Article

Diversity Messaging After Affirmative Action

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Many colleges and universities communicate publicly that they value racial diversity—a practice this Article will call diversity messaging. *Yet growing hostility to race-consciousness by courts, legislators, and other public figures has made diversity messaging increasingly fraught.*

This Article examines empirically whether law schools changed their diversity messaging following the Supreme Court's decision in Students for Fair Admissions v. Harvard (SFFA)*, and, if so, how. I surveyed three sources of diversity messaging from law schools: admissions materials, hiring announcements, and DEI websites. Analysis of these materials revealed that schools significantly reduced or eliminated their diversity messaging after* SFFA. *Seventy-three percent of law schools revised the diversity messaging in their application materials: explicit references to race decreased by 73% and explicit references to diversity decreased by 36%. Similarly, 44% of law schools revised the diversity messaging in their hiring announcements: 50% of those schools eliminated language stating that they actively seek or value diversity, and the number of schools requesting a diversity statement decreased by 33%. Finally, 54% of law schools revised their DEI websites in the five months following* SFFA*, with*

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48% of those schools deleting explicit references to race or diversity, and several schools completely deleting their DEI pages.

These sweeping changes reveal that schools are revising their diversity messaging in ways that are not explicitly required by SFFA. *One possible explanation for this seeming overcompliance with* SFFA *is that schools wish to reduce the legal, political, and social risks associated with diversity messaging after* SFFA. *Alternatively, we might conclude that schools' commitment to racial diversity was always ambivalent—and thus easily surrendered when the winds shifted.*

*Regardless of the underlying explanation, the Article argues that the decrease in diversity messaging need not impair racial justice efforts on campus. Indeed, untethering diversity messaging from substantive racial justice may encourage schools to emphasize substance over signal. The Article concludes that racial justice can thrive in a post-*SFFA *world and offers several concrete measures that schools can pursue.*

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INTRODUCTION

On June 16, 2023, Yale Law School's "Diversity & Inclusion" website broadcast a strong commitment to racial justice.[1] A banner at the top of the page featured a photo of smiling racially diverse young people.[2] A message from Dean Heather Gerken stated: "Diversity and inclusion are core to the values of this school."[3] Dean Gerken's message proclaimed, in bold text, that "[t]he most daunting and important challenges we face, both as a society and as a school, stem from the powerful effects of past and present racial discrimination."[4] The message went on to highlight that Yale Law's six most recent classes had been the most diverse in its history, with 55% students of color and 52% women.[5]

By August 16, 2023—just two months later—much had changed. The webpage, now hosted at a different link, had been retitled "Equity, Inclusion, & Belonging."[6] Gone was Dean Gerken's stirring message, replaced by a brief unsigned paragraph that stated: "We are committed to prioritizing equity,

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1. *Diversity & Inclusion*, YALE L. SCH. (June 16, 2023), [https://web.archive.org/web/20230616161330/https://law.yale.edu/student-life/diversity-inclusion] (expressing a commitment to remedying past and present racial discrimination and highlighting diversity as a core institutional value). This Article references old versions of websites throughout. Where web archive links are available, these links are included in citations along with cited dates based on the Wayback Machine capture dates. In some examples there is a slight discrepancy between the Wayback Machine capture date and the exact date when I reviewed a given website. In all cases, however, the contents of the archived pages have been verified against my webpage screenshots by the *Minnesota Law Review* to ensure substantive consistency.

For the purposes of this Article, I adopt the definition of "racial justice" articulated by the nonprofit organization Race Forward: "[A] vision and transformation of society to eliminate racial hierarchies and advance collective liberation, where Black, Indigenous, Latinx, Asian Americans, Native Hawaiians, and Pacific Islanders, in particular, have the dignity, resources, power, and self-determination to fully thrive." *What is Racial Equity?*, RACE FORWARD, https://www.raceforward.org/what-racial-equity-0 [https://perma.cc/LF8A-T3RN]. Racial justice could include—but certainly is not limited to—efforts to improve the racial diversity of colleges, universities, and other educational institutions.

2. *Diversity & Inclusion*, *supra* note 1.

3. *Id.*

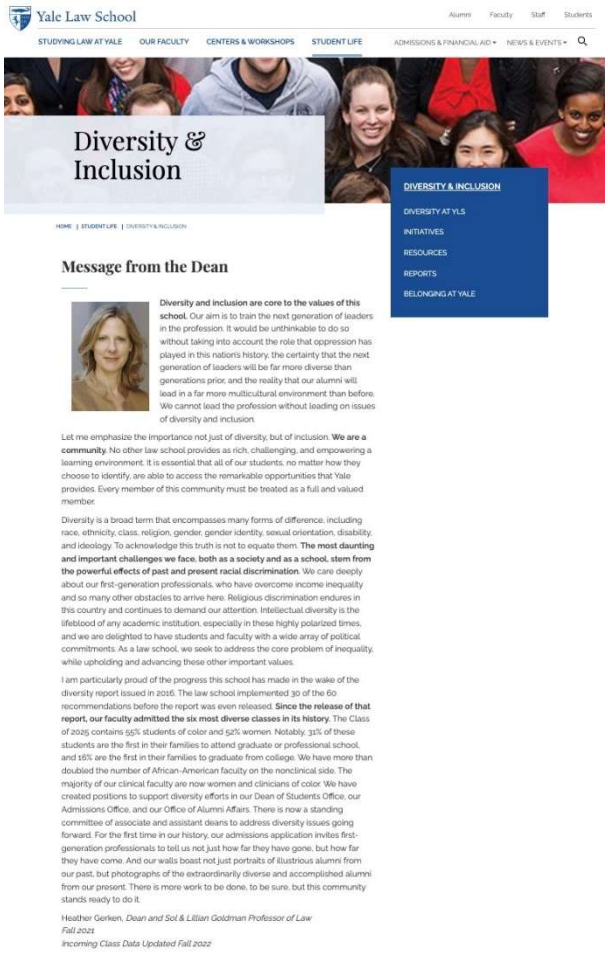
4. *Id.*

5. *Id.*

6. *Equity, Inclusion, & Belonging*, YALE L. SCH. (Aug. 16, 2023), [https://web.archive.org/web/20230816123736/https://law.yale.edu/student-life/equity-inclusion-belonging].

