

AFFIRMATIVE ACTION: A MISMATCH FOR CORRECTING A TRADITION OF RACIAL WEALTH GAP DISCRIMINATION

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I. INTRODUCTION

The issue to be addressed is whether a legally risky affirmative action policy, which considers race or social economic factors without giving any facial consideration to the after-effects of slavery in promoting educational diversity or economic justice, is a reasonable solution for correcting generations of racial discrimination. Governmental policies authorizing race-based affirmative action have been construed as a thinly disguised attempt to practice reverse hostile race-based discrimination.¹ Aggressive attacks on race-based affirmative action grew significantly during the 1990s.² Nevertheless, supporters of race-based affirmative action continue to argue that it is required as a form of social diversity medication for past racial discrimination.³ In sharp contrast, the enemies of race-based affirmative action have made known their belief that, because affirmative action represents one-sided preferences based on race, affirmative action constitutes reverse racial discrimination.⁴

The heavy focus on a traditional affirmative action remedy is a distraction from a real public debate about what is needed to close the nation's racial wealth gap and correct the after-effects of slavery and generations of racial discrimination. An argument can be made that the affirmative action apple pie was never actually intended to close the wealth gap between Black Americans and White Americans, but that it was offered as a form of racial appeasement allowing primarily the Black upper class to have greater access to the nation's more prestigious universities. The American racial wealth gap has been described by researchers as "the economic disparities between Black and [W]hite Americans, with a [W]hite-to-Black per capita wealth ratio of 6 to 1."⁵ Professor Michelle Alexander has implicitly suggested that the struggles around affirmative action may

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¹ 9 West's Fed. Admin. Prac. § 11466, *Affirmative Action and Reverse Discrimination—The Future of Affirmative Action*, Westlaw (database updated July 2022).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap*, 1860–2020, at 1 (Nat'l Bureau Econ. Rsch., Working Paper No. 30101, 2022), <https://www.nber.org/papers/w30101>.

have intentionally been designed to distract people from focusing in on challenging the structures that perpetuates the racial wealth gap.⁶ Unlike the typical affirmative action debate, “the racial wealth gap underscores the importance of slavery and post-slavery institutions for the persistence of the wealth gap.”⁷

There are good reasons for examining the plausible, unintended, harmful consequences associated with race-based and class-based affirmative action attempting to correct generations of racial discrimination without a link to the after-effects of slavery. It is necessary and proper, during a discussion of the future of affirmative action, to review some of the race and class-based affirmative action issues confronting the courts, lawmakers, and commentators. The affirmative action debate must focus on the continuing harmful economic after-effects of slavery on the lives of Americans who were freed from involuntary slavery. A discussion of affirmative action which ignores slavery as an oversized factor undermines any articulated commitment to economic justice and social equality. In twenty-first century America, those who suffer from the six-to-one racial wealth gap⁸ lack the competitive middle-class resources to live in the better neighborhoods or to attend the good schools, buy homes, or use discretionary money to invest in the stock market.

Part I briefly discusses how using race-based affirmative action to help correct generations of racial discrimination is a legally risky and inadequate road paved with problematic intentions. Part II analyzes how the affirmative action issue was treated by lower federal courts by highlighting the Harvard case and examining the University of North Carolina case.⁹ Part II presents the implications of the economic after-effects of slavery under the Thirteenth Amendment and the Harvard affirmative action publicity. Finally, Part IV recommends a revised constitutional model for affirmative action based on the neutrality of the slave provision in the Thirteenth Amendment.

⁶ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 234 (2010).

⁷ Derenoncourt et al., *supra* note 5, at 4.

⁸ *Id.* at 1.

⁹ See Nina Totenberg & Eric Singerman, *The Supreme Court Adds Affirmative Action to its Potential Hit List*, NPR, <https://www.npr.org/2022/01/24/1003049852/supreme-court-adds-affirmative-action-to-its-potential-hit-list> (Jan. 24, 2022, 5:39 PM) (announcing that the United States Supreme Court will review affirmative action programs at Harvard and the University of North Carolina).

II. TRADITIONAL AFFIRMATIVE ACTION IS LEGALLY RISKY AND INADEQUATE

What is the purpose of affirmative action programs? Generally, “[a]ffirmative action programs have been established by government units to correct generations of racial discrimination.”¹⁰ However, using affirmative action to correct generations of racial discrimination is a risky public policy road paved with problematic intentions.¹¹ Supporters of race-based affirmative action “who believe they are doing good can end up doing bad (the law of unintended consequences). There is no value in simply planning to do good if you don't actually do it.”¹² One of the problems with race-conscious college admissions programs is that they are virtually impossible to implement.¹³ The Court will hold that race-based admissions programs are prohibited by the equal protection principle or that a state may prohibit race-based affirmative action programs without violating equal protection.¹⁴

Historically speaking, when those who plan to do good by implementing race-based affirmative action believe they cannot actually implement their good intentions, they look to class-based admissions as a plausible alternative.¹⁵ From a pragmatic perspective, class-based affirmative action appears to be less problematic than race-based affirmative action because class-based affirmative action is easier to defend against an allegation of an unconstitutional equal protection violation.¹⁶ Indeed, “the Court has never found that classifications on the basis of income are suspect.”¹⁷ Advocates of class-conscious affirmative action contend that race-based affirmative action programs usually benefit people who are not truly as disadvantaged as other members of their minority group.¹⁸ When

¹⁰ 9 West's Fed. Admin. Prac., *supra* note 1, § 11466.

¹¹ See Josef Essberger, *The Road to Hell is Paved with Good Intentions*, Eng. Club https://www.englishclub.com/ref/esl/Sayings/Quizzes/Religion/The_road_to_hell_is_paved_with_good_intentions_917.php (last visited Nov. 22, 2022).

¹² *Id.*

¹³ Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. Rev. 55, 61 (2016).

