

WHAT WILL HAPPEN TO CLEO IN THE WAVE OF AFFIRMATIVE ACTION LITIGATION

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INTRODUCTION

The *Students for Fair Admission* (“*SFFA*”) decision has upended how law schools conduct admission, changing the decades-old practices of considering race as one of many factors in the admissions process. Despite the narrow use of race in the admission process, the legal profession is still almost 81% white, suggesting the use of affirmative action has not been a substantial boost to minority enrollment in law school.¹ Despite the low impact, the United States Supreme Court proceeded with a sweeping decision declaring the use of racial checkboxes unconstitutional and limiting the use of race in admissions to evidence of nonracial attributes an applicant might have, such as resilience.² This change has forced nearly

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1. AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 2022 (2022), <https://www.aba.legalprofile.com/demographics.php#anchor4> [<https://perma.cc/LS7K-RRMU>].

2. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2175–76 (2023).

every institution in the country to reevaluate their admissions processes, and for those who have heavily focused on acquiring a racially diverse class, they are facing big changes.³ What the Court does not discuss in its opinion is what happens to all of the currently existing programs that help encourage students of color get ready for and enroll in higher education. From programs that help students with test preparation and academic support skills, there are now questions about the constitutionality of these types of programs and institutions' relationships with them. This Article will explore one longstanding pipeline program, the Council on Legal Education Opportunity ("CLEO"), and how schools' relationships with that program may change. This Article begins with a brief overview of the history of segregation and the founding of CLEO, it moves to a history of affirmative action litigation, and provides an in-depth analysis of the new *SFFA* case. Next, this Article will explore how the Dear Colleague letter distributed by the Department of Education and the Department of Justice impacts school action.⁴ Finally, the article will explore potential litigation from the perspective of CLEO, Law Schools, and students of color. The *SFFA* decision will result in many schools proceeding very cautiously with an eye toward potential litigation, with the outcome of the potential litigation being uncertain. In the case of CLEO, the most pressing question is what a court would consider as a proxy for race, and what can CLEO and Law Schools do to maintain their diversity goals while guarding against the appearance of using race in the admissions decision.

I. HISTORY OF SEGREGATION IN LAW SCHOOLS AND CLEO

When law schools started to desegregate in the 1960s, the legal profession was almost completely white and male.⁵ Harvard Law School sought to address the lack of diversity by creating a summer institute in the summer of 1965 where forty students, primarily from historically black colleges, took classes for eight weeks on first-year law topics.⁶ Their performance in the summer program provided an alternative credential for

3. See Neil H. Shah, *A Month After the Fall of Affirmative Action, How Can Colleges Uphold Diversity?*, THE HARV. CRIMSON (July 28, 2023), <https://www.thecrimson.com/article/2023/7/28/admissions-post-supreme-court/> [https://perma.cc/2A2Y-Y9ZN].

4. The Department of Justice and Department of Education co-authored and published a letter and question-and-answer document to provide schools with guidance on how to interpret and implement change based on the *SFFA* decision. See C.R. Div., U.S. Dep't of Just. & Office for C.R., U.S. Dep't of Educ., Dear Colleague Letter: *SFFA* (Aug. 14, 2023), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf> [https://perma.cc/M2AB-54YK].

5. See William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000*, 19 HARV. BLACK LETTER L.J. 1, 7 (2003).

6. See Dana N. Thompson Dorsey, *Accessing the Legal Playing Field: Examining the Race-Conscious Affirmative Action Legal Debate Through the Eyes of the Council of Legal Education Opportunity (CLEO) Program*, 16 TEX. WESLEYAN L. REV. 645, 654 (2010).

admission to law school. Half of the students in the program were admitted to law school following the program, and two other schools adopted similar programs in the next few years.⁷ Thus, the Council on Legal Education Opportunity (“CLEO”) was born. Today, CLEO continues to provide programming to deliver on their mission to “inspire, motivate, and prepare students from underrepresented communities to succeed in law school and beyond.”⁸

Since 1968, CLEO has hosted summer programs for students of color and students of lower socio-economic status, providing the opportunity to take summer law classes to develop skills necessary to succeed and gain admission to law school.⁹ For more than fifty years, CLEO has helped thousands of students of color gain admission to law school and become lawyers.¹⁰ While it has not necessarily eliminated the gap in attorneys of color, this program has played an important role in diversifying the profession, which remains 81% white.¹¹

The annual summer institute hosted by CLEO allows students to be admitted to law school with alternative credentials or who want to develop their academic skills.¹² Approximately forty students are selected, most of whom come from underrepresented racial and socio-economic groups.¹³ However, the application is open to anyone who is eligible to attend law school. The first two weeks are dedicated to academic success programming to help students develop skills surrounding case reading, briefing, and analysis, along with other essential success skills. Then, students engage in four weeks of in-person law classes on first-year topics, such as contracts, criminal law, and legal writing.¹⁴ The students’ grades in these classes are shared with law schools they have applied to in hopes that their performance will help them gain admission. Typically, CLEO students may have lower LSAT scores or other indicators preventing them from law

7. *Id.*

8. *About CLEO*, COUNCIL ON LEGAL EDUC. & OPPORTUNITY, INC., <https://cleoinc.org/about/> [<https://perma.cc/GN9Q-V5EK>].

9. *Pre-Law Summer Institute*, COUNCIL ON LEGAL EDUC. & OPPORTUNITY, INC., <https://cleoinc.org/plsi/> [<https://perma.cc/4X6R-83DF>].

10. *Home Page*, COUNCIL ON LEGAL EDUC. & OPPORTUNITY, INC., <https://cleoinc.org/> [<https://perma.cc/M4S7-9HHX>].

11. AM. BAR ASS’N, *supra* note 1, at 26.

12. *Pre-Law Summer Institute*, *supra* note 9 (“Many students with marginal LSAT scores and GPAs would not be admitted to law school without the assistance of CLEO. While CLEO Pre-Law Summer Institute participants must meet predetermined academic requirements, CLEO recognizes and considers the numerous challenges that applicants have overcome in pursuit of their goal to attend law school.”).

13. *See id.*

14. *Id.*

school admissions.¹⁵ Part of the purpose of CLEO is to help students prove their academic potential outside of a standardized test score.¹⁶

The CLEO Legally Inspired Cohort (“CLIC”) program is a subsidiary program of the pre-law summer institute modeled after the Possie program.¹⁷ Students who attend the summer institute can opt to be a part of a cohort selected to go to a particular law school if they meet the school’s admission criteria.¹⁸ The cohort admissions model provides the admitted students with an already developed group of peers, thus helping with retention, support, and comradery. Schools that opt to enroll a CLIC group of students have the option of setting up their own admissions criteria for the pre-selected group, but they are pledging to consider admitting the cohort.¹⁹

Both the pre-law summer institute and CLIC program serve as pipeline opportunities to help diversify the legal profession by providing students with the academic preparation and credentials needed to be enrolled in and complete law school.²⁰ Part of this initiative serves to help students of color overcome differences in LSAT scores. Differences in performance on the LSAT based on race have been long documented and inevitably contribute to the lack of diversity in the legal profession.²¹ Currently, there is a thirteen-point spread of average LSAT scores based on race, with white test takers scoring the highest and Puerto Rican test takers scoring the lowest.²²

15. *Id.* When I was the director of CLEO, we submitted grades to the school of the CLEO student’s choice in order to help facilitate their opportunity for admission.

16. *See About CLEO*, *supra* note 8.

17. *See* THE POSSE FOUND., <https://www.possefoundation.org/> [<https://perma.cc/6GMC-KLCJ>].

18. My institution has participated in CLIC, and this previous summer, we considered enrolling a cohort again with our own admissions standards. We ended up not participating, but we strongly considered how the CLIC program would add to our incoming class.

19. *Id.*

20. *CLEO Legally Inspired Cohort*, COUNCIL ON LEGAL EDUC. & OPPORTUNITY, INC., <https://cleoinc.org/clic/> [<https://perma.cc/RHU6-QFMX>].

