feingold, *supra* note 15 (explaining that when elite universities locate racial discrimination in an ignoble past, they mute calls for race-conscious remedies in the present).

²⁶ Others have detailed how moments of racial progress (e.g., the Civil War Amendments) were followed by prolonged periods of racial backlash and retrenchment (e.g., Jim Crow). See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364 (1988) (“Without such an analysis of racism’s role in maintaining hegemony, [Alan Freeman’s] explanation simply does not convincingly capture the political realities of racism and the inevitability of white backlash against any serious attempts to dismantle the machinery of white supremacy.”). We are in the midst of a similar dynamic, in which 2020’s global uprising for racial justice triggered a nationwide assault on antiracist efforts and basic civil rights stretching from public education to voting. See Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Thousands of Voters*, WASH. POST (Mar. 11, 2021) <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/> [<https://perma.cc/9NAE-4S57>]; Olivia B. Waxman, ‘Critical Race Theory is Simply the Latest Bogeyman.’ *Inside the Fight Over What Kids Learn About America’s History*, TIME (July 16, 2021) <https://time.com/magazine/us/6075407/july-5th-2021-vol-198-no-1-u-s/> [<https://perma.cc/2ZS2-DSEV>].

In that spirit, this Article explores two intersecting dynamics that leave affirmative action in the hands of ambivalent advocates. First, features common to elite universities disincentivize zealous advocacy for their own race-conscious policies.²⁷ Second, procedural rules privilege university defendants above other stakeholders.²⁸ In total, intersecting institutional dynamics and procedural rules produce an adversarial context that pits uncompromising affirmative action opponents against ambivalent affirmative action advocates.

Surfacing the source of ambivalence broadens and sharpens common accounts of affirmative action's legal and political instability.²⁹ It also reminds us that racial retrenchment has often been a bipartisan project that depends on concessions from liberal elites.³⁰

This Article proceeds as follows. Part I outlines how legal doctrine and cultural norms position elite universities to shape our national affirmative action debates. Part II then explores three dynamics that lead elite universities to resist facts and theories that would strengthen the case for their own race-conscious policies: (a) commitment gaps,³¹ (b) perceived conflicts of interest,³² and (c) risk aversion.³³

I. A PRIVILEGED VOICE ON AFFIRMATIVE ACTION

Elite universities are uniquely positioned to shape how we think, talk, and feel about affirmative action. This privileged posture derives from two

²⁷ See *infra* section II.

²⁸ See *infra* section I.2.

²⁹ The standard story foregrounds unfriendly doctrine, hostile justices, and a skeptical public. See Mario Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 278–84 (2015) (providing a “brief history” of affirmative action). This story is not wrong. But it is incomplete and, potentially, misleading. To begin, the Supreme Court has exhibited hostility toward antiracist projects since the post-Civil War era. See *The Civil Rights Cases*, 109 U.S. 3, 23 (1883) (“When a man has emerged from slavery . . . there must be some stage in progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.”). Campaigns to discredit antiracism have always benefitted from liberals’ failure to contest conservative frames. See Jonathan Feingold, *Reclaiming Equality: How Regressive Laws Can Advance Regressive Ends*, 73 S.C. L. REV. 723 (2022); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (explaining why affirmative action, albeit controversial, constitutes a modest policy intervention).

³⁰ Cf. Devon Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678, 1686 (2022) (“In the present context, the greater good is the so-called ‘war on drugs’—a now decades-long and bipartisan campaign ostensibly intended to combat illegal drug use in America.”).

³¹ See *infra* section II.A (discussing how “integrationist” institutions have never valued racial inclusion as much as “segregationist” institutions valued racial exclusion).

³² See *infra* section II.B (discussing how elite universities often perceive a conflict between arguments that would strengthen the case for affirmative action and other institutional interests in brand and budget).

³³ See *infra* section II.C (discussing how aversion to legal exposure incentivizes elite university administrators and their attorneys to avoid behavior before and during litigation that, if undertaken, would strengthen the case for race-conscious admissions).

sources: (1) the public's preoccupation with elite schools and (2) procedural rules that center university defendants' voices and perspectives.

This outsized influence over legal and lay debates about affirmative action matters. Affirmative action disputes often serve as proxies for broader fights over the meaning of racism itself. When a university defendant understates the case for affirmative action, it does more than undermine the legal viability of a specific practice or policy. It also normalizes regressive talking points designed to erode any legal or moral distinction between American Apartheid (e.g., Jim Crow) and race-conscious efforts to remedy that history (e.g., affirmative action).³⁴

Translated to the present, the litigation at Harvard and UNC implicates more than the universities' respective admissions policies. These lawsuits also function as public referenda on the enduring relevance of race and racism in America—and, by extension, whether antiracism is a moral and just project. Against the backdrop of resurgent campaigns to delegitimize race-conscious efforts to remedy racial inequality,³⁵ Harvard and UNC are uniquely positioned to make the case for affirmative action. But doing so requires championing race-conscious admissions as a modest measure that counters the “preferential treatment” white students often enjoy in purportedly “colorblind” admissions processes. Harvard and UNC have failed to do so.

A. *The Source of Privilege*

I. *Public Preoccupation*

In most respects, elite universities and their students do not reflect the average American university or college student.³⁶ For this reason alone, many have criticized the attention these institutions garner within legal scholarship and lay discourse.³⁷ Even accepting the critique, elite universities—and Ivy League schools in particular—remain objects of public obsession.³⁸ Two recent examples are illustrative.

In March 2019, the Department of Justice disclosed “Operation Varsity Blues,” a federal investigation into a college bribery scheme that implicated

³⁴ See Flagg, *supra* note 24.

³⁵ See Feingold, *supra* note 29 (outlining multiple fronts in ongoing political, discursive, and judicial campaign of racial retrenchment).

³⁶ See Ben Casselman, *Shut Up About Harvard*, FIVETHIRTYEIGHT (Mar. 30, 2016), <https://fivethirtyeight.com/features/shut-up-about-harvard/> [<https://perma.cc/LM8E-U6C6>] (arguing that a “focus on elite schools ignores the issues most college students face.”).

³⁷ See, e.g., *id.*

³⁸ See Jeffrey Selingo, *Our Dangerous Obsession with Harvard, Stanford and Other Elite Universities*, WASH. POST (Apr. 5, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/04/05/our-dangerous-obsession-with-harvard-stanford-and-other-elite-universities/> [<https://perma.cc/LWR3-8EW6>] (“It’s also the time when seemingly everyone involved in the college search process—from the media to school counselors—are obsessed with the admissions decisions Harvard and dozens of other selective colleges and universities have made.”).

“high-profile actresses, lawyers, CEOs, vintners, a fashion designer and more.”³⁹ The scandal involved “bribing coaches and university administrators and arranging for falsified test scores on students’ entrance exams.”⁴⁰ Media coverage illuminated how parents—through lawful and unlawful means—leveraged their personal wealth, networks, and influence to secure their children’s admission at elite schools.⁴¹ These revelations provoked outrage because of the naked corruption parents exerted over a process that already favors students (like their children) who inherit wealth and privilege.⁴²

But the episode also reflected a broader obsession with prestigious universities—an obsession that transcends the nation’s wealthiest families.⁴³ For many across the socioeconomic spectrum, elite universities confer symbolic and material benefits. To begin, many “Americans’ identities are often intertwined with their post-secondary brands.”⁴⁴ The school we attend often shapes our underlying sense of self. The more prestigious or highly regarded the institution, the better it reflects on the students enrolled there.

As for material benefits, access to elite institutions is often viewed as a prerequisite to a life of comfort and privilege in the United States.⁴⁵ This

³⁹ Feroze Dhanoa, “*Operation Varsity Blues*”: *College Cheating Scheme Names Dozens*, PATCH, (Mar. 12, 2019), <https://patch.com/massachusetts/boston/college-admissions-cheating-scheme-feds-announce-charges> [https://perma.cc/TK9X-DCA5]; see also 8 *Outrageous Details From the U.S. College Scam Court Documents*, CBC NEWS (Mar. 14, 2019), <https://www.cbc.ca/news/world/us-college-scam-court-cheating-1.5055097> [https://perma.cc/6Y94-7C2Q].

⁴⁰ 8 *Outrageous Details*, *supra* note 39.

⁴¹ See Matt Kwong, *What Bribery in U.S. College Admissions Says About the ‘Myth’ of Meritocracy*, CBC NEWS (Mar. 14, 2019), <https://www.cbc.ca/news/world/us-college-scam-court-cheating-myth-meritocracy-1.5055854> [https://perma.cc/K54C-NBBG] (“The scandal, in other words, is not just the crimes, said Jeet Heer, an associate editor with *The New Republic* who comments frequently on U.S. culture and politics. ‘The scandal is what is legal.’”).

⁴² See Jonathan Feingold, “*All (Poor) Lives Matter*”: *How Class-Not-Race Logic Rein-scribes Race and Class Privilege*, U. CHI. L. REV. ONLINE 47, 56–57 (2020) (outlining how standard measures of merit—e.g., standardized tests—benefit class-privileged white applicants with “an uneven playing field that rewards inherited race and class privilege”); Complaint for Declaratory and Injunctive Relief, *Smith v. Regents of the Univ. of Cal.*, No. RG19046222 (Cal. Super. Ct. Dec. 10, 2019) (arguing that the SAT and ACT are neither race- nor class-neutral because they function on “prox[ies] for students’ wealth and accumulated advantage”).

⁴³ See Abby Mims, *I Helped Get Rich Kids into Elite Colleges. Obsessed Parents Drove Me Away*, WASH. POST (Mar. 13, 2019) <https://www.washingtonpost.com/outlook/2019/03/13/i-helped-get-rich-kids-into-elite-colleges-obsessive-parents-drove-me-away/> [https://perma.cc/8SLZ-NS4Q]; see also Selingo, *supra* note 38 (identifying myopic focus on elite institutions from the media, legislators, and general public).

⁴⁴ Kwong, *supra* note 41.

⁴⁵ See Danielle Douglas-Gabriel & Susan Svrluga, *Former Students Sue Georgetown, Columbia and Other Elite Universities Over Financial Aid Practices*, WASH. POST (Jan. 10, 2022), <https://www.washingtonpost.com/education/2022/01/10/university-financial-aid-law-suit/> [https://perma.cc/XE2E-VKJL] (“These elite universities are gatekeepers to the American Dream, and they are closing the gate more than they should.”).

perception extends beyond universities to secondary, primary, and even early childhood education.⁴⁶

The American public's obsession with prestige shows no signs of waning.⁴⁷ Nor is it void of logic.⁴⁸ For decades, the United States has experienced rising wealth gaps alongside the ever-increasing scarcity of employment opportunities for individuals without a college degree.⁴⁹ One can understand how the resulting economic anxieties translate to competition over limited spots in institutions associated with wealth and privilege. Still, this obsession overlooks that prestigious universities—unlike their less-prestigious counterparts—are far better at reproducing privilege than at catalyzing social mobility.⁵⁰ The universities that provide the most economic mobility are not Ivy League staples like Harvard or elite public schools like UNC. Rather, the schools that “create a consistent path to the middle class” tend to be state schools that “enroll mostly low- and moderate-income students.”⁵¹

⁴⁶ See Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 718 (2021) (“Like selective school enrollment in New York, parents perceive access to elite higher education as essential to ensuring student success.”).

⁴⁷ See Melissa Korn, *Ivy League Colleges Report Dramatic Growth in Early-Admission Applicant Pools*, WALL ST. J. (Dec. 18, 2020) <https://www.wsj.com/articles/ivy-league-colleges-report-dramatic-growth-in-early-admission-applicant-pools-11608308681> [<https://perma.cc/EA6T-4YGG>] (“Early-admission applications to Ivy League colleges skyrocketed this year, as anxious high-school seniors tried to boost their chances of getting into some of the most selective schools in the country.”).

⁴⁸ See, e.g., Grutter, 539 U.S. at 332 (“[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.”).

⁴⁹ See Heather Long, *Many Left Behind in this Recovery Have Something in Common: No College Degree*, WASH. POST (Apr. 22, 2021), <https://www.washingtonpost.com/business/2021/04/22/jobs-no-college-degree/> [<https://perma.cc/76UF-CRUF>]; see also John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 806 (2009) (“At a time of perceived scarcity and contracting government budgets, targeted policies may be viewed as favoring some constituent group rather than the public good. If the target group is historically disfavored or considered ‘undeserving,’ targeted policies risk being labeled ‘preferences’ for ‘special interests.’”). Elite universities are responsible, in part, for perceived and actual scarcity. See Sam Haselby, *Break Up the Ivy League Cartel*, BIG BY MATT STOLLER (Apr. 25, 2021), <https://mattstoller.substack.com/p/break-up-the-ivy-league-cartel> [<https://perma.cc/MS2A-PQ6J>] (“In 1940, the acceptance rate at Harvard was eighty-five percent. In 1970, it was twenty percent. This year, for the class of 2025, it was 3.4 percent.”).

⁵⁰ See generally ADAM HOWARD & RUBEN GAZTAMBIDE-FERNANDEZ, *EDUCATING ELITES: CLASS PRIVILEGE AND EDUCATIONAL ADVANTAGE* (2010) (examining how “elite” schools often cater to students with the most inherited race and class privilege).

⁵¹ Michael Itzkowitz, *Out With the Old, In With the New: Rating Higher Ed by Economic Mobility*, THIRD WAY (Jan. 27, 2022), <https://www.thirdway.org/report/out-with-the-old-in-with-the-new-rating-higher-ed-by-economic-mobility> [<https://perma.cc/FMP7-YQ5W>] (noting that the “schools shown to provide the most economic mobility are all Hispanic-serving Institutions . . . located in California, Texas, and New York”); see also Gregor Aisch, Larry Buchanan, Amanda Cox & Kevin Quealy, *Some Colleges Have More Students from the Top 1 Percent Than the Bottom 60. Find Yours.*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> [<https://perma.cc/T9VA-MGR7>] (“Even though

A 2021 incident at Yale Law School (“YLS”) further reflects our public fascination with elite institutions. That spring, a minor personnel matter involving a controversial YLS professor ballooned into a public spectacle. In brief, the underlying matter concerned a meeting with the professor and two students at the professor’s residence.⁵² As Elizabeth Bruenig reported, at least three major and highly regarded publications “gave the mysterious affair a lengthy report.”⁵³ The underlying incident arguably called for some level of institutional inquiry.⁵⁴ Still, it is hard to imagine public interest in the controversy had it occurred somewhere other than Yale or a comparably elite institution. Had the same incident occurred at the University of New Haven (across town from Yale), for example, there is little chance it would have garnered any interest by *The New York Times*, *The New Yorker*, *New York Magazine*, and their readership.

Although just two data points, the foregoing examples reflect the acute and special attention elite universities command from the media and much of the American public.⁵⁵ This dynamic affords elite schools a unique ability to shape national conversations—including debates about affirmative action and racism’s enduring relevance in America.⁵⁶

I now turn to another YLS source of this privileged posture: litigation structure, which elevates the voice and perspective of formal defendants over other interested parties.

most lower-income students fare well at elite colleges, there are relatively few of them there, so less elite colleges may be more important engines of social mobility.”).

⁵² Elizabeth Bruenig, *The New Moral Code of America’s Elite*, THE ATLANTIC (July 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/07/amy-chua-yale-law-school-real-story-dinner-party/619558/> [https://perma.cc/9NW4-NQPP]. It was understood among students that, due to past incidents, YLS had prohibited this professor from hosting students for private engagements at her residence. *See id.*

⁵³ *See id.*

⁵⁴ Among other considerations, power dynamics between professors and students impose a heightened ethical—if not legal—responsibility on institutions to ensure professors do not abuse that power (whether or not such abuse is intentional). *See* C. John Cicero, *The Classroom As Shop Floor: Images of Work and the Study of Labor Law*, 20 VT. L. REV. 117, 142 (1995) (“To me, this is evidence of a dynamic at work where the authority of the professor, like that of a boss, carries with it the power to coerce (even at a school like CUNY which has endeavored to introduce alternatives to the hierarchical professor/student relationship).”). Moreover, that baseline dynamic is even more pronounced when, as here, the professor at issue is recognized as a “gatekeeper” to more prestigious professional opportunities such as Supreme Court clerkships.

⁵⁵ Elite universities remain a common target of ridicule from entities, individuals, and interests across the political spectrum. The Right, for example, often invokes elite universities as a potent political foil—an alleged bastion of left-wing indoctrination that threatens conservative American values. *See, e.g.*, Anemona Hartocollis & Shawn Hubler, *Donald Trump vs. the Ivy League: An Election-Year Battle*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/us/trump-ivy-league-election.html> [https://perma.cc/F4GN-YVVA].

⁵⁶ The Supreme Court’s current review of race-conscious admissions at Harvard and UNC has amplified the attention these two institutions already command from the media and public.

2. *Litigation Structure*

Multiple dimensions of litigation structure privilege elite universities over other affirmative action advocates.⁵⁷ I explore two below: (1) procedural rules that hinder third party intervention and (2) judicial deference to university “expertise.”

(i) *Procedure Disfavors Intervenors*

Standard procedural rules doubly privilege university defendants over other affirmative action advocates by (a) centering the university’s perspective and (b) marginalizing, if not excluding, the perspectives of third parties who would tell a more comprehensive and compelling affirmative action story.⁵⁸

When an admissions policy is challenged, the university—as the formal defendant—acquires the right to control the defense. This entails the power to determine which defenses to raise, which theories to invoke, and what evidence to submit and seek.⁵⁹ This formal status positions the university to craft the underlying legal narrative—that is, the story that explains what affirmative action is, the function it performs, and the backdrop against which it intervenes. The narrative matters because it shapes how courts and the public will view the underlying dispute.⁶⁰

Basic litigation structure also privileges the university over third parties—even when those parties have a direct stake in the litigation and would marshal a more compelling defense.⁶¹ This privilege derives from Rule 24 of the Federal Rules of Civil Procedure (“Rule 24”), which prescribes when a non-party may intervene in a civil dispute.⁶² Rule 24 creates two avenues for

⁵⁷ Third-party advocates include students of color and civil rights organizations dedicated to desegregating higher education in America. See Harris, *supra* note 17 at 702 (noting that in *Grutter* and *Gratz*, the Supreme Court “heard arguments from the plaintiffs, the University, and even the Solicitor General on behalf of the United [S]tates . . . everyone except these [underrepresented minority] students” who also possessed “a serious stake in the outcome of the litigation”).

⁵⁸ See Jenkins, *supra* note 12 (explaining that procedural rules privilege the perspective of university defendants over third-party stakeholders who attempt to highlight how affirmative action is necessary to counter racial (dis)advantages that benefit white applicants).

⁵⁹ See FED. R. CIV. P. 17 (“An action must be prosecuted in the name of the real party in interest.”).

⁶⁰ Even if empowered to craft the defense, the university must contend with the facts, theories, and frames that the plaintiff employs.

⁶¹ See Harris, *supra* note 17, at 702 (explaining that the *Grutter* student intervenors “had a serious stake in the outcome of the litigation” and that in “*Bakke*, the [students of color] that arguably had the most at stake in the outcome did not have a direct voice in the case when it was heard”).