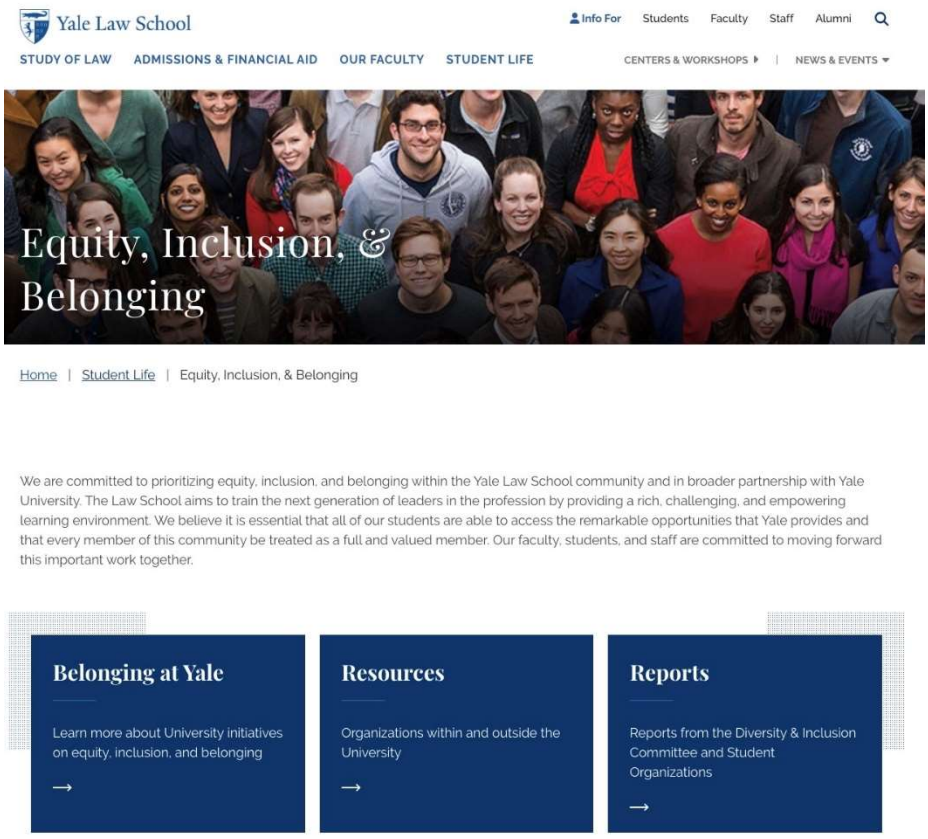
inclusion, and belonging within the Yale Law School community and in broader partnership with Yale University."[7] Gone were the comments about the daunting challenges of past and present racial discrimination. Gone were the statistics about the diversity of Yale Law School's recent classes. The sole remnant of the June website was the banner photo with the smiling racially diverse young people.

Figure 1: Yale Law School "Diversity & Inclusion" Website, June 16, 2023



7. *Id.*

Figure 2: Yale Law School "Equity, Inclusion, & Belonging" Website, August 16, 2023



What happened between June 16 and August 16?[8] For one thing, the Supreme Court decided *Students for Fair Admissions v. President of Harvard College* (*SFFA*) on June 29, 2023.[9] There, the Court held that race-conscious admissions programs at Harvard and the University of North Carolina (UNC) violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.[10] The decision effectively eliminated race-based affirmative action programs in higher education.[11] Colleges and universities could still pursue the goal of racial diversity, the Court held, but could not do so by using race as a factor in evaluating individual applicants.[12]

Considerable scholarly analysis and popular commentary have already examined *SFFA*'s implications for college and university admissions.[13] These implications are substantial: one

8. To be clear, I don't know what happened at Yale Law School: I have no inside knowledge about the circumstances surrounding the DEI website redesign. Perhaps the revisions were part of a routine update. Or perhaps they were part of an effort to purge evidence of race-consciousness from the law school's Internet presence. What this Article *will* demonstrate is that the changes to Yale's website are consistent with a broader trend by many colleges and universities to reduce or eliminate public statements relating to race and diversity. *See infra* notes 242–81 and accompanying text (analyzing changes to the diversity messaging of colleges and universities).

9. Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141 (2023).

10. *See id.* at 2175 ("[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause.").

11. *See id.* at 2176 ("[T]he student must be treated based on his or her experiences as an individual—not on the basis of race."). The Court did not state that diversity could *never* serve as a compelling interest that would justify using individual race as a factor in higher educational admissions—for example, military academies might be one unique situation warranting an exception. *See infra* note 153 (explaining that whether diversity could be a compelling interest to justify using individual race as a factor in military academy admissions is currently being litigated in federal court). But the type of race-conscious plans in use by many schools prior to *SFFA* are now clearly unconstitutional. *See SFFA*, 143 S. Ct. at 2175 (holding that the Constitution prohibits considering an individual's race as a beneficial factor in admissions decisions).

12. *See SFFA*, 143 S. Ct. at 2175–76 (explaining that affording benefits to applicants on the basis of race is impermissible, but that colleges and universities are *not* prohibited from "considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise").

13. *See, e.g.*, Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023) (offering a critical reading of *SFFA*); Peter N. Salib & Guha Krishnamurthi, *The Goose*

study found that seventy-four percent of selective colleges and universities used race as a factor in their admissions processes prior to *SFFA*,[14] and these schools will need to revise their procedures to comply with the decision. Such revisions may dramatically impair racial justice efforts by reducing enrollment of students from underrepresented racial groups.[15]

But *SFFA* affects more than admissions processes. The decision also implicates a practice I will call *diversity messaging*—public signaling about racial diversity. At colleges and universities, diversity messaging may include public statements by the

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and the Gander: How Conservative Precedents Will Save Campus Affirmative Action, 102 TEX. L. REV. 123, 133, 138 (2023) (arguing that *SFFA* does not need to change schools' actual admissions practices due to longstanding challenges in proving discriminatory intent); Henry L. Chambers, Jr., *Douglass, Lincoln, and Douglas Before* Dred Scott*: A Few Thoughts on Freedom, Equality, and Affirmative Action*, 83 MD. L. REV. 245, 246 (2023) ("[T]he continued salience of race relates to life experiences Black and multiracial people often have, an issue especially important in how the Supreme Court recently addressed affirmative action in university admissions."); Jonathan P. Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 HARV. C.R.-C.L. L. REV. 143 (2023) (examining the role of elite universities in destabilizing affirmative action prior to *SFFA*); Vinay Harpalani, "*With All Deliberate Speed": The Ironic Demise of (and Hope for) Affirmative Action*, 76 SMU L. REV. F. 91 (2023) (discussing possible outcomes of and implications flowing from the decision prior to *SFFA*); Mitchell F. Crusto, *A Plea for Affirmative Action*, 136 HARV. L. REV. F. 205 (2023) (drawing on personal experience and historical and social remedial rationales to support affirmative action prior to *SFFA*).