21. *See* Marisa Manzi & Nina Totenberg, *Already Behind: Diversifying the Legal Profession Starts Before The LSAT*, NPR (Dec. 22, 2020, 5:00 AM), <https://www.npr.org/2020/12/22/944434661/already-behind-diversifying-the-legal-profession-starts-before-the-lsat> [<https://perma.cc/QRP2-RHKC>].

22. *See* LAURA A. LAUTH & ANDREA T. SWEENEY, LAW SCH. ADMISSION COUNCIL, *LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL AND ETHNIC BREAKDOWNS: 2011–2012 THROUGH 2017–2018 TESTING YEARS 25* (2022), https://www.lsac.org/sites/default/files/research/tr-22-01_june-2023-edition_accessible.pdf [<https://perma.cc/FD89-7SDX>].

Mean LSAT Scores by Race²³

White/Caucasian	153.18
Asian	152.85
Multi-racial	149.64
Hispanic/Latino	145.84
Am. Indian/Alaska Nat.	145.17
Black/African American	141.70
Puerto Rican	140.78

These disparities highlight the relevance and continuing need for CLEO and other law school preparation programs. CLEO states that one of its main goals is to work with students who have lower indicators but show potential for becoming lawyers.²⁴ When at least 75% of the students admitted to law school achieve at least a 152 on the LSAT,²⁵ it is easy to see how diversifying the legal profession becomes very difficult. This is why helping students with potential demonstrate their aptitude in other ways is important, and programs like the CLEO summer institute help to provide students with alternative credentials for admission.

II. HISTORY OF AFFIRMATIVE ACTION LITIGATION

Most Americans have heard the phrase “40 acres and a mule,” but many may not know that for the United States, this idea could be considered the genesis of affirmative action.²⁶ In the post-Civil War era, many initiatives sought to help formerly enslaved people, such as the formation of the Freedmen’s Bureau.²⁷ The Bureau aimed to help any refugees from the war, but in particular, the Bureau sought to help formerly enslaved people navigate the post-slavery world.²⁸ The term “affirmative

23. *See id.*

24. *See Pre-Law Summer Institute, supra* note 9.

25. *See* LAW SCH. ADMISSION COUNCIL, ADMISSION TRENDS: ABA APPLICANTS, ADMITTED APPLICANTS, MATRICULATIONS & APPLICATIONS (2023), <https://report.lsac.org/View.aspx?Report=AdmissionTrendsApplicantsAdmitApps> [<https://perma.cc/DLA6-FCP4>].

26. The phrase “40 acres and a mule” comes from General William T. Sherman’s Special Field Order No. 15, issued on Jan. 16, 1865, in which he reallocated a large plot of seized land to formerly enslaved persons. The original order did not include a mule. *See* Henry L. Gates, Jr., *The Truth Behind ‘40 Acres and a Mule’*, PBS (2013), <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/> [<https://perma.cc/HHU8-VQ7J>]. The land redistribution plan crafted by radical republicans was ultimately overturned by Lincoln’s successor Andrew Johnson, who sympathized with the south. *Id.*

27. *The Freedmen’s Bureau*, NAT’L ARCHIVES, <https://www.archives.gov/research/african-americans/freedmens-bureau> [<https://perma.cc/N2HT-8E5D>].

28. *See* CLAYBORNE CARSON ET AL., THE STRUGGLE FOR FREEDOM: A HISTORY OF AFRICAN AMERICANS 229–30 (2019).

action” was not used until 1961 in an executive order issued by President John F. Kennedy requiring federal contractors to “take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, creed, color or national origin.”²⁹ From there, administrations enacted a variety of affirmative action policies, particularly when it came to hiring federal contractors.³⁰ The Merriam-Webster Dictionary defines affirmative action as “the use of policies, legislation, programs, and procedures to improve the educational or employment opportunities of members of certain demographic groups (such as minority groups, women, and older people) as a remedy to the effects of long-standing discrimination against such groups.”³¹ Throughout history the concept has been used in a variety of ways, but when most Americans think of affirmative action, they think about admission to schools, and currently a majority are not in favor of the practice.³²

The *Brown v. Board of Education* decision set the stage for affirmative action as schools rushed to desegregate.³³ The Court in the *SFFA* decision acknowledges that affirmative action has always been a tool to remedy past, specific discrimination.³⁴ In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court outlined how schools were to desegregate after the decision in *Brown*, including limited use of ratios and quotas, grouping of noncontiguous school zones and busing.³⁵ This type of governmental action to remedy past discrimination and to open opportunity still happens today. In June 2023, the Justice Department announced a consent decree in St. Martin Parish, Louisiana Public Schools to advance desegregation.³⁶

In higher education, most schools started adopting affirmative action policies because they had a desire to diversify their class in response to a cultural shift.³⁷ For example, when the University of California Davis

29. See Establishing the President's Committee on Equal Employment Opportunity, 26 Fed. Reg. 1977 (Mar. 6, 1961).

30. See 42 U.S.C. § 2000e *et seq.*

31. *Affirmative Action*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/affirmative%20action> [<https://perma.cc/2BZA-BHU4>].

32. See *More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity in Admissions Decisions*, PEW RSCH. CTR. (June 8, 2023), <https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions/> [<https://perma.cc/4K2N-K3JJ>].

33. See *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954).

34. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2162 (2023).

35. See *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 28 (1971).

36. Press Release, U.S. Dep't of Just., Justice Department Secures Consent Decree in Louisiana School Desegregation Case (June 12, 2023), <https://www.justice.gov/opa/pr/justice-department-secures-consent-decree-louisiana-school-desegregation-case> [<https://perma.cc/4UW4-NE2J>].

37. See Douglas N. Harris, *Affirmative Action: Race or Class?*, MILLER CTR. OF PUB. AFFS. 1, 5 (2009), http://web1.millercenter.org/debates/whitepaper/deb_2009_0416_affirmative-action.pdf [<https://perma.cc/W2F2-NDX6>].

was founded in 1968, their first entering class was all white.³⁸ As a result, the school set aside 16 seats of 100 for a special admissions process for economically, educationally disadvantaged groups or minority group members such as Blacks, Chicanos, Asians, or American Indians.³⁹ UC Davis was not the only school engaging in this type of affirmative action at the time; in 1974 the University of Washington School of Law was sued over the practice of assigning less weight to minority applicants entering admissions statistics than those from other ethnic groups.⁴⁰ Defunis, a prospective student filed a lawsuit when he was placed on a waitlist even though his credentials surpassed those of minority and non-minority students admitted to the law school.⁴¹ The case was ultimately moot because Defunis was admitted through the lower court's injunction, while going through the appeal process. By the time the Supreme Court heard oral arguments, Defunis was in the last quarter of studies and was going to graduate regardless of the outcome of the decision.⁴²

The *Regents of the University of California v. Bakke* case was the first landmark decision about the use of affirmative action in admissions.⁴³ Allan Bakke was a white male who applied to the University of California Medical School at Davis and was denied admission twice, and in both of those years, special applicants were admitted with significantly lower scores than him.⁴⁴ Bakke could have sued under different provisions, but he chose to pursue a Title VI of the Civil Rights Act of 1964 and Equal Protection Clause claim.⁴⁵ Title VI states that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance,”⁴⁶ which is how affirmative action precedent applies to private institutions and not just government actors. Justice Powell, in his majority opinion, found that a violation of the Equal Protection Clause equated to a violation of Title VI for those institutions receiving federal funds.⁴⁷ As such, the Court has always applied the Equal Protection analysis to questions of Title VI violations.

38. See *Supreme Court Landmark Case Regents of the University of California v. Bakke*, C-SPAN (May 14, 2018) [hereinafter C-SPAN], <https://www.c-span.org/video/?440878-1%2Fsupreme-court-landmark-case-regents-university-california-v-bakke> [<https://perma.cc/KTW7-G7LV>].