⁶² FED. R. CIV. P. 24. A party may intervene by right when “[o]n timely motion,” the movant “(1) is given an unconditional right to intervene by federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” *Id.* at 24(a).

intervention: (1) by right or (2) at the court's discretion. To intervene as a matter of right, non-parties must demonstrate, *inter alia*, that the "existing parties [cannot] adequately represent [the non-party's] interest."⁶³ To warrant permissive intervention, courts consider whether "an applicant's claim or defense and the main action have a question of law or fact in common."⁶⁴

As I detail in Part II, common institutional dynamics disincentivize elite universities from foregrounding evidence that would strengthen the legal and moral case for their own policies.⁶⁵ This includes facts about the university's own history of racial exclusion. Alan Jenkins reflected on this dynamic over two decades ago: "Without intervention by [affirmative action] beneficiaries, affirmative action cases typically pit unsuccessful White applicants and counsel opposed to traditional civil rights enforcement against governments and other institutions with a history of racial bias and strong incentives to avoid confessing civil rights liability."⁶⁶

In theory, Rule 24 creates a vehicle for third parties to attain formal party status and supplement an otherwise lacking record. In practice, Rule 24 has proved a limited tool for prospective intervenors.⁶⁷

This trend has extended to the Harvard and UNC lawsuits. In the Harvard case, putative student intervenors questioned the university's "ability and willingness" to advance the strongest affirmative action defense.⁶⁸ The students argued that Harvard, "so as not to offend its alumni, faculty,

⁶³ *Id.*

⁶⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 45 (D. Mass. 2015), *aff'd*, 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176-ADB) (quotation marks and citation omitted). When deciding whether permissive intervention is warranted, courts "can consider almost any factor rationally relevant, and enjoy[] very broad discretion in allowing or denying the motion." *Id.*

⁶⁵ See *infra* section II (explaining that, among other dynamics, universities are reluctant to foreground their own racial discrimination—even if that showing would buttress the case for race-conscious admissions).

⁶⁶ Jenkins, *supra* note 12, at 268 ("[E]ach party in a bipolar affirmative action case faces strong disincentives to presenting evidence of recent discrimination by the defendant or questioning the validity of standardized tests and other selection criteria that may discriminatorily exclude certain classes of applicants."). Similar dynamics were present in the *Bakke* litigation. See JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 49 (1979) ("*Bakke* was a defensive action, and minorities found themselves on the sidelines, reminded that despite the rhetoric of progress so popular in the 1970s, most American institutions remained solely in the hands of white men who made decisions that would profoundly affect their welfare.").

⁶⁷ See Jenkins, *supra* note 12, at 266 ("[S]tudents of color and organizations that represent them have sought, and been denied, intervention in suits challenging affirmative action programs at the University of Washington, the University of Texas Law School, and the Boston Latin Academy."). This contrasts with affirmative action litigation outside of the admissions contexts where intervenors have found greater success. See *id.* (identifying multiple affirmative action cases from the 1990s where district courts granted intervention). At the same time, the Supreme Court has relaxed standing requirements for parties challenging affirmative action. See *id.* at 264.

⁶⁸ Memorandum in Support of Proposed Defendant-Intervenors' Motion to Intervene at 14, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* 308 F.R.D. 39 (No. 14-cv-14176-ADB). This line of reasoning tracks intervention arguments in past affirmative action litigation.

the academic community, or the public,” might “be hesitant to advance relevant arguments advocating affirmative action as a remedial step that would expose its own history of past discrimination or to address ongoing problems with race relations or dissatisfaction with racial diversity on the campus.”⁶⁹ The students further claimed that Harvard would omit theories of ongoing discrimination that, if developed, could buttress the legal case for its own policy.⁷⁰

Harvard objected to intervention.⁷¹ Among other arguments, the university denied that it would inadequately defend its own program.⁷² The district court sided with Harvard.⁷³ Still, the district court granted the students “amicus plus” status—thus elevating their participation above other non-parties.⁷⁴ This decision reflected the intervenors’ value to the dispute. Even so, Harvard retained primary authority to frame the case, seek and submit evidence, and respond to the plaintiff’s arguments.⁷⁵

In the UNC litigation, student intervenors similarly attacked UNC’s ability to adequately defend its own admissions policy. Unlike the Harvard movants, the UNC intervenors sought a limited right to present evidence on two issues: (1) “the history of segregation and discrimination at UNC-Chapel Hill and in North Carolina” and (2) “the effect of UNC-Chapel Hill’s existing, and [plaintiff’s] proposed, admissions processes on the critical mass of diverse students at UNC-Chapel Hill.”⁷⁶ UNC objected on all fronts.⁷⁷

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See Harvard’s Response to Motion to Intervene, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* 308 F.R.D. 39 (No. 14-cv-14176-ADB).

⁷² See *id.* at 1 (“Harvard is mounting a vigorous defense of those policies and practices, and it looks forward to a successful and expeditious resolution of this case.”).

⁷³ See Memorandum and Order on Proposed Defendant-Intervenors’ Motion to Intervene, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* 308 F.R.D. 39 (No. 14-cv-14176-ADB).

⁷⁴ The district court permitted the student intervenors to: (1) “submit a brief or memorandum of law not to exceed 30 pages, exclusive of exhibits, on any dispositive motion in this case”; (2) “participate in oral argument on any dispositive motion”; and (3) “submit personal declarations or affidavits in support of their memorandum of law, which may be accorded evidentiary weight if otherwise proper.” *Id.* at 23.

⁷⁵ See *New Hampshire Ins. Co. v. Greaves*, 110 F.R.D. 549, 552 (D.R.I. 1986) (explaining that absent intervention, the original parties have the right “to control the destiny of their own suits”).

⁷⁶ Consolidated Reply in Support of Motion to Intervene at 2, *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (No. 1:14-cv-954). The district court distinguished the intervenors motion from that in the Harvard litigation. See *Students for Fair Admissions Inc. v. Univ. of N.C.*, 319 F.R.D. 490, 497 (M.D.N.C. 2017) (“However, the factual circumstances of the two cases are distinguishable. Unlike in *Harvard College*, where the proposed intervenors sought to participate as full-fledged parties to the action, Proposed Intervenors here seek only limited participation in this action. Further, UNC-Chapel Hill, as a public institution, subject to state funding and regulations, is distinguishable from Harvard, a private institution. Over 80% of UNC-Chapel Hill’s entering freshman class must come from North Carolina, a state which has its own history of discrimination and segregation.”) (citations omitted).

⁷⁷ See Defendants’ Response to Motion to Intervene, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 2015 WL 4764171 (M.D.N.C. July 22, 2015) (No. 1:14-CV-954) (objecting to

Here, the district court granted the students' narrow request, which entails greater status than the Harvard intervenors received.⁷⁸ Even with this ruling, UNC has retained much of its authority to construct the narrative and the factual record that will inform lay and legal perceptions of the case.

Notably, the UNC intervenors affected the litigation. Through their briefing and trial testimony, the intervenors surfaced and highlighted evidence that links race's contemporary force at UNC to the university's own history of formal racial exclusion and white supremacy.⁷⁹ This historical framing would not have entered the case without the intervenors.⁸⁰

The district court's opinion reflects the intervenors' impact. Early in the opinion, the court cited "credible evidence that UNC 'has been a strong and active promoter of white supremacy and racist exclusion for most of its history.'" ⁸¹ The underlying testimony came not from UNC, but from one of the intervenors' experts.⁸² The same expert testified, and the district court noted, that although "faculty, administrators and trustees have made important strides to reform the institution's racial outlook and policies, . . . those efforts have fallen short of repairing a deep-seated legacy of racial hostility and disrespect for people of color."⁸³

The UNC intervenors did what UNC would not. They defended race-conscious admissions as a tool to counter racism's ongoing presence at UNC and throughout North Carolina. This story, which ties past to present, is necessary to explain why affirmative action remains an essential institutional practice. And by exposing how race still matters, the intervenors countered

intervention on the basis that UNC adequately represented the intervenors' interests, intervention would delay the litigation, and that intervenors could meaningfully participate as *amicus curiae*).

⁷⁸ See *Students for Fair Admissions*, 319 F.R.D. at 496.

⁷⁹ See, e.g., Defendant-Intervenors' Brief in Response to Plaintiff's Motion for Summary Judgment at 9, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 2019 WL 1339089 (M.D.N.C. Mar. 4, 2019) (No. 1:14-cv-954-LCB-JLW) ("North Carolina has a 'sordid,' 'shameful,' and 'disgraceful' history of state sponsored racial discrimination, which includes excluding African-American and other students of color from UNC-Chapel Hill." (citation omitted)).

⁸⁰ Aside from limited gestures, UNC did not center its own legacy of racial exclusion and white supremacy as part of that backdrop of racial discrimination that necessitates race-conscious admissions. As one example, UNC's post-trial brief did not include any of the following words or phrases to describe its past or present conduct vis-à-vis students of color: "discrimination," "segregation," or "white supremacy." See UNC Defendants' Proposed Findings of Fact and Conclusions of Law, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (No. 1:14-cv-954).

⁸¹ See Trial Findings of Fact and Conclusions of Law at 9 n.5, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (No. 1:14-cv-954) (describing expert testimony as an "important contribution to the Court's understanding of the context of this case").

⁸² See *id.*

⁸³ *Id.* During oral argument, UNC's counsel reiterated that UNC was not pursuing a remedial justification, but noted that the "university's history is relevant to the university's diversity analysis." Transcript of Oral Argument at 90–91, *Students for Fair Admissions, Inc. v. Univ. of North Carolina* (No. 21-707) (2022).

“colorblind” rhetoric that siloes racism to a distant past and insulates racial disparities—and the systems that produce them—from critique.⁸⁴

This link between affirmative action litigation and broader contestations over the source of racial inequality reveals why legal victories for affirmative action are insufficient to counter regressive political projects. The rationale underlying those decisions matters. When affirmative action advocates—whether universities, courts, or others—defend such policies as “justifiable discrimination” or necessary “racial preferences,”⁸⁵ they legitimize the existing distribution of wealth, power, and resources as the product of purportedly neutral systems. So even if affirmative action prevails in the court of law, the appetite for racial justice wanes in the court of public opinion.⁸⁶

(ii) *Courts Defer to University Expertise*

Amplifying the procedural rules that privilege formal defendants, courts often defer to universities on matters that implicate institutional expertise.⁸⁷ This includes judgments about the admissions process—an aspect of doctrine that traces to Justice Powell’s opinion in *Regents of the Univ. of Cal. v. Bakke* in 1978.⁸⁸

In *Grutter v. Bollinger*, where a 5-4 majority upheld the University of Michigan Law School’s race-conscious admissions policy, Justice O’Connor invoked this principle. She declared that “[t]he Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”⁸⁹ Justice O’Connor further located the majority’s holding in

⁸⁴ Sam Adler-Bell, *Behind the Critical Race Theory Crackdown*, THE FORUM (Jan. 13, 2022), <https://www.aapf.org/theforum-critical-race-theory-crackdown> [https://perma.cc/KM3H-6JBR] (“An unstated goal of demonizing CRT . . . is to eliminate this insight [of structural racism] from the policy discussion: to shift the blame for persistent inequalities away from the government and back to individuals and families”); see also David Theo Goldberg, *The War on Critical Race Theory*, BOST. REV. (May 7, 2021), <https://bostonreview.net/articles/the-war-on-critical-race-theory/> [https://perma.cc/J273-8A3N].

⁸⁵ Cf. Andy Portinga, *Racial Diversity as a Compelling Governmental Interest*, 75 U. DET. MERCY L. REV. 73, 75–76 (1997) (“The most common argument in favor of affirmative action is that *racial preferences* are *necessary* to remedy the effects of past discrimination.”) (emphasis added).

⁸⁶ See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1629 (2003) (characterizing *Grutter* as a loss because, *inter alia*, the diversity rationale “serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants”).

⁸⁷ See, e.g., *Fisher*, 579 U.S. at 387.

⁸⁸ 438 U.S. 265, 312 (1978) (Powell, J.) (“Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body”); see also *Fisher*, 579 U.S. at 387 (reaffirming that universities deserve deference related to the value of a diverse student body).

⁸⁹ *Grutter*, 539 U.S. at 328–29 (“Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”).

“our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”⁹⁰

In 2016, Justice Kennedy reaffirmed this principle when he upheld the University of Texas’s race-conscious admissions policy in *Fisher v. Texas*. Writing for the Court, Justice Kennedy explained that “[o]nce . . . a university gives a reasoned, principled explanation for its decision, deference must be given to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.”⁹¹

Justice Kennedy clarified that deference is not boundless. On the one hand, “judicial deference is proper” vis-à-vis a university’s interest in student body diversity.⁹² But “no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals.”⁹³ Translated to doctrine,⁹⁴ deference extends to strict scrutiny’s compelling interest prong, but not the narrow tailoring analysis.⁹⁵ Moreover, deference has been limited to a single compelling interest: the university’s pursuit of student body diversity.⁹⁶ The Supreme Court has not deferred to other institutional judgments, such as the need to remedy past discrimination.⁹⁷

⁹⁰ *Id.*

⁹¹ *Fisher*, 579 U.S. at 376–77.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ A defendant that employs a “racial classification” must establish that the consideration of an applicant’s race is (a) narrowly tailored (b) to further a compelling interest. *See Grutter*, 539 U.S. at 326.

⁹⁵ *See Fisher*, 579 U.S. at 389 (“The Court’s affirmance of [the University’s] admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies”); *see also* Shakira D. Pleasant, *Fisher’s Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 818 (2019) (“The holding in *Fisher II* unquestionably outlined the Court’s expectation that UT collect, scrutinize, and utilize data to evaluate and refine its race-conscious admissions process.”).

⁹⁶ Scholars have raised multiple concerns about institutional deference in the admissions context. *See, e.g.*, Charles Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 771 (1997) (observing that Justice Powell’s logic “could as easily justify an all white school as one that is racially diverse”); Goodwin Liu, J., Sup. Ct. of Cal., American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After *Bollinger* 33–34 (Aug. 2, 2003) (noting that the “academic freedom argument . . . would seem to swing both ways” and could support arguments for segregated universities if they could be justified on educational grounds); Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 590 (2005); John Payton, President, NAACP Legal Defense Fund, American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After *Bollinger* 34 (Aug. 2, 2003) (“acknowledg[ing] the tension [in the academic freedom argument]” and suggesting that the Law School “tried not to make too much of the academic freedom point” in its brief to the Supreme Court).

⁹⁷ *Compare Grutter*, 539 U.S. at 329 (“Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission, and that ‘good faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”), *with Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 230 (1995) (refusing to grant deference to Congress

The above reinforces that deference has limits. And given the Supreme Court's current composition, there is reason to question whether Harvard and UNC will receive the deference that other defendants have enjoyed in prior admissions cases.⁹⁸ Still, university defendants possess a privileged position vis-à-vis other affirmative action advocates. Against this backdrop, I now outline the arguments that universities continue to leave on the table.

B. *Opportunity Lost*

Harvard and UNC enjoy a unique opportunity to influence a resurgent national debate over race in America. This includes competing claims over what, if anything, is necessary to overcome this country's legacy of legalized racial subordination.⁹⁹ Harvard and UNC could counter a calculated campaign to discredit antiracism as the new racism, and paint antiracists as the new racists.¹⁰⁰ Doing so would buttress the moral case for race-conscious

in the context of interpreting the Equal Protection Clause and related federal antidiscrimination measures).

⁹⁸ *Compare Grutter*, 539 U.S. at 329 (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”), with *Fisher*, 579 U.S. at 390 (Alito, J., dissenting) (“[The University’s] primary argument is that merely invoking ‘the educational benefits of diversity’ is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.”).

⁹⁹ Some might argue that doctrine incentivizes Harvard and UNC to eschew arguments that foreground race and racism's ongoing impact on American society. It is true that the Supreme Court has rejected “societal discrimination” as a compelling interest that justifies race-conscious admissions. See *Bakke*, 438 U.S. at 328 (Brennan, J., concurring in the judgment in part and dissenting in part). But as I detail below and elsewhere, university defendants undersell affirmative action even accounting for legitimate doctrinal constraints. As one example, Harvard and UNC could leverage the diversity rationale to center the present and personal equality interests of students of color. See Jonathan Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, 101–09 (2019) [hereinafter *Hidden in Plain Sight*]. They fail to do so. Moreover, nothing precludes Harvard and UNC from defending race-conscious admissions as a modest countermeasure that mitigates the racial advantages the “colorblind” considerations confer upon white applicants. See Carbado, *supra* note 16, at 1221–27. Moreover, right-wing activists have long attacked affirmative action by simultaneously working within and contesting existing doctrinal frameworks. See Jonathan Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 716 (2019) [hereinafter *White Bonus*] (outlining how SFFA mobilizes existing caselaw and seeks to overturn existing caselaw). It behooves Harvard and UNC to navigate doctrinal constraints and a Supreme Court hostile to race-consciousness. But even recognizing doctrinal constraints and a hostile Court, the university defendants avoid facts and theories that would strengthen the legal case for their own policies. See Feingold, *supra* note 15 (discussing how university defendants employ unnecessarily shallow conceptions of diversity and fail to challenge the empirical claim that race-consciousness constitutes preferential treatment).

¹⁰⁰ See Benjamin Wallace-Well, *How a Conservative Activist Invented the Conflict Over Critical Race Theory*, THE NEW YORKER (June 18, 2021) <https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory> [<https://perma.cc/G57X-FWY9>] (quoting right-wing activist Cristopher Rufo as explaining

reform and strengthen the legal case for their own policies.¹⁰¹ They have failed to do so.

This failure is not surprising. For decades, privileged voices on the Left have defended race-conscious admissions as justifiable “racial preferences” that harm otherwise deserving white applicants.¹⁰² This framing, which suggests affirmative action corrupts a race neutral baseline, is neither inevitable, strategic, nor empirically sound.¹⁰³

Above all, this framing ignores the myriad racial advantages and disadvantages embedded within facially race-neutral admissions regimes.¹⁰⁴ This constellation of racial (dis)advantages ranges from inherited race-class privilege and fraught measures of academic “merit”¹⁰⁵ to disparate treatment and dominant narratives that internalize anti-Black stereotypes.¹⁰⁶ The upshot is simple: most “colorblind” criteria extend unearned racial advantages to wealthy white applicants that harm “innocent” students of color.¹⁰⁷

that “‘Critical race theory’ is the perfect villain” to counter the growing appeal of progressive politics and antiracism following 2020’s summer of protests for racial justice).

¹⁰¹ In a companion piece, I offer a more comprehensive account of Harvard and UNC’s failure to advance available arguments that trade on existing precedent and caselaw. See Feingold, *supra* note 15.

¹⁰² See *id.*

¹⁰³ See *id.*

¹⁰⁴ See Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 199–226 (2016) (providing empirical evidence to support [the] claim that middle-class Black students experience multiple disadvantages that likely affect their academic performance and the overall competitiveness of their admissions files).

¹⁰⁵ See Kristen Holmquist, Marjorie Shultz, Sheldon Zedeck & David Oppenheimer, *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 566 (2014) (“The research confirmed that selection based on this more complete model of lawyering [than the LSAT alone] greatly reduces racial disparities and captures a more fundamental meaning of merit which should drive admission decisions”); Jonathan Feingold, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSP. 231, 233 (2011) (“In the presence of stereotype threat, the LSAT is a defective tool that prevents otherwise qualified Black and Latino/a students from displaying their true talent. Understood in this way, reliance on the LSAT contravenes fair measures and deprives Black and Latino/a applicants of the individualized review our Constitution demands.”).

¹⁰⁶ See Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1109 (2009) (“Generally, there are two major categories of opposing theories explaining the racial gap in SAT scores: ‘minority-deficiency’ theories and ‘test-deficiency’ theories.”).

¹⁰⁷ See Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 330–39 (2015) (outlining how standard measures of merit create a racial boost for white applicants by systematically understating the existing academic talent of students from negatively stereotyped groups); Brief of Experimental Psychologists, *supra* note 21, at 5 (reviewing decades of stereotype threat research that confirms “[s]tandardized test scores and high school GPAs systematically underestimate the true talents of many members of minority groups stigmatized as intellectually inferior”); Feingold, *supra* note 42, at 57 (identifying how standard admissions policies tend to benefit class-privileged white applicants).

One might expect universities to defend their own policies as modest correctives that promote a more “meritocratic,”¹⁰⁸ race neutral, and individualized review. This framing enjoys decades of empirical support and positions affirmative action as the remedy for present-day “preferential treatment,” not its source. Nothing prevents Harvard and UNC from simultaneously (a) championing race-consciousness as essential antidiscrimination and (b) working within existing caselaw.¹⁰⁹ Harvard and UNC could emphasize that affirmative action—by countering unearned racial advantages for white applicants—helps them diversify their campuses and protects each student’s present and personal equality interests.