14. Drew DeSilver, *Private, Selective Colleges Are Most Likely to Use Race, Ethnicity as a Factor in Admissions Decisions*, PEW RSCH. CTR. (July 14, 2023), https://www.pewresearch.org/short-reads/2023/07/14/private-selective-colleges-are-most-likely-to-use-race-ethnicity-as-a-factor-in-admissions-decisions [https://perma.cc/SSA6-XC92]. *SFFA* may be less important for less selective schools. *See* Sarah Reber et al., *Admissions at Most Colleges Will Be Unaffected by Supreme Court Ruling on Affirmative Action*, BROOKINGS INST. (Nov. 7, 2023), https://www.brookings.edu/articles/admissions-at-most-colleges-will-be-unaffected-by-supreme-court-ruling-on-affirmative-action [https://perma.cc/HPY7-EKUJ] (explaining that "only the most selective fifth of colleges put significant weight on race in admissions decisions" prior to *SFFA*'s holding).

15. Researchers have found "precipitous" drops in enrollment of Black and Latine students after the passage of state measures banning affirmative action. *See, e.g.*, William C. Kidder, *The Struggle for Access from* Sweatt *to* Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 30–34 (2003) (observing significant drops in the enrollment of BIPOC students at five universities after affirmative action was banned).

institution's leadership,[16] information on the institution's website,[17] promotional brochures,[18] and other public-facing materials produced by the institution.[19]

To understand the significance of diversity messaging in higher education, we must consider the complex history of the diversity rationale for affirmative action. Forty-five years before *SFFA*, the Supreme Court decided *Regents of the University of California v. Bakke*, in which Justice Powell's controlling opinion concluded that "obtaining the educational benefits that flow from an ethnically diverse student body" could justify the use of race in college and university admissions.[20] Many commentators criticized the diversity rationale for its weak relationship to racial justice: renowned critical race theory scholar Charles Lawrence wrote that diversity was a "substanceless" concept that held "no inherent meaning."[21] Others observed that the diversity rationale was palatable precisely *because of* its indeterminacy.[22] The diversity rationale was flexible enough to capture progressive ideals of racial justice without overtly excluding conservative constituencies, because, in theory, anyone could contribute

16. *See, e.g.*, *A Message from Dean Gerken on Today's Supreme Court Ruling on Admissions*, YALE L. SCH. (June 29, 2023), https://law.yale.edu/yls-today/news/message-dean-gerken-todays-supreme-court-ruling-admissions [https://perma.cc/E78B-TE65] (exemplifying a public statement by a school's institutional leadership on the topic of diversity).

17. *See infra* notes 123–25 and accompanying text (explaining that law schools broadcast diversity messaging on their DEI websites).

18. *See infra* note 124 (describing the use of photographic materials that showcase student diversity).

19. These materials include application materials and hiring announcements. *See infra* Part II.A (discussing diversity messaging in application materials); Part II.B (discussing diversity messaging in hiring announcements).

20. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 (1978).

21. Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 765 (1997) ("I argue that diversity cannot be an end in itself—it is substanceless. It has no inherent meaning and cannot be a compelling interest unless we ask the prior question: diversity to what purpose?"); *see also infra* notes 80–94 and accompanying text (discussing the critical reception of *Bakke*'s diversity rationale).

22. Carla D. Pratt, *The End of Indeterminacy in Affirmative Action*, 48 VAL. U. L. REV. 535, 546 (2014) ("By avoiding analytical precision in articulating the state's diversity interest, educational diversity in the abstract served to provide a generic rationale for the maintenance of race-conscious higher education admissions . . . .").

to diversity.[23] And so diversity messaging became a convenient way for schools to signal a commitment to racial justice while minimizing the extent to which they alienated other stakeholders.[24]

SFFA, however, effectively invalidated higher education admissions processes that consider the race of individual applicants in order to achieve the benefits of student body diversity.[25] So a school that expresses an affinity for diversity—particularly the racial kind—now risks the perception that it is engaged in

23. In *Bakke*, Harvard endorsed the diversity rationale, arguing that "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer." Brief of Columbia University et al. as Amici Curiae app. at 2, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007, app. at *2.

24. *See* Pratt, *supra* note 22, at 546 (positing that the indeterminacy of diversity as an abstract interest allowed institutions to engage in race-conscious admissions); Jennifer Lisa Vest, *What Doesn't Kill You: Existential Luck, Postracial Racism, and the Subtle and Not So Subtle Ways the Academy Keeps Women of Color Out*, 12 SEATTLE J. SOC. JUST. 471, 486 (2013) ("Diversity is a word that does not offend, does not highlight inequality, does not refer to historical injustices, or point the finger or lay blame. Diversity has a certain neutrality about it that makes it palatable."). This is not to say that the concept of diversity has never attracted negative attention from the right. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., concurring in part and dissenting in part) ("'[D]iversity,' for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue." (alteration in original)); NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION 52–76 (Harv. Univ. Press ed., 1987) (criticizing the diversity rationale for affirmative action). Rather, my point is that diversity's indeterminacy makes it a more challenging target for conservatives as opposed to more concrete concepts like "reparations." *Cf.* Carrie Blazina & Kiana Cox, *Black and White Americans Are Far Apart in Their Views of Reparations for Slavery*, PEW RSCH. CTR. (Nov. 28, 2022), https://www.pewresearch.org/short-reads/2022/11/28/black-and-white-americans-are-far-apart-in-their-views-of-reparations-for-slavery [https://perma.cc/4S2M-A8ZA] (summarizing survey results regarding Americans' views on reparations for slavery and reflecting general disapproval for reparations, especially among political conservatives).

25. Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2175–76 (2023) ("[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. . . . [T]he student must be treated based on his or her experiences as an individual—not on the basis of race.").

an impermissible endeavor.[26] Diversity messaging has become fraught with legal and political hazards.[27]

This Article investigates empirically whether schools have changed their diversity messaging after *SFFA*, and, if so, how. Using law schools as a case study,[28] I examined three sources of diversity messaging: application materials; faculty hiring announcements; and diversity, equity, and inclusion (DEI) websites. Many law school application materials signal an interest in diversity by requesting that applicants discuss diversity in their personal statement or a supplemental essay.[29] Likewise, many law school hiring announcements indicate that a school is interested in diversity by stating that the school seeks candidates who would contribute to its diversity or by requesting that candidates submit a "diversity statement."[30] And law school DEI websites provide a forum for schools to communicate the value they place on diversity to current and prospective students, faculty, alumni, and the world at large.[31]

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26. Post-*SFFA*, Peter Salib and Guha Krishnamurthi have argued that "almost nothing will have to change" about how universities admit applicants except "how universities talk about admissions." Salib & Krishnamurthi, *supra* note 13, at 133. They contend that the demanding discriminatory intent standard the Supreme Court has long applied in Equal Protection and other discrimination claims will insulate admissions processes from liability. *Id.* at 136–38 ("[T]he disparate impact approach and its attendant statistical proof are not always allowed. Notably, it is unavailable in Equal Protection cases. . . . Thus, statistics will not carry post-*SFFA* claims against universities that continue to use race as a factor in admissions."). But for schools to escape liability, Salib and Krishnamurthi argue that statements about the use of race in admissions "have to go," along with racial content, in "mission statements, websites, advertisements, and the like." *Id.* at 134. Whether schools *will* change the way they talk is a different matter entirely, and one this Article examines empirically. *See infra* Part II (conducting an empirical analysis of the changes in university diversity messaging post-*SFFA*).