39. *Id.*

40. See *DeFunis v. Odegaard*, 416 U.S. 312, 320–24 (1974).

41. *Id.*

42. *Id.*

43. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978).

44. *Id.* at 277.

45. See C-SPAN, *supra* note 38.

46. 42 U.S.C. § 2000d.

47. *Bakke*, 438 U.S. at 287.

The Court applied a strict scrutiny standard, asking if the use of race by UC Davis was narrowly tailored to achieve a compelling government interest.⁴⁸ The University argued that they were promoting four compelling interests in their use of race, including “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,” “countering the effects of societal discrimination,” “increasing the number of physicians who will practice in communities currently underserved,” and “obtaining the educational benefits that flow from an ethnically diverse student body.”⁴⁹ Justice Powell only found creating a diverse student body to be a compelling interest and stated that the others are not measurable or specific enough to meet strict scrutiny.⁵⁰ Specifically, he stated that there was no documented discrimination at UC Davis Medical School and that there was no documented evidence that minority medical students will serve underserved populations.⁵¹ As Justice Powell’s decision emerged as the majority, the diversity rationale became the standard for institutions to follow.⁵² Interestingly, Justices Brennan, White, Marshall, and Blackmun found that remedying societal harms and working to “avoid exclusion of historically disadvantaged minorities” would meet strict scrutiny.⁵³ However, Justices Stevens, Stewart, and Rehnquist suggest that the statutory question should be answered first and as such a plain meaning interpretation should be afforded to Title VI. In turn, this means that the Court should adopt a colorblind interpretation of discrimination, and therefore, any use of race should be prohibited.⁵⁴

Powell grounded the diversity rationale as a compelling interest in the academic freedom that the Court has long respected.⁵⁵ He stated that institutions have four freedoms to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”⁵⁶ From this, the Court found that universities can use race in a very narrow way to determine their entering class. Powell stated that a quota, as was used at UC Davis, was not narrowly tailored enough, but race as one of many factors, such as in the Harvard admissions scheme, would meet an equal protection challenge.⁵⁷

48. *Id.* at 291.

49. *Id.* at 305–06.

50. *Id.* at 314.

51. *Id.* at 310.

52. *See id.* at 310–11; Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 172–73 (2005).

53. *See Bakke*, 438 U.S. at 363 (Brennan, J., dissenting). Justice Blackmun goes further to say that affirmative action when done properly is what the Equal Protection clause is meant for. *Id.* at 405 (Blackmun, J., dissenting).

54. *See id.* at 413–14.

55. *Id.* at 312.

56. *Id.*

57. *Id.* at 316.

On the same day in 2003, the Court released two decisions on affirmative action. In *Gratz v. Bollinger*, the University of Michigan undergraduate program awarded applicants from underrepresented minority backgrounds an automatic twenty points in a system that evaluated grades, test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race.⁵⁸ In a 6-3 decision, the Court found that the admissions scheme was not narrowly tailored enough to meet strict scrutiny because it lacked consideration of the individual when it came to the racial component.⁵⁹

In *Grutter v. Bollinger*, the University of Michigan's Law School policy was evaluated, and the Court found that it did not violate the Equal Protection Clause or Title VI.⁶⁰ The law school used several "soft variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection."⁶¹ These factors were assessed to determine the contribution that the applicant would make to the Law School's social and intellectual life. The institution also stated that one of their goals was to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."⁶² The Court found that these goals met the compelling interest requirement of strict scrutiny.

The Court also evaluated the individualistic nature in which each applicant was considered. No points were given for race, and the holistic nature of balancing all of the soft admissions factors met the narrowly tailored requirement.⁶³ The Court specifically stated that to be narrowly tailored, an admissions program that considers race must not "unduly burden individuals who are not members of the favored racial and ethnic groups,"⁶⁴ meaning that applicants who were not part of a racial minority could add to diversity or have other types of soft factors that made them competitive. In essence, the Court sought an admissions process in which race was not outcome-determinative.⁶⁵ Justice Sandra Day O'Connor stated towards the end of the opinion that part of having an admissions process that meets strict scrutiny means evaluating when it is no longer needed to achieve the institution's goals of diversity in the learning environment.⁶⁶ She included a sentence that became a pivotal point in the *SFFA* case: "We expect that 25 years from now, the use of racial preferences will no longer

58. *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

59. *Id.* at 271.

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

61. *Id.* at 315.

62. *Id.*

63. *Id.* at 337.

64. *Id.* at 341.

65. *Id.*

66. *Id.* at 342.

be necessary to further the interest approved today.”⁶⁷ Her point in making this statement was to reiterate that the Court would only likely approve these types of policies for a while and that there will come a time when inequalities will no longer require affirmative action to achieve the goal of a diverse student body.⁶⁸

The Supreme Court next addressed affirmative action in the *Fisher I* and *Fisher II* cases. Abigail Fisher applied to the University of Texas-Austin with a 3.59 GPA and 1180 SAT score, which placed her in the top 12% of her high school.⁶⁹ At the time UT Austin employed two admissions policies. First, any student who finished in the top 10% of their high school class in Texas was automatically accepted.⁷⁰ The second process considered a student’s personal achievement index, which evaluated leadership, extracurricular activities, and a student’s background, and an academic index, which combined a student’s GPA⁷¹ and test scores. In the personal index score,⁷² race was considered. However, race was not assigned a specific score but was considered a “meaningful factor.”⁷³ Both the personal and the academic index score were plotted on an x and y axis, and students above a certain line were admitted.⁷⁴

In *Fisher I*, the Court remanded the case to the lower court because they determined the lower court did not apply the strict scrutiny standard correctly.⁷⁵ Specifically, the Supreme Court found that the lower court relied on “good faith” in determining that the university was using race in a constitutionally permissible way, instead of having the university demonstrate in fact that they were using a plan that was narrowly tailored to achieve a permissible purpose.⁷⁶

After further appeals, the Court reheard the case and ultimately found that the admissions process met strict scrutiny because the university was working to achieve the compelling interest of a “robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.”⁷⁷ Additionally, the Court found that there were no workable race-neutral alternatives because the university engaged in a year-long study in which they explored alternatives but determined that none would help them achieve their goal.⁷⁸ In the year Abigail Fisher was denied, forty-

67. *Id.* at 343.

68. *See id.*

69. *See Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 375 (2016).

70. *Id.* at 394.

71. *Id.* at 371.

72. *Id.* at 397.

73. *Id.*

74. *See id.* at 393.

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

76. *Id.*

77. *See Fisher II*, 579 U.S. at 382.

78. *Id.*

seven students with lower test scores than Fisher were admitted, but only five of those were students of color.⁷⁹ Ultimately, this fact likely helped the University's argument that race was not a determinative factor and was what the Court called a "factor of a factor of a factor."⁸⁰ Despite the ruling in favor of the university, the Court warned that the decision in *Fisher II* did not provide an unchecked pass to continue with the policy forever.⁸¹ They specifically stated that it was the obligation of the institution to continue refining and reflecting on the admissions policy.⁸² This foreshadowing alerted institutions to the finite nature of the affirmative action programs that the Court suggested the Equal Protection Clause requires.

The final Supreme Court case dealing with affirmative action in admissions came from the K-12 environment. In *Parents Involved*, the Seattle School District and Jefferson County School District in Kentucky both employed voluntary integration plans in which they considered race in their admissions processes.⁸³ In Seattle, students could apply to any high school in the district, but when schools were at capacity or oversubscribed, the district used race as one of the factors to determine enrollment.⁸⁴ Jefferson County was previously under this decree to desegregate until 2000.⁸⁵ Afterward, the school district adopted a voluntary assignment plan in which the district would reassign a student if they would contribute to the school's racial imbalance.⁸⁶ The Court affirmed that race consciousness is allowed to remedy traceable segregation but found that the two school districts did not meet that criterion in this case.⁸⁷ The Court also rejected the idea that creating a diverse student body, which had previously been allowed at the higher education level, did not apply in this case.⁸⁸ The Court specifically found that trying to achieve racial proportionality would fly in the face of the principle that citizens must be treated as individuals.⁸⁹ The Court further cited the decision in *Brown* to determine that public schools must determine admission on a non-racial basis.⁹⁰

79. See Ericka Cruz Guevarra, *Roundup: Reactions To This Week's Supreme Court Decision On Affirmative Action*, NPR (June 24, 2016, 1:41 PM), <https://www.npr.org/sections/codeswitch/2016/06/24/483233119/roundup-reactions-to-this-weeks-supreme-court-decision-on-affirmative-action#:~:text=However%2C%20during%20the%20case%2C%20it,of%20the%2047%20were%20white> [<https://perma.cc/GE9E-GTWA>].