¹⁴ *Id.* at 61 & n.29 (“Justice Kennedy, for one, conceptualizes the move toward class-based (or otherwise non-race-based) avenues as a means to remedy the race-salient problem of the underrepresentation of racial minorities in academic classes to be an intended and desired eventuality -- and not a guileful effort to duck the requirements of the Constitution. See also *Grutter*, 539 U.S. at 394 (Kennedy, J., concurring) (“Were the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives.”)).

¹⁵ *Id.* at 61.

¹⁶ *Id.* at 63.

¹⁷ *Id.*

¹⁸ *Id.* at 88; see also *id.* at 88 n.153 (citing Richard D. Kahlenberg & Halley Potter, *A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences* (2012) (arguing that the racial minorities who actually benefit from race-conscious

compared to race-based affirmative action, “class-based programs will more successfully target those who are disadvantaged, ensuring that those who are benefitted are actually deserving in that regard.”¹⁹

Although some are willing to extend a greater degree of toleration to class-based affirmative action than race-based affirmative action, it is nevertheless a problematic act of symbolism.²⁰ Class-based affirmative action, despite its likelihood of being upheld as constitutionally valid, will not help to correct generations of racial discrimination in a truly significant way.²¹ Its symbolism fails to adequately address the bigger fight for economic equal justice.²² Thus, neither race-based affirmative action nor class-based affirmative action will help correct generations of racial discrimination plus the after-effects of slavery in impairing economic equality.²³

Race-based affirmative action is not adequate to promote educational equality and diversity in college admission and diversity.²⁴ Race-based affirmative action is so problematic that its good intentions may have lost their symbolic value because of an enduring greater legal struggle.²⁵

The battle over [race-based] affirmative action in higher education is part of a larger legal struggle. The contemporary conservative legal movement was formed in part to strike down anti-discrimination laws and race-conscious policies designed to promote diversity. That movement says dividing people up by race is unconstitutional, that the Constitution is “colorblind” and that all Americans should be treated as individuals, not as members of a racial or ethnic group.²⁶

admissions programs enjoy a large degree of class privilege and/or come from privileged subpopulations (such as immigrant groups)).

¹⁹ *Id.* at 88; see also *id.* at 88 n.154 (citing Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L. REV. 213, 257 (1997) (delineating Kahlenberg's position that class preferences benefit the actual victims of class injury in a way that race “preferences” do not)).

²⁰ Haley Tenore, *Opinion: Affirmative Action Is Not the Way to End Discrimination*, STATE PRESS (Feb. 24, 2021) <https://www.statepress.com/article/2021/02/spopinon-affirmative-action-is-not-the-way-to-end-discrimination#>.

²¹ Bridges, *supra* note 13, at 80–94 (citations omitted).

²² *Id.*

²³ *Id.*

²⁴ Tenore, *supra* note 20 (“It feels as though universities are more focused on tokenism, rather than making sure marginalized students succeed. This is where the issue lies.”).

²⁵ *Id.* (“Affirmative action is peak performative activism . . .”).

²⁶ John Blake, *The Supreme Court May Ban Affirmative Action, but the World That*

According to a Gallup Poll conducted in 2021, sixty-two percent of Americans said that they supported the big concept of affirmative action.²⁷ However, “nearly three-quarters of Americans in a 2019 Pew Research Center survey said colleges and universities should not consider race or ethnicity in student admissions.”²⁸ Sixty-two percent of Black Americans and seventy-eight percent of White Americans said race should not be a factor in college admissions.²⁹

The fundamental problem with an affirmative action approach is that its advocates have promised more than it can deliver. These advocates suggest that affirmative action can make significant progress toward correcting generations of racial discrimination by “compensat[ing] for centuries of slavery and segregation.”³⁰ Economic research,³¹ when linked to the affirmative action debate, demonstrates that the under-representation of racial minorities at Harvard and other institutions of higher learning is directly linked to the racial wealth gap created by the after-effects of slavery and the continuing intergenerational racial discrimination. Researchers Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn and Moritz Schularick, from the National Bureau of Economic Research, have concluded, “The racial wealth gap is the largest of the economic disparities between Black and [W]hite Americans, with a [W]hite-to-Black per capita wealth ratio of 6 to 1. It is also among the most persistent.”³²

These economic researchers have documented evidence of “the role played by initial conditions, income growth, savings behavior, and capital returns in the evolution of the gap. Given vastly different starting conditions under slavery, racial wealth convergence would remain a distant scenario, even if wealth-accumulating conditions had been equal across the two groups since Emancipation.”³³ As compared to the narrower wealth gap one would expect if wealth-accumulating conditions had been equal since Emancipation, these economic researchers stated that closing the wealth gap between Black Americans and White Americans has moved “even slower . . . over the last 150 years, with convergence stalling after 1950. Since the 1980s, the wealth gap has widened again as capital gains have predominantly benefited [W]hite households, and income convergence has stopped.”³⁴

Embraces Diversity Is Here to Stay, CNN, <https://www.cnn.com/2022/02/27/us/affirmative-action-scotus-blake-cec/index.html> (Feb. 27, 2022, 12:45 PM).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ See Derenoncourt et al., *supra* note 5.

³² *Id.* at 1.

³³ *Id.*

³⁴ *Id.*

An economic justice remedy for the centuries of exploitation created by slavery and discrimination reasonably requires more than either class-based or race-based affirmative action has to offer. “Centuries of discrimination and exploitation have left Black Americans much poorer than [W]hite Americans. . . . But any program to close the racial wealth gap must grapple with . . . wealth concentration in contemporary America. The 400 richest American billionaires have more total wealth than all 10 million Black American households combined.”³⁵ Although a degree from Harvard may provide an increase in the opportunity for economic gain,³⁶ the Harvard degree is not enough to make amends for the loss of wealth accumulation opportunity by an enslaved people.³⁷ Consider the argument that the affirmative action battle at America’s leading universities may very well be an intended consequence to preoccupy these universities with race.³⁸ A leading university preoccupied with defending race-based affirmative action is less likely to promote economic research that demonstrates increasing taxes on the privileged billionaire class is an effective tool to close the racial wealth gap.³⁹ “A comprehensive agenda to close the racial wealth gap would likely include reforms to income and estate taxation, plus new taxes on wealth and inheritance, buttressed by a substantial investment in enforcement.”⁴⁰ However, this proposed comprehensive plan to increase taxes on the super-rich will probably not survive because the billionaire class is very likely to object.⁴¹ Although affirmative action is a very inadequate measure to cure the racial disparity gap, the Supreme Court’s decision to hear a challenge to race-based affirmative action during its upcoming term

³⁵ Vanessa Williamson, Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth, Brookings Inst. (Dec. 9, 2020), <https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/>.