27. *See* Salib & Krishnamurthi, *supra* note 13, at 133–36 (explaining that universities will have to change their diversity messaging post-*SFFA* to avoid legal challenges).

28. As I explain in Part II, I selected law schools because of their heavy engagement with issues of diversity and their sensitivity to Supreme Court decisions.

29. *See infra* Part II.A (discussing diversity messaging in law school application materials).

30. *See infra* Part II.B (discussing diversity messaging in law school hiring announcements).

31. *See infra* Part II.C (discussing diversity messaging in law school DEI websites).

Examining each of these sources of diversity messaging before and after *SFFA* revealed significant changes in schools' diversity messaging.[32] Seventy-three percent of law schools revised the diversity messaging in their application materials: explicit references to race decreased by 73%, and explicit references to diversity decreased by 36%.[33] Similarly, 44% of law schools revised the diversity messaging in their hiring announcements: 50% of those schools eliminated language stating that they actively seek or value diversity, and the number of schools requesting a diversity statement decreased by 33%.[34] And 54% of law schools revised their DEI websites in the five months following *SFFA*, with 48% of those schools deleting explicit references to race or diversity, and several schools completely deleting their DEI pages.[35] (The empirical information used for this Article was current as of August 2023.)

A small subset of the changes schools made to their diversity messaging was required by *SFFA*.[36] But even the changes to application materials far exceeded those that *SFFA* mandated. For example, *SFFA* did not prohibit schools from inviting applicants to discuss how they would contribute to the diversity of the law school community or from considering an applicant's discussion of the way that race impacted their life.[37] It held only that schools could not use the bare fact of a student's racial identity characteristics as a factor in their decisions.[38] Yet many schools

32. *See infra* Part II (conducting an empirical analysis of diversity messaging before and after *SFFA* and finding significant changes in law schools' diversity messaging).

33. *See infra* note 177 and accompanying text (finding a 36% decrease in explicit references to diversity for those schools studied); *see also infra* note 188 and accompanying text (finding a 73% decrease in explicit references to race for those schools studied).

34. *See infra* Appendix B.

35. *See infra* notes 245–47 and accompanying text.

36. For example, if a school's application materials stated that it took race into account as a factor in considering applications, *SFFA* would require the school to cease the practice and remove the statement from its application materials. For a discussion of universities' modification of diversity messaging beyond what *SFFA* requires, see *infra* notes 335–53 and accompanying text.

37. Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2176 (2023) ("[N]othing 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.").

38. *See id.* ("[T]he student must be treated based on his or her experiences as an individual—not on the basis of race.").

eliminated such essay prompts from their application materials or revised them so that they no longer explicitly referenced diversity.[39] The revisions to hiring announcements and DEI websites went further still: Although *SFFA* said nothing at all about diversity statements in hiring processes or DEI website content, many schools eliminated these forms of diversity messaging altogether.[40]

The Article then considers possible explanations for these sweeping revisions. It may be that schools are revising their diversity messaging to minimize legal, political, and social risks.[41] Such behavior implies that some colleges and universities were willing to prioritize racial diversity only when their efforts were relatively costless. Now that *SFFA* has increased the risks of diversity messaging, perhaps some schools have quietly decided that it is no longer worth the effort.

Ultimately, however, the changes in diversity messaging may not matter much as far as racial equity is concerned. That is, the fact that schools are saying less about race does not have to mean that they must do less about racial justice. Indeed, by directing fewer resources to diversity messaging, schools may find that they have more time, money, energy, and goodwill to devote to substantive racial reforms. I explore three reforms that are not dependent on diversity messaging: substantive curricular offerings, cluster hiring centered around racial justice, and financial aid for students who seek to pursue careers in racial justice. This list of reforms is by no means exhaustive; rather, it is intended to demonstrate that robust racial justice measures have not been foreclosed by *SFFA* and may operate wholly independent of diversity messaging efforts.

The balance of the Article is organized in three parts. Part I examines the diversity rationale, uncovering its origins and considering common critiques. Part II presents original empirical research comparing schools' diversity messaging before and

39. *See infra* notes 173–200 and accompanying text (finding a marked decrease in explicit references to diversity and an increase in diversity-related synonyms in law school application materials after *SFFA*).

40. *See infra* Part II.B (noting that many law schools eliminated diversity messaging in hiring announcements); Part II.C (noting that many law schools eliminated diversity messaging from DEI websites).

41. *See infra* Part III.A.1 (exploring the mitigation of legal, political, and social risks as a possible explanation for the decrease observed in law schools' diversity messaging post-*SFFA*).

after *SFFA*. It demonstrates that schools have significantly reduced their diversity messaging beyond what is required by *SFFA*. Finally, Part III considers the implications of these empirical findings, first positing possible explanations and then arguing that the decline in diversity messaging need not limit racial justice reforms.

I. A CRITICAL HISTORY OF THE DIVERSITY RATIONALE

This Part examines the legal and social influence of the diversity rationale. Part I.A offers a brief overview of affirmative action and the diversity rationale. Part I.B examines the diversity rationale's scholarly reception and surveys common critiques. Part I.C explains how the legal importance of diversity has imbued the concept with social importance, leading institutions to engage in diversity messaging. And Part I.D turns to the *SFFA* decision. After *SFFA*, diversity has lost legal status, but its social influence has thus far remained uncertain, setting the stage for the empirical examination in Part II.

A. THE DIVERSITY RATIONALE

Affirmative action programs originated in the 1960s in workplace settings, where their justification was explicitly remedial.[42] In 1977, the U.S. Commission on Civil Rights defined affirmative action as an effort "beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."[43] Federal courts upheld affirmative action programs on this basis. For example, in 1971, the Eighth Circuit upheld an affirmative action program as "a method of presently eliminating the effects of past racial discriminatory practices

42. The term "affirmative action" first appeared in governmental documents in President John F. Kennedy's order establishing the President's Committee on Equal Employment Opportunity, which stated: "[All government contractors] will 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." Exec. Order No. 10,925, 26 Fed. Reg. 1,977 (Mar. 8, 1961); *see also* JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 7, 114 (1996) (describing impact of Executive Order 10,925).