80. See *Fisher II*, 579 U.S. at 397.

81. *Id.* at 388.

82. *Id.*

83. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709–10 (2007).

84. *Id.* at 710.

85. *Id.* at 715–16.

86. *Id.* at 716.

87. *Id.* at 723.

88. *Id.* at 724–25.

89. *Id.* at 730.

90. *Id.* at 743.

III. THE OUTLIER NATURE OF THE *SFFA* DECISION

In many ways, the *SFFA v. Harvard* case is a landmark because it changes nearly fifty years of precedent in how colleges and universities approach admissions. In some ways, the decision is limited and vague when it outlines how schools should approach admissions in regard to wanting a diverse class.⁹¹ The decision never states that universities seeking a diverse class is unconstitutional.⁹² In turn, this provides schools wanting to use pipeline programs like CLEO a lot of room for creativity to achieve their goals of acquiring a diverse student body. This section outlines the heart of the *SFFA* case and provides an analysis for the application of the decision, pointing out where the Court is explicit in prohibiting certain admission practices and silent or obscure in its direction to schools.

Harvard and UNC, in many ways are outlier institutions and not good test case schools to use as examples for deciding constitutional admission practices. Both institutions use more monetary and human resources to determine who is admitted, both institutions are elite, and both are deciphering amongst applicants that have nearly perfect qualifications.⁹³ On average most schools have a handful of people reading applications and making decisions on applicants, and most applicant files are read once or twice and only allotted minutes of contemplation by the admissions teams.⁹⁴ Harvard and UNC have multistep admissions processes where each application is reviewed multiple times, by multiple people, and with large panels considering the application.⁹⁵ Harvard alone receives more students with perfect test scores and GPAs than they have spots for admission.⁹⁶ Harvard and UNC are not the average institutions of higher education. So, using them to outline how race should and should not be used in admissions is challenging because most institutions admit the majority of their applicants and have limited resources to review applications.⁹⁷

91. See Marissa Meredith, *Future Implications of SFFA V. Harvard: Potential Curtailing of Diverse Environments*, AM. BAR ASS'N, <https://www.americanbar.org/groups/diversity/DiversityCommission/publications/the-innovator/vol7-issue2/feature2/> [<https://perma.cc/3JBX-8DZZ>].

92. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2166 (2023) (noting that diversity goals are commendable but the means to measure is difficult to achieve).

93. See *id.* at 2154. When comparing Harvard and UNC's admission processes to the institution I work at, we have far fewer people evaluating applications, and typically, the application is only reviewed by a handful of people at most.

94. See Brief in Opposition by Univ. Respondents at 5–8, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023) (No. 21-707); Brief for Respondent at 6–10, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199).

95. *SFFA*, 143 S. Ct. at 2154–56.

96. *Id.* at 2154–55.

97. *Cf. id.* at 2154–56 (describing the admissions process at Harvard and UNC).

In all previous Supreme Court litigation on the affirmative action question, the suits were brought by individuals who were denied admission to the institution.⁹⁸ In this case, SFFA is a collective organization with the goal of ending the use of race in admissions.⁹⁹ No individual from SFFA had been denied admission to UNC or Harvard; they merely were concerned about the admissions process. Specifically, the organization is composed of mostly Asian identifying people who are concerned that the evaluation of their racial group in the Harvard and UNC admission process violated Title VI and Equal Protection.¹⁰⁰

Both the nature of the institutions involved and the complaining organization in the case provide opportunities for creativity compliance and in figuring out how to maintain relationships with pipeline programs that bring diversity. Harvard and UNC's admission processes are so different from other institutions, and the plaintiff in this case is vastly different from a denied applicant that the decision hardly seems like a test case. In previous cases, institutions could compare and contrast their processes and those who were denied admission with the case. Still, the case is based almost entirely on generalized statistics and hypotheticals instead of a plaintiff's actual experience. In some ways, it makes it easier for institutions to proclaim that the way they approach admissions is different. For example, institutions may have a detailed articulation as to why someone is not admitted on substantiated grounds, or they may not conduct interviews or have many review processes like Harvard or UNC. Thus, the proposition that their process is constitutional will be an easier argument.

However, in some ways, the decision leaves higher education institutions uncertain about their processes because much of the decision is based on generalized statistics. For example, the *SFFA* decision relies on the racial breakdowns of the entering Harvard class over a period of time.¹⁰¹ Reliance on this type of data is unique, and it has not been seen in previous affirmative action litigation.¹⁰² This reliance leaves schools wondering how their processes will be evaluated if they are subject to litigation. Will it be based on the experience of a denied applicant, the overall numbers of minority students at their institutions, or the way in which they go about considering a variety of factors in admissions that may surround a person's

98. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 375 (2016); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007).

99. "Students for Fair Admissions is a nonprofit membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional." *About*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> [<https://perma.cc/9WFT-C2JQ>].

100. See *SFFA*, 143 S. Ct. at 2156.

101. *Id.* at 2171.

102. See *Bakke*, 438 U.S. at 318; *Grutter*, 539 U.S. at 343; *Fisher II*, 579 U.S. at 375; *Parents Involved*, 551 U.S. at 711.

race or ethnicity? In some ways this ambiguity is helpful to allow institutions flexibility, until future litigation provides more insight into what practices are unconstitutional.

IV. SUMMARY OF THE *SFFA* DECISION

In sections I and II of the decision, the Chief Justice outlines the history of the two institutions and the students for fair admission organization and discusses the standing issue for SFFA.¹⁰³ Section III of the majority opinion summarizes the Equal Protection clause of the Fourteenth Amendment, which provides the foundation for the analysis of the affirmative action decision.¹⁰⁴ The Court's analysis of the history and intent of the Equal Protection clause boils down to the statement, "[t]he conclusion reached by the *Brown* Court was thus un-mistakably clear: the right to a public education 'must be made available to all on equal terms.'"¹⁰⁵ In the opinion the Court does not acknowledge the beginnings of the Equal Protection litigation in the *Slaughterhouse* cases, where the Court acknowledged that the intent of the Amendment was to provide for the uplifting of previously enslaved individuals.¹⁰⁶ The Court also never mentions whether it is overturning the previous precedent in *Bakke* and *Grutter*, where the court stated that having a diverse class was a compelling enough interest to allow for limited use of race in the admissions process. Instead, it focuses on two permissible uses of race in government action, "remediating specific, identified instances of past discrimination" and segregation of inmates by race to avoid a race riot.¹⁰⁷ The court reiterates that a generalized desire to ameliorate discrimination is not a compelling interest.¹⁰⁸

Interestingly, the case uses the framework set out in *Bakke* and *Grutter* to analyze the Harvard and UNC admissions schemes, while silently gutting those decisions.¹⁰⁹ In the majority, the Court extrapolates on the precedent that race should be used as one of many factors to determine admission.¹¹⁰ The Court concludes in two foundational points that it provides the biggest change in affirmative action precedent.¹¹¹ The Court goes beyond the *Grutter* reasoning, saying that most of the current ways

103. See *SFFA*, 143 S. Ct. at 2154–59.

104. *Id.* at 2159–66.

105. *Id.* at 2160 (quoting *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954)).

106. See *Slaughter-House Cases*, 83 U.S. 36, 81 (1872).

107. See *SFFA*, 143 S. Ct. at 2162.

108. *Id.* at 2173–74.