³⁶ 4 Reasons Why an Ivy League Education Is Worth It, CRIMSON EDUC. BLOG (June 13, 2022), <https://www.crimsoneducation.org/us/blog/campus-life-more/benefits-of-Ivy-League/> (“Except for MIT, Harvard graduates make more money after college than graduates from any other college.”).

³⁷ See generally S. Michael Gaddis, *Discrimination in the Credential Society: An Audit Study of Race and College Selectivity in the Labor Market*, 93 *SOCIAL FORCES* 1451 (2014).

³⁸ Sofia Elena Chaelin Lee-Rodriguez & Warren Wu, *Affirmative Action: A Convenient Distraction from Institutional Inertia*, FAULT LINES (June 25, 2021), <https://faultlinesmag.com/affirmative-action-euphemism/> (last visited Oct. 21, 2022); see also Tanya M. Washington, *Jurisprudential Ties That Bind: The Means to End Affirmative Action*, 31 *HARV. J. RACIAL & ETHNIC JUST. ONLINE* 1, 34 n.138 (2015) (citing ALEXANDER, *supra* note 6, at 236).

³⁹ See generally Lee-Rodriguez, *supra* note 38 (quoting Vinay Harpalani: “As for redressing ‘other types of challenges [underprivileged students] face, . . . Harvard, the admissions process, [and] affirmative action [aren’t doing] much to address that[.] So I would like to see it do more. And I think it can do a lot more, whether Harvard wants to do that or not... [because] they want to maintain their elite status.’”)

⁴⁰ Williamson, *supra* note 35.

⁴¹ See, e.g., David Gura, *The Super Rich Push Back Against a Wealth Tax*, NPR (Nov. 10, 2021, 5:08 AM), <https://www.npr.org/2021/11/10/1054175407/the-super-rich-push-back-against-calls-for-a-wealth-tax>.

has recently generated increased publicity and scrutiny about affirmative action in college admissions.⁴²

III. AFFIRMATIVE ACTION IN FEDERAL COURT

Researchers from the National Bureau of Economic Research strongly suggest what is really needed to promote economic equality is a tax policy to close the racial wealth gap with a program of progressive taxation aimed at billionaires.⁴³ In light of this perspective, one may wish to consider the question asked by Professor Tanya Washington: whether affirmative action is worth preserving in the context of college admissions at all.⁴⁴ After all, “affirmative action, in its current condition – weakened by the Court’s consistent calibration of constitutional rules to foreclose meaningful progress, may not be adequate for the task at hand.”⁴⁵ Affirmative action appears to be dying prematurely despite the continued existence of the problems it was implemented to solve.⁴⁶

As the Supreme Court prepares to issue its next affirmative action decision, Professor Alexander says affirmative action is a distraction, and that race-based affirmative action programs only create the appearance of racial equality because there is a continuing need to distract people from the continuing harm caused by racial discrimination.⁴⁷ In the big-picture context of the racial wealth gap between Black Americans and White Americans created by generations of slavery and racial discrimination, increasing educational diversity at Harvard is a symbolic token, at best.⁴⁸ Nevertheless, it is necessary and proper to discuss affirmative action because on October 31, 2022, the United States Supreme Court heard oral arguments in *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College*, an affirmative action case that was originally consolidated from two cases, one involving Harvard and the other involving the University of North Carolina.⁴⁹ On July 22, 2022, the Court deconsolidated the two cases,⁵⁰ thus allowing Justice Ketanji Brown Jackson to participate in the North Carolina case despite having recused herself from the Harvard case.⁵¹

⁴² See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

⁴³ Derenoncourt et al., *supra* note 5, at 26.

⁴⁴ Washington, *supra* note 38, at 34.

⁴⁵ *Id.* at 34 & n.137 (citing ALEXANDER, *supra* note 6 at 234).

⁴⁶ *Id.*

⁴⁷ *Id.* at 34 n.138 (citing ALEXANDER, *supra* note 6 at 236).

⁴⁸ See *supra* Part II.

⁴⁹ 142 S. Ct. 895 (2022).

⁵⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2022 WL 2899391, at *1 (U.S. July 22, 2022).

⁵¹ Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (July 22, 2022, 6:43 PM),

The current Harvard case arises in part from a First Circuit affirmative action case, wherein Asian American plaintiffs alleged discrimination by historically White Harvard in favor of White applicants.⁵² However, since Harvard's diversity goals do not expressly address the racial wealth gap between Black Americans and White Americans,⁵³ the battle over diversity affirmative action is a tempest in teapot. Perhaps Harvard's "tempest in the teapot" promotion of diversity affirmative action exists because the appearance of racial diversity—as armor against generations of racial discrimination against Black people by White people—matters more than results. The future challenge for Harvard is to go beyond educational diversity and develop relevant economic data and legal theories relating to the National Bureau of Economic Research's conclusion that the contemporary racial wealth gap issue exists as an after-effect of slavery.⁵⁴ But for slavery, the racial wealth gap, and racial discrimination, affirmative action educational diversity would not be either legally necessary or plausible.⁵⁵

A. The Harvard Case

Students for Fair Admissions, Inc. (SFFA) filed its suit in federal district court on November 17, 2014, against Harvard.⁵⁶ The suit alleged that Harvard's undeniably race-conscious undergraduate admissions process is prohibited by Title VI of the Civil Rights Act of 1964 ("Title VI") because it practices racial discrimination against Asian American applicants in favor of White applicants.⁵⁷ SFFA claimed that Harvard does not meet the Supreme Court's requirements for the use of race in college admissions to promote educational diversity since the Harvard plan is fatally flawed because it utilizes the following four prohibited techniques: "(1) it engages in racial balancing of its undergraduate class; (2) it impermissibly uses race as more than a 'plus' factor in admissions decisions; (3) it considers race in its process despite the existence of workable race-neutral alternatives; and (4) it intentionally discriminates against Asian American applicants to

<https://www.scotusblog.com/2022/07/court-will-hear-affirmative-action-challenges-separately-allowing-jackson-to-participate-in-unc-case/>.