Neither Harvard nor UNC has defended its policy as a modest countermeasure that reduces race’s impact on admissions. Instead, they reproduce the contestable claim that affirmative action breaches an otherwise neutral and “meritocratic” admissions process.¹¹⁰ As noted, this framing misdescribes the backdrop against which affirmative action intervenes. It also contradicts Harvard and UNC’s public acknowledgments that racism remains a powerful force in American society and on their own campuses.¹¹¹ Moreover, when Harvard and UNC fail to foreground affirmative action’s antidiscrimination function, they feed the narrative that racial disparities are the natural byproduct of actual differences in academic talent and potential. In so doing, Harvard and UNC mask the many ways that race operates within purportedly “colorblind” components of their own admissions regimes.

II. EXPLAINING AMBIVALENCE

Harvard and UNC remain ambivalent affirmative action advocates. I now turn to three sources of this ambivalence: (a) commitment gaps, (b) perceived conflicts of interest, and (c) risk aversion.

¹⁰⁸ Advocates could borrow from Professors Jerry Kang and Mazharin Banaji, who defended affirmative action as a “fair measure” of applicant talent and potential. *See* Kang & Banaji, *supra* note 9, at 1067–68 (“‘Fair’ connotes the moral intuition that being fair involves an absence of unwarranted discrimination, by which we mean unjustified social category-contingent behavior. The term also connotes accuracy in assessment. ‘Measure’ has the double meaning as well: measurement and an intervention intentionally taken to solve a problem.”).

¹⁰⁹ *See* Feingold, *supra* note 15, at 1982–2005 (explaining how universities could offer a thicker diversity rationale that centers the present and personal equality interests of actual university students).

¹¹⁰ *See id.* at 1968 (critiquing Harvard and UNC’s use of terminology like “tips” or “plus factor” to describe how race-conscious considerations affect their respective admissions systems).

¹¹¹ *See, e.g.*, Message from Harvard President Lawrence S. Bacow, *Harvard & The Legacy of Slavery* (Apr. 26, 2022), <https://legacyofslavery.harvard.edu/about/aboutmessage-from-president> [<https://perma.cc/GRU6-3FU3>] (“But our recent progress must not obscure the reality of our past—or the continuing effects of the past on the present. The legacy of slavery, including the persistence of both overt and subtle discrimination against people of color, continues to influence the world in the form of disparities in education, health, wealth, income, social mobility, and almost any other metric we might use to measure equality.”).

The following overview explores common features of elite universities that shape institutional decisionmaking. I am not making a causal claim regarding a specific university's affirmative action defense. My more modest goal is to surface common institutional dynamics that help to explain why university defendants avoid—if not resist—facts and theories that would buffer their own policies against legal and political attacks.

A. *Commitment Gaps*

*The overt racists are united, coordinated & relentless in their efforts to completely undo the Civil Rights Movement and doom us to another 100 years at least of brutal racial oppression. White liberals aren't nearly as committed to stopping them.*¹¹²

Bree Newsome, whose tweet appears above, gained national attention after she scaled South Carolina's State House and removed a Confederate flag in 2015.¹¹³ Her tweet gestured to a then-nascent campaign of backlash that followed the nation's growing appetite for antiracist reform during 2020's global uprising for racial justice.¹¹⁴ Newsome juxtaposed the right-wing forces behind that campaign (and their sustained efforts to roll back civil rights) with white liberals (and their often fickle commitment to civil rights). This contrast between uncompromising segregationists and compro-

¹¹² Bree Newsome (@BreeNewsome), TWITTER (June 1, 2021, 8:53 AM), <https://twitter.com/BreeNewsome/status/1399891938640343040?s=20> [<https://perma.cc/S2BN-CY4J>].

¹¹³ Newsome's tweet tracks a longstanding critique that white liberals are more invested in white reconciliation than protecting the basic rights of communities of color. Martin Luther King, Jr. offered similar sentiment in his 1963 Letter from Birmingham Jail:

First, I must confess that over the past few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in his stride toward freedom is not the White Citizen's Council-er or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says: "I agree with you in the goal you seek, but I cannot agree with your methods of direct action"; who paternalistically believes he can set the timetable for another man's freedom; who lives by a mythical concept of time and who constantly advises the Negro to wait for a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

Martin Luther King Jr., *Letter from a Birmingham Jail*, AFRICAN STUDIES CENTER, UNIV. OF PENN. (Apr. 16, 1962) https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [<https://perma.cc/YPJ8-3JAP>].

¹¹⁴ See Hakeem Jefferson & Victor Ray, *White Backlash Is a Type of Racial Reckoning, Too*, FIVETHIRTYEIGHT (Jan. 6, 2022), <https://fivethirtyeight.com/features/white-backlash-is-a-type-of-racial-reckoning-too/> [<https://perma.cc/RJ59-H8XC>] ("And the racial reckoning of this moment — one characterized by white backlash to a perceived loss of power and status — seems poised to be much more consequential.").

ming integrationists embodies the first source of affirmative action ambivalence: commitment gaps.¹¹⁵

Taking elite universities as the baseline, commitment gaps manifest in two directions. To one side, elite universities value affirmative action less than other stakeholders who are often sidelined from litigation.¹¹⁶ To the other side, elite universities value affirmative action less than right-wing actors oppose it.¹¹⁷ To explore this latter gap, I now juxtapose *segregationist* universities' commitment to segregation with *integrationist* universities' commitment to integration.

1. *Uncompromising Segregationists*

In this Article, I attach the modifier *segregationist* to historically white universities that engaged in *de jure* racial segregation before *Brown* and resisted integration after *Brown*.¹¹⁸ Desegregation resistance was swift and enduring.¹¹⁹ The Southern Manifesto, which 101 of 128 Southern Congressmen signed after the Supreme Court outlawed racial segregation in public schools, embodies this commitment.¹²⁰ The Manifesto's signatories decried *Brown* as "a clear judicial abuse of power" and encouraged states to resist its mandate.¹²¹ Although subject to varying interpretations, the Manifesto represented a unified front against the promise and potential of a post-

¹¹⁵ For some readers, this dynamic will evoke Derrick Bell's theory of interest convergence. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹¹⁶ See Memorandum of Law in Support of Motion to Intervene at 12, *Gratz v. Bollinger*, (No. 97-75231) 1998 WL 35167805 (E.D. Mich. 1998) ("While the University's continued existence or prosperity would not be jeopardized by a ruling for Plaintiffs in this case, Applicants face a serious risk of being excluded from educational opportunity at the University."); *id.* ("Applicants' interest, by contrast, is not in defending any particular admissions program implemented by the University, but rather in preserving access for African-American and Latino students and in maintaining a racially and ethnically diverse student body.").

¹¹⁷ The individuals and entities that fund anti-affirmative action litigation have also underwritten political and legal efforts to roll back basic civil rights gains across sectors of American life. See Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard.*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> [<https://perma.cc/UK9Q-7AUY>].

¹¹⁸ More broadly, the term *segregationist*—as I use it herein—could apply to any individual or entity that opposes measures that would promote racial integration and inclusion within a given institution, community, or society.

¹¹⁹ Derrick A. Bell, Jr., *Waiting on the Promise of Brown*, 39 L. & CONTEMP. PROBS. 346, 372 (1975). To a meaningful degree, this resistance never ended. See Latoya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397 (2019).

¹²⁰ For a detailed review of the Southern Manifesto, see Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1071 (2014) ("The true meaning of the Manifesto was to make defiance of the Supreme Court and the Constitution socially acceptable in the South—to give resistance to the law the approval of the Southern Establishment.").

¹²¹ *Southern Manifesto on Integration*, PBS (Mar. 12, 1956), https://www.thirteen.org/wnet/supremecourt/rights/sources_document2.html [<https://perma.cc/D44Y-7JPM>].

Apartheid America.¹²² As Professor Justin Driver explains, “drafters of the Manifesto aimed to preserve the prevailing racial order, which at bottom was animated by an ideology that the Supreme Court has accurately labeled ‘White Supremacy,’ the bedrock belief that whites are better than blacks.”¹²³

The Manifesto’s defiant spirit foreshadowed decades of desegregation defiance across the country. Senator Harry Byrd, a Virginia Senator and staunch segregationist, employed the moniker “Massive Resistance” to capture the segregationist resolve following *Brown*.¹²⁴

North Carolina’s efforts to evade meaningful integration is instructive.¹²⁵ The State’s political leaders, including those within the UNC System, engaged in a strategy of calculated “moderation.”¹²⁶ Unlike Southern states that openly defied federal desegregation orders, North Carolina’s white elite privileged token representation and moderated its rhetoric.¹²⁷ Even pre-*Brown*, the legislature had opened an all-Black law school so that it could continue to exclude Black students from its flagship university.¹²⁸

¹²² See Driver, *supra* note 120, at 1079 (“In the end, the bid for regional unity proved remarkably successful, as the overwhelming majority of the South’s congressional delegation signed the Manifesto.”).

¹²³ *Id.*

¹²⁴ See James Hershman, *Massive Resistance*, ENCYC. VA. (Jul. 18, 2022), <https://encyclopediavirginia.org/entries/massive-resistance/> [<https://perma.cc/2W8U-E62N>]; *Byrd Calls for ‘Massive’ Resistance to Integration*, NEWPORT NEWS DAILY PRESS (Feb. 26, 1956) (quoting Harry Byrd) (“If we can organize the Southern States for massive resistance to this order, I think that in time the rest of the country will realize that racial integration is not going to happen in the South.”).

¹²⁵ For a more comprehensive overview of UNC’s desegregation resistance, see Feingold, *supra* note 15, at III.A.1.

¹²⁶ See Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 98 (1994) (“[T]he concept of ‘moderation’ in the post-Brown South, particularly in North Carolina, was a malleable concept, skillfully used to deflect widespread pupil integration. Resistance to Brown was far more spectacular in the defiant southern states such as Virginia and Louisiana, but equally effective in states such as North Carolina that understood the value of tokenism and appeals to moderation.”).

¹²⁷ See Braxton Craven, *Legal and Moral Aspects of the Lunch Counter Protests*, CHAPEL HILL WKLY., Apr. 28, 1960, at 1B (“The choice is not between segregation and integration; it is between some integration and total integration. . . . [If we resist all integration], it is a foregone conclusion that the winner will be total integration, or that the schools will be closed. . . . Token integration . . . will save the state and save the schools. . . . This is moderation.”).

¹²⁸ Donna L. Nixon, *The Integration of UNC-Chapel Hill – Law School First*, 97 N.C. L. REV. 1741, 1756–57 (2019) (“The unaccredited North Carolina College School of Law was the only institution open to African Americans for enrollment. It was specifically created by the state in 1939 to avoid integrating Carolina Law, the state’s flagship university, and the only public law school at the time. The North Carolina legislature acted swiftly to establish the North Carolina College School of Law, situated approximately eleven miles from UNC-Chapel Hill, after the United States Supreme Court decided *Missouri ex rel. Gaines v. Canada*, a 1938 case against the University of Missouri School of Law”); Irving Joyner, *Pimping Brown v. Board of Education: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160, 169 (2013) (“Legislators established the law school to protect the University of North Carolina Law School from a *Missouri ex rel. Gaines* inspired lawsuit by the NAACP on the grounds that the state did not have a law school African-Americans could attend.”).

Moderation proved an effective strategy.¹²⁹ As late as 1969, fifteen years after *Brown* and five years after Congress passed the Civil Rights Act of 1964,¹³⁰ UNC remained effectively an all-white institution.¹³¹ Through the entire 1970s, UNC was embroiled in federal litigation for failing to remedy its history of *de jure* segregation.¹³² That litigation continued until 1981, when the university entered into a favorable settlement with a sympathetic Reagan administration.¹³³ The NAACP Legal Defense Fund, which played a leading role in the litigation, challenged the consent decree as insufficient to realize meaningful desegregation.¹³⁴ David S. Tatel, who led the federal agency that pushed for desegregation during the Carter Administration, offered a similar critique: “This settlement doesn’t read like a desegregation plan. It reads like a joint U.S.-North Carolina defense of everything the system did.”¹³⁵

Some of the most entrenched desegregation resistance occurred outside of higher education. As with recent campaigns targeting antiracism and Critical Race Theory in K-12 settings, backlash to integration often occurred in primary and secondary schools. From the Deep South to the far North, Black students and other children of color often required armed escort to navigate the harassment, intimidation, and violence they faced when integrating all-white schools.¹³⁶ Rarely did such mistreatment cease at the schoolhouse

¹²⁹ See Douglas, *supra* note 126, at 155.

¹³⁰ Title VI of the Civil Rights Act of 1964 made it unlawful for entities receiving federal funding to engage in racial discrimination. 42 U.S.C. § 2000d (2012) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

¹³¹ See Nicholas Graham, *Historic African American Enrollment at UNC*, UNC LIBR. (Apr. 21, 2016), <https://blogs.lib.unc.edu/hill/2016/04/21/historic-african-american-enrollment-at-unc/> [<https://perma.cc/QLK2-PAR4>] (reporting that in the 1969-70 academic year, 148 undergraduate Black students were enrolled at UNC Chapel Hill, comprising 1.5% of student body).

¹³² In 1969, the Nixon administration responded by naming North Carolina among ten states ordered to develop desegregation plans—an affirmative obligation under federal law. See History Department of N.C. State Univ., *Fluctuating Commitment*, N.C. STATE UNIV.: THE STATE OF HISTORY, <https://soh.omeka.chass.ncsu.edu/exhibits/show/colorline-hew/hewcommitment> [<https://perma.cc/46WB-LY3R>].

¹³³ See Charles R. Babcock, *U.S. Accepted Desegregation Plan Once Rejected for N.C. Colleges*, WASH. POST (July 11, 1981), <https://www.washingtonpost.com/archive/politics/1981/07/11/us-accepted-desegregation-plan-once-rejected-for-nc-colleges/3e4c542b-40b8-405f-8cc9-a46952035b0f/> [<https://perma.cc/W2N9-VW9W>].

¹³⁴ See David W. Bishop, *The Consent Decree Between the University of North Carolina System and the U.S. Department of Education, 1981–82*, 52 J. NEGRO EDUC. 350, 358–60 (1983).

¹³⁵ Babcock, *supra* note 133.

¹³⁶ In 1967, the US Commission on Civil Rights observed that “violence against Negroes continues to be a deterrent to school desegregation.” *Resistance to School Desegregation*, EQUAL JUST. INST., (Mar. 1, 2014), <https://ejl.org/news/history-racial-injustice-resistance-to-school-desegregation/> [<https://perma.cc/KN9J-MULS>]; see also Mamie Hassell, *The Clinton 12: The Integration Story of Tennessee’s Public School*, TENN. STATE MUSEUM (July 28, 2020), https://tnmuseum.org/junior-curators/posts/the-clinton-12-the-integration-story-of-tennessees-public-schools?locale=EN_us [<https://perma.cc/83RL-JZ8B>] (describing the “[a]ngry mobs

door.¹³⁷ The anti-Black backlash that overtook Mansfield, Texas, a small farming town of 1,500 residents, captures this broader phenomenon:

When the school board of Mansfield, Texas, a farming town of 1500 people, admitted 12 Black students to all-white Mansfield High School, white residents took to the streets in protest. On August 30, 1956, the first day of school, mobs of white pro-segregationists patrolled the streets with guns and other weapons to prevent Black children from registering.

The mob hung an African American effigy at the top of the school's flagpole and set it on fire. Attached to each pant leg was a sign. One read, "This Negro tried to enter a white school. This would be a terrible way to die," and the other read, "Stay away, n*ggers."

A second effigy was hung on the front of the school building. Soon afterward, the Mansfield School Board voted to "exhaust all legal remedies to delay segregation."

In December 1956, the United States Supreme Court ordered the Mansfield school district to integrate immediately, but Mansfield public schools did not officially desegregate until 1965.¹³⁸

This brief account of desegregation resistance is far from comprehensive.¹³⁹ Beyond offering a limited historical picture, it excludes the ever-evolving anti-integration tactics that persist in 2022.¹⁴⁰ Still, the preceding examples highlight a well-documented legacy of violence, armed resistance and other extra-judicial efforts to maintain systems of racial exclusion and subordination.¹⁴¹ I invoke this history, in part, because it directly implicates

and members of the Ku Klux Klan" who protested the integration of Clinton, Tennessee's high school in 1956).

¹³⁷ See Bell, *supra* note 119, at 372 ("The violent response of the white Bostonians was indefensible, but predictable, given their conviction that black students will deteriorate already inferior schools and their knowledge that the well-to-do suburbs are exempt from the problems they face.").

¹³⁸ See *Resistance to School Desegregation*, *supra* note 136.

¹³⁹ For a more comprehensive review of the anti-integration campaign that became known as Massive Resistance, see *Massive Resistance, Segregation in America*, EQUAL JUST. INST., <https://segregationinamerica.eji.org/report/massive-resistance.html> [<https://perma.cc/HAQ4-6SQ6>].

¹⁴⁰ Since the mid-twentieth century, segregationist efforts have evolved; they have not stopped. The endless string of litigation challenging affirmative action and other policies designed to promote gender and racial inclusion comprises one strand of these efforts. See Jody Godoy, *Activist behind Harvard race case takes aim at Calif. Board laws*, REUTERS (JULY 13, 2021), <https://www.reuters.com/legal/legalindustry/activist-behind-harvard-race-case-takes-aim-calif-board-laws-2021-07-13/> [<https://perma.cc/B9MN-CCQH>]. A separate strand is embodied by the resurgent efforts to maintain racially exclusive K-12 schools. See generally Erika Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y. 233 (2019); LaToya Baldwin-Clark, *Education as Property*, 105 VA. L. REV. 391 (2019).

¹⁴¹ Desegregation resistance remains a reality across the country. As a contemporary analogy, anti-antiracist backlash appears to have occurred in school districts experiencing above-

UNC—which is now defending its race-conscious admissions policy before the Supreme Court.¹⁴² But I also engage this history to juxtapose (a) the lengths segregationist universities went to maintain racial exclusion against (b) the often lukewarm efforts integrationist universities take to safeguard racial inclusion. To concretize this comparison, I now turn to the University of California, an *integrationist*¹⁴³ university with longstanding ambivalence toward affirmative action.

2. *Compromising Integrationists*

In many respects, the University of California (“UC”) offers a paradigmatic example of the *integrationist* university. For decades, UC leaders have championed racial diversity and inclusion.¹⁴⁴ Even if earnest, UC’s commitment to racial inclusion has never matched segregationists’ commitments to racial exclusion. To flesh out this story, I highlight two defining moments in UC history: (1) the *Bakke* litigation in the 1970s and (2) the passage of Regents Special Policy 1 (“SP-1”) and Proposition 209 (“Prop. 209”) in the 1990s.

(i) *The Bakke Litigation*

Regents of California v. Bakke was the Supreme Court’s first substantive engagement with affirmative action. Many law professors and students are familiar with *Bakke*’s basic facts and holding. Few are familiar with the details.

average levels of demographic shift. See Tyler Kingkade & Nigel Chiwaya, *Schools facing critical race theory battles diversifying rapidly, analysis finds*, NBC NEWS (Sept. 13, 2021), <https://www.nbcnews.com/news/us-news/schools-facing-critical-race-theory-battles-are-diversifying-rapidly-analysis-n1278834> [<https://perma.cc/7S7T-88MA>] (“An NBC News analysis of 33 cities and counties where school districts have faced rancor over equity initiatives this year in at least three recent school board meetings finds that each has become less white over the last 25 years, reflecting a national trend.”).

¹⁴² For decades after *Brown*, UNC resisted meaningful desegregation. Now UNC employs a race-conscious admissions policy. UNC is not the same university it was in 1955, but neither has it overcome its legacy of racial exclusion. Given this dynamic, UNC might be characterized as a university animated by segregationist and integrationist impulses.