109. It is arguable that under the *Bakke* and *Grutter* Court, these admissions schemes would be found constitutional. See *id.* at 2163–64; *Regents of the Univ. Of Cal. v. Bakke*, 438 U.S. 265, 315 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

110. *SFFA*, 143 S. Ct. at 2165.

111. *Id.* at 2165.

race is used in admissions is based on illegitimate stereotyping.¹¹² Specifically, Roberts discusses the use of a checkbox and how that practice violates this notion of a holistic use of race in the admissions process. Specifically, the Court says, “[i]t is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.”¹¹³ The Court essentially says that use of checkboxes, or categorizations of race in the admissions process is not narrowly tailored enough to meet strict scrutiny.¹¹⁴

The second foundational point the Court establishes is that race can never be used as a negative or to “unduly harm nonminority applicants.”¹¹⁵ The majority plainly states that there are those who win and those who lose in the admissions process, and that the use of race inevitably means that some will be advantaged over others.¹¹⁶ They further elaborate that this is a problem because reliance on race, even to the amount that race might explain 1.2% of in-state admittance at UNC, is problematic because it relies on stereotypes to determine that those students will bring a unique perspective to the student body.¹¹⁷ Thus, the Court starts to gut the idea that a diverse student body contributes to a quality learning environment and is a compelling reason for schools to consider race.¹¹⁸

The majority spends a fair amount of time discussing the time limit set out in *Grutter* and the goals of UNC and Harvard.¹¹⁹ Both issues are used by the Court to poke holes in the admission processes in question, but they do not provide a test by which schools in the future can rely on for guidance in creating their own processes. The Court states that the use of race in admissions, at least in the way that institutions previously used it, had to be temporary. The *Grutter* twenty-five-year mark fueled much of the Court's focus on how Harvard and UNC had no finite ending point for using race.¹²⁰ The Court found indefinite timelines, such as when significant representation is achieved without considering race insufficient and also focused on how the stated goals of both UNC and Harvard could not be measured.¹²¹ For example, UNC stated that one of their goals justifying the use of race as one of many factors in admission was “promoting the robust

112. *See id.* at 2165–66.

113. *Id.* at 2167.

114. *Id.* at 2166.

115. *Id.* at 2151.

116. *Id.* at 2169.

117. *Id.* at 2169 n.6, 2170.

118. The Court never says they are reversing the ultimate finding of *Bakke* and *Grutter*, they just chip away at the primary findings in subtle ways. *See id.* at 2163–64. This leaves institutions wondering if they can still make the argument that getting a diverse class is a compelling interest, as long as they do not use checkboxes and labels to define who will contribute to diversity.

119. *See id.* at 2165–66.

120. *Id.* at 2165–66.

121. *Id.* at 2166.

exchange of ideas.”¹²² The Court found that this goal is not specific enough and measurable enough to determine when the use of race in admissions to achieve this goal could end.¹²³ They discuss how the Court cannot know what a significant enough exchange of ideas is to warrant it being robust and how much use of race in the admissions process is needed to meet that goal.¹²⁴ In essence, it appears that the Court is insinuating that no goal would warrant the use of race in admissions, but they never clearly state that sentiment.

From the foundational points articulated by the Court, institutions can be sure that certain practices would be found unconstitutional if challenged in the future. First, schools must abandon the use of categories in the admissions process. This likely means that schools cannot use a checkbox and that those government-prescribed categories that are found on the census should only be explicitly known during the admissions process if the applicant brings it up in the context of some other qualification, which this Article will explore later. The qualifications for admission that the institution considers must be generally race-neutral, like previous educational experience or involvement in extracurricular activities.¹²⁵ The goal of attaining a diverse class is still legitimate, but it cannot be based on racial diversity.¹²⁶ In this sense, schools can happen upon a racially diverse class, but this cannot be a product of effort of the institution that involves considering race for race’s sake. Finally, from the majority opinion, schools know that if they were ever to argue that use of race in admissions was constitutional, they would have to establish a very finite time for using race, and it would have to be tied to an achievable goal that the Court will find compelling and easy to determine when it has been satisfied.¹²⁷

This list of requirements clearly stated in the majority opinion may leave institutions feeling they must erase from their minds the fact that there are racial categories within our society.¹²⁸ The Court, however, outlines two points that provide leeway for institutions wanting to achieve a diverse student body. First, in footnote four of the majority opinion, the Court clearly suggests that military academies may have a compelling interest in using race in their admission process, thus opening the door for institutions that have different structures, goals, and outlooks than Harvard and UNC.¹²⁹ This alerts the higher education field that this decision may not apply to all institutions, particularly if those institutions can determine a compelling

122. *Id.*

123. *Id.* at 2166–67.

124. *Id.*

125. *Id.* at 2170.

126. *Id.* at 2166, 2170.

127. *Id.* at 2168, 2173.

128. A nearly impossible task since our society is highly racialized, and racial categorizations have real impacts on people.

129. *See SFFA*, 143 S. Ct. at 2166 n.4.

reason for using race in admissions. Second, the Court states “[a]t the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”¹³⁰ These two provisions allow institutions to evaluate their likeness to Harvard and UNC and to ask if their goals are the same as theirs, or if they may be different enough, like a military academy, to warrant a different analysis. It also suggests that it does not need to be completely erased from the admissions process. It can be considered when it is evident that a person’s racial identity contributes to their admissions qualifications, as long as the qualifications are not race based.¹³¹ These two provisions will support the basis for how pipeline programs such as CLEO can continue to play a vital role in helping students, and in particular, students of color gain admission to law school.

V. DEAR COLLEAGUE LETTER

The U.S. Department of Education and the U.S. Department of Justice authored a joint Dear Colleague Letter and Q&A document six weeks after the *SFFA* decision.¹³² The purpose of the letter was to remind institutions that the promise of equal access to education from the *Brown* decision has not yet been met, and that institutions had much to do to ensure the promise of the Equal Protection clause in education.¹³³ The departments specifically discuss how removing barriers, creating a sense of belonging, and supporting underserved students is imperative.¹³⁴ The letter also reiterates the benefits of having a diverse student body, including better classroom discussions, increased problem-solving abilities, and reduction of bias.¹³⁵ The Dear Colleague Letter discusses the need for institutions to review their policies to determine which attributes should be valued in the admissions process, so as not to unnecessarily provide more advantage to privileged applicants.¹³⁶ The tone of the letter was hopeful and reassuring that while some practices should change, such as admissions officers having access to demographic data, many existing practices can stay as long as they do not provide racial preference in the admissions process.¹³⁷

The Q&A document that accompanied the Dear Colleague Letter provides more clarity in specific actions and processes institutions can take

130. *Id.* at 2176.

131. *Id.*

132. C.R. Div., U.S. Dep’t of Just. & Off. for C.R., U.S. Dep’t of Educ., Dear Colleague Letter: SFFA (Aug. 14, 2023), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf> [<https://perma.cc/M2AB-54YK>].

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

to reach their goals of admitting a diverse group of students.¹³⁸ The departments reiterate in the second question that schools can consider individual's backgrounds and attributes that will contribute to the student body. Race can be considered as long as it is not for race's sake, and it speaks to some non-racial attribute that the institution is seeking in its student body.¹³⁹ The Q&A document provides an example of how an applicant could discuss learning to cook Hmong food with their grandmother as origin for their passion for food.¹⁴⁰ The applicant identified their ethnic and racial heritage, and connected how their background helped them identify an area of study they are interested in.¹⁴¹ Thus, according to the Q&A, universities may consider how a students' racial background impacted their characteristics which make them eligible for admission.¹⁴²

Finally, the Q&A document provides the most helpful guidance in terms of the future of CLEO. The document specifically talks about outreach and pathway programs as a means to focus on increasing applicants from a particular group of students.¹⁴³ Institutions can invest in pathway programs, use them to enhance outreach, and even target certain demographics when recruiting for pathway programs.¹⁴⁴ The guidance provides key insight into how schools can continue relationships with a pathway or pipeline program and not evoke a strict scrutiny analysis as outlined in the *SFFA* case.¹⁴⁵ Specifically, schools can reserve admission spots for those who participate in a pathway program, when the program does not use racial criteria for selection.¹⁴⁶ Additionally, a school can have a relationship with a pipeline program that uses racial criteria for selection, but the school may not reserve spots or provide preference for students who participate in the program.¹⁴⁷ These two options become important when considering the continuing relationship between CLEO and law schools.