⁵² *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA III)*, 980 F.3d 157, 163 (1st Cir. 2020).

⁵³ Brief for Respondent at 5–6, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2002) (No. 20-1199). *See also* Derenoncourt et al., *supra* note 5, at 1.

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *SFFA III*, 980 F.3d at 163.

⁵⁷ *Id.* (citing Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601–05, 78 Stat. 241, 252–53 (codified at 42 U.S.C. §§ 2000d–2000d-7)).

Harvard College.”⁵⁸

The district court refused to grant Harvard's motion to dismiss SFFA's suit for lack of Article III standing.⁵⁹ At the conclusion of a fifteen-day bench trial during which thirty witnesses testified, the district court issued a 130-page opinion based on the facts and applicable rules of law.⁶⁰ The district court found that Harvard met its burden of demonstrating that its admissions practice did not violate Title VI, and it entered judgment in favor of Harvard on all of the Title VI claims.⁶¹ SFFA appealed the Title VI judgment, and although Harvard repeated its argument that SFFA lacked standing, the First Circuit Court of Appeals concluded that SFFA had “associational standing to bring its claims.”⁶² The First Circuit affirmed that Harvard's race-conscious admissions practice under relevant Supreme Court affirmative action diversity precedent did not violate Title VI.⁶³

1. *Harvard's Current Admissions Practices*

Harvard's admissions process is complex and very competitive.⁶⁴ Every year, Harvard College admits a class of about 1,600 students.⁶⁵ For the entering class of 2019, Harvard acknowledged about 35,000 applications.⁶⁶ Due to the great size of its applicant pool, Harvard is not able to admit all applicants who have the ability to succeed academically.⁶⁷ “Rather, Harvard seeks students who are not only academically excellent but also compelling candidates on many dimensions.”⁶⁸ Harvard's elaborate application process contains six steps: (1) pre-application recruitment; (2) application submissions; (3) Harvard's “first read;” (4) applicant interviews by admissions representatives and alumni; (5) subcommittee recommendations by admissions representatives; and (6) final deliberation and decisions by the whole admissions committee.⁶⁹ In addition, Harvard utilizes a system of “tips” for individual applicants that may be examined during or after the third step – a “tip” being “plus factors” that might otherwise push an applicant into Harvard's admitted class.⁷⁰

⁵⁸ *Id.*

⁵⁹ *Id.*; see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA I)*, 261 F. Supp. 3d 99, 111 (D. Mass. 2017).

⁶⁰ *SFFA III*, 980 F.3d at 163; see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA II)*, 397 F. Supp. 3d 126, 132 (D. Mass. 2019).

⁶¹ *SFFA III*, 980 F.3d at 163 (citation omitted).

⁶² *Id.* at 164 (citation omitted).

⁶³ *Id.*

⁶⁴ *Id.* at 165.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *SFFA III*, 980 F.3d at 165.

The Harvard case demonstrates the elaborate steps that Harvard has taken to justify and implement its very problematic race-conscious diversity affirmative action admissions program. If Harvard prevails in protecting its affirmative action plan, its victory will—at best—create a symbol of educational diversity justice. At worst, a problematic “protect affirmative action” victory for Harvard will perpetuate false notions of either racial superiority or racial inferiority among racial groups seeking admission to Harvard. Contextually, Harvard’s admission process serves as a very valuable tool to support an argument for transparency in college admission decisions at all colleges—especially those with very competitive admission standards. In college admissions, race is not likely to be treated as one among many factors; rather, most people perceive race as the significant “but for” factor in the admission process. If race is indeed a significant “but for” factor, any use of race by Harvard in the admission process may very well be on the chopping block in the Supreme Court’s upcoming decision.⁷¹

Harvard takes elaborate steps to finalize its undergraduate admission decisions.⁷² The applicants presented to the full committee are discussed individually and each member of the full committee votes on admission.⁷³ An applicant is required to receive a majority of the full committee’s vote in order to be offered admission.⁷⁴ The full committee vote on applicants usually results in a group of 2,000 tentative admits from whom the final 1,600 are selected.⁷⁵ To finalize the admitting class, Harvard administers a “lop process” in order to continue to reduce the pool of 2,000 tentative admits.⁷⁶

Before deciding which applications will be lopped, members of the admissions committee are informed of various demographic characteristics of the admitted applicants, including race. Admissions officers then compile a “lop list” of applicants who might be lopped. This list includes information about tentative admits -- race, athletic rating, legacy status, and socioeconomic status -- relating to some of Harvard’s admissions tips. After enough applicants have been lopped, Harvard sends decisions to applicants.⁷⁷

⁷¹ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

⁷² *SFFA III*, 980 F.3d at 170.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 165, 170.

⁷⁶ *Id.* at 170.