¹⁴³ I use the modifier *integrationist* for historically white universities that voluntarily adopted race-conscious admissions policies to promote racial inclusion on their campus.

¹⁴⁴ UC is a massive institution spanning nine academic campuses. See *Campuses & Locations*, UNIV. CAL., (last visited Oct. 1, 2022) <https://www.universityofcalifornia.edu/uc-system/parts-of-uc> [<https://perma.cc/W244-LYP4>]. Treating UC as a single entity obscures and flattens this complexity, which includes competing viewpoints about any policy or proposal. Where possible, I disentangle distinct institutional interests and actors to tell a more nuanced story. Even recognizing those limitations, the diversity of perspectives in most large universities is likely to mute institutional support for policies often viewed as “political”—including affirmative action. See Memorandum of Law in Support of Motion to Intervene at 6, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998), rev’d sub nom *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (“[T]he University’s vigor in defending its admissions programs might be affected by real differences among faculty, members of the Board of Regents, and other members of the University community regarding the desirability of race-conscious admissions.”).

In 1968, UC Davis opened its Medical School (“Davis”) and welcomed an entering class of fifty students. Davis admitted forty-seven white students and three Asian students in its inaugural class.¹⁴⁵ That class included zero Black, Latinx, or American Indian students. By 1971, Davis had enlarged its class to one hundred students and “devised a special admissions program to increase the representation of ‘disadvantaged’ students.”¹⁴⁶ This Task Force program involved a parallel admissions track for “economically and/or educationally disadvantaged” students.¹⁴⁷ Through this separate track, which was open to any disadvantaged student, Davis admitted sixty-three students of color between 1971 and 1974; only forty-four students of color (thirty-seven of whom were Asian American) gained entry via the standard track during those same years.¹⁴⁸

Allan Bakke applied to Davis in 1973 and 1974. Davis rejected him both years.¹⁴⁹ After the second rejection, Bakke—who is white—sued Davis.¹⁵⁰ Among other claims, Bakke alleged that Davis’s Task Force program violated his rights under the Fourteenth Amendment’s Equal Protection Clause.¹⁵¹ In 1978, the U.S. Supreme Court found for Bakke and struck down Davis’s Task Force program.¹⁵²

For purposes of this Article, the Supreme Court’s holding is not the relevant part of this story. I am more interested in Davis’s less-than zealous defense of its own admissions policy—particularly during the initial state court proceedings.¹⁵³

For much of the litigation, Davis appeared more interested in obtaining legal clarity concerning the constitutional bounds of race-conscious admis-

¹⁴⁵ For a critical analysis that examines how the racialized positionality of Asian Americans shaped aspects of the *Bakke* litigation, see generally Claire Jean Kim, *Are Asians the New Blacks?: Affirmative Action, Anti-Blackness, and the ‘Sociometry’ of Race*, 15 DuBois Rev. 217 (2018).

¹⁴⁶ *Bakke*, 438 U.S. at 272. For a more detailed summary of the special admissions program, including questions that appeared on Davis’s application form, see *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 38–41 (1976), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978).

¹⁴⁷ See *id.* at 275.

¹⁴⁸ See *Bakke*, 438 U.S. at 275–76 (“From the year of the increase in class size—1971—through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans, and 37 Asians, for a total of 44 minority students.”).

¹⁴⁹ See DREYFUSS & LAWRENCE III, *supra* note 66, at 16–30 (1979) (outlining Bakke’s medical school application history).

¹⁵⁰ See *id.*

¹⁵¹ See *Bakke*, 438 U.S. at 277–78 (“[Bakke] alleged that the Medical School’s special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, . . . the California Constitution, and . . . Title VI of the Civil Rights Act of 1964.”).

¹⁵² See *id.* at 319–20.

¹⁵³ I am not arguing that UC broadly, and the Davis Medical School more narrowly, did not value racial inclusion. My argument is that Davis valued racial inclusion less than segregationist institutions valued racial exclusion.

sions than in preserving its admissions scheme.¹⁵⁴ The desire for judicial guidance makes sense. In the mid-1970s, most affirmative action measures—including in university admissions—were recent creations. Accordingly, the Supreme Court had yet to identify the legal standard for claims targeting remedial race-conscious programs.¹⁵⁵ But one can (a) desire legal clarity and (b) dedicate resources to safeguard a key policy and influence an undefined area of law.

Davis showed more interest in the former than the latter—particularly during the state court proceedings.¹⁵⁶ On this point, observers criticized Davis for failing to develop a robust factual record that laid out its entire admission process and documented the Task Force program's multiple benefits.¹⁵⁷ Davis introduced no evidence about “past and present racial discrimination in the California public school system.”¹⁵⁸ Nor did Davis marshal facts or theories to advance the proposition that “the Davis medical school itself had

¹⁵⁴ See DREYFUSS & LAWRENCE III, *supra* note 66, at 92 (quoting Donald Reidhaar, then Chief UC System Legal Counsel, as stating: “It is far more important for the University to obtain the most authoritative decision possible of the legality of its admissions process than to argue over whether Mr. Bakke would or would not have been admitted in the absence of the special admissions program.”).

¹⁵⁵ Here, I use “remedial” to broadly capture race-conscious admissions policies designed to increase the representation of students from historically excluded racial groups. Prior to *Bakke*, the Supreme Court had confronted the constitutionality of race-conscious admissions on only one other occasion. See *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974). That case produced no substantive law because the Supreme Court vacated and remanded on mootness grounds. See *id.* at 319–20 (“Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.”).

¹⁵⁶ Other university defendants have also privileged efficiency over investing resources necessary to mount a comprehensive affirmative action defense. See, e.g., *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1269–70 (11th Cir. 2001) (“Intervenors also contend that additional time should have been afforded so that they could have developed a record supporting a remedial justification for UGA’s consideration of race. As Intervenors see it, whether UGA has eliminated the vestiges of past discrimination is still an open question. But none of the parties—or for that matter the federal government—accepts that claim. Moreover, the issue raised by Intervenors would have greatly expanded the scope and burden of the case, and quite probably have necessitated further delays beyond those ostensibly sought by the Intervenors. Especially given the significance of the lawsuit, and critical importance to UGA and its future freshman applicants of resolving this matter as soon as possible, the district court had ample grounds for declining to modify or halt proceedings.”) (emphasis added).

¹⁵⁷ The thin trial court record compromised Davis’s position before the Supreme Court. See *Bakke*, 438 U.S. at 310 (Powell, J.) (“Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner’s special admissions program is either needed or geared to promote that goal.”) (emphasis added).

¹⁵⁸ Cf. Bell, *supra* note 17, at 6; Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 955 (2001) (“For example, when *Grutter v. Bollinger* . . . was first filed, many people encouraged the University to admit and carefully document its own historical and contemporary discrimination against African-Americans and other minority students.”).

discriminated against minority applicants” when it opened in 1968.¹⁵⁹ In fact, Davis forewent a trial altogether—thereby limiting the record to evidence presented during a single pre-trial hearing.¹⁶⁰

These factual deficiencies denied the court and the public a comprehensive admissions story. Lacking, for example, was evidence that could have illustrated how the Task Force program countered unearned race (and class) advantages that white applicants enjoyed in Davis’s standard process.¹⁶¹ Davis did not introduce evidence regarding racial biases embedded within test scores.¹⁶² Nor did Davis introduce evidence to support multiple justifications it later offered to the Supreme Court.¹⁶³ Rather than develop the facts and theories that could have grounded the constitutional and moral case for its own policy, the university privileged a speedy resolution—even though that approach compromised early efforts to integrate its own Medical School.¹⁶⁴

Throughout the trial court proceedings, Davis also failed to counter Bakke’s misleading characterization of the Task Force program.¹⁶⁵ From his initial complaint, Bakke argued that Davis employed a “quota of 16 percent” and that “under this admission program racial majority and minority applicants went through separate segregated admission procedures with sep-

¹⁵⁹ Cf. Bell, *supra* note 17, at 6. These are among the arguments third-party stakeholders wanted Davis to advance. See *id.* at 6–7 (“If the case had been remanded for a full trial, impressive evidence would have been introduced indicated that the Medical College Admission Test (MCAT) is not a valid indicator of minority performance in medical school, and that Davis therefore was justified in attempting to compensate for the test’s antimorality bias.”).

¹⁶⁰ See DREYFUSS & LAWRENCE III, *supra* note 66, at 59.

¹⁶¹ See Bell, *supra* note 17, at 6 n.9 (citing cases and noting that “[f]ederal and state courts have found racial discrimination in California’s public school system”).

¹⁶² See *Bakke*, 438 U.S. at 296 n.36 (Powell, J.) (“Not one word in the record supports this conclusion [that Black applicants would have better test scores but for societal discrimination].”).

¹⁶³ See *id.* at 310 (“Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is *virtually no evidence in the record* indicating that petitioner’s special admissions program is either needed or geared to promote that goal.” (emphasis added)).

¹⁶⁴ See DREYFUSS & LAWRENCE III, *supra* note 66, at 32 (“The lack of a trial in *Bakke* remains a major criticism of the handling of the case by attorneys for the [UC]. In addition, a number of important omissions and concessions by attorneys for the University have muddied the defense all the way to the [Supreme Court]. . . . The facts indicate that the university lawyers were hampered not so much by a lack of lawyering skills as by the competing concerns of their client and an ambivalence about issues central to the case.”); *id.* at 66 (“It was not difficult to conclude that a group of white male attorneys would see the *Bakke* case as a simple matter of law and an opportunity to settle once and for all a practice that was generating considerable public resistance as the mood of the nation changed . . .”).

¹⁶⁵ Before the trial court, UC characterized the Task Force program as a “preference.” See DREYFUSS & LAWRENCE III, *supra* note 66, at 51 (quoting UC’s counsel: “The issue is not whether preference should be allowed; they are basic to the admissions process. The question is whether the Constitution is to deny members of minority groups from disadvantaged backgrounds the kind of preference which is routinely granted to a myriad other individuals and groups.”).

arate standards for admissions.”¹⁶⁶ Bakke further alleged that this process “resulted in the admission of minority applicants less qualified than plaintiff” and other rejected applicants.¹⁶⁷ This framing, which conjured a rigid and racially exclusionary process, mischaracterized Davis’s actual practices.¹⁶⁸

In a 1978 review of the case, journalist Joel Dreyfuss and Professor Charles Lawrence lamented that “[e]arly in the case the university virtually conceded that a quota was in operation.”¹⁶⁹ This concession reified incomplete and inaccurate information that Davis had provided about its own admissions process. The university indicated that in the two years Bakke applied, the Medical School had admitted sixteen students through the Task Force program.¹⁷⁰ Contrary to this assertion, admissions records revealed that in 1974, Davis admitted only fifteen Task Force students. Dreyfuss and Lawrence point out that even if minor, this discrepancy contradicted the characterization of a rigid quota. Davis’s decision to admit only fifteen Task Force students in 1974 also suggests that the Medical School held all students to high academic standards that ensured every admit was qualified to attend.¹⁷¹

Davis also omitted facts about the Task Force program and its standard admissions process. This included testimony that the Task Force had considered (but did not admit) white applicants and had rejected middle-class applicants of color.¹⁷² Moreover, Davis never disclosed that its dean often intervened on behalf of well-connected, but academically unimpressive,

¹⁶⁶ See *id.* at 37–38. In his brief before the California Supreme Court, Bakke characterized Davis’s dual admissions program as a “preferential racial quota” that unlawfully discriminated against white applicants. See Brief for Respondent, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187993, at *27–28 (“There are 100 places in the first year class at the Davis Medical School. Under normal circumstances, Allan Bakke would be eligible to compete for all of those places. In this case, however, petitioner has formally adopted a preferential racial quota and has set aside 16 of the places for members of designated racial and ethnic minority groups. In so doing, petitioner has prevented Bakke, solely because of his race, from competing for the 16 quota places. Petitioner does not dispute this fact and, under the burden of proof rule announced by the California Supreme Court, concedes that it cannot refute Bakke’s claim that he would have been admitted to the medical school had there been no quota.”).

¹⁶⁷ See Complaint for Mandatory Injunctive & Declaratory Relief at 2–3, *Bakke v. Regents of the Univ. of Cal.*, (Sup. Ct. Cal. 1974) (No. 31287).

¹⁶⁸ See DREYFUSS & LAWRENCE III, *supra* note 66, at 41–43.

¹⁶⁹ See *id.* at 41.

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² The controlling criteria was student disadvantage, not student race. See *id.* at 41–42 (citing testimony that “white applicants were interviewed . . . [but] were not admitted because they failed to meet the economic and social qualifications applied to minority applicants or because they indicated no plans to practice in underserved or ghetto areas”). These details arose in the state court proceedings, but the California Supreme Court appeared to discredit those facts. See *Bakke v. Regents of Univ. of California*, 18 Cal. 3d 34, 44 (1976) (“The trial court found that although the special admission program purports to be open to ‘educationally or economically disadvantaged’ students, and although in 1973 and 1974 some applications for the program were received from members of the white race, only minority students had been admitted under the program since its inception, and members of the white race were barred from participation.”), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978).

white applicants.¹⁷³ As Dreyfuss and Lawrence explain, this behavior reflected an “extremely subjective and arbitrary admissions” process that benefitted otherwise unqualified white and wealthy applicants.

In short, Davis omitted evidence that could have countered Bakke’s claim that a rigid quota benefitted unqualified students of color to the detriment of “innocent” white applicants.¹⁷⁴ More zealous advocacy might not have altered the ultimate outcome. But a more developed record would have empowered Davis and other stakeholders to tell a more comprehensive and compelling affirmative action story.¹⁷⁵

Beyond omitting facts, Davis conceded legal arguments. To support his claim, Bakke argued that he would have been admitted but for the Task Force program. Davis initially opposed this claim. But in its motion for re-hearing before the California Supreme Court, the university stated that it was unable to disprove Bakke’s claim.¹⁷⁶ Davis did so even when available facts undercut Bakke’s claim. This included that twelve Medical Schools had rejected Bakke and that age discrimination might have motivated these decisions.¹⁷⁷ To onlooking stakeholders, the failure to challenge Bakke’s causal claim reaffirmed that Davis was more interested in obtaining legal clarity than defending its right to employ a modest affirmative action policy.¹⁷⁸

Concerns intensified when Davis, after losing before the California Supreme Court, expressed a desire to appeal to the United States Supreme

¹⁷³ See *id.* at 42 (referencing reports that the dean had admitted as many as five such applicants each year).

¹⁷⁴ After the trial court proceedings, UC took a more aggressive stand against Bakke’s core framing. But the damage had been done; the narrative of a rigid racial quota dominated judicial and public discourse. See Bakke, 438 U.S. at 288 (plurality opinion) (“[T]he parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a ‘goal’ of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.”).

¹⁷⁵ Justice Powell, drawing on the California Supreme Court, adopted Bakke’s characterization of racially segregated admissions tracks. See Bakke, 438 U.S. 288 n.26 (plurality opinion) (“The court below found—and petitioner does not deny—that white applicants could not compete for the 16 places reserved solely for the special admissions program. Both courts below characterized this as a ‘quota’ system.”); see *id.* at 289 (plurality opinion) (“To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.”).

¹⁷⁶ See DREYFUSS & LAWRENCE III, *supra* note 66, at 91; see also Bakke v. Regents of Univ. of Cal. 553 P.2d 1152, 1172 (Cal. 1976) (“In these circumstances, we would ordinarily remand . . . for the purpose of determining . . . whether Bakke would have been admitted . . . absent the special admission program. However, on appeal the University has conceded that it cannot meet the burden of proving that the special admission program did not result in Bakke’s exclusion.”), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978).

¹⁷⁷ See DREYFUSS & LAWRENCE III, *supra* note 66, at 5 (“[Bakke] had applied to twelve medical schools over two years, and all had turned him down. Two had been honest enough to tell him why: age.”).

¹⁷⁸ See *id.* at 91 (“Once again the university’s attorneys made a move that fueled controversy surrounding the defense.”).

Court.¹⁷⁹ The NAACP moved for a new trial so that the “real parties in interest” could cure a “wholly inadequate and almost non-existent” record.¹⁸⁰ The National Conference of Black Lawyers opposed certiorari on the grounds that Davis’s inadequate representation would deprive the Supreme Court of a “fully developed record in a vigorously litigated case.”¹⁸¹ The Supreme Court took the case. And affirming the stakeholders’ concerns, held that the Task Force program violated Bakke’s constitutional rights.¹⁸²

(ii) *SP-1 & Proposition 209*

The next moment brings us to the mid-1990s,¹⁸³ when UC Regent Ward Connerly spearheaded the passage of two anti-affirmative action measures in California: SP-1 and Proposition 209 (“Prop. 209”). Among other goals, Connerly and his allies wanted to eliminate the existing race-conscious practices “at many . . . UC campuses that had enabled the racial integration of even flagship schools like UC-Berkeley and UCLA.”¹⁸⁴ When SP-1 and Prop. 209 passed, UC’s leadership confronted a critical question: How to respond? UC had shown a commitment to racial inclusion since at least the

¹⁷⁹ See Bell, *supra* note 17, at 5 n.5 (“[T]he Regents took the *Bakke* case to the Supreme Court over the vehement protests of virtually every minority rights group in the country. Those groups, after reviewing the unfavorable lower court *Bakke* decisions, which were based on the inadequate record developed by the Regents, concluded that Supreme Court review might prove an invitation to disaster.”).

¹⁸⁰ Petition of NAACP for Leave to File as Amicus Curiae on Petition for Rehearing and Brief, *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34 (1976); see also Petition of NAACP for Leave to File as Amicus Curiae on Petition for Rehearing at 6, *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976) (arguing that remand was necessary so third-party stakeholders could “present evidence on a full range of issues”); *id.* at 7 (“The real parties in interest in the instant case are Blacks, Mexican-Americans, Asians, Native Americans and other minority persons who will as a result of this decision be denied the opportunity to become doctors.”). The California Supreme Court denied the motion. See Joanne Villanueva, *The Power of Procedure: The Critical Role of Minority Intervention in the Wake of Ricci v. DeStefano*, 99 CALIF. L. REV. 1083, 1090 n. 39, 1115 (2011).

¹⁸¹ Brief for The National Conference of Black Lawyers as Amicus Curiae Supporting Petitioners, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), at vii–viii, <http://blackfreedom.proquest.com/wp-content/uploads/2020/09/bakke9.pdf> [<https://perma.cc/PU67-A74W>] (“However, we also have an interest in assuring that so profound a pronouncement not be obscured, diluted or tainted by the infirmities of a poorly developed record and a nonadversary case.”).

¹⁸² See *Bakke*, 438 U.S. at 271.

¹⁸³ This article provides an inexhaustive history of UC’s affirmative action ambivalence. Other important episodes include moments when UC leadership misattributed race-conscious admissions as a source of anti-Asian biases. See Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 271 (2022) (“In response to allegations of [anti-Asian] discrimination, UC Berkeley framed admissions as a zero-sum game. It contended that admission of underrepresented minority groups was responsible for the lower admissions rate of Asian Americans.”). See generally DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN PACIFIC AMERICANS AND RACIAL POLITICS* (1998).

¹⁸⁴ See Harris & Narayan, *supra* note 20, at 1222.

1960s.¹⁸⁵ But unlike the segregationists who viewed *Brown* and Title VI (and their accompanying mandates to integrate) as existential threats, little suggests the attacks on affirmative action triggered parallel concerns for UC.