VI. HOW WILL THIS IMPACT CLEO AND OTHER PIPELINE PROGRAMS?

The best way to consider the consequences or impact of the *SFFA* decision is to think about potential litigation that could and will likely arise from this decision, which is how institutions have previously responded to

138. U.S. Dep't of Just. & U.S. Dep't of Educ., Questions and Answers Regarding the Supreme Court's Decision in *Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina* (Aug. 14, 2023) [hereinafter Q&A], https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf [<https://perma.cc/3L4K-SQWK>].

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

litigation in the wake of new Supreme Court decisions. After *Bakke*, schools proposed new admission policies such as in the *Gratz* case, where the University of Michigan tried awarding points for certain traits.¹⁴⁸ However, this admissions process was deemed unconstitutional, and the *Gratz* decision alerted schools that they cannot use a set of points, but they can use race as an indeterminate factor as outlined in *Grutter*.¹⁴⁹ After each case, institutions have scrambled to make sense of the Court's decision and adjust their practices.¹⁵⁰ Now schools will take the firm direction from the Court's opinion, such as eliminating admissions personnel's access to race information. However, schools will likely attempt new procedures to garner a diverse class. Ultimately, the case will likely shape potential litigants behavior. A school will consider what justifications they need to document if they have two similarly situated candidates and one is admitted over another. The challenge with the way the Court structured its argument, in both *Bakke* and *SFFA*, stems from the statement that no admissions scheme should "unduly harm nonminority applicants," thus appearing to create a requirement for institutions and organizations to justify any minority candidates admitted. The Court could have used language that suggested that race should not harm any applicant but instead chose to focus on discussing the harm to "nonminorities." This begs the question, could a minority applicant successfully make an Equal Protection or Title VI claim?

VII. CAN CLEO STILL EXIST?

The *SFFA* decision is narrow enough that it appears that it only applies to higher education institutions' process of admission and activities substantially tied to admission, like financial aid. While different interested groups have speculated that the case could have a wider reaching scope, the Court clearly states that this is about higher education admission at schools that are similar to Harvard and UNC.¹⁵¹ *SFFA* may impact CLEO, in that the organization has the potential to receive federal funding and thus would be subject to Title VI of the Civil Rights Act of 1964. CLEO states that anyone who is qualified for admission to law school is permitted to apply for the program, not suggesting that there are any racial or socio-economic

148. *Gratz v. Bollinger*, 539 U.S. 244, 253–54 (2003).

149. *Id.* at 270–71.

150. See *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2175 n.9, 2176 (2023); Liam Knox, *What the Affirmative Action Decision Means Beyond Admissions Inside Higher Ed.*, INSIDE HIGHER ED (July 17, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/07/17/what-affirmative-action-decision-means-beyond-admissions#:~:text=Reading%20Between%20the%20Lines%20on,be%20wise%20to%20prepare%20accordingly> [https://perma.cc/JKR5-FFH4].

151. See Knox, *supra* note 150.

indicators required for acceptance.¹⁵² Under a Title VI claim, considering a person's financial background would not evoke a strict scrutiny analysis by the Court, but race certainly would. The likely litigant would be a denied CLEO pre-law summer institute applicant, who alleged that people of color were granted preference in the process over them because race was considered. The mission of CLEO to expand opportunities for underrepresented populations does not need to change because of the Dear Colleague Letter, however it is likely that a court would not find this as a compelling interest if there were a question under Title VI, which currently is evaluated with strict scrutiny.¹⁵³

CLEO could make an argument that if they use race in their admissions process for the pre-law summer institute, they are doing so to remedy the racial gap in LSAT scores. It is unclear how the Supreme Court would analyze this type of interest and whether the Court would find it compelling. From *Bakke* to *SFFA*, the Court chips away at what it finds is a compelling interest, stating that interests that are not directly tied to the institutions are not compelling.¹⁵⁴ Remediating generalized societal discrimination or reducing historic deficits were considered generic reasons that were not directly tied to specific actions in the institution and thus were too nebulous to warrant the use of race.¹⁵⁵ The Court also noted that there is not enough data to conclude the minority physicians work in minority communities.¹⁵⁶ *SFFA* similarly discussed the measurability of the interest and the duration for which the interest may exist.¹⁵⁷

It is hard to predict how a court might rule on a proposal that remediating the LSAT gap or providing alternative credentials for admission is a compelling interest enough to warrant the use of race. On one hand, there is very specific data demonstrating the disparities that exist on the LSAT, making it difficult for the Court to reject specific evidence of the problem.¹⁵⁸ The question comes down to whether privileging students from racial groups that have demonstrated performance gaps on the LSAT is compelling enough to let CLEO and other pipeline programs use race as a factor to provide them the opportunity to obtain alternative credentials to gain admission in a program like CLEO.

Considering the *SFFA* and *Bakke* courts' focus on the impact of race in admission on non-minority candidates, they would likely find that there is a race neutral alternative—simply allow anyone with low LSAT scores to participate in CLEO. That way institutions can reach groups that

152. *Pre-Law Summer Institute*, COUNCIL ON LEGAL EDUC. & OPPORTUNITY, INC., <https://cleoinc.org/plsi/> [<https://perma.cc/YZ7N-4735>].

153. See *About CLEO*, *supra* note 8; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–291 (1978).

154. See *Bakke*, 438 U.S. at 307; *SFFA*, 143 S. Ct. at 2163.

155. See *Bakke*, 438 U.S. at 307; *SFFA*, 143 S. Ct. at 2163.

156. *Bakke*, 438 U.S. at 310.

157. *SFFA*, 143 S. Ct. at 2172–73.

158. See LAUTH & SWEENEY, *supra* note 22, at 21–25.

have disparate outcomes on the LSAT, and non-minorities are not harmed. It is also likely that this type of argument is too close in nature to UC Davis' stated interest in countering the effects of societal discrimination.¹⁵⁹ The difference in this situation is that CLEO would be trying to remedy a specific societal discrimination, e.g. disparities on the LSAT, that can be measured, and an endpoint can be determined. The Court could find this persuasive, or they could say CLEO itself is not significantly connected enough to the problem to take on this interest. The Court might reiterate their point in *Parents Involved*, that it takes a finding of discrimination to warrant use of race, and only those who are causing the discrimination are able to implement a remedy.¹⁶⁰ The question is which entity would be close enough to the problem to warrant remedy, the Law School Admission Council that administers the exam, but does not rely on it, or the law schools that rely on the exam. The interesting point about standing made in *SFFA* could be helpful to CLEO in this situation. *SFFA* sued on behalf of concerned constituents, not actual students who were denied admission to Harvard or UNC.¹⁶¹ CLEO could make the argument that their nexus to the LSAT is no more remote than the nexus between *SFFA* and denied applicants.

VIII. *SFFA*'S IMPACT ON LAW SCHOOLS

The *SFFA* decision has already inevitably changed the way many law schools approach admissions. The weeks following the decision brought about numerous articles, webinars, and calls to counsel about how processes need to change to protect from litigation, follow the decision, and still strive for diversity.¹⁶² Many institutions sent press releases stating that they would still focus on diversity while being mindful of the decision.¹⁶³ Behind the scenes, admissions offices combed their websites to take down

159. *Bakke*, 438 U.S. at 306.

160. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702 (2007).

161. *SFFA*, 143 S. Ct. at 2156–57.