⁷⁷ *Id.*

The Court will likely require Harvard to delete race as a factor from its “lop list” process because the Court will likely not recognize racial diversity as an adequately compelling interest. Instead, the Court will likely find that considering race as a factor unconstitutionally discriminates against races not included in Harvard’s affirmative action plan.⁷⁸ As an alternative to considering race as a factor when deciding who might be lopped, Harvard could consider the race-neutral economic disparity effects of the legacy of slavery as a factor in its admission process.⁷⁹ Because of the great gap in starting conditions that exist as a result of slavery, both an education and racial wealth gap continue to persist between Black Americans and White Americans.⁸⁰

2. *Harvard Can Move Forward With a Constitutional “Badge of Slavery” Tip System*

Harvard’s defense of its affirmative action procedure starts with alleging that SFFA does not have standing to challenge the Harvard program. A federal court cannot hear a case that fails to meet the case and controversy requirements of Article III of the U.S. Constitution.⁸¹ An association has standing to sue for its members if three requirements have been met: (1) a minimum of one of its “member[s] possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals.”⁸² Harvard unsuccessfully attempted to deny SFFA an opportunity to present its challenge to Harvard’s affirmative action admissions program by alleging that SFFA did not meet the standing requirement demanded by Article III of the Constitution.⁸³ The First Circuit rejected Harvard’s lack of standing argument because “when suit was filed in November 2014, SFFA was a validly incorporated 501(c)(3) nonprofit with forty-seven members who joined voluntarily to support its mission of ‘defend[ing] human and civil rights secured by law, including the right of individuals to equal protection under the law.’”⁸⁴ SFFA has associational standing to move forward on its claim that the Harvard affirmative action plan is prohibited by Title VI.⁸⁵

⁷⁸ *Id.*

⁷⁹ See Derenoncourt et al., *supra* note 5.

⁸⁰ See *id.* at 1.

⁸¹ *SFFA III*, 980 F.3d at 182–83; see, e.g., Warth v. Seldin, 422 U.S. 490, 498 (1975).

⁸² *SFFA III*, 980 F.3d at 183 (quoting *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir. 1992)).

⁸³ *Id.* at 184.

⁸⁴ *Id.*

⁸⁵ *Id.*

As a result of receiving federal money, Harvard is subject to Title VI.⁸⁶ Because Title VI's protections are identical to those in the Equal Protection Clause of the Fourteenth Amendment, "Harvard is subject to the same limitations on its use of race in admissions as state-run institutions."⁸⁷ Harvard confesses that it thinks about race in its admissions process and sometimes gives "tips" to applicants while using race as a factor.⁸⁸ To survive a challenge under Title VI, Harvard's use of race in its admission process must meet the requirements of the strict scrutiny test.⁸⁹ Strict scrutiny requires that Harvard's use of race in its admissions process must be narrowly tailored to promote a compelling interest.⁹⁰ In the past, the Supreme Court has held that achieving student body diversity could serve as a compelling interest.⁹¹ To prove that its interest in achieving student body diversity is compelling, a university must prove that the university's justification for the use of race as a factor is clearly identified and unquestionably legitimate.⁹² SFFA's appeal before the First Circuit did not challenge the theory that Harvard has a compelling interest in diversity.⁹³ However, the First Circuit declared that Supreme Court precedent required it to judge whether Harvard's interest in promoting racial diversity is clearly identified, definite, and precise.⁹⁴

Harvard has identified specific, measurable diversity goals it is trying to achieve by using the race factor in admissions.⁹⁵ These diversity goals are more precise and open to judicial review than the diversity goals identified in the case that established diversity as a compelling interest, *Fisher II*.⁹⁶ The First Circuit relied on Harvard's Khurana Report to help it determine whether Harvard's educational diversity interest was compelling.⁹⁷ "The articulated purpose of the Khurana Report was to enable courts to assess whether Harvard's interest was sufficiently compelling to comply with strict scrutiny and Supreme Court precedent. The Khurana Committee produced the report after a thoughtful, rigorous study of the importance of diversity to

⁸⁶ *Id.* at 184–85; see 42 U.S.C. § 2000d ("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.").

⁸⁷ *SFFA III*, 980 F.3d at 185; see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

⁸⁸ *SFFA III*, 980 F.3d at 185.

⁸⁹ *Id.*; see *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 309 (2013).

⁹⁰ *SFFA III*, 980 F.3d at 185; see *Gutter v. Bollinger*, 539 U.S. 306, 326 (2003).

⁹¹ *SFFA III*, 980 F.3d at 185; see *Fisher I*, 570 U.S. at 310.

⁹² *SFFA III*, 980 F.3d at 185; see *Fisher I*, 570 U.S. at 310 (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505 (1989)).

⁹³ *SFFA III*, 980 F.3d at 185.

⁹⁴ *Id.*

⁹⁵ *Id.* at 186.

⁹⁶ *Id.* (citing *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365 (2016)).

⁹⁷ *Id.*

Harvard.”⁹⁸ The Khurana Committee utilized input and data received from students, alumni, faculty, and staff, as well as other stakeholders linked to Harvard's admissions process.⁹⁹ The Khurana Report identified four specific goals: “(1) training future leaders in the public and private sectors as Harvard's mission statement requires; (2) equipping Harvard's graduates and Harvard itself to adapt to an increasingly pluralistic society; (3) better educating Harvard's students through diversity; and (4) producing new knowledge stemming from diverse outlooks.”¹⁰⁰

Despite the First Circuit's opinion to the contrary, these four identifiable goals are clearly achievable without giving any formal consideration to race as a factor. Harvard's use of race as a factor to achieve its diversity goal is problematic because it creates an implicit interest in advancing simple ethnic diversity without guaranteeing a specified percentage of the student body to any ethnic group.¹⁰¹ Moreover, Harvard's use of race as a factor in more than one step of the admission process practically defeats its problematic argument that race is not a controlling factor if all the other factors among the applicants are equal.¹⁰²

A truly broad array of qualifications and characteristics would promote Harvard's diversity interest without necessitating formal consideration of race.¹⁰³ Increasing students' exposure to significant diversity of people, cultures, ideas, and viewpoints should be done without any formal consideration of race.¹⁰⁴ As an alternative to its current admission practices, Harvard should formally consider the effects of the badges of slavery as one of many race-neutral factors in a diversity program. Consideration of the badges of slavery is race-neutral because slavery is described in race-neutral terms in the Thirteenth Amendment.¹⁰⁵ Slavery or involuntary servitude is not permitted to exist in the United States except as a punishment for those convicted of a crime.¹⁰⁶ The Thirteenth Amendment grants Congress the necessary and proper power to enact appropriate legislation to enforce the prohibition against slavery.¹⁰⁷ Congress also has the power to erase the badges of slavery under the Enabling Clause of the Thirteenth Amendment, which provides “Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery

⁹⁸ *Id.*

⁹⁹ *SFFA III*, 980 F.3d at 186.