43. U.S. COMM'N ON C.R., CLEARINGHOUSE PUBL'N 54, STATEMENT ON AFFIRMATIVE ACTION 2 (1977).

and . . . making meaningful in the immediate future the constitutional guarantees against racial discrimination."[44]

As a legal justification for affirmative action, diversity emerged later. Eboni Nelson has identified the roots of the diversity rationale in the Supreme Court's integration and desegregation cases from the 1950s.[45] But the Supreme Court did not explicitly endorse diversity as a rationale for affirmative action until *Regents of the University of California v. Bakke* in 1978.[46] There, the plaintiff brought an Equal Protection challenge to the affirmative action program used by the Medical School of the University of California at Davis.[47] The program set aside sixteen seats in a class of 100 for applicants who indicated that they wished to be considered members of a "minority group."[48] The University of California justified its program, and affirmative action generally, on four grounds: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," (2) "countering the effects of societal discrimination," (3) "increasing the number of physicians who will practice in communities currently underserved," and (4) "obtaining the educational benefits that flow from an ethnically diverse student body."[49]

Four justices would have accepted any of these rationales.[50] Writing only for himself, Justice Powell brought diversity into the spotlight.[51] He rejected the first three rationales for

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44. Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971) (en banc).

45. Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIA. L. REV. 577, 585 (2009) ("Although the diversity rationale is often thought to have been announced first by Justice Powell in *Bakke*, this Part details the evolution of the rationale from the Court's desegregation jurisprudence in cases such as *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents for Higher Education* . . . ." (footnote omitted)).

46. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978) (holding that "the interest of diversity is compelling in the context of a university's admissions program").

47. *Id.* at 269.

48. *Id.* at 289.

49. *Id.* at 306 (citations omitted).

50. *See id.* at 325 (Brennan, J., concurring in part and dissenting in part) ("[The] [g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice . . . .").

51. *Id.* at 311–15 (majority opinion) (explaining why diversity is a "constitutionally permissible goal for an institution of higher education").

affirmative action: the historical remedial rationale, the social remedial rationale, and the rationale of increasing the number of providers who serve marginalized communities.[52] But Justice Powell then declared that "the attainment of a diverse student body. . . . clearly is a constitutionally permissible goal for an institution of higher education."[53] He linked diversity to academic freedom, stating that "universities must be accorded the right to select those students who will contribute the most to the 'robust exchange of ideas,'" and that "our tradition and experience lend support to the view that the contribution of diversity is substantial."[54] Powell emphasized that race could operate only as a "'plus' in a particular applicant's file" and must be incorporated in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[55] Admissions schemes could not involve quotas or set-asides for members of particular racial groups.[56] As to *Bakke* itself, therefore, Powell provided a fifth vote for invalidating the University of California's plan.[57]

The *Bakke* case and Justice Powell's deciding vote for the diversity rationale attracted great interest[58] and firmly entrenched that rationale in law, and, eventually, society.[59] Other justifications for affirmative action in higher education receded; the remedial rationale no longer had legal force other than a narrow exception for an entity's implementation of remedial

52. *Id.* at 307–11 (holding that the remedial rationales and underserved-communities rationale are not compelling government interests for the purposes of strict scrutiny).

53. *Id.* at 311–12.

54. *Id.* at 313.

55. *Id.* at 317.

56. *Id.* at 315 (noting that a "special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity").

57. *Id.* at 320 (holding that the special admissions program is invalid under the Fourteenth Amendment).

58. Warren Weaver, Jr., *Justice Dept. Brief 1 of 58 in Bakke Case*, N.Y. TIMES (Sept. 20, 1977), https://www.nytimes.com/1977/09/20/archives/justice-dept-brief-1-of-58-in-bakke-case-but-it-is-likely-to-carry.html [https://perma.cc/D86Y-UULN] (noting that fifty-eight amicus briefs were filed in *Bakke*, which Court official believed was record-breaking).

59. *See infra* Part I.C (describing the rise and cultural prominence of "diversity").

measures for its own past discrimination.[60] Diversity therefore became the near-exclusive focus for those who wished to maintain affirmative action in higher education.

Challenges to affirmative action in higher education continued. One such challenge, involving two lawsuits against the University of Michigan, reached the Supreme Court in 2003. In *Gratz v. Bollinger*, plaintiffs sued to invalidate the undergraduate admissions program, under which applicants needed to accrue 100 points to guarantee admission and were awarded twenty points for membership in an "underrepresented minority" group.[61] And in *Grutter v. Bollinger*, plaintiffs challenged the law school's admissions program, which used race as one factor in a holistic evaluation of applicants.[62] Surprising some observers, the Court struck down the undergraduate admissions program but upheld the law school program.[63] Justice O'Connor's majority opinion in *Grutter* held that, because the law school conducted a highly individualized review of each applicant, race was not dispositive in any application and all factors relating to diversity were given weight.[64]

The Court again revisited the diversity rationale in *Fisher v. University of Texas* when it considered an Equal Protection

60. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. . . . Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination.").

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

62. Grutter v. Bollinger, 539 U.S. 306, 315 (2003) ("[Michigan Law's] policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.").

63. *Gratz*, 539 U.S. at 275 (striking down the undergraduate admissions program on Fourteenth Amendment grounds); *Grutter*, 539 U.S. at 343–44 (upholding the constitutionality of the law school admissions program).

64. *Grutter*, 539 U.S. at 337 ("[T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto,* of automatic acceptance or rejection based on any single 'soft' variable.").

lawsuit brought by Abigail Fisher, a white applicant.[65] She challenged an admissions program in which the University of Texas filled its class pursuant to the state's Top Ten Percent Law by guaranteeing admission to students who graduated in the top ten percent of each high school.[66] The University then allocated the remaining slots using a *Grutter*-like holistic review that could involve race as one of many factors.[67]

Fisher's case first reached the Supreme Court in 2013 (*Fisher I*).[68] The Court held that both the District Court and the Court of Appeals applied strict scrutiny in a manner too deferential to the University, remanding for the lower court to apply the correct standard.[69] In 2016, the case returned to the Supreme Court (*Fisher II*).[70] By a vote of 4-3,[71] the Supreme Court held that the University of Texas's affirmative action program did not violate the Equal Protection Clause.[72] And thus affirmative action in higher education, buttressed by the diversity rationale, lived to fight another day.

In contrast to its higher education decisions, the Court's employment decisions have never upheld diversity as a permissible justification for considering race as one factor in hiring

65. Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 301–02 (2013).

66. *Id.* at 305.

67. *Id.* at 304–06 (describing the University's admissions program). The plaintiff in *Fisher* did not challenge the Texas Top Ten Percent Law. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 375 (2016) ("Petitioner . . . filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants.").

68. *Fisher I*, 570 U.S. 297.

69. *Id.* at 314–15 ("The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. . . . The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.").

70. *Fisher II*, 579 U.S. 365.

71. The unusual vote total resulted from (1) Justice Kagan's recusal, likely because she worked on the case as solicitor general, and (2) Justice Scalia's death just a few months prior to the decision. Ronald Turner, *Justice Kennedy's Surprising Vote and Opinion in* Fisher v. University of Texas at Austin, 6 WAKE FOREST L. REV. ONLINE 38, 39 n.7, 40 n.19 (2016).