162. See Vinay Bhaskara, *DEI is Under Attack at Colleges and Universities*, FORBES (July 7, 2023, 9:00 AM), <https://www.forbes.com/sites/vinaybhaskara/2023/07/07/dei-is-under-attack-at-colleges-and-universities/?sh=1eddf5977dae> [https://perma.cc/LF5Y-RMY6].

163. E.g., *Chancellor King and SUNY Board of Trustees on SCOTUS Decision on Race Conscious Admissions Cases*, THE STATE UNIV. OF N.Y. (June 29, 2023), <https://www.suny.edu/diversity/scotus2023-affirmativeaction/> [https://perma.cc/Ry3G-ARRS]; Emma H. Haidar & Claire Yuan, *Harvard Reaffirms Commitment to Diversity, Will Abide by Supreme Court Ruling*, THE CRIMSON (June 30, 2023), <https://www.thecrimson.com/article/2023/6/30/harvard-response-affirmative-action/> [https://perma.cc/476N-52HN]; *Statement on SCOTUS affirmative action ruling*, UNIV. OF ARIZ. (June 30, 2023), <https://news.arizona.edu/story/statement-scotus-affirmative-action-ruling> [https://perma.cc/E3EC-9AYD].

any mention of opportunities that were specifically for students of color or underrepresented minorities.¹⁶⁴

As procedures change, law schools will inevitably think about potential plaintiffs. Like CLEO, plaintiffs will likely come in the form of a white student who was denied admission and has academic credentials equal to or higher than admitted students of color. Many schools have focused on the section of the majority opinion where the Court states that applicants can discuss how their racial identity has impacted them in relation to any racial criteria the institution is evaluating for admission, such as resilience.¹⁶⁵ Some institutions have changed the type of information they seek from applicants to help procure information that helps them determine admissibility outside of their incoming academic credentials to continue the permissible goal of diversity, as long as it is not based on race.¹⁶⁶

The challenge for law schools wanting to maintain a relationship with CLEO is how they might justify the admission of a CLEO student over another student with equal or better academic credentials and whether CLEO participation may someday be declared a proxy for race. The Dear Colleague Letter clearly states that schools can utilize pipeline-type programs to encourage diverse applicants to apply.¹⁶⁷ Still, the question is how a court would view this type of relationship. For a school to admit a student who participated in CLEO over someone with higher academic indicators, the school will need to clearly identify which attributes they are valuing in the application and how that weighs against academic indicators like the LSAT or undergraduate GPA. Certainly, prior experience with legal education, resilience in overcoming obstacles such as lower test scores, and demonstrated performance could all be factors considered by a law school. The challenge then comes in justifying how you evaluate those factors against the LSAT of other applicants.

The main question will be: can participation in CLEO be considered a proxy for race? While the program is open to any applicants, historically, the participants have been mostly students of color.¹⁶⁸ The Court has considered when something might be a proxy for race when counsel strikes members of a jury panel.¹⁶⁹ In *Hernandez v. New York*, counsel for the petitioner objected to the prosecutor's use of challenges to exclude Latino jurors.¹⁷⁰ However, the Court found that the prosecutor's reason for striking the jurors, because they were bilingual and would not

164. See Bhaskara, *supra* note 162.

165. *SFFA*, 143 S. Ct. at 2176.

166. See U.S. DEPT. OF EDUC., STRATEGIES FOR PROMOTING DIVERSITY AND INCLUSION IN HIGHER EDUCATION 17 (2023), <https://sites.ed.gov/ous/files/2023/09/Diversity-and-Opportunity-in-Higher-Education.pdf> [<https://perma.cc/6SN5-A4WK>].

167. Q&A, *supra* note 138.

168. See *Pre-Law Summer Institute*, *supra* note 152; *About CLEO*, *supra* note 8.

169. See *Hernandez v. New York*, 500 U.S. 352, 355, 362 (1991).

170. See *id.* at 355.

follow the interpreter's direction, was a race-neutral explanation.¹⁷¹ The Court outlined the *Batson* test, which would likely be used in some form to determine if admission factors are proxies or stand-ins for race.¹⁷² Under *Batson*, the defendant must first show that peremptory challenges were based on race.¹⁷³ Then, the burden shifts, and the prosecutor must articulate a race-neutral reason for the challenges.¹⁷⁴ If the prosecutor meets his burden, then the Court must determine if the defendant proved a discriminatory purpose despite the race-neutral explanation.¹⁷⁵ In translating the test for the admissions context, the plaintiff will likely have to articulate and show what factors were used as a proxy for race, the defendant will have to provide a race-neutral explanation, and the Court will make the determination if the factor used was truly a proxy.

In what may be a positive precedent for schools wanting to maintain connections with CLEO, a First Circuit court found that geography was not a proxy for race in a case about striking jurors.¹⁷⁶ The First Circuit explained, “[t]his statistical fact alone cannot convert a facially race-neutral explanation into one based on race.”¹⁷⁷ The court further states, “[b]ut even when the criterion used by the prosecutor has a discriminatory impact, unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality.”¹⁷⁸ If an institution is challenged for their prioritizing admissions factors gained from participation in a program like CLEO, the *Richards* decision clearly states that discriminatory impact does not outweigh a race-neutral purpose.¹⁷⁹ Thus, suggesting that schools can argue that despite more students of color being admitted from a relationship with a program like CLEO, as long as the race-neutral purpose of admitting students with previous legal education experience is legitimate, no proxy finding should be made.¹⁸⁰

In what might be negative precedent for institutions, a Ninth Circuit court found that restricting voting on to “Native Inhabitants of Guam” served as a proxy for race.¹⁸¹ In this case, the court analyzed the history and nature of using a classification like native inhabitants of Guam.¹⁸² The court stated “classifications that are race neutral on their face but racial by

171. *Id.* at 362.

172. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

173. *Id.*

174. *Id.*

175. *Id.*

176. *See Richards v. Relentless, Inc.*, 341 F.3d 35, 45 (1st Cir. 2003).

177. *Id.*

178. *Id.*

179. *See id.*

180. *Id.*

181. *Davis v. Guam*, 932 F.3d 822, 839 (9th Cir. 2019).

182. *See id.* at 835–38.

design” are a proxy for race.¹⁸³ In this instance the court did not apply a test, but rather used common knowledge, societal norms and history to determine if the factor was a proxy.¹⁸⁴ This could also be the approach of the court in an affirmative action case based on the use of a pipeline program in the admissions process. A court could look at the history of the program, common knowledge of who participates in the program, and the societal norms of who a program like CLEO is for, to determine if participation is a proxy for race.

Still there is one final question, can schools set aside admission spots for participants in CLEO, like the CLIC program is designed to do? As the program currently stands, this seems like the highest level of litigation risk a school could engage in. The Dear Colleague Letter currently states that institutions can engage in practices like reserving spots, as long as the program is not restrictive in who they admit.¹⁸⁵ However, reserving spots for students in the program still could bring about a claim. The institution will need to be prepared to justify how the CLIC enrollees are measured against non-CLIC applicants if a plaintiff makes a case that CLIC and CLEO are proxies for race. The institution will need to carefully evaluate each applicant for both academic and non-academic credentials and possibly take protective measures to ensure that those who are making the final admission decisions are guarded from the race of the applicant and maybe even the applicant’s involvement in the CLEO and CLIC program. While the Dear Colleague Letter suggests that holding spots open would not violate the new *SFFA* standard, it is likely that the Court might analogize this practice to *Bakke*’s holding open of sixteen spots.¹⁸⁶

IX. POTENTIAL SUITS BY STUDENTS OF COLOR

Undoubtedly the *SFFA* case creates a lot of opportunities for litigation and is driving institutions’ actions in the area of admission. Despite the justices’ focus on the impact of admissions policies on non-minority applicants, the case leaves a large question about discrimination against students of color in the admission process.¹⁸⁷ The heavy reliance of the LSAT in the law school admissions process appears to be a prime opportunity for students from groups that on average perform lower on the test.¹⁸⁸ The large point difference between white test takers and Black,

183. *Id.* at 833.

184. *See id.* at 835–38.