¹⁰⁰ *Id.*

¹⁰¹ *Contra id.*

¹⁰² *Contra id.*

¹⁰³ *Contra id.*

¹⁰⁴ *Contra id.*

¹⁰⁵ U.S. CONST. amend. XIII, § 1.

¹⁰⁶ *Id.*

¹⁰⁷ U.S. CONST. amend. XIII, § 2.

in the United States.”¹⁰⁸

Harvard should consider, as an alternative to its current race-conscious affirmative action plan, a formal race-neutral admissions policy that allow survivors to share how they are being impacted by the badges and incidents of the legacy of slavery. Under this “badges of slavery” proposal, every student seeking admission to Harvard, regardless of race, would be given an opportunity to demonstrate how his or her experience, as a survivor of the incidents and badges of slavery, will contribute to educational diversity at Harvard. If Harvard’s student body diversity rationale is based on the effects of slavery without any consideration of race as a factor, Harvard will not have to prove it has a compelling interest in racial diversity to survive constitutional scrutiny.¹⁰⁹ Harvard does not need a compelling interest to justify a race-neutral “survivor of the incidents and badges of slavery” diversity approach to comply with Title VI if the plan does not consider race as a factor.¹¹⁰ Instead, Harvard’s decision to implement the educational benefits that flow from student body diversity based on those who have experienced the badges and incidents of slavery, without considering race as a factor, would be an academic judgment which is given a great deal of judicial deference.¹¹¹ The heart of SFFA’s challenge to Harvard’s use of race in its admission plan is that the plan cannot survive strict scrutiny because, in the real world of experience, virtually no college admission plan using the race factor can be narrowly tailored enough to avoid the fatal attraction of step-by-step racial discrimination.¹¹²

Harvard’s use of race is neither narrowly tailored nor consistent with Supreme Court precedent because race is not just one factor; it is an oversized factor outweighing any other single factor in the admissions process.¹¹³ Overall, race continues to be an oversized factor in America’s deliberation about educational equality and diversity, and it is a factor beyond Harvard’s control because of the history of race relations in America.¹¹⁴ Supreme Court precedent reveals that “a university’s admissions program cannot be not narrowly tailored if it (1) involves racial balancing or quotas, . . . (2) uses race as a mechanical plus factor, . . . or (3) is used despite workable race-neutral alternatives”¹¹⁵ SFFA contends that Harvard’s admissions policy is not narrowly tailored because Harvard

¹⁰⁸ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968).

¹⁰⁹ *See SFFA III*, 980 F.3d 157, 185 (1st Cir. 2020).

¹¹⁰ *Id.*

¹¹¹ *Id.*; *see Fisher I*, 570 U.S. 297, 310 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

¹¹² *Contra SFFA III*, 980 F.3d at 187–95.

¹¹³ *Contra id.*

¹¹⁴ *Contra id.*

¹¹⁵ *Id.* at 187 (citations omitted).

was improperly practicing racial balancing.¹¹⁶ Harvard's attempt to explain diversity as an unstated ratio or proportion of a specific group, where race is intentionally or incidentally an oversized factor, likely violates the prohibition against racial balancing.¹¹⁷ Harvard's use of race as an oversized factor in its admissions process cannot be considered narrowly tailored to achieve diversity when its goal is to achieve an implied (but technically unspecified) racial ratio among its admitted students.¹¹⁸ A diversity plan that monitors numbers using race as a factor implicitly creates either an acknowledged form of racial balancing – a soft quota – or an unacknowledged “bury your head in the sand” improper use of race.¹¹⁹

B. The North Carolina Case

When universities with diversity programs monitor admissions numbers using race as a factor, race is practically, and predictably, at risk of becoming an oversized single factor. In the University of North Carolina (UNC) affirmative action case that was originally consolidated with the Harvard case, the federal trial court held “that race may be used only as a ‘plus’ factor that is at times — but never nonstop — offered to an underrepresented minority (URM) applicant.”¹²⁰ The judge explained that, with regard to UNC’s admissions policies, “[r]ace is one of more than forty criteria considered in every application, and the evaluation process is flexible enough to consider all of the pertinent elements of diversity that may be present for any particular applicant.”¹²¹ Perhaps because race was one of more than forty criteria in every application, the trial court held that “UNC’s policies are clear that race may never be used as the defining feature of a candidate’s evaluation.”¹²² Unlike the federal trial court, however, the Supreme Court during its upcoming term is likely to treat the “race as a plus factor” aspect of UNC’s admissions policies as an oversized racial factor that violates the equal protection of the law principle.¹²³ Although it may be difficult to determine when the race factor is so heavily weighted that it violates the equal protection principle, the Court’s decision is likely to echo Justice Stewart’s definition of hard-core pornography: “I know it when I see

¹¹⁶ *Id.* at 188.

¹¹⁷ *Id.*

¹¹⁸ *SFFA III*, 980 F.3d at 188; *see* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007).

¹¹⁹ *Contra SFFA III*, 980 F.3d at 188.