On July 20, 1995, the UC Regents adopted SP-1, a policy designed to eliminate race-based affirmative action across the UC system.¹⁸⁶ SP-1's proponents linked the measure to Republican Governor Pete Wilson's anti-affirmative action crusade—an effort that appeared designed to boost his electoral prospects.¹⁸⁷ Fueled by SP-1's passage, Connerly organized a coalition of anti-affirmative action forces to back Prop. 209, a state ballot measure.¹⁸⁸ Prop. 209 prohibits the state from “discriminat[ing] against” or “granting preferential treatment” to anyone on the basis of race, sex, color, ethnicity, or national origin in employment, education, and contracting.¹⁸⁹ The words “affirmative action” are absent from Prop. 209's text. But Connerly was not shy about his goal: eliminate the formal consideration of race across sectors of public life in California.¹⁹⁰ In 1996, California voters approved Prop. 209;¹⁹¹ its language is now codified in the California Constitution.¹⁹²

For present purposes, I am most interested in UC's reaction to SP-1 and Prop. 209. As with the university's approach to the *Bakke* litigation, UC exhibited a far-from-uncompromising commitment to affirmative action and racial inclusion writ large.

¹⁸⁵ See generally Jerome Karabel, *The Rise and Fall of Affirmative Action at the University of California*, 25 J. BLACKS IN HIGHER EDUC. 109 (1999) (outlining rise and fall of affirmative action programs at UC).

¹⁸⁶ SP-1 banned UC from “us[ing] race, religion, sex, color, ethnicity, or national origin as criteria for admission to the University or to any program of study.” The Regents of the University of California, Policy Ensuring Equal Treatment: Admissions (SP-1) (July 20, 1995) (rescinded May 16, 2001). SP-1 applied to UC admissions. The Regents adopted a related measure, SP-2, to eliminate the consideration of race in employment and contracting. See The Regents of the University of California, Policy Ensuring Equal Treatment: Employment and Contracting (SP-2) (July 20, 1995) (rescinded May 16, 2001).

¹⁸⁷ See The Regents of the University of California, Policy Ensuring Equal Treatment: Admissions (SP-1) (July 20, 1995) (rescinded May 16, 2001) (“Whereas, Governor Pete Wilson, on June 1, 1995, issued Executive Order W-124-95 to ‘End Preferential Treatment and to Promote Individual Opportunity Based on Merit.’”); Harris & Narayan, *supra* note 20, at 1236 (“Former Republican Governor Pete Wilson had been a moderate supporter of affirmative action as mayor of San Diego and during his first term in office as governor. However, his position took a turn as the primaries for the presidential election loomed in sight. He took the lead in the debate over SP-1 and SP-2 and strenuously lobbied regents who were uncertain or opposed to the measure.”).

¹⁸⁸ See *California Civil Rights Initiative*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/california-civil-rights-initiative> [<https://perma.cc/K7WP-YGL9>] (identifying coalitions that Connerly partnered with during Prop. 209 campaign).

¹⁸⁹ Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities (“Proposition 209”) (Nov. 1996) CAL. CONST., ART. I, § 31.

¹⁹⁰ See Marcia Barinaga, *Backlash Strikes at Affirmative Action Programs*, 271 SCIENCE 1908, 1908–09 (1996).

¹⁹¹ See California Secretary of State, Statement of the Vote (1996) <https://elections.cdn.sos.ca.gov/sov/1996-general/sov-complete.pdf> [<https://perma.cc/6E5W-SWE3>].

¹⁹² See CAL. CONST. art. I, § 31.

At the outset, internal fights over SP-1 and Prop. 209 exposed competing commitments to racial inclusion among UC's leadership. With respect to SP-1, the Regents clashed with UC's administrative leaders and academic senate—both of which endorsed race-conscious practices.¹⁹³ As for Prop. 209, numerous students, staff, faculty, and alumni protested Connerly's open assault on affirmative action.¹⁹⁴ Yet even as stakeholders across UC defended affirmative action, this support never coalesced into the unified institutional front that paralleled segregationist resistance to integration.¹⁹⁵

For present purposes, I put to the side whether UC leaders could have, or should have, engaged in civil disobedience or other extra-legal measures to resist anti-affirmative action efforts. Rather, I outline moderate steps that UC could have undertaken to protect affirmative action and promote racial integration on its campuses.¹⁹⁶ UC's failure to take even these steps highlights the segregationist-integrationist commitment gap.

To begin, UC could have legally challenged the force and effect of both measures. SP-1 was vulnerable to legal attack. The measure abrogated ad-

¹⁹³ See JOHN A. DOUGLAS, A BRIEF ON THE EVENTS LEADING TO SP1 3 (Feb. 28, 1997), https://senate.universityofcalifornia.edu/_files/reports/sp1rev.pdf [<https://perma.cc/9LVL-52S8>] (“[T]he Regental approval of SP1 came despite the formal opposition of both the Academic Senate and the administration.”). The UC Regents and their values are not static. The current Regents support the repeal of Proposition 209. See Press Release, UC Office of the President, UC Board of Regents Unanimously Endorses ACA 5, repeal of Prop. 209 (June 15, 2020), <https://www.universityofcalifornia.edu/press-room/uc-board-regents-endorses-aca-5-repeal-prop-209> [<https://perma.cc/94WP-Z2RN>]. Moreover, in 2001, the Regents rescinded SP-1. Amy Argonis, *Regents Rescind SP-1, SP-2: Chancellor, Students Applaud Decision*, UC DAVIS (May 25, 2001), <https://www.ucdavis.edu/news/regents-rescind-sp-1-sp-2-chancellor-students-applaud-decision> [<https://perma.cc/N52L-8PE3>].

¹⁹⁴ See *California Students Protest Prop. 209*, THE HARV. CRIMSON (Nov. 13, 1996), <https://www.thecrimson.com/article/1996/11/13/california-students-protest-prop-209-pstudents/> [<https://perma.cc/BX5R-SCJP>] (detailing that student protests at several UC campuses resulted in “more than 40 arrests”). Prop. 209 opponents continue to fight for race-conscious admissions. See Kaylene Carter, *Affirmative Action Ballot Measure Fails, But These Students are Still Fighting to Diversify Their Universities*, CAL MATTERS (Nov. 5, 2020), <https://calmatters.org/education/higher-education/college-beat-higher-education/2020/11/affirmative-action-ballot-measure-fails-but-these-students-are-still-fighting-to-diversify-their-universities/> [<https://perma.cc/EZ4N-2MJN>]; Brandon Yung, *Black Students at UC Berkeley Spearheaded Statewide Initiative to Restore Affirmative Action*, BERKELEYSIDE (July 9, 2020), <https://www.berkeleyside.org/2020/07/09/black-students-uc-berkeley-diversity-proposition-209-proposition-16-affirmative-action-california> [<https://perma.cc/6QD7-YVYE>].

¹⁹⁵ This dynamic continues to shape affirmative action advocacy. UNC offers a contemporary example. In the same moment that UNC defends its right to consider an applicant's race, North Carolina's Republican-dominated legislature is advancing bills modeled after Prop. 209. See Lynn Bonner, *NC Senate Leader wants to ban consideration of race in UNC admissions and government contracting*, THE PULSE (July 14, 2021), <https://pulse.ncpolicywatch.org/2021/07/14/nc-senate-leader-wants-to-ban-consideration-of-race-in-unc-admissions-and-government-contracting/#sthash.ZDs0OBIF.dpbs> [<https://perma.cc/6JAZ-ZHVX>].

¹⁹⁶ Lawrence III, *supra* note 158, at 968–69 (“Short of civil disobedience, what course can the University take to live out its moral obligation? I want to suggest that the legal constraints imposed by Proposition 209, the *Hopwood* decision, and other provisions prohibiting the use of race in university admissions may offer an opportunity to move closer to the radical vision of affirmative action, a vision that adopts the victim perspective and creatively shapes remedies that directly address remaining conditions of inequality.”).

missions authority formally vested within UC faculty.¹⁹⁷ And before adopting SP-1, the Regents employed a procedural process that lacked the level of deliberation common to, and arguably required of, UC's system of shared governance.¹⁹⁸ On either account, UC could have challenged SP-1 as legally defective.

It did not.¹⁹⁹ Instead, UC jettisoned racially-attentive practices across its campuses—including many that arguably exceeded the measures' scope.²⁰⁰ One explanation is that UC's leadership—including its campus counsel—internalized an unnecessarily broad interpretation of Prop. 209 and SP-1. This helps to explain why UC never argued that many of its then-existing race-conscious practices remained lawful notwithstanding SP-1 and Prop. 209.

At least three distinct theories support this argument. First, UC could have argued—as others have—that Prop. 209 applies to student selection but not outreach or retention.²⁰¹ Second, UC could have argued that its existing race-conscious practices complied with Prop. 209's precise mandates. Recall that Prop. 209 does not mention affirmative action.²⁰² Nor does Prop. 209

¹⁹⁷ See Harris & Narayan, *supra* note 20, at 1236 (“The Regents of the University of California, the governing body for the university system, delegates the power to make admissions decisions to the faculty of each campus department. Standing Orders of the Regents of the University of California, 105.2(a) (2001). Both the SP-1 and Proposition 209 directly undermined this delegation of authority”); DOUGLAS, *supra* note 193, at 1.

¹⁹⁸ See DOUGLAS, *supra* note 193, at 1 (“[T]he process of consultation leading to SP1 violated the historical pattern of shared governance in which the Regents, the faculty through the Academic Senate, the administration, and to a lesser extent, students, share in the responsibility of managing the University of California.”).

¹⁹⁹ After voters adopted Prop. 209, several individuals and groups challenged the ballot initiative in federal court. See Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 698 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (Aug. 21, 1997), *as amended* (Aug. 26, 1997). The trial court granted a preliminary injunction that the Ninth Circuit overturned. See *id.*

²⁰⁰ For example, UC eliminated race-conscious outreach efforts designed to increase the pool of applicants from historically excluded racial groups. See Kate Antonovics & Ben Backes, *Were Minority Students Discouraged from Applying to University of California Campuses after the Affirmative Action Ban*, 8 EDUC. FIN. AND POL'Y 208, 213 (2013) (“It is important to recognize that in an effort to minimize the effects of Prop 209 on minority enrollment, UC campuses increased minority outreach efforts. These efforts were widely viewed as ineffective, however, at least initially. Part of the reason for lack of effective programs was that in the immediate aftermath of Prop 209, there were concerns about whether race-specific outreach (as opposed to, for example, targeting low-income areas) was permitted after Prop 209.”).

²⁰¹ See Kim Bojórquez, *Affirmative Action Failed on California's Ballot—But Colleges Commit to Diversity Goals*, SACRAMENTO BEE, (Nov. 9, 2020), <https://www.sacbee.com/news/politics-government/capitol-alert/article246990537.html> [<https://perma.cc/JD5J-7M8L>] (quoting UCLA Law Professor Laura Gomez as stating that “Prop 209 says that we can't use racial preferences in admissions, but it doesn't say that we can't take race into account when it comes to scholarships or recruiting once they've been admitted . . . [b]ut the UC legal interpretation has actually not been that broad . . . Why can't we push that further?”).

²⁰² This omission was strategic. Prop. 209's proponents advertised the measure as a “Civil Rights Initiative.” See Jerome Karabel & Lawrence Wallack, *Proponents of Prop. 209 Misled California Voters*, CHRISTIAN SCIENCE MONITOR (Dec. 5, 1996), <https://www.csmonitor.com/1996/1205/120596.opin.opin.2.html> [<https://perma.cc/H4HV-GQDX>] (“Proposition 209's sponsors fought ferociously to keep the very words ‘affirmative action’ off the ballot.”).

expressly prohibit universities from considering an applicant’s race. Rather, Prop. 209 mandates that the “state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race.”²⁰³ By its own terms, Prop. 209 bans only those race-conscious practices that “discriminate” or “grant preferential treatment.”

Terms like “discrimination” and “preferential treatment” are not self-defining. UC could have argued that its race-conscious practices complied with Prop. 209 because they constituted neither discrimination nor preferential treatment. To substantiate this argument, UC could have detailed how its existing admissions process relied on “colorblind” admission considerations—including grades and standardized test scores—that artificially inflated the academic “merit” of wealthy white students.²⁰⁴ UC could have then defended race-consciousness as essential *antidiscrimination* that mitigates preferential treatment for students who enjoy the most inherited race and class advantage.²⁰⁵ Understood as such, race-conscious admissions are necessary to further Prop. 209’s plain language.

Scholars have advanced this point. Professor Kimberly West-Faulcon, for example, has highlighted how indeterminate terms like “preference” are “open to substantial and varying interpretation.” Accordingly:

[s]tate courts that interpret the antipreference provision of the state’s anti-affirmative action laws as an absolute ban on the use of racial classifications, are, in essence, equating the term preference with any race-conscious action. In contrast, a state court may conclude that prohibiting racial preferences “does not ban all government action that is cognizant of race.”²⁰⁶

This quote reinforces the observation that racial affirmative action does not necessarily result in “preferential treatment” for its beneficiaries. Such a characterization requires a baseline free from white racial advantages. If,

²⁰³ Prop. 209’s relevant text, now codified as Section 31 of Article I of the California Constitution includes:

- (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. . . .
- (e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

CAL. CONST. art. I, § 31.

²⁰⁴ See *supra* Section I.B.

²⁰⁵ See Feingold, *supra* note 15.

²⁰⁶ West-Faulcon, *supra* note 106, at 1152. Compare *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5 (Ct. App. 2001) (invalidating a state affirmative action statutory scheme applicable to the state lottery and the sale of government bonds based on equal protection concerns), with *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 72 P.3d 151, 164 (Wash. 2003) (“Given th[e] language [of the I-200 voters pamphlet], an average voter would have understood that I-200 does not ban all affirmative action programs, and would only prohibit the type of affirmative action we have described as ‘reverse discrimination’ or ‘stacked deck’ programs.”).

however, white students enjoy racial advantages in facially race-neutral selection processes, affirmative action functions as an antidote to “discrimination” and “preferential treatment”—not the source.

Professor Cheryl Harris bridged this insight to law school admissions:

The fact that Proposition 209 eliminated any official preferences based on race does not mean that racial preferences have been eradicated; they persist in the form of housing segregation, educational inequality, and access to societal resources from health care to employment. Arguably, they also persist in the selection of admissions processes that rely heavily on a gatekeeping tool—the LSAT—that is known to produce a racial preference—primarily for whites.²⁰⁷

In 1996, UC could have employed similar arguments to defend its existing admissions practices. To do so, the university did not need to rely on racially progressive legal scholars. Instead, it could have invoked Justice Powell’s *Bakke* opinion. In an often-overlooked footnote, the conservative Justice made the following observation:

Racial classifications in admissions conceivably could serve a fifth purpose . . . : fair appraisal of each individual’s academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no “preference” at all.²⁰⁸

This statement reflects the same insights that anchor Professors West-Faulcon and Harris’ preceding comments. To determine whether affirmative action constitutes a “racial preference,” one must know what function affirmative action performs and the baseline against which it intervenes. If UC considered applicant race to *counter* racial (dis)advantages that benefitted white applicants and harmed applicants of color, the policy would confer “no ‘preference’ at all.”²⁰⁹ To the contrary, it would produce a more individualized, fair, and “meritocratic” admissions regime.

²⁰⁷ See also Harris & Narayan, *supra* note 20, at 1229.

²⁰⁸ *Bakke*, 438 U.S. at 306 n.43 (Powell, J.). It is worth noting that this rationale appears in a footnote because UC did not defend Davis’s admissions policy on this basis. See *id.*

²⁰⁹ Here, I am suggesting that UC had a reasonable basis to claim that Prop. 209 permitted the continued consideration of race. A stronger version of the counter-preference argument would be that Prop. 209 requires race-conscious admissions when universities consider criteria that confer race and class preferences on wealthy white students. Thus, because the SAT and ACT are known to reward inherited race and class privilege, Prop. 209’s ban on “preferential treatment” could be read to require an affirmative counter-measure for anyone university that relies on such tests. In the face of a global pandemic, litigation targeting its reliance on standardized tests, and waning public support for standardized tests, UC announced plans to eliminate all use of the SAT and ACT beginning in 2025. See Jose Chavez, UC Agrees to No Longer Consider ACT/SAT Scores in Admissions, *THE GUARDIAN* (May 23, 2021) <https://>

The empirical case for Justice Powell's insight is stronger now than it was in 1996. But even then, evidence suggested that standard measures of merit (e.g., grades, standardized tests, alumni interviews) systematically under-measured the existing talent and potential of students from negatively stereotyped racial groups.²¹⁰

In addition to the foregoing, UC could have defended its race-conscious practices under Prop. 209's federal funding exception. Prop. 209 expressly exempts "action which must be taken to establish or maintain eligibility for any funding program, where ineligibility would result in a loss of federal funds."²¹¹ Accordingly, UC could have argued that eliminating any consideration of applicant race would have exposed the university to liability under Title VI or its implementing regulations.

A limited number of government entities defended their affirmative action programs on that basis.²¹² UC did not. Rather, as Professor West-Faulcon describes, UC "simply ceased considering race in admissions."²¹³

One might presume that UC forewent such an argument because it lacked evidentiary support. Even were that true in 1996, it was not by 1998, the year UC abandoned race-conscious admissions.²¹⁴ That year, the percentage of Black and Latinx UC admits plummeted—particularly at Berkeley and UCLA, the UC system's flagship campuses.²¹⁵ This decline accompanied a widening admissions gap between white applicants and applicants of color. In response, stakeholders sued Berkeley for over-relying on the SAT and

[ucsdguardian.org/2021/05/23/uc-agrees-to-no-longer-consider-act-sat-scores-in-admissions/](https://perma.cc/GH4F-A3MM) [https://perma.cc/GH4F-A3MM].

²¹⁰ Other affirmative action stakeholders advanced similar arguments. See Lawrence III, *supra* note 158, at 943–44 ("The current Berkeley admissions process creates a preference for white folks in two very concrete ways: First, it gives bonus points to high school students who are enrolled in advanced placement courses; and second, it relies in a determinative and exclusionary way on insignificant differences in standardized test scores."). In the face of a global pandemic, litigation targeting its reliance on standardized tests, and waning public support for standardized tests, UC announced plans to eliminate all use of the SAT and ACT beginning in 2025. See Jose Chavez, *UC Agrees to No Longer Consider ACT/SAT Scores in Admissions*, THE GUARDIAN (May 23, 2021) <https://ucsdguardian.org/2021/05/23/uc-agrees-to-no-longer-consider-act-sat-scores-in-admissions/> [https://perma.cc/GH4F-A3MM].

²¹¹ CAL. CONST. art. I, § 31.

²¹² See West-Faulcon, *supra* note 106, at 1092 ("A few government entities, including the City and County of San Francisco, have attempted to employ [the federal funding] exception to defend their continued use of affirmative action policies.").

²¹³ *Id.* (describing how UC's decision to cease considering race tracked the response of other universities facing laws similar to Prop. 209).

²¹⁴ See *id.* at 1094.

²¹⁵ See Lawrence III, *supra* note 158, at 942–43 ("Berkeley is the UC system's most selective school, and of the 25,796 applicants for the 1999 freshman class, 9,858 had GPAs of 4.0. But a white applicant with a straight "A" average has a much better shot at getting into Berkeley than a black, Latino or Filipino applicant with the same grades."); William C. Kidder & Jay Rosner, *How the SAT Creates "Built-in Headwinds,"* 43 SANTA CLARA L. REV. 131, 187 (2002) (noting that Berkeley "admitted 28.1% of all applicants (8,438/30,038), including 31.2% of Whites (2,778/8,892), 20.6% of Latinos (647/3139), and 19.3% of African Americans (241/1249)").

ACT.²¹⁶ The plaintiffs argued that Berkeley's new admissions practices, which no longer considered race, violated Title VI and the Equal Protection Clause of the Fourteenth Amendment.²¹⁷

Berkeley could have employed the same facts and theories that underlay the plaintiffs' complaint to defend its race-conscious admissions policy.²¹⁸ And even if the university was determined to go "colorblind," it could have maintained a more racially inclusive admissions regime by proactively reducing reliance on metrics that rewarded inherited race-class advantage.