72. *Fisher II*, 579 U.S. at 388 (upholding the University of Texas at Austin's admissions program).

decisions.[73] In 1979, the year after it decided *Bakke*, the Supreme Court upheld against a Title VII challenge a union training program that reserved half the available training slots for Black steelworkers, commensurate with the percentage of Black people in the local labor force.[74] The Court held that the plan was "designed to break down old patterns of racial segregation and hierarchy," that it did not "unnecessarily trammel the interests of the white employees," and finally that it "is a temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."[75] Thus, the plan fell within the "area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[76] Although subsequent decisions expressing skepticism about the use of racial classifications have cast doubt on the Court's commitment to *Weber*, the case remains good law.[77]

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73. Deborah C. Malamud, *The Strange Persistence of Affirmative Action Under Title VII*, 118 W. VA. L. REV. 1, 3–5 (2015) (describing remedial rather than diversity-based rationale for affirmative action in employment hiring practices).

74. United Steelworkers v. Weber, 443 U.S. 193 (1979).

75. *Id.* at 208.

76. *Id.* at 209; *see also* Johnson v. Transp. Agency, 480 U.S. 616 (1987) (upholding *Weber* with respect to gender preferences).

77. The federal appellate courts consistently continue to follow *Weber*. *See, e.g.*, United States v. Brennan, 650 F.3d 65 (2d Cir. 2011); Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996); Smith v. Va. Commonwealth Univ., 84 F.3d 672 (4th Cir. 1996); Sharkey v. Dixie Elec. Membership Corp., 262 Fed. App'x 598 (5th Cir. 2008) (unpublished decision); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985); Hill v. Ross, 183 F.3d 586 (7th Cir. 1999); Setser v. Novack Inv. Co., 657 F.2d 962 (8th Cir. 1981); Doe v. Kamehameha Schs., 470 F.3d 827 (9th Cir. 2006); Turner v. Orr, 759 F.2d 817 (11th Cir. 1985); Shea v. Kerry, 796 F.3d 42 (D.C. Cir. 2015). A separate line of cases has addressed whether an employer may use race-conscious measures in order to avoid an unintentional but racially disparate impact on hiring decisions. In *Ricci v. DeStefano*, the Supreme Court considered whether it is impermissible for an employer (there, the City of New Haven) to throw out the results of a promotion examination because the exam eliminated the promotion prospects of a disproportionate number of minority candidates. 557 U.S. 557, 562 (2009). The court concluded that the employer must have a "strong basis in evidence" before doing so. *Id.* at 592–93. While the case considered whether Title VII permitted an employer to *alter* its process to avoid a possible disparate-impact suit, it did not address the permissible scope of a program designed to institute broader remedial measures. *Id.* at 592–93.

B. CRITIQUING DIVERSITY

From its inception, the diversity rationale announced in *Bakke* was the subject of confusion and criticism. On the right, stakeholders were qualifiedly pleased that the decision did away with quotas, although many wondered "how race could be used as one factor in admission 'without that factor eventually becoming the determining factor.'"[78] Scholars also view *Bakke* as part of a gradual conservative shift in racial views following the civil rights progress of the 1950s and 1960s.[79] A Gallup poll found that, a month after the *Bakke* decision, two-thirds of Americans believed that in their communities, Black people had just "as good" a chance of being hired for jobs for which they are qualified as do white people.[80] And just two years after *Bakke*, Ronald Reagan was elected President, having aired regressive views on race throughout his political career and presidential campaign.[81]

But some of the most potent criticism of diversity came from the left, including several highly influential scholars of critical race theory. Writing in 1997, Charles Lawrence argued that "diversity cannot be an end in itself" because "it is substanceless."[82] Diversity "has no inherent meaning" and therefore "cannot be a compelling interest unless we ask the prior question: diversity to what purpose?"[83] Lawrence therefore criticized Justice Powell's opinion in *Bakke* for "de-coupling" the diversity and remedial

78. *See, e.g.*, Charles R. Babcock & Loretta Tofani, *The Reaction*, WASH. POST (June 29, 1978), https://www.washingtonpost.com/archive/politics/1978/06/29/the-reaction/cb3cb387-b736-44cb-ab63-d4f66d8f58cc [https://perma.cc/9U6V-6KU7].

79. *See, e.g.*, SKRENTNY, *supra* note 42, at 181–82 (describing President Richard Nixon's civil rights agenda); BYRON E. SHAFER & RICHARD JOHNSTON, THE END OF SOUTHERN EXCEPTIONALISM 108–16 (2006) (describing post-Civil Rights era political shift).

80. Steve Crabtree, *The Gallup Brain:* Bakke *and Affirmative Action*, GALLUP (Jan. 28, 2003), https://news.gallup.com/poll/7660/gallup-brain-bakke-affirmative-action.aspx [https://perma.cc/M2U5-QTZG].

81. Reagan called the Civil Rights Act of 1964 "a bad piece of legislation," the Voting Rights Act "humiliating to the South," and said of a California law undoing fair housing provisions that "if an individual wants to discriminate against Negroes and others in selling or renting his house, it is his right to do so." DANIEL S. LUCKS, RECONSIDERING REAGAN 11–12, 67 (2020) (arguing that Reagan had the worst record on race of any president since the 1920s).

82. Lawrence, *supra* note 21, at 765.

83. *Id.*

rationales.[84] Diversity is only a compelling interest, Lawrence argued, "because the university must have a racially diverse student body to play its part in remedying historic societal racism."[85]

Other critical race theory scholars also expressed doubts about diversity. Immediately following the Court's closely-divided decision in *Grutter*, Derrick Bell argued that the focus on diversity in affirmative action was "a serious distraction in the ongoing efforts to achieve racial justice."[86] Bell's argument was not that diversity was a detriment, but rather that the focus on achieving diversity deflected attention from more important issues.[87] He wrote: "The tremendous attention directed at diversity programs diverts concern and resources from the serious barriers of poverty t[h]at exclude far more students from entering college than are likely to gain admission under an affirmative action program."[88] Diversity, in other words, occupied attention that would be better directed toward dismantling structural barriers of race and class.[89] Presciently, Bell also argued that diversity's conceptual weakness would invite ongoing litigation.[90]

Like Bell, other supporters of affirmative action were relieved by the result in *Grutter*, but criticism of the diversity rationale continued. Reflecting on the quarter century that had elapsed since *Bakke*, Daria Roithmayr wrote that "the issue of affirmative action in higher education has bedeviled those of us on the left."[91] Roithmayr explained that the tension is between strategy and policy: "Even the most radical of critical race

84. *Id.* at 766.

85. *Id.*; *see also* Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423 (2020) (arguing, based on archival research, that the diversity rationale appealed to Justice Powell as a way of deradicalizing college campuses).

86. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

87. *Id.* at 1631–32 (noting the rising unemployment rate among black people and large education budget cuts resulting in less financial aid awards).

88. *Id.* at 1622.