¹²⁰ *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 601 (M.D.N.C. 2021).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

it.”¹²⁴

Since race is perceived as an oversized single factor in the affirmative action admission program at UNC, it is not surprising that the UNC program has become a target for allegations by SFFA that the university’s public commitment to holistic admissions fails to live up to its billing.¹²⁵ SFFA claims UNC’s holistic approach fails “because UNC either conceals an improper use of race behind opaque procedures or is unable to ensure that the work of its large Admissions Office is consistent with its stated mission.”¹²⁶ The federal district court rejected the SFFA claim that UNC’s affirmative action holistic approach failed to live up to its billing by concluding “that there is no evidence that UNC conceals the improper use of race behind opaque procedures.”¹²⁷ In the North Carolina case, the Supreme Court is likely to hold that any use of race in the college admission process is invalid under the Constitution’s Equal Protection Clause.¹²⁸

C. Maintaining Racial Progress Despite Judicial Review of Race-Based Affirmative Action Programs

In the Harvard case, the First Circuit Court of Appeals interpreted the Supreme Court’s decision in *Fisher II* to support its conclusion that consideration of race by Harvard did “not operate as a mechanical plus factor for underrepresented minorities.”¹²⁹ However, the First Circuit’s interpretation of *Fisher II* is likely to be rejected in the Court’s current term.¹³⁰

The Supreme Court’s power to interpret the United States Constitution arises under its power of judicial review.¹³¹

It’s [the power of judicial review] that affirmative action supporters dread now that the high court has decided to consider the use of race in college admissions. They fear the conservative majority on the court will undo more than 50 years of racial progress in higher education, and the ripple effects could cause American institutions to

¹²⁴ See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

¹²⁵ *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d at 601.

¹²⁶ *Id.*

¹²⁷ *Id.* at 602.

¹²⁸ See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022).

¹²⁹ *SFFA III*, 980 F.3d 157, 190 (1st Cir. 2020) (quoting *Fisher II*, 579 U.S. 365, 375 (2016)).

¹³⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022).

¹³¹ Blake, *supra* note 26,

backtrack on efforts to become more diverse.¹³²

The Court's likely condemnation of affirmative action at Harvard and UNC is not new because affirmative action has been criticized since its introduction in the mid-1960s.¹³³ Although instituted in part to "compensate for centuries of slavery and segregation[,] affirmative action in the name of education diversity is not adequate to compensate for the after-effects of centuries of involuntary chattel slavery."¹³⁴ As the Rev. Martin Luther King Jr. stated, "[a] society that has done something special *against* the Negro for hundreds of years must now do something special *for* the Negro."¹³⁵ What American society did "special" against African Americans was to enslave them. The wealth gap experienced by African Americans today is because of the special harm they received as enslaved people and not because there was something unique about their race.¹³⁶ A society wishing to provide equitable access to higher education for any group of people, regardless of race, who can demonstrate a continuing societal disadvantage because of the after-effects of slavery is permitted to offer special affirmative action under the Thirteenth Amendment.¹³⁷

IV. THE IMPLICATIONS OF THE ECONOMIC AFTER-EFFECTS OF SLAVERY UNDER THE THIRTEENTH AMENDMENT AND THE HARVARD AFFIRMATIVE ACTION PUBLICITY

The Supreme Court's announcement on Monday January 24, 2022, that it would hear an affirmative action case involving the use of race as one factor in admissions at Harvard has generated a great deal of publicity because "[w]hen it comes to affirmative action, Harvard's program has long been a constitutional model cited by the court in dealing with programs at other schools."¹³⁸ The man behind the Harvard and UNC lawsuits, Edward Blum, is a conservative who has supported litigation hostile towards affirmative action for many years.¹³⁹ Blum has stated accurately that "polls

¹³² *Id.* (citing Joan Biskupic, *Supreme Court conservatives may have their chance to end affirmative action at universities*, CNN, <https://www.cnn.com/2021/12/09/politics/affirmative-action-supreme-court-conservatives-harvard/index.html>) and Ian Millhiser, *The Supreme Court case that could end affirmative action, explained* <https://www.vox.com/22301135/supreme-court-affirmative-action-harvard-college-race-students-for-fair-admission-ed-blum>

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* citing MARTIN LUTHER KING, JR. & CORETTA SCOTT KING, *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* (2010) (emphasis added).

¹³⁶ See Derenoncourt, *supra* note 5, at 3.

¹³⁷ U.S. CONST. amend. XIII, § 1.

¹³⁸ Totenberg & Singerman, *supra* note 9.

¹³⁹ *Id.*

conducted by Pew and Gallup have found that nearly 3 out of 4 Americans are opposed to the use of race in college admissions.”¹⁴⁰ That number, he observes, includes, “majorities of Hispanics, majorities of African Americans and majorities of Asian.”¹⁴¹ SFFA filed a ninety-nine-page brief asking the justices to reject *Grutter v. Bollinger*, the Supreme Court’s 2003 opinion affirmed the University of Michigan Law School’s use of race as a factor in making admission decisions.¹⁴²

Rachael Dane, Harvard spokesperson, defending Harvard’s race-conscious affirmative action policy, stated, “More than 40 years of Supreme Court precedent have held that race can be one of many factors considered in college admissions.”¹⁴³ Lawrence S. Bacow, Harvard University President, also offered this defense: “[C]onsidering race as one factor among many in admissions decisions produces a more diverse student body which strengthens the learning environment for all.”¹⁴⁴ Dane doubled down, declaring, “Harvard will not stop vigorously defending its race-conscious diversity admissions policy.”¹⁴⁵ However, Edward Blum, SFFA’s president, described the Harvard and UNC lawsuits before the Supreme Court as “rescue missions for the colorblind legal principles that hold together Americans of all races and ethnicities.”¹⁴⁶ Under the Thirteenth Amendment, the prohibition against slavery is a color-blind concept.¹⁴⁷ Perhaps both Blum and Harvard will soon help bring all Americans – regardless of race or ethnic identity – together to erase the racial wealth gap created by the badges of slavery.¹⁴⁸ Although the Thirteenth Amendment does not require Americans to remediate badges of slavery, the U.S. Constitution does not prohibit a voluntary, race-neutral approach to eradicating the continuing economic after-effects of slavery by anyone.¹⁴⁹

After reading the Harvard affirmative action appellate decision and the publicity surrounding the Supreme Court’s decision to reconsider race-conscious affirmative action, commentators interested in economic justice and/or economic equality should read the *Wealth of Two Nations: The U.S. Racial Wealth Gap* report.¹⁵⁰ This report will help commentators to see

¹⁴⁰ Totenberg & Singerman, *supra* note 9.