Berkeley did neither. The day after the lawsuit commenced, Berkeley Chancellor Robert Berdahl issued the following statement: "We have demonstrated for decades a steadfast resolve to admit and educate students of all races and ethnicities Our resolve has not changed. But the laws under which we operate have changed."²¹⁹ When faced with complaints about rising racial disparities, Berdahl attributed the decline of Black, Latinx, and Filipino admits to exogenous forces beyond the university's control. He blamed "the laws"—a reference to Prop. 209 and SP-1.²²⁰ These statements insulated and obscured the institutional priorities and decisions that produced the racial disparities Berdahl decried. This included Berkeley's decision to equate academic "merit" with fraught instruments such as the SAT and ACT.²²¹

Building on the foregoing of empirical claims, Berdahl advanced a complementary claim about values. By identifying "bad" laws as the source of inequality, Berdahl situated Berkeley "on the side of good and right" and defused accusations of institutional racism—even as the university was responsible for the admissions process that produced its own resegregation.²²²

²¹⁶ Complaint for Declaratory and Injunctive Relief at 4, *Rios v. Regents of the Univ. of Cal.*, (N.D. Cal. Feb. 2, 1999) (No. C.99-0525) [hereinafter *Rios Complaint*].

²¹⁷ See American Civil Liberties Union, *Minority Students Sue U.C. Berkeley Over Unfair Admissions Policy*, ACLU (Feb. 2, 1999), <https://www.aclu.org/press-releases/minority-students-sue-uc-berkeley-over-unfair-admissions-policy> [<https://perma.cc/LFQ2-G52X>]. For a deeper discussion of the Berkeley litigation, see Kidder & Rosner, *supra* note 215, at 187.

²¹⁸ See *Rios Complaint*, *supra* note 225.

²¹⁹ Lawrence III, *supra* note 158, at 947.

²²⁰ Berkeley is not the only integrationist university that cited "laws" to evade responsibility for re-segregation. See *id.* at 954–55 ("It is this implicit participation in the big lie that allows liberal faculty at Berkeley, UCLA, and Texas to see themselves as fully committed to affirmative action, even as they throw up their hands and say, 'We are helpless' in the face of Proposition 209 and the Fifth Circuit's decision in Hopwood.").

²²¹ See Feingold, *supra* note 15.

²²² Lawrence III, *supra* note 158, at 948. Berdahl's statement also implies that racial disparities were the product of deficient students of color who could not compete against "more qualified" white applicants. This message normalizes the conservative claim that affirmative action departs from a "race-neutral" and "objective" baseline. Even UC's current leadership, which supports racial affirmative action, attributed racial disparities to student deficiencies. See Press Release, UC Office of the President, UC To Continue to Champion Diverse Student Body Despite Rejection of Proposition 16 (Nov. 4, 2020), <https://www.universityofcalifornia.edu/press-room/uc-continue-champion-diverse-student-body-despite-rejection-proposition-16> [<https://perma.cc/PP58-8QB8>] ("Despite the failure of Proposition 16, the University will continue to look for innovative and creative approaches to further improve the diversity of its student body through outreach to underserved groups, schools and communities; support for

As discussed below, the dissonance between how Berkeley presented itself (as a champion of racial justice) and how it behaved (adopting policies that exacerbated racial disparities) is not uncommon to integrationist universities.²²³

I am not contesting Berkeley's commitment to a racially integrated campus. To the contrary, the evidence suggests that Berdahl—as with UC's general leadership—valued student body diversity and affirmative action as a vehicle to get there.²²⁴ But this backdrop supports my claim that *integrationist* universities tend to value integration less than *segregationist* institutions value segregation.²²⁵ One could defend how UC responded to SP-1 or Prop. 209. But UC's response—marked by the voluntary elimination of all race-conscious admissions policies and other race-conscious practices—fails to match the segregationists' resistance to integration. To build on the above, I now explore how competing institutional commitments tend to disadvantage affirmative action.

B. *Perceived Conflicts of Interest*

Elite universities tend to perceive conflicts between racial inclusion and other institutional priorities. When perceived conflicts arise, racial inclusion (and affirmative action as a means to that end) tends to lose out. One can locate these competing institutional commitments within three overarching categories: (1) brand goals, (2) budget goals, and (3) risk aversion.

Two prefatory notes are warranted. First, the commitments I outline below often interact with, and at times bleed into, one another. I am not suggesting otherwise. Still, these categories highlight discrete, if interconnected, elements of university governance that tend to amplify and entrench affirmative action ambivalence.

Second, these “competing” goals often do not actually conflict with affirmative action. Rather, universities *perceive* conflicts that do not, in fact, exist. As an analytical matter, it is important to distinguish perception from reality. In practice, the perception-reality gap matters far less. If a university perceives a conflict, that perception is likely to shape its behavior even if no actual conflict exists.

college preparation; and efforts to close equity gaps among students attaining a UC education.”).

²²³ See *infra* section II.B.1(1).

²²⁴ See DOUGLAS, *supra* note 193 (identifying the UC central administration's opposition to SP-1).

²²⁵ See *infra* section II.B.

1. *Brand Goals*

Elite universities care about their reputation—what I term *brand goals*.²²⁶ At least two distinct brand goals can disincentivize a robust affirmative action defense: the desire to (1) cultivate a *racial justice* persona and (2) maximize institutional *prestige*. In theory, these brand goals need not hinder zealous affirmative action advocacy. In practice, elite universities often perceive a conflict. When they do, brand goals tend to prevail.

(i) *Performing Racial Justice*

Most elite universities project a commitment to racial justice.²²⁷ I am not suggesting that such projections misrepresent actual institutional values.²²⁸ But even if elite schools value racial justice in its own right, they also value a racial justice brand. A strong racial justice brand can serve institutional ends even if the university does not promote racial justice on its campus.²²⁹ In some cases, commitments to a racial justice brand can hinder actual racial justice projects.

Among other consequences, a strong racial justice brand can insulate universities from legitimate critique. To begin, university leaders can mobilize that brand to defuse complaints about institutional racism.²³⁰ We saw this when then-UC Berkeley Chancellor Berdahl highlighted the university's diversity commitments to defuse claims that the university employed discrimi-

²²⁶ See, e.g., Frans Van Vught, *Mission Diversity and Reputation in Higher Education*, 21 HIGHER EDUC. POL'Y 151, 153 (2008).

²²⁷ Following the global uprising for racial justice in the summer of 2020, racial justice brand goals manifest in stated commitments to “antiracism.” See, e.g., *Anti-Racism: Learning, Healing and Taking Action*, HARV. COLL. DEAN OF STUDENTS OFF., <https://dso.college.harvard.edu/anti-racism> [https://perma.cc/2R6P-Y2DD]; Message from the University Office for Diversity and Inclusion: Anti-Black Violence, UNC OFFICE OF THE PROVOST (May 29, 2020), <https://diversity.unc.edu/2020/05/message-from-the-university-office-for-diversity-and-inclusion-anti-black-violence/> [https://perma.cc/4RDE-J9CV].

²²⁸ That said, there is evidence that racial justice brand commitments can eclipse actual racial justice commitments. As one example, multiple universities were implicated for cropping students of color into official promotional materials to project a veneer of racial diversity on campus. See Deena Pritchep, *A Campus More Colorful Than Reality: Beware that College Brochure*, NPR (Dec. 29, 2013), <https://www.npr.org/2013/12/29/257765543/a-campus-more-colorful-than-reality-beware-that-college-brochure> [https://perma.cc/4C4Q-TJQT].

²²⁹ Some have used the term “performative” to describe the gap between racial justice brand goals and actual racial justice commitments. Dennis Kennedy, *Moving Beyond “Performative” Diversity Commitments*, PRESIDIO GRADUATE SCH. (Dec. 7, 2020), <https://www.presidio.edu/blog/moving-beyond-performative-diversity-commitments/> [https://perma.cc/DJH3-VJH5] (“Performative DEI is used to convey a commitment to diversity, equity, and inclusion; however, often neglects to assign a policy, action, or person designed to bring about racial equity. Performatives are ritual social practices that are enacted over time to avoid potential litigation or scrutiny from consumers or stakeholders.”)

²³⁰ The episodes involving Cornel West and Nikole Hannah-Jones reflect how incidents of racial discrimination (actual or perceived) can trigger widespread public rebuke and condemnation. See *supra* notes 1–8 and accompanying text.

natory admissions criteria.²³¹ Moreover, effectively cultivating a racial justice persona can mute claims of outgroup derogation and ingroup favoritism—and thereby legitimize a status quo of racial injustice.²³²

The pursuit of a racial justice brand can also incentivize schools to deny or downplay the racial harm students of color confront on campus.²³³ If a racial justice brand requires universities to project a picture of racial harmony, it makes sense for the university to discount countervailing narratives. But by downplaying racial harm, particularly when doing so denies students' lived experience, universities undermine the goal of an equal learning environment. Moreover, by downplaying narratives of racial harm, universities suppress facts that would illustrate race and racism's enduring force on campus and the corresponding need for race-conscious interventions—including in admissions.²³⁴

Translated to live litigation, consider how racial justice brand goals could shape Harvard's defense. If Harvard is more concerned with its racial justice persona than actual racial justice, the university can lose in the court of law but prevail in the court of public opinion. The litigation centers Harvard as affirmative action's formal champion. Regardless of the arguments Harvard makes, this positioning locates Harvard on the side of affirmative action and racial diversity—and, by extension, racial justice. To a significant degree, Harvard can enjoy those reputational benefits even if it understates the legal case for its own policy.

One might ask what Harvard values more: affirmative action (a tool of racial justice) or its brand (a perception of racial justice)? If brand goals are on top, Harvard might be inclined to avoid evidence that betrays the image of racial harmony on campus. This includes evidence that (a) wealthy white students enjoy unearned race-class preferences in Harvard's admissions process and (b) students of color continue to confront racial discrimination on

²³¹ See *supra* note 221; see also Lawrence III, *supra* note 158, at 948 (characterizing Berdhal's response as an attempt to counter claims of racism).

²³² See Dian D. Squire, Rosemary J. Perez, & Z. Nicolazzo, *Institutional Response as Non-Performative: What University Communications (Don't) Say About Movements Toward Justice*, 2019 REV. HIGHER EDUC. 109, 113 (2019) (explaining that "institutional rhetoric regarding a desire for diversity [can] act[] as a way to (re)instill white institutional presence"); see also *id.* at 129 (arguing that "the purpose of higher education is to maintain the nationalistic, neoliberal discourse that aims to reinforce the status quo via the process of minority absorption"); Sophia Wolmer, *BSU Members Say College's Response to #BlackMindsMatter Protest is 'Reactionary and Performative'*, AMHERST STUDENT (Apr. 21, 2021) <https://amherst-student.com/article/bsu-members-say-colleges-response-to-blackmindsmatter-protest-is-reactionary-and-performative/> [<https://perma.cc/KTN2-NNPD>].

²³³ By "racial harm," I mean to include individual conduct and institutional dynamics that deny students of color equal university membership. See *Hidden in Plain Sight*, *supra* note 99.

²³⁴ See Jenkins, *supra* note 12 (explaining that remedying discrimination attributable to the university remains a viable defense for race-conscious admissions); see also Villanueva, *supra* note 180.

Harvard's campus.²³⁵ Both sets of facts would support the legal and moral case for affirmative action. But both could undermine Harvard's racial justice brand.²³⁶

Ongoing litigation suggests Harvard is privileging the latter.²³⁷ SFFA, the plaintiff, has alleged that Harvard discriminates against Asian Americans. As I detail elsewhere, SFFA leverages this narrative of Asian victimhood to stigmatize and scapegoat affirmative action—even as SFFA traces anti-Asian biases to “colorblind” admissions criteria that benefit white applicants.²³⁸

Harvard could defuse this narrative and strengthen the case for affirmative action. But doing so requires a somewhat counterintuitive response: acknowledge that facially race-neutral considerations disadvantage Asian Americans to the benefit of similarly-situated white applicants.²³⁹ By highlighting the source and beneficiary of the alleged anti-Asian bias, Harvard can counter SFFA's attempt to spin the narrative that affirmative action pits Asian Americans against other students of color.²⁴⁰ Moreover, Harvard could marshal evidence of anti-Asian bias to illuminate the racial advantages white applicants enjoy even with affirmative action in place.²⁴¹ Pursuant to this

²³⁵ For a more detailed analysis concerning the racial (dis)advantages that permeate standard admissions processes, see Carbado, Turetsky & Vaughns, *supra* note 104; see also Feingold, *supra* note 15.

²³⁶ This is a place where the conflict between brand goals and inclusion goals may be more perception than reality. One could argue that acknowledging and reckoning with institutional racism—as opposed to denying and avoiding its presence—bolsters the case for affirmative action and promotes a racial justice brand. There are emerging examples of universities taking more proactive steps to reckon with institutional histories of racism. One example comes from Johns Hopkins University:

Launched in fall 2020, the Hard Histories at Hopkins Project examines the role that racism and discrimination have played at Johns Hopkins. Blending research, teaching, public engagement and the creative arts, Hard Histories aims to engage our broadest communities—at Johns Hopkins and in Baltimore—in a frank and informed exploration of how racism has been produced and permitted to persist as part of our structure and our practice. Through the lessons of hard histories we will chart a way forward. Join us.

Hard Histories at Hopkins, JOHNS HOPKINS UNIV., <https://hardhistory.jhu.edu/> [<https://perma.cc/9UZ7-RHSE>].

²³⁷ See *White Bonus*, *supra* note 99 (outlining allegations in Harvard lawsuit).

²³⁸ See *id.* (identifying that SFFA alleges that several dimensions of Harvard's admissions process harms Asian Americans to the benefit of white applicants).

²³⁹ Lawrence III, *supra* note 158, at 941 (“[N]either [William Bowen or Derek Bok] questions the validity of standard admissions criteria used at these institutions, nor examines the ways that these criteria reinforce the effects of societal segregation and racism.”).

²⁴⁰ See *id.*

²⁴¹ SFFA identifies a report from Harvard's Office of Institutional Research that suggested Asian applicants might face a race-based penalty in Harvard's admissions process. See Plaintiff's Memorandum of Reasons in Support of its Motion for Summary Judgment at 13, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 308 F.R.D. 39 (No. 14-cv-14176-ADB). SFFA further alleged that Harvard prefers white applicants over Asian applicants with similar academic credentials. See, e.g., *id.* at 10 (“An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white—even including the biased personal rating.”).

strategy, Harvard would bolster the case for *more* affirmative action—including a policy better tailored to mitigate the racial advantages that white students enjoy vis-à-vis their Asian American counterparts.²⁴²

Harvard has not taken this approach. Rather than foreground sites of white racial advantage, the university disputes all allegations of anti-Asian discrimination.²⁴³ Brand concerns do not explain, in full, why Harvard has disputed evidence that would buttress the case for race-conscious admissions.²⁴⁴ Still, brand goals help to explain why Harvard contests allegations of anti-Asian bias that, in fact, call for more race-consciousness.

Similar brand goals help to explain why elite universities resist evidence that students of color experience racial harm on campus.²⁴⁵ This evidence, which often comes in the form of student testimonials, could fortify an existing affirmative action rationale: student body diversity.²⁴⁶ The diversity rationale remains the primary justification universities invoke to defend race-conscious admissions.²⁴⁷ But when schools like Harvard and UNC champion diversity, they often obscure the relationship between racial diversity and racial equality on campus.²⁴⁸

Specifically, university defendants have yet to center racial diversity as an antidote for racial harms that students of color face when severely underrepresented in university settings.²⁴⁹ We can think of this as diversity's "equality" function.²⁵⁰ Understood in this sense, racial diversity is constitutionally compelling because it mitigates a racial tax that uniquely burdens

²⁴² See *White Bonus*, *supra* note 99, at 732 ("Rather than colorblindness, a responsive remedy would necessitate the implementation of a race-conscious policy capable of redressing the specific harm of negative action underlying SFFA's discrimination claim.")

²⁴³ See Brief for Defendant-Appellee at 27, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2020 WL 2521577 (1st Cir. 2020) (No. 1:14-cv-14176-ADB) ("On the merits, SFFA's claims fail. As the district court correctly found, Harvard does not discriminate against Asian-American applicants.")

²⁴⁴ See *White Bonus*, *supra* note 99, at 711–12 (explaining that Harvard's defense fails to "disentangle the claim that it discriminates against Asians from SFFA's broader assault against affirmative action")

²⁴⁵ See Harvard's Response to Motion to Intervene, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2015 WL 3833689 (D. Mass. May 13, 2015) (No. 1:14-cv-14176-ADB) (opposing intervention and arguing that evidence of discrimination against students of color is legally irrelevant to Harvard's defense).

²⁴⁶ *Hidden in Plain Sight*, *supra* note 99 (outlining how universities could articulate a more capacious conception of diversity that centers the experience of students of color).

²⁴⁷ See *id.*

²⁴⁸ University defendants tend to foreground how student body diversity promotes more robust conversation in the classroom—what we might call diversity's "speech" function. See Jonathan Feingold, *Diversity Drift*, 9 WAKE FOREST L. REV. ONLINE 14, 17 (2019); Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1145 (2013) (enumerating diversity benefits embedded in Justice O'Connor's *Grutter* opinion).

²⁴⁹ See *Hidden in Plain Sight*, *supra* note 99 (outlining concept of "equal university membership"); see also Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 768 (2015) (explaining that "the Supreme Court has broadly defined the educational benefits of diversity").

²⁵⁰ See *id.*; see also Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1707–10 (2018) (describing how an "Elite Student Paradigm" centers whiteness

students of color. This tax denies students of color their basic right to “equal university membership.”²⁵¹ Race-conscious admissions, in turn, offer a potent tool to safeguard that personal and present equality interest.²⁵²

When defending affirmative action, universities often gesture to diversity’s equality benefits.²⁵³ But rarely do universities uplift diversity as a necessary ingredient for racial equality on campus.²⁵⁴ This continues to play out at Harvard and UNC. Even when student intervenors seek to center the harms that flow from racial isolation, neither Harvard nor UNC has emphasized how racial diversity can counter institutional dynamics that would otherwise subject students of color to a racially hostile learning environment.²⁵⁵

It is unclear why Harvard and UNC continue to mobilize a thin conception of diversity that foregrounds diversity’s speech benefits over equality benefits. One explanation is that by focusing on speech, elite universities can champion racial diversity without interrogating (or disclosing) how race and racism continues to shape the experience of its students.²⁵⁶ Put differently, Harvard and UNC can defend affirmative action without having to confront evidence that locates racial injustice within the institution itself.²⁵⁷

To recap, elite universities often perceive a conflict between maintaining a racial justice brand and acknowledging racial harms on campus. This conflict, even if more perceived than real, helps to explain why Harvard and UNC have downplayed evidence that their own students encounter racial hostility on campus—even if that evidence would strengthen the case for their own race-conscious policies.

and imagines students of color—particularly Black students—as perpetual university outsiders).

²⁵¹ See *Hidden in Plain Sight*, *supra* note 99.

²⁵² See *id.*

²⁵³ See, e.g., *Fisher*, 579 U.S. at 384 (noting that the University of Texas argued that “minority students admitted under the [non-affirmative action] *Hopwood* regime experienced feelings of loneliness and isolation”).

²⁵⁴ See, e.g., *id.* at 404 (Alito, J., dissenting) (noting that UT identified four “more specific” diversity goals: “demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation”).

²⁵⁵ To the extent this diversity framing has entered the litigation, it has come from student intervenors. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. at 44 (ruling on motion to intervene) (“In addition, the Students claim that they will argue—and that Harvard is unlikely to argue—that achieving a “critical mass” of minority students is necessary to reduce the racial isolation of minority students on campus.”).

²⁵⁶ Professor Charles Lawrence reflected on a similar dynamic during the *Grutter* and *Gratz* litigation: “It should not surprise us that well-meaning individuals who self-identify as liberal should be attracted to an argument for racial integration that least threatens their own privilege.” Lawrence III, *supra* note 158, at 941.