89. *Id.* at 1629–31 (discussing that standardized tests give advantages to candidates with high socioeconomic backgrounds and disproportionately screen out individuals from minority groups).

90. *Id.* at 1625–29 (arguing that the narrow permittance of diversity as a factor in admission in the law school case is vulnerable to litigation).

91. Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 CONST. COMMENT. 191, 192 (2004).

theorists acknowledges that, in connection with *Grutter*, we needed to defend small-scale diversity-oriented programs in order to hold the line on affirmative action rollbacks,"[92] even though such programs "produced few material gains for most people in communities of color" than a program justified by remedial concerns.[93] Concurring with Roithmayr, Kenneth Nunn wrote that diversity fails as a remedial social justice tool,[94] and Trina Jones questioned whether diversity can serve as a "vehicle of change" to "further a civil rights agenda."[95] Many other progressive scholars expressed concerns about the weaknesses of the rationale, even as we continued to defend the necessity of race-conscious admissions policies.[96]

At the same time, some scholars and other proponents of diversity adopted a more favorable stance toward diversity as a

92. *Id.*

93. *Id.* at 192–93.

94. Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 720 (2008) (offering six reasons that "diversity" fails as a remedial social justice tool).

95. Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 172, 176 (2005) (arguing that discussions of diversity "may lead to confusion, distortion, and obfuscation," and advocating for a more substantive conception of diversity).

96. A full catalog of critiques would require the balance of the Article to reproduce, but some examples include RICHARD THOMPSON FORD, RACIAL CULTURE 45 (2005) (arguing that under the diversity rationale "the *cultural* identity of racial minority groups is emphasized at the expense of the history of racism"); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153–54 (2013) (arguing that the diversity rationale creates incentives for predominantly white institutions to commodify the people of color who study and work within them); Nelson, *supra* note 45, at 582–83 (acknowledging "the costs and casualties associated with the relentless pursuit of the Holy Grail that is racial diversity" and arguing that "a disconnect exists between the theory of racial diversity and the reality of educational equality"); Devon W. Carbado & Mitu Gulati, *What Exactly Is Racial Diversity?*, 91 CALIF. L. REV. 1149, 1150 (2003) (reviewing ANDREA GUERRERO, SILENCE AT BOALT HALL: THE DISMANTLING OF AFFIRMATIVE ACTION (2002)) (arguing that "diversity" is an "underdeveloped" concept in relation to affirmative action); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 426 (2014) (arguing that the diversity rationale "perpetuates the subordination of people of color by prompting the elimination of affirmative action programs"). For a discussion of the shortcomings of diversity in the workplace context, see LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 55–60 (2016) (arguing that courts are more attentive to the existence of corporate DEI programs than to their effectiveness).

guiding principle for racial justice.[97] Stacy Hawkins offered a thoughtful and pragmatic version of this view, arguing that workplace diversity efforts "foster equal opportunities in the workplace" that "have become all the more important . . . as robust enforcement of anti-discrimination laws designed to curb workplace discrimination has waned in recent years."[98] But the views of many other proponents of diversity measures are significantly undertheorized, embracing diversity without serious analysis of why diversity is valuable or at what cost the value of diversity might come.[99]

Notwithstanding scholarly debates regarding the diversity rationale, the repeated legal challenges to affirmative action have required ongoing efforts to mount a robust defense of diversity.[100] These efforts have further entrenched the concept in academia and beyond. Yet defenders of diversity have not spoken to its intrinsic value,[101] instead invoking its instrumental

97. *See, e.g.*, Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201, 235–40 (2012) (arguing that diversity may repair subordination and strengthen pluralism); Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1051–54 (1997) (acknowledging shortcomings of diversity rationale alongside pragmatic utility of concept as a tool for racial reform).

98. Stacy L. Hawkins, *The Long Arc of Diversity Bends Towards Equality: Deconstructing the Progressive Critique of Workplace Diversity Efforts*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 61, 63 (2017); *id.* at 66 (emphasizing the equality-enhancing effects of workplace diversity efforts notwithstanding emphasis on "forward-looking, instrumental rationales" rather than the "backward-looking, remedial rationale" associated with traditional affirmative action plans).

99. The National Diversity Council, for example, says that its vision "is to advance diversity, equity, inclusion and belonging by transforming our workplaces and communities into inclusive environments where individuals are valued for their talents and empowered to reach their fullest potential." *Transforming Workplaces and Communities: Vision and Mission*, NAT'L DIVERSITY COUNCIL, https://thendc.org/about/who-we-are/vision-and-mission [https://perma.cc/LK7E-3QQN]. But nowhere does it define the terms "diversity," "equity," "inclusion," or "belonging," let alone explain how these concepts might further substantive racial justice. *Id.*

100. *See, e.g.*, Ellena Erskine et al., *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUSBLOG (Oct. 29, 2022), https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases [https://perma.cc/HCK2-7WDE] (describing amicus briefs filed on behalf of university defendants); *see also* Leong, *supra* note 96, at 2166–67 n.79 (cataloging amicus briefs filed in the *Grutter* and *Gratz* cases).

101. *Cf.* Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1188 (2009) ("[T]he good of racial diversity is *not* intrinsic or unconditional.").

properties.[102] In higher education, educators cited social science research insisting that diversity improves learning outcomes[103] or that it prepares graduates for a diverse workforce.[104] In the corporate world, scholars argued that diversity made good business sense—that diversity was a means to the end of increasing profits or achieving other goals related to workplace functioning.[105] Yet linking diversity to these instrumental goals conditioned its importance on its value to predominantly white institutions and failed to make the case for racial justice on its own terms.[106] Scholars continued to express concern that seeking diversity did not go far enough toward achieving racial justice, or that the diversity rationale enabled purely symbolic progress,[107] but diversity continued its rise.

C. THE RISE AND RISE OF DIVERSITY

The rise of diversity has profoundly influenced American institutions. In the corporate world, one report estimated that companies spent $9.3 billion on DEI in 2022 and projected that

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102. *See, e.g.*, Cho, *supra* note 97, at 1051–54 (stressing pragmatic utility of diversity as a tool for racial reform); Adam Chilton et al., *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 361–67 (2022) (demonstrating empirically that racially diverse law review boards select articles that are more frequently cited).

103. The social science research is at best mixed, and some of it suggests that racial diversity in educational environments benefits white people more than people of color. Leong, *supra* note 96, at 2166 (discussing the social science evidence on the benefits of diversity in education and employment settings).

104. *See, e.g.*, Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241, 02-516), 2003 WL 1787554 at *5 (stating that a racially diverse officer corps is "essential to the military's ability to fulfill its principal mission to provide national security" and that goal cannot be achieved "unless the service academies and the ROTC use limited race-conscious recruiting and admissions policies").

105. *See, e.g.*, Hawkins, *supra* note 98, at 69 (workplace diversity initiatives "emphasize instrumental business concerns"). *But see* Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795–96 (2005) (cataloging individual and social costs associated with business rationale).