185. Q&A, *supra* note 138.

186. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 279 (1978).

187. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2165 (2023).

188. Black students brought suit under Titles VI and IX of Civil Rights Act for the use of the LSAT in the admissions process. The Court of Appeals dismissed based on insufficient evidence to state a claim that the LSAT was administered intentionally for the purpose of discrimination, and there was no basis for discrimination based on not following

Hispanic, or Native American counterparts seems like an opportunity for a disparate impact claim under both Title VI and the Equal Protection clause.¹⁸⁹ While *SFFA* was able to sue Harvard and UNC directly for relief under Title VI because they were claiming direct discrimination, a disparate impact claim under the act must go through the administrative process and cannot be taken up as a private action by an individual.¹⁹⁰ Still a student of color could make a complaint to a federal agency, like the Department of Education, that law school reliance on the LSAT disparately impacts students of color in the admissions process.

The analysis for disparate impact claims under Title VI mirror Title VII, in that a three-part test is applied.¹⁹¹ The agency evaluates if there is disparate impact and assesses the facially neutral policy that creates the disparate impact based on race.¹⁹² There is no bright line test for what constitutes an actional disparity, but the agency must find that there is sufficient disparity to establish a legal violation.¹⁹³ The EEOC and DOJ have adopted an 80% rule, suggesting that when the disparate outcome for individuals based on race is 80% or less than their white counterparts, this constitutes sufficient statistical evidence of disparate impact.¹⁹⁴ Courts have not necessarily adopted this bright line test, and there are wide ranging examples of disparate impact that the Court has and has not constituted as sufficient.¹⁹⁵ Once disparate impact is established, the burden would fall to the entity receiving federal funding to show a legitimate purpose for the policy.¹⁹⁶ The purpose must be necessary to meet a “legitimate, important, integral [part] of the institutional mission.”¹⁹⁷ Finally, even if there is a permissible purpose for the policy, Title VI requires implementation of any less discriminatory alternatives.¹⁹⁸

A claim that reliance on the LSAT creates a disparate impact for applicants of color would likely be found to be significant by an agency. On average, white LSAT test takers score 153.18 out of a possible 180

admissions policies. *Clyburn v. Shields*, 33 F. App'x 552, 555 (2d Cir. 2002) (unpublished opinion).

189. See U.S. DEPT. OF JUST., C.R. DIV., TITLE VI LEGAL MANUAL, at VII, 9.

190. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

191. See *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).

192. *Id.* at 1037–39.

193. See *id.*

194. U.S. DEPT. OF JUST., *supra* note 189, at VII, 25.

195. The Court of Appeals for the Fourth Circuit found that 54.3% of non-white tenant households receiving eviction notices, compared with 14.1% of white households. See *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983, 986 (4th Cir. 1984). The Court of Appeals for the Fifth Circuit did not find that a black applicant pass rate being 93% of a white pass rate was sufficient for disparate impact. See *Moore v. Sw. Bell Tel. Co.*, 593 F.2d 607, 608 (5th Cir. 1979).

196. See *Georgia State Conf. v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985).

197. *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1413 (11th Cir. 1993).

198. *Id.*

points.¹⁹⁹ This translates into white test takers receiving 85% of the points available on the LSAT.²⁰⁰ In contrast, Black test takers on average score 141.7 out of 180 points, translating to Black test takers receiving 78% of the points possible.²⁰¹ The disparities may not reach the 80% threshold that the EEOC and DOJ use as a benchmark to determine when they will investigate disparities,²⁰² but the difference in point allocation is substantial when considering how institutions view scores in the 140s versus scores in the 150s, particularly when the 25th, 50th, and 75th percentile LSAT scores for those admitted to law school in 2022 were, 152, 158, and 164 respectively.²⁰³ Another aspect that could be analyzed under a disparate impact claim is the admissions rates of different racial groups. Currently this data is not published in reports such as the American Bar Association Standard 509 disclosures, but information could be gathered about these statistics through an investigative process.²⁰⁴

If an agency were to find that there was sufficient disparity, schools would have to articulate their race-neutral reason for their use of the LSAT. This is likely to be an easy threshold to overcome since the LSAT has been used for decades, use of standardized tests for admissions is a routine practice around the country and within almost every discipline, and everyone in theory has access to take the LSAT. The less discriminatory alternative may be where an agency finds that law schools could deemphasize use of the LSAT in admissions. This is where higher emphasis on non-academic credentials could be the answer to finding a less discriminatory alternative. Additionally, schools participating in programs like CLEO that provide alternative evidence of potential success in law school could also be seen as a less discriminatory alternative.

Conversely, an Equal Protection claim for disparate treatment is not likely to be successful.²⁰⁵ Even though an allegation of disparate impact discrimination is being made, the Court typically applies a lower level of scrutiny to consider whether there was a purpose for the policy or the action.²⁰⁶ In this case, schools will have to show that the use of the LSAT is rationally related to the legitimate purpose of screening applicants in a fair way. This is a low threshold to overcome, and in these instances, the Court is likely to give great deference to the processes that the institutions use.

199. LAUTH & SWEENEY, *supra* note 22, at 21–25.

200. *See id.*

201. *Id.*

202. 29 C.F.R. § 1607.4 (2022).

203. *See* Law Sch. Admission Council, *supra* note 25.

204. 509 Required Disclosures, AM. BAR ASS'N, <https://www.abarequireddisclosures.org/disclosure509.aspx> [<https://perma.cc/NF2X-R6KS>].

205. *See* Michael G. Perez, Note, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467, 495–96 (2004).

206. *See* Washington v. Davis, 426 U.S. 229 (1976).

CONCLUSION

Inevitably there will be future lawsuits regarding the admission practices of institutions, and much of the fear of litigation is likely to shape those institutions' behaviors. Ideally, institutions could take at face value the conclusions of the majority opinion in *SFFA* and simply eliminate the racial check box on their application, ensure those making decisions are not aware of the applicant's race, and further refine what their academic and non-academic criteria are for admission. However, there has been enough discussion and outreach from various groups threatening suit, that it seems likely that schools will become much more restrictive in their practices.²⁰⁷ It is also inevitable that some schools will abandon attempts to gain any sort of diversity in their entering class because the financial burden of enduring a lawsuit is too great. California schools saw large decreases in students of color after the passage of Proposition 209 in 1996.²⁰⁸ For those schools that want to continue having a diverse class, association with pipeline programs will be essential to encouraging students from diverse backgrounds to apply to their institution, but it is not without risk. There will likely be plaintiffs waiting in the wings to challenge those relationships, and hopefully, future litigation will set more parameters as to what the Court finds to be constitutional and what might be considered a proxy for race. Until then, it is likely to be schools on strong financial footing and that have strong convictions surrounding a diverse student body that will be the first to continue working with programs like CLEO.

207. See Karen Sloan, *Conservative Legal Group Threatens to Sue Law Schools Over Racial Preferences*, REUTERS (July 5, 2023, 1:37 PM), [https://www.reuters.com/legal/government/conservative-legal-group-threatens-sue-law-schools-over-racial-preferences-2023-07-05/#:~:text=July%20%20\(Reuters\)%20%2D%20Law,Court%20decision%20on%20affirmative%20action](https://www.reuters.com/legal/government/conservative-legal-group-threatens-sue-law-schools-over-racial-preferences-2023-07-05/#:~:text=July%20%20(Reuters)%20%2D%20Law,Court%20decision%20on%20affirmative%20action) [<https://perma.cc/F64A-QYKB>].

208. At Berkley and UCLA, black student enrollment hovered around six and seven percent, respectively, just before the law was passed. See Katherine Mangan, *Enrolling Diverse Students When Race is off the Table*, CHRON. OF HIGHER EDUC. (Sept. 2, 2022), <https://www.chronicle.com/article/after-affirmative-action> [<https://perma.cc/7UGU-7ARJ>]. Enrollment for both groups dropped to three percent at both institutions in the years after, and in 2021, enrollment climbed to four and six percent, respectively. *Id.*