²⁵⁷ See *id.* at 953 (“By looking only forward, it avoids any direct admission or acknowledgement of the institution’s past discriminatory practices, even when that discrimination is *de jure* and of relatively recent vintage. It makes no effort to inquire into the ways that current facially neutral practices may have a foreseeable and unjustifiable discriminatory impact or to account for unconscious bias in their administration.”).

(ii) *Pursuing Prestige*

Elite universities hunt academic prestige.²⁵⁸ Derek Bok, a former president of Harvard University, described this pursuit for prestige as follows: “[Universities’] most comprehensive objective . . . is academic distinction, or prestige—an elusive concept that embraces the quality of the students and the scholarly and scientific reputations of the faculty.”²⁵⁹ Bok surfaces three important features of prestige: (1) universities want it, (2) the concept is amorphous, and (3) the concept signals something about the quality of an institution’s students and faculty.

One might ask why universities seek prestige. The simple answer is that more prestige yields multiple institutional benefits. First, more prestige makes a university more competitive for sought-after students and faculty.²⁶⁰ Second, and building on the above, more prestige increases revenues in the form of tuition and donor giving.²⁶¹ This relationship between prestige and its benefits is circular: “prestige is both the cause and the result of getting or having ‘good’ students, ‘good’ faculty, and ample financial support.”²⁶²

Given its amorphous quality, prestige can be difficult to assess in a concrete or objective way.²⁶³ Historically, prestige has come from a school’s reputation in the relevant community.²⁶⁴ Today, that reputation often derives from (and informs) a school’s U.S. News & World Report ranking (“the Rankings”).²⁶⁵ In 2003, Professor Lani Guinier described the Rankings “as undoubtedly the most influential voice in judging who ‘wins’ and ‘loses’ in the contest for elite status.”²⁶⁶ Little suggests this influence has waned. The association between the Rankings and prestige appears as strong as ever.²⁶⁷

²⁵⁸ See Roger L. Geiger, *The Competition for High-Ability Students: Universities in a Key Marketplace*, in *THE FUTURE OF THE CITY OF INTELLECT: THE CHANGING AMERICAN UNIVERSITY* 82, 84 (Steven Brint ed., 2002) (citations omitted) (“The behavior of universities is frequently described as competition for prestige to achieve or maintain status.”).

²⁵⁹ DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* 159 (2003); see also Geiger, *supra* note 258, at 87 (referring to prestige as the “coin of the realm in higher education”).

²⁶⁰ See Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945, 959–60 (2011) (“Whether these student and alumni patrons will pay, and how much, is in large part a function of the university’s prestige”).

²⁶¹ See *id.*

²⁶² Geiger, *supra* note 258, at 87.

²⁶³ Kim, *supra* note 260, at 959–60.

²⁶⁴ That community could be a city, region, country, or subset of similar institutions.

²⁶⁵ See Kim *supra* note 260, at 963 (“[T]he abstract concept of prestige has been *de facto* operationalized into the U.S. News rankings.”).

²⁶⁶ Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144 n.126 (2003).

²⁶⁷ See Kim, *supra* note 260, at 962–63 (“[Q]uantitative analyses of admissions trends at colleges and law schools conclusively demonstrate that rankings influence how many applications a school receives, the academic characteristics of the school’s applicant pool, the percentage of applicants who are accepted, and the percentage of accepted students who then matriculate. . . . [T]he higher the institution’s U.S. News rank, the more likely it will attract students with higher academic credentials and the more difficult it will be to gain admission.”). As of January 9, 2023, fourteen laws schools had announced their intent to stop sup-

Accordingly, a rational university set on maximizing prestige would prioritize metrics that influence the Rankings.²⁶⁸ This often translates to standardized test scores (e.g., the SAT and ACT) that enjoy an outsized impact on a university's ranking.²⁶⁹ The relationship between test scores and ranking extends to law schools. Between 2003 and 2006, for example, of the top fifty ranked law schools, no school had a median LSAT score lower than a lower ranked school.²⁷⁰ Or as Professor Alex Johnson observed, "none of these other so-called variables are apparently important enough or weighted heavily enough to cause a school which is superior in all other respects to be ranked higher than a law school with a higher median LSAT."²⁷¹

This reality is not lost on the leaders of American law schools and universities. Privileging higher test scores leads to higher rankings, which yield other institutional benefits. But privileging test scores comes with costs.²⁷²

plying U.S. News with internal data the company uses to construct its rankings. See *List of Law Schools Withdrawing from U.S. News & World Report Rankings Participation*, SPIVEY CONSULTING (NOV. 19, 2022), <https://www.spiveyconsulting.com/blog-post/list-of-law-schools-withdrawing-from-us-news-rankings/> [<https://perma.cc/4TW6-2E52>]. Although these defections have spurred U.S. News to modify aspects of its law school ranking process, it remains unclear whether they will curtail the Rankings' impact on institutional decisionmaking across American law schools and higher education writ large. See Scott Jaschik, *Will Law Schools Respond to 'U.S. News' Changes?*, INSIDE HIGHER ED, (Jan. 9, 2023), <https://www.insidehighered.com/admissions/article/2023/01/09/us-news-changes-approach-law-school-rankings> [<https://perma.cc/GR9H-W9HU>].

²⁶⁸ The Rankings have been subject to widespread critique. See Malcolm Gladwell, *Lord of the Rankings*, REVISIONIST HIST. (July 1, 2021), <https://www.pushkin.fm/episode/lord-of-the-rankings/> [<https://perma.cc/4HWG-CCGE>]; Bok, *supra* note 259, at 159–60 ("Although the unreliability of [U.S. News's] ratings is notorious, they continue to have an influence, since nothing else has been devised that provides such regular, seemingly exact measures of comparative academic quality.")

²⁶⁹ The Rankings rely heavily on standardized test scores to compute "the institution's selectivity which is then used to compute its overall rank." Kim, *supra* note 260, at 963–64; see also West-Faulcon, *supra* note 106, at 1080 ("Because universities with higher overall SAT score averages fare better [in the Rankings and bond systems], reducing the focus on applicant SAT scores may have the unwelcome consequence of lowering a top-ranked university's prestige standing and financial-strength rating."). Given the waning reliance on standardized test scores at elite universities (at least in the undergraduate context), it is unclear how rankings will adjust. See Vivi Lu, *Harvard College Suspends Standardized Testing Requirements for Next Four Years*, THE HARV. CRIMSON (Dec. 17, 2021) <https://www.thecrimson.com/article/2021/12/17/college-testing-requirement-suspended/> [<https://perma.cc/W728-S39N>].

²⁷⁰ Alex M. Johnson, Jr., *The Destruction of the Holistic Approach to Admissions: The Pernicious Effects of Rankings*, 81 IND. L.J. 309, 311 n.14 (2006).

²⁷¹ *Id.*

²⁷² See Wendy Espeland & Michael Sauder, *Rankings and Diversity*, 18 S. CALIF. REV. L. & SOC. JUST. 587, 601 (2009) (noting that universities are "forced to choose between a higher median LSAT score and a more diverse student body"). Multiple law school deans cited the Ranking's perverse incentives and/or emphasis on standardized test scores as a factor that motivated their decision to stop supplying U.S. News with internal data. See, e.g., David Faigman, *UC Law SF Opts Out of U.S. News Rankings Participation*, (Jan. 6, 2023), <https://www.uchastings.edu/2023/01/06/uc-law-sf-will-opt-out-of-u-s-news-participation/> [<https://perma.cc/Y59U-SRQY>] ("Diversity Penalty. By allocating too much weight to standardized test scores (LSAT), the new ranking methodology reinforces structural inequalities."); Russell Korobkin, *UCLA Law will not participate in U.S. News & World Report rankings* (Nov. 22, 2022), <https://law.ucla.edu/news/message-interim-dean-russell-korobkin> [<https://perma.cc/>]

Standardized tests better measure a student's social capital (including race and class privilege) than academic promise and potential.²⁷³ It is therefore predictable that such tests produce racial disparities—at least as measured by group mean.²⁷⁴ When a school privileges standardized test scores in admissions, that decision will lock out many otherwise talented and qualified students of color and poor white students.²⁷⁵ To summarize, the Rankings penalize universities that admit meaningful numbers of students from groups that under-perform on standardized tests.²⁷⁶ From a different angle, the Rankings reward universities that admit wealthy white students instead of otherwise qualified students of color.

These incentives interact with affirmative action in two ways. First, the Rankings pressure universities to emphasize criteria that amplify the need for a robust affirmative action program.²⁷⁷ The increased need arises from (a) the white racial advantages that standardized test scores reproduce and (b) the foreseeable white over-representation that results.²⁷⁸ Second, the same prestige goals that drive over-reliance on test scores disincentivize universities from taking steps to counter white racial advantage. Were a school to reduce standardized tests' exclusionary effects (by, for example, becoming more race-conscious), the effect is to reduce the source of prestige. Professor Sung Hui Kim has summarized this dynamic: "Consequently, affirmative action programs that seek to meaningfully expand the numbers of under-represented minority groups are at cross-purposes with a university's ongo-

TX3E-HLCB] ("Although no rankings can provide a perfect measure of quality, the U.S. News rankings are particularly problematic for a number of reasons: The rankings disincentivize schools from supporting public service careers for their graduates, building a diverse student population, and awarding need-based financial aid. . . . [T]he rankings perversely reward schools for spending more and passing on the costs to their students, without regard for the value of the expenditures.").

²⁷³ See Ezekiel J. Dixon-Roman, Howard T. Everson & John J. Mcardle, *Race, Poverty and SAT Scores: Modeling the Influences of Family Income on Black and White High School Students' SAT Performance*, 115 TEACHERS' COLL. REC. 2 (2013). Standardized tests like the SAT and ACT are not the only measure of academic "merit" that internalize social advantage.

²⁷⁴ See Richard Reeves & Dimitrios Halikias, *Race Gaps in SAT Scores Highlight Inequality and Hinder Upward Mobility*, THE BROOKINGS INST. (Feb. 1, 2017), <https://www.brookings.edu/research/race-gaps-in-sat-scores-highlight-inequality-and-hinder-upward-mobility/> [<https://perma.cc/5BE5-EPD9>].

²⁷⁵ See Espeland & Sauder, *supra* note 272, at 599 ("Generally (and it is crucial to emphasize these patterns are measures of central tendency that necessarily obscure variation), men score higher than women, whites and Asian Americans do better than African Americans, Mexican Americans and Puerto Ricans, and people living in the Northeast do better than those from the South. Studies have also found persistent class effects in standardized testing where students from wealthy or middle-class families do better than those from working-class or poor families.").

²⁷⁶ See Gladwell, *supra* note 268.

²⁷⁷ See Kim, *supra* note 260, at 968 ("Sociological interviews of law school administrators, faculty, and staff involved in the admissions process reveal that the rankings have sharpened the emphasis on students' LSAT profiles, which has impeded their efforts to craft a racially (as well as economically) diverse class of students.").

²⁷⁸ As I outlined above, standardized tests tend to systematically under-measure the existing talent and potential of students from negatively stereotyped groups. See Carbado, *supra* note 16.

ing attempts to increase its prestige standing, driven primarily by standardized test scores, as represented by its U.S. News ranking.²⁷⁹

In a contest that pits racial inclusion and affirmative action against prestige, prestige often prevails.²⁸⁰ This equation—in which prestige trumps inclusion—further explains the common dissonance between words (e.g., celebrating racial diversity) and deeds (e.g., maintaining admissions practices that privilege applicants with the most inherited advantage).

A university might insist that the Rankings' influence limits institutional choice. There is, one might argue, a degree of coercion involved; most universities cannot opt-out of the “rankings game.”—even if they stop providing internal data to U.S. News. Yet even accepting this argument,²⁸¹ it reinforces my primary claim: elite universities are ambivalent about affirmative action.

One final point about prestige is warranted. When elite universities reward high performance on standardized tests, they reify a narrow conception of excellence that conflates “merit” with high test scores. So when Harvard values test scores over other metrics, Harvard is communicating what academic excellence looks like and who deserves to be at Harvard.²⁸² This message further erodes the case for affirmative action. By conflating “merit” with test scores, Harvard is saying that racial disparities derive from actual differences in merit—not, for example, Harvard's decision to privilege metrics that measure social advantage.²⁸³ Coming full circle, the decision to privilege test scores reinforces the contestable claim that affirmative action constitutes “preferential treatment” that contravenes an objective and race-neutral baseline.²⁸⁴

2. Budget Goals

Universities also pursue *budget goals*—a term I use to capture a school's desire to maximize revenues and minimize costs. Both goals can

²⁷⁹ Kim, *supra* note 260, at 968.

²⁸⁰ Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1, 50 (2013) (“Sadly, it seems that today's post-secondary institutions are not willing to compromise their academic elite status.”).

²⁸¹ Some institutions privilege values other than prestige. Rarely, however, are these the institutions that the public would view as elite or prestigious. See, e.g., Malcolm Gladwell, *Project Dillard*, REVISIONIST HIST. (July 8, 2021), <https://www.pushkin.fm/episode/project-dillard/> [<https://perma.cc/5WNL-N8ZZ>] (highlighting institutions that serve students from disadvantaged backgrounds even if it undermines their rankings).

²⁸² There is, of course, internal contradiction when seventy-five percent of Harvard's white students would have been rejected but for their “Legacy+” status. See Feingold, *supra* note 15.

²⁸³ See *id.* (documenting the substantial race and class bonuses Harvard awards to the children of alumni, recruited athletes, and other select statuses).

²⁸⁴ See Carbado, Turetsky & Vaughs, *supra* note 104; Cheryl I. Harris, *Fisher's Foible: From Race and Class to Class not Race*, 64 UCLA L. REV. DISCOURSE 648 (2017).

conflict with affirmative action and a university's broader racial inclusion commitments.²⁸⁵

We can start with revenues—that is, sources of university income. The tension between affirmative action and revenues follows from our preceding discussion about prestige goals. For most universities, revenues come from two primary sources: tuition and donors. A university's ability to charge high tuition or demand substantial donations turns, in large part, on its prestige. As noted above, prestige often turns on the Rankings, which overvalue metrics that advantage students with inherited race and class privilege. As a result, meaningful affirmative action efforts can undercut the metrics that drive a university's ranking, and thereby diminish prestige and depress what an institution can charge students and expect from donors.²⁸⁶

On the other side of the ledger are a university's costs. Affirmative action, and the more diverse student body it produces, can entail additional administrative expenses. When a school reduces reliance on standardized test scores, this can increase five distinct categories of cost: (1) search costs, (2) yield costs, (3) justification costs, (4) equal environment costs, and (5) borrowing costs.²⁸⁷ I briefly discuss each below.

(i) *Search Costs*

Search costs include the time, resources, and human capital necessary to design and administer admissions systems that consider applicant race. As a general matter, mechanical and objective processes (e.g., sorting students by test scores alone) are more efficient, economical, and administrable than flexible and subjective processes (e.g., holistic review common to many elite universities). Race-conscious admissions policies can fall on either end of this spectrum.

On the mechanical end of the spectrum, a university might assign a numerical score to racial identity.²⁸⁸ On the flexible end of the spectrum, a school might consider race as one of many factors within a holistic process. There are pros and cons to both. As a simple matter of cost, the former system is cheaper. Prior to 2003, a university could have employed a more mechanical race-conscious process that awarded numerical points to students for any aspect of their identity—including race. But in *Gratz* and *Grutter*, a pair of 2003 decisions, the Supreme Court held that the Fourteenth

²⁸⁵ Kim, *supra* note 260, at 958–59 (“[A]s a purely descriptive matter, there is plenty of evidence to suggest that meaningful affirmative action programs that admit more than token numbers of underrepresented minorities . . . generate more economic costs than economic benefits to universities.”).

²⁸⁶ Beyond impacting prestige, support for affirmative action or other antiracist efforts can decrease revenues by alienating alumni who oppose those policies. See Robertson, *supra* note 4.

²⁸⁷ See Kim, *supra* note 260, at 974 (“Effective administration of affirmative action programs takes up significant financial resources.”).

²⁸⁸ See *Gratz*, 539 U.S. at 277 (O’Connor, J., concurring) (noting that admissions counselors assign a specific numerical score for various aspects of applicant identity including race).

Amendment prohibits admissions policies that assign specific numerical scores to racial identity.²⁸⁹ The Court specified that universities may consider race. But to comply with constitutional requirements, a university must employ a “highly individualized, holistic review” that considers race as one of many factors.²⁹⁰

Grutter and *Gratz* made it more expensive for universities to maintain race-conscious admissions policies.²⁹¹ No longer could a university assign a numerical value to an applicant’s race.²⁹² Rather, a university must employ a flexible and holistic process and assume the heightened cost of doing so.²⁹³ Whatever one’s view on affirmative action, the Supreme Court made it more expensive than it might otherwise be. At least in theory, that added expense could disincentivize certain institutions—particularly those with fewer resources—from maintaining what had been a more economically efficient and administrable race-conscious admissions policy.

(ii) *Yield Costs*

Yield costs capture the expenses required to ensure admitted students from underrepresented racial groups choose to enroll. For multiple reasons, students from underrepresented groups—particularly Black and Latinx students—often have lower yield rates than those from other groups.²⁹⁴ One

²⁸⁹ *See id.*

²⁹⁰ *See Grutter*, 539 U.S. at 309 (“As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way.”).

²⁹¹ To the extent a university already employs holistic review, including racial identity as one factor among many may not significantly increase search costs. On the other hand, if the university would otherwise employ a more mechanical approach, the “holistic review” requirement attached to race is likely to yield a significant increase in cost.

²⁹² The University of Michigan identified this concern when defending its more mechanical process in *Gratz*. 539 U.S. at 275 (“Respondents contend that ‘[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the . . . admissions system upheld by the Court today in *Grutter*.’”).

²⁹³ *See* Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 537 n.309 (2012) (“These measures may cause institutions to incur more costs, but colleges and universities have adjusted to similar circumstances in the past: after *Grutter*, institutions had to expend more resources on holistic admissions and eliminate more cost-effective point systems similar to the one struck down in *Gratz*”); *see also Gratz*, 539 U.S. at 275 (“Respondents contend that ‘[t]he volume of applications and the presentation of applicant information make it impractical for [university] to use the . . . admissions system’ upheld by the Court today in *Grutter* . . . But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.”) (citation omitted).

²⁹⁴ *See* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 592, 626 n.146 (2017) (“Universities may have ample justification for admitting African American students who fall in this category at substantially higher rates than similarly situated Asian American and white applicants because the number of such African American students is comparatively small and because the ‘yield rate’—the percentage of the very high-scoring African American students who decide to enroll subsequent to their admission—is often significantly lower than similarly situated Asian American and white applicants”); *see also* William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 77–78 (2013) (observing that after Prop. 209 passed, yield

reason is that students from underrepresented racial groups are disproportionately low- or middle-income.²⁹⁵ This increases the need for more financial assistance, which the university must often provide.²⁹⁶ Additionally, there is often heightened competition among elite schools for “high performing” students of color.²⁹⁷ As a result, universities must expend more resources to ensure admitted students of color matriculate than they do for students from over-represented groups.

(iii) *Justification Costs*

Justification costs capture a university’s ongoing burden to defend—politically and legally—its right to consider applicant race. The Supreme Court has reaffirmed that universities may employ race-conscious admissions only when race-neutral alternatives are unavailable.²⁹⁸ This mandate places an ongoing and affirmative obligation on universities to establish that affirmative action is required to achieve student body diversity.²⁹⁹ This sort of analysis demands a non-trivial expenditure of institutional resources. In a zero-sum world of limited resources, the human capital and financial resources required to conduct this work is unavailable to pursue other institutional endeavors.

More broadly, affirmative action exacts justification costs anytime a private party or state actor attacks an existing affirmative action policy. On the legal front, this can entail marshaling resources to defend civil suits or manage federal investigations. Even when challenges are not legal *per se*, universities must deploy institutional resources to defuse anti-affirmative action campaigns and legitimize existing practices.