106. Leong, *supra* note 96, at 2171–72 (noting the irony that the diversity rationale values nonwhiteness in terms of what worth it gives to white people and further that white people determine nonwhiteness worth).

107. *See supra* notes 78–99 and accompanying text (discussing various critiques of the diversity rationale).

amount to increase to $15.4 billion during 2026.[108] The murder of George Floyd in 2020 and subsequent protests prompted an outpouring of corporate enthusiasm for racial justice and diversity—arguably without a robust examination of the conceptual distinction between those concepts.[109]

Academia followed a similar trajectory. A 2019 study found that spending on DEI in academia had increased twenty-seven percent over the five previous years.[110] Diversity has become deeply engrained in many aspects of university life. On the admissions front, many schools expressly maintained race-conscious admissions programs, stating that they took race into account in keeping with the Supreme Court's guidelines.[111] Schools have also made significant efforts to diversify the ranks of faculty through their hiring processes.[112] And within the past

108. Glob. Indus. Analysts, Inc., *As Diversity, Equity & Inclusion Hits $9.3 Billion in Global Spending, Watch Out for These Key Trends in 2022*, PR NEWSWIRE (Feb. 23, 2022), https://www.prnewswire.com/news-releases/as-diversity-equity--inclusion-hits-9-3-billion-in-global-spending-watch-out-for-these-key-trends-in-2022--301487159.html [https://perma.cc/793G-BTZE]; *see also* PAMELA NEWKIRK, DIVERSITY, INC. 195 (2019) ("Decades after *diversity* became a buzzword in the workplace, the business promoting its virtue and profitability is booming.").

109. For a general discussion of the disparity between what corporate America has promised regarding racial justice and what corporate America has done to promote those values, see Tracy Jan et al., *Corporate America's $50 Billion Promise*, WASH. POST (Aug. 24, 2021), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/?itid=hp-top-table-main [https://perma.cc/JP8R-CCSB] (stating that one year after George Floyd's murder, America's fifty largest companies pledged $49.5 billion to address racial inequality, but more than ninety percent of that amount ($45.2 billion) was allocated as loans or investments from which the companies could profit; of the $4.2 billion in outright grants, just $70 million went to groups specifically focused on criminal justice reform).

110. INSIGHT Staff, *An INSIGHT Investigation: Accounting for Just 0.5% of Higher Education's Budgets, Even Minimal Diversity Funding Supports Their Bottom Line*, INSIGHT INTO DIVERSITY (Oct. 16, 2019), https://www.insightintodiversity.com/an-insight-investigation-accounting-for-just-0-5-of-higher-educations-budgets-even-minimal-diversity-funding-supports-their-bottom-line [https://perma.cc/W8ED-LJET].

111. *See, e.g.*, Salib & Krishnamurthi, *supra* note 13, at 130 n.48 (citing documents in which both Harvard and UNC stated explicitly that they took race into account in their admissions processes).

112. *See, e.g.*, *Recruitment & Retention of Minority Law Faculty Members*, THE ASS'N OF AM. L. SCHS. (May 11, 2023), https://www.aals.org/about/handbook/good-practices/minority-law-faculty-members [https://perma.cc/SQ7B-HJX5] (describing "good practices" for recruitment of faculty of color).

decade, many universities have designated a chief diversity officer or created an office of DEI.[113]

As diversity gained prominence in academia, universities increasingly integrated diversity messaging into their activities. For example, some schools have designed their application materials to include essay prompts that invite applicants to discuss how they might contribute to diversity on campus or to discuss how an array of identity characteristics have shaped their lives.[114] These prompts serve as diversity messaging: by asking about diversity in essay prompts, schools signal to applicants that they are the kind of school that cares about diversity.

In the realm of faculty hiring and retention, many schools incorporated diversity messaging into their job postings. For example, an advertisement for a faculty position might state that the university particularly seeks or values diversity in its faculty.[115] Diversity language in a job announcement thus serves as diversity messaging by communicating to faculty candidates and other stakeholders who see the announcements (students; administrators; faculty at other schools) that diversity is important to them.[116]

Schools also began to request what are known as "diversity statements"—essays in which candidates for faculty positions describe how they would contribute to diversity on campus, or in which candidates for promotion and tenure describe their DEI-related activities on campus.[117] Diversity statements have been

113. J. Brian Charles, *The Evolution of DEI*, CHRON. HIGHER EDUC. (June 23, 2023), https://www.chronicle.com/article/the-evolution-of-dei [https://perma.cc/GG9C-UPQR] ("Colleges that didn't have diversity officers quickly made those [DEI] hires, and then articulated a commitment to more diversity in their student body and faculty.").

114. *See infra* notes 162–63 and accompanying text (discussing application materials that prompt applicants to speak about their experiences with diversity).

115. *See infra* notes 201–05 and accompanying text (discussing the diversity related promotions in faculty hiring).

116. *See infra* notes 201–05 and accompanying text.

117. Brian Soucek, *Diversity Statements*, 55 UC DAVIS L. REV. 1989, 1991–96 (2022) (describing legal and political debate regarding diversity statements). A variant of such statements relate to pedagogy and prompt discussion of "inclusive teaching practices." *See infra* notes 201–05 and accompanying text (discussing the requirements faculty candidates must complete in relation to diversity prompts).

a source of controversy.[118] Some have likened them to a loyalty oath, arguing that they violate norms of academic freedom or the First Amendment,[119] and a few states have moved to ban them.[120] Other commentators have defended both their legality[121] and their desirability.[122] Diversity statements, too, have a diversity messaging function. By requiring or requesting a diversity statement, a school communicates that it values diversity, implies to candidates that it aims to establish a particular type of campus climate, and, perhaps, placates current faculty and administrators who want the institution to do more to further racial justice.

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118. *Compare* Soucek, *supra* note 117, at 2011–21 (describing how universities may require diversity statements consistent with the First Amendment), *with* Daniel Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 CATH. U. L. REV. 515, 575–78 (2021) (arguing that diversity statements serve as a "smokescreen" for viewpoint discrimination).

119. *See, e.g.*, Matthew W. Finkin, *Diversity! Mandating Adherence to a Secular Creed*, 2 J. FREE SPEECH L. 451 (2023) (arguing that requiring candidates for promotion and tenure to describe DEI activities is unconstitutional). Diversity statements have also been controversial among faculty, with schools voting both in favor and against diversity statements as part of the hiring or tenure processes. Isha Trivedi, *More Colleges Are Adding Diversity to Tenure Standards. But the Debate's Not Settled.*, CHRON. HIGHER EDUC. (Aug. 12, 2022), https://www.chronicle.com/article/more-colleges-are-adding-diversity-to-tenure-standards-but-the-debates-not-settled [https://perma.cc/E3Q6-PNZH] (describing