¹⁴¹ *Id.*

¹⁴² Rahem D. Hamid & Nia L. Orakwue, *SFFA Asks Supreme Court to Overturn Precedents Upholding Affirmative Action in Filing for Harvard, UNC Cases*, HARV. CRIMSON (May 4, 2022), <https://www.thecrimson.com/article/2022/5/4/affirmative-action-supreme-court-sffa-filing-may2/>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See U.S. CONST. amend. XIII, § 1.

¹⁴⁸ See Derenoncourt, et al., *supra* note 5, at 3.

¹⁴⁹ See U.S. CONST. amend. XIII, § 1.

¹⁵⁰ Derenoncourt et al., *supra* note 5.

affirmative action as a constitutionally permissible economic justice remedy under a Thirteenth Amendment “badges of slavery” rationale.¹⁵¹ Contextually, affirmative economic justice is permissible for those suffering from the badges of slavery because, “in 2019, Black Americans held just 17 cents on average for every [W]hite dollar of wealth. By comparison, the income gap is 50 cents to the dollar.”¹⁵² The significant and continuous economic impact of historical slavery on those who continue to suffer from the badges of slavery is often unacknowledged, but slavery’s continuing harmful impact is clearly recognized in the *Wealth of Two Nations: The U.S. Racial Wealth Gap* report.¹⁵³

Even with hypothetical ideal equal conditions for gathering wealth after slavery, assuming identical savings percentages as well as capital gains among Black and White Americans, a racial wealth gap of three to one would still exist today.¹⁵⁴ “The main reason for such a large and lasting gap is the enormous difference in initial wealth between Black and [W]hite Americans on the eve of the Civil War.”¹⁵⁵ Thus, even if America had practiced perfect economic justice every day without any consideration of race from the day the Civil War ended to now, a three-to-one racial wealth gap would still exist today due to the continuing effects of slavery as a plus factor.¹⁵⁶ “Although Black wealth growth outpaced that of [W]hite Americans’ between 1870 and 1930, the rate of convergence in these years lags far behind what would be expected had the two groups enjoyed equal conditions for wealth accumulation.”¹⁵⁷ Of course, the descendants of enslaved people in America did not experience economic justice in the form of a post-slavery equal playing field from 1870 to 1930.¹⁵⁸

From 1870 to 1930, the U.S. experienced widespread “expropriation of Black wealth, exclusion of Black Americans from the political process, and legally sanctioned segregation and discrimination in land, labor, and capital markets.”¹⁵⁹ The harm suffered by the descendants of enslaved people between 1870 and 1930, plus the after-effects of slavery more generally, cannot adequately be addressed by the current, limited forms of affirmative action. However, as the racial wealth gap between Black Americans and White Americans disappears, so will the justification for diversity-based affirmative action. According to researchers, a “long-run

¹⁵¹ See U.S. CONST. amend. XIII, § 1.

¹⁵² Derenoncourt et al., *supra* note 5, at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

view of the racial wealth gap underscores the importance of slavery and post-slavery institutions for the persistence of the wealth gap. Until the 1860s, the vast majority of Black Americans were enslaved – contributing to building the nation’s wealth while being legally barred from accumulating wealth themselves.”¹⁶⁰ Because of slavery, “at the time of Emancipation, Black Americans embarked on freedom with extremely low levels of wealth compared to [W]hite Americans. Furthermore, post-slavery wealth accumulation by Black Americans occurred under highly unequal circumstances.”¹⁶¹

The expansion of Black wealth fell behind that of White Americans because of almost 100 years of specific capital and labor market marginalization after slavery.¹⁶² However, the widespread publicity surrounding the Harvard and UNC affirmative action cases has failed to adequately discuss the plausible Thirteenth Amendment link.¹⁶³ Commentators on the Supreme Court’s decision to hear the Harvard and UNC affirmative action lawsuits should link the need for affirmative action to the social economic conditions caused by the continuing aftershocks of slavery rather than race. Under the Thirteenth Amendment, it is constitutionally permissible to use the race-neutral legacy of slavery as a plus factor to increase educational diversity at Harvard and UNC.¹⁶⁴

V. CONCLUSION

Even if the Supreme Court avoids holding that race can never play a role in college admissions, it will likely invalidate the Harvard affirmative action plan because Harvard uses race as an oversized plus factor.¹⁶⁵ Since 1978, the Supreme Court has supported the constitutionality of affirmative action plans involving admissions three times.¹⁶⁶ However, this time, the six conservative justices on the Court (Chief Justice John Roberts, Justices Clarence Thomas and Samuel Alito, and three Trump-appointed conservatives) are likely to not approve Harvard’s use of race in its affirmative action plan.¹⁶⁷ Therefore, Harvard should introduce a revised constitutional model for affirmative action based on the racially neutral anti-slavery provision in the Thirteenth Amendment.¹⁶⁸ Harvard could implement its revised affirmative action procedure by considering every

¹⁶⁰ *Id.* at 4.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ U.S. CONST. amend. XIII, § 1.

¹⁶⁴ *See id.*

¹⁶⁵ Totenberg & Singerman, *supra* note 9.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

applicant as an individual, looking at the economic after-effects of the badges of slavery as a plus factor and utilizing a holistic portrayal of the student without using race as a factor.¹⁶⁹ Using the race-neutral slave provision of the Thirteenth Amendment to justify diversity admissions will inspire colleges, universities, and other policymakers to explore more deeply the link between the ongoing racial wealth gap and slavery.

* * *

¹⁶⁹ *Contra id.*