(iv) *Equal Learning Environment Costs*

Equal learning environment costs capture the resources required to create and maintain a learning environment that supports students from historically underrepresented groups.³⁰⁰ These costs arise, in part, because most elite universities were never designed for students of color—let alone white students without inherited class advantage.³⁰¹ As a result, constructing a uni-

rates for high performing Black and Latinx admits declined at eight UC campuses relative to their white and Asian counterparts).

²⁹⁵ *See id.*

²⁹⁶ Beyond yield, students from low- and middle-income families are more likely to encounter economic or other hardships while in school. The costs associated with these hardships fall heavier on schools that admit a higher percentage of students from low- and middle-income families. *See Gladwell, supra* note 281.

²⁹⁷ *See id.*

²⁹⁸ *See Fisher*, 579 U.S. at 365.

²⁹⁹ *See Pleasant, supra* note 95.

³⁰⁰ *See generally Feingold, supra* note 248.

³⁰¹ This backdrop helps to explain why Historically Black Colleges and Universities (“HBCUs”)—which were created to serve Black students—continue to better educate Black students than do historically white serving institutions. *See Stacy Hawkins, Reverse Integra-*

versity where all students can thrive requires resources and initiatives unnecessary in homogenous environments populated primarily with wealthy white students.³⁰² Relevant resources and initiatives range from ensuring housing and food security,³⁰³ to developing and implementing more racially inclusive curricula and pedagogy, to remaking university's physical landscape.³⁰⁴ Moreover, as student diversity increases, so does the likelihood of conflict and disagreement—challenges that require more institutional investment in student affairs staff and communications departments, among other offices.³⁰⁵

(v) *Borrowing Costs*

Borrowing costs capture a university's ability to access capital necessary for institutional expansion and investment.³⁰⁶ Professor West-Faulcon has outlined how affirmative action (and, more broadly, inclusive admissions practices) can enhance borrowing costs:

The three major financial rating agencies—Moody's Investors Service, Standard & Poor's, and Fitch Ratings—consider average SAT scores as part of their credit analyses. Because it has become increasingly common for colleges and universities to issue bonds to raise money for major expansion projects, many institutions have a very direct financial incentive to try to increase their overall average SAT score. The fact that average SAT score is used to gauge institutional financial health as well as prestige encourages admissions officials to place even greater weight on SAT scores as an admissions criterion.³⁰⁷

This explanation captures how affirmative action programs can exact discrete but intersecting administrative costs. I am not arguing that these

tion: Centering HBCUs in the Fight for Educational Equality, 24 U. PA. J. L. & SOC. CHANGE 2021 (2020).

³⁰² See *id.*

³⁰³ See Gladwell, *supra* note 281 (identifying the elevated demands on schools that primarily serve students from families who lack intergenerational wealth).

³⁰⁴ See, e.g., Steven Johnson, *Silent Sam Protesters at Chapel Hill Embrace a New Tactic: a 'Grade Strike'*, CHRON. OF HIGHER EDUC. (Dec. 7, 2018), <https://www.chronicle.com/article/silent-sam-protesters-at-chapel-hill-embrace-a-new-tactic-a-grade-strike/> [<https://perma.cc/666B-P7QP>].

³⁰⁵ See *An INSIGHT Investigation: Accounting for Just .5% of Higher Education's Budgets, Even Minimal Diversity Funding Supports Their Bottom Line*, INSIGHT INTO DIVERSITY (Oct. 16, 2019), <https://www.insightintodiversity.com/an-insight-investigation-accounting-for-just-0-5-of-higher-educations-budgets-even-minimal-diversity-funding-supports-their-bottom-line/> [<https://perma.cc/8YSZ-C5XF>] (reporting that, as of 2019, “[s]pending on diversity, equity and inclusion (DEI) efforts at American universities ha[d] increased 27 percent over the past five years”).

³⁰⁶ See Kim, *supra* note 260, at 976 (“Another reason why meaningful affirmative action programs may generate more economic costs than economic benefits to universities is that affirmative action programs may negatively impact the university's bond ratings.”).

³⁰⁷ West-Faulcon, *supra* note 106, at 1105; see also Gladwell, *supra* note 298.

costs outweigh the benefits of race-conscious admissions. Rather, I highlight these costs to mark another site where affirmative action competes with other institutional priorities. As with brand goals, budget goals complicate a university's relationship with affirmative action. In the next section, I outline a final dynamic that can compromise a university's affirmative action advocacy: risk aversion.

C. Risk Aversion

Elite universities, as with other institutions, try to minimize legal risk. Risk aversion can disincentivize universities from engaging in affirmative action and taking steps that would strengthen the case for such practices.

1. Chill Lawful Behavior

Risk aversion directly threatens affirmative action because it can lead a university to eliminate, suspend, or otherwise limit lawful race-conscious practices. Recall how UC responded to Prop. 209 and SP-1.³⁰⁸ After voters and the Regents adopted these measures, UC eliminated all race-conscious admissions practices across its campuses. The desire to avoid legal exposure helps to explain this decision. By eliminating all race-conscious admissions practices, UC reduced the likelihood of legal attacks and adverse legal rulings—even though plausible defenses were available to it.³⁰⁹

As outlined above, UC could have raised procedural and substantive arguments to defend its existing policies. For example, UC could have argued that its existing race-conscious admissions practices complied with Prop. 209 because they mitigated “preferential treatment” for white applicants.³¹⁰ UC also could have argued that Prop. 209's funding exception applied, or that the ballot measure regulated student selection but not outreach or retention.³¹¹

Had UC retained its race-conscious practices, litigation likely would have followed and a court might have concluded that those practices violated SP-1 or Prop. 209. The question remains hypothetical because UC preemptively eliminated this suite of racially inclusive measures.³¹² For an institu-

³⁰⁸ See West-Faulcon, *supra* note 106.

³⁰⁹ See *supra* Part II.2(2) (discussing UC response to Prop. 209 and SP-1).

³¹⁰ See *id.* (outlining arguments UC could have made to defend the continued use of race-conscious admissions).

³¹¹ See *id.*

³¹² Risk aversion concerns continue to animate UC's public Prop. 209 guidance. See *Guidelines for Addressing Race and Gender Equity in Academic Programs in Compliance with Proposition 209*, OFF. OF GEN. COUNS., UNIV. OF CAL. (July 2015), <https://diversity.universityofcalifornia.edu/files/documents/prop-209-guidelines-ogc-full.pdf> [<https://perma.cc/LGY4-VG7U>].

tion committed to racial inclusion, risk aversion helps to explain why UC abandon practices that promoted a more inclusive institution.³¹³

Some universities recently dropped race-conscious programs after receiving formal or informal complaint. For example, Texas Tech University Health Sciences Center School of Medicine abandoned its longstanding race-conscious admissions policy in 2019 following threats of federal action.³¹⁴ This example is noteworthy, in part, because such practices are constitutional under existing Supreme Court law.³¹⁵ Even with the law on its side, the threat of a federal investigation—and the costs involved—led the school to pull its program. These costs, which range from the expenditure of human capital to expenses required to retain outside legal counsel, constitute one component of the “justification costs” referenced above.³¹⁶

Similar examples have become more common since President Trump issued his initial “anti-CRT” Executive Order in 2020.³¹⁷ In the wake of that order—which a federal court subsequently enjoined—Stanford University directed employees to avoid references to “structural” or “systemic racism” within “Diversity Trainings.”³¹⁸ The response provoked immediate and widespread backlash.³¹⁹ One line of critique highlighted how Stanford, by prohibiting discussion of terms such as “structural racism,” voluntarily transcended the scope of Trump’s actual Executive Order.³²⁰ Following public

³¹³ Derrick Bell reflected on this dynamic following *Grutter*:

What is the besieged university counsel to do when faced by decisions that invite litigation that will be expensive, disruptive, and divisive? The prudent course is to urge that all use of race be removed from the admissions process. This is precisely the recommendation they would have given had Michigan lost the law school as well as the undergraduate case. Indeed, even before the Michigan decisions, a number of colleges and universities had opted to remove all racial criteria from their admissions policies. Schools that decide not to abandon minority admissions efforts entirely have chosen to rely on percentage plans or a set of nonracial criteria.

Bell, *supra* note 86, at 1629.

³¹⁴ See Michelle Hackman, *U.S. Requires Texas Tech Med School to End Use of Race in Admissions Decisions*, WALL ST. J. (Apr. 9, 2019), <https://www.wsj.com/articles/trump-administration-to-require-texas-tech-to-end-use-of-race-in-admissions-decision-11554829163> [<https://perma.cc/X58R-YK6R>]. In a similar vein, the University of Georgia opted not to reinstate its race-conscious admissions policy even after the Supreme Court confirmed the validity of such practices in *Grutter*. See Eric Stirgus, *Court ruling changed Georgia’s approach to race-based college admissions*, THE ATLANTA J.-CONST. (July 3, 2018).

³¹⁵ See *Fisher*, 579 U.S. at 365.

³¹⁶ See *supra* Section II.B.2(3) (explaining that affirmative action can produce a range of administrative costs)

³¹⁷ See Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf> [<https://perma.cc/2B2W-RRQ7>].

³¹⁸ See Khari Johnson, *Stanford rushes to comply with Trump Executive Order Limiting Diversity Training*, VENTURE BEAT (Nov. 17, 2020), <https://venturebeat.com/2020/11/17/stanford-rushes-to-comply-with-trump-executive-order-limiting-diversity-training/> [<https://perma.cc/JRB9-TQ5V>].

³¹⁹ See *id.*

³²⁰ Michele Dauber (@mldauber), Twitter (Nov. 16, 2020, 2:16 AM), <https://twitter.com/mldauber/status/1328235391019728896?s=20&t=CJTGDuTtP7hmBkjhkBuW-Zg> [<https://perma.cc/4MK7-U84D>].

outcry, Stanford reversed course. But their behavior was far from unique.³²¹ Even today, educators and institutions across the country report self-censorship of what they believe to be legal conduct—for fear of legal and political backlash.³²²

2. *Chill Evidence Gathering*

Even for universities that employ affirmative action, risk aversion can dissuade institutions from gathering and analyzing evidence that could fortify the legal case for their existing program. Specifically, institutions may be reluctant to compile evidence of past or present racial discrimination.³²³ Why the reluctance? Because even if evidence of discrimination would strengthen the case for affirmative action, it could expose the university to legal liability.³²⁴

This concern is not new. For decades, judges, scholars, and intervenors have cited this dynamic to explain why universities cannot adequately defend their own programs.³²⁵ The following articulation, from the *Gratz* intervenors, captures this insight: “[C]ourts in other cases have repeatedly recognized, even those educational institutions that purport to defend affirm-

³²¹ Reflecting a similar dynamic, the University of Central Florida’s English Department removed, and then reposted, an “antiracism statement” from its website after Florida’s Republican Governor signed a bill that regulates how educators can discuss race and racism in the classroom. See Nicole Orsorio, *UCF’s English Department suspends anti-racism statement following the passage of Stop WOKE Act in Florida*, ORLANDO WEEKLY (July 7, 2022), <https://www.orlandoweekly.com/news/ucfs-english-department-suspends-anti-racism-statement-following-the-passage-of-stop-woke-act-in-florida-31978303> [<https://perma.cc/K63A-M9V9>].

³²² See Eesha Pendharkar, *Efforts to Ban Critical Race Theory Now Restrict Teaching for a Third of America’s Kids*, Education Week (Jan. 27, 2022), <https://www.edweek.org/leadership/efforts-to-ban-critical-race-theory-now-restrict-teaching-for-a-third-of-americas-kids/2022/01> [<https://perma.cc/3SRY-AHGX>]. See also Nick Seabrook (@DrSeabrook), TWITTER (Jan. 9, 2023), <https://twitter.com/DrSeabrook/status/1612470031933218818?s=20&t=JHpK57bRUTgqKS4ENNPnFQ> [<https://perma.cc/DB2Q-K3D9>] (“Key point in this @donmoyn piece: the chilling effect on faculty speech is real even if the courts rule against DeSantis. Already in the last week I’ve had faculty members come to me and ask if they should remove references to race, diversity, and equity from their syllabi.”).

³²³ Alan Jenkins raised this precise concern when he observed that “by proffering evidence of the racial disparities that would exist absent the use of race-sensitive policies, affirmative action defendants expose themselves to potential liability to minority applicants.” Jenkins, *supra* note 12, at 308–09.

³²⁴ See *id.* A similar script played out in 2020 after Princeton University acknowledged its own history of institutional racism. See Anemona Hartocollis, *Princeton Admitted Past Racism. Now It Is Under Investigation*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/us/princeton-racism-federal-investigation.html> [<https://perma.cc/N4W5-ESX2>].

³²⁵ United Steel Workers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring) (suggesting that “on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks”); Memorandum in Support of Proposed Defendant-Intervenors’ Motion to Intervene, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* 308 F.R.D. 39 (No. 14-cv-14176-ADB); Memorandum of Law in Support of Proposed Defendant-Intervenors’ Motion to Intervene at 15, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 319 F.R.D. 490 (No. 1:14-cv-954).

ative action admissions policies are unlikely to proffer defenses that would call attention to their own past, let alone any present, discrimination.”³²⁶

This is not to suggest that risk aversion is the only factor that leads universities to downplay evidence of discrimination.³²⁷ Such evidence might also cut against a school’s brand goals.³²⁸ Still, risk aversion remains a motivating force that renders universities compromised affirmative action advocates.

3. *Chill Theory Development*

Risk aversion can also dissuade universities from endorsing or advancing broad conceptions of discrimination. The logic tracks potential concerns associated with evidence gathering. But whereas evidence gathering could produce facts probative of unlawful discrimination, theory development could expand the types of conduct that create legal liability.

The Harvard litigation offers a useful case study. One of SFFA’s principal claims is that Harvard discriminates against Asian American applicants. Under governing case law, discrimination claims require proof of discriminatory purpose or intent.³²⁹ Evidence of disparate impact, alone, is insufficient.³³⁰ This narrow conception of discrimination poses a significant hurdle for SFFA. Even with evidence that Harvard’s admissions process subjects Asian Americans to unintentional disparate treatment, the district court and First Circuit rejected SFFA’s claim because the plaintiff did not establish

³²⁶ See Motion to Intervene, *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998), *rev’d sub nom.* *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999) (No. 97-CV-75231-DT) (citing *Baker v. City of Detroit*, 504 F. Supp. 841, 849 (E.D. Mich. 1980) (“One way to minimize the employer’s dilemma in a reverse discrimination case is to allow intervention by parties who have an incentive to introduce evidence of past discrimination”), *aff’d sub nom.* *Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983); see also *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1082 n.47 (D. Md. 1993) (“It is worthy of note that the University is (to put it mildly) in a somewhat unusual situation. It is not often that a litigant is required to engage in extended self-criticism in order to justify its pursuit of a goal that it deems worthy. All other matters aside, UMCP administrators are to be commended for the moral courage that they have demonstrated in undertaking this self-examination with an admirable degree of candor”), *vacated*, 38 F.3d 147 (4th Cir. 1994), *amended on denial of reh’g*, 46 F.3d 5 (4th Cir. 1994).

³²⁷ *Lawrence*, *supra* note 154, at 956–57 (“Perhaps the University’s rejection of the remedial defense can be explained by its concern that by admitting its own discriminatory practices it would expose itself to liability vis-à-vis minority applicants and students.”).

³²⁸ See *id.* (arguing that a “University’s reluctance to admit past and present discrimination is . . . the faculty’s and administration’s reluctance to examine and admit their own participation in racism and to give up the advantages the current system affords them”).

³²⁹ See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”); *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (“What we said in *Alexander v. Choate* . . . is true today: ‘Title VI itself directly reach[es] only instances of intentional discrimination.’”).

³³⁰ One exception comes from Title VI’s implementing regulations, which contain a disparate impact provision. See *Feingold*, *supra* note 15 (discussing Title VI’s implementing regulations).

discriminatory intent.³³¹ These rulings deemed immaterial evidence of implicit biases and other manifestations of anti-Asian discrimination that occurred before and during Harvard's admissions process.³³²

For a university interested in minimizing legal exposure, there is a benefit to legal standards that require proof of discriminatory intent. Under such a regime, Harvard can evade most—if not all—discrimination claims that target facially race-neutral practices in admissions or beyond. As a matter of institutional self-interest, Harvard has no obvious incentive to advance a thicker conception of discrimination that encompasses, for example, disparate impact or unintentional disparate treatment.

Consistent with this logic, Harvard contested SFFA's discrimination claim by citing the absence of discriminatory intent.³³³ This response trades on a doctrinal rule that inoculates many of Harvard's existing practices from legal scrutiny—even if those policies function as white racial advantages that undermine the goal of a racially diverse and inclusive campus. But intent-based rules benefit neither affirmative action nor affirmative action's direct beneficiaries: students from underrepresented racial groups. As noted, the intent standard insulates common institutional arrangements that reproduce racial inequality. Harvard's defense, in turn, entrenches a legal regime better suited to perpetuate than to remedy legacies of racial exclusion.

The intent standard also narrows the available justifications for affirmative action. Were the Supreme Court to infuse antidiscrimination law with a more capacious conception of discrimination (e.g., disparate impact or unintentional disparate treatment), that would broaden the remedial rationales available to affirmative action proponents. As a result, when Harvard reinforces a narrow conception of discrimination, it constrains its own ability to legally defend race-conscious admissions.³³⁴

³³¹ The evidence of unintentional disparate treatment implicates facially race-neutral components of Harvard's admissions process. See *White Bonus*, *supra* note 99, at 722, 725–728 (explaining that evidence of anti-Asian bias, because it tends to benefit white applicants, derives from facially race-neutral components of Harvard's admissions process).

³³² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 171 (D. Mass. Sep. 30, 2019) (“Taking account of all the available evidence, it is possible that implicit biases had a slight negative effect on average Asian American personal ratings, but the Court concludes that the majority of the disparity in the personal rating between white and Asian American applicants was more likely caused by race-affected inputs to the admissions process (e.g. recommendations or high school accomplishments) or underlying differences in the attributes that may have resulted in stronger personal ratings.”). Even as it dismissed the discrimination claim, the district court advised that Harvard's admissions “process would likely benefit from conducting implicit bias trainings for admissions officers.” See *id.* at 204.

³³³ See, e.g., Brief for Defendant-Appellee, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 2020 WL 2521577 at *48 (No. 1:14-cv-14176-ADB) (“The district court found that the statistical evidence ‘does not demonstrate any intent by admissions officers to discriminate,’ or otherwise show that ‘Harvard has engaged in improper intentional discrimination.’ This finding was well supported.”) (citations omitted).

³³⁴ Beyond legal risk aversion, a motivating factor may be the university's desire to retain autonomy over its admissions practices. See *Jenkins*, *supra* note 12, at 314 (“In the affirmative

CONCLUSION

We are at pivotal political moment. 2020's global uprising for racial justice triggered a right-wing campaign against antiracism itself. Affirmative action is back before the Supreme Court. Even if the outcome is inevitable, affirmative action litigation—and the public discourse it generates—remains a site of potent contestation over the ongoing relevance of race and racism in America. Harvard and UNC enjoy an outsized opportunity to shape that national conversation. Despite this privileged position, Harvard and UNC have not marshaled the most compelling case for their own race-conscious policies. For those committed to antiracist reform and multiracial democracy, it is critical to understand why affirmative action's formal champions remain ambivalent advocates. Doing so is unlikely to alter the trajectories of ongoing litigation, but it can help chart a path for what comes after affirmative action.

action context, defendants have an interest not only in avoiding liability, but also in maintaining selection criteria and other operating procedures that are easy to administer, relatively inexpensive, and enjoy broad support. Beneficiaries, in contrast, are generally unconcerned with the particular mechanisms that are used, so long as they are fair and preserve equal opportunity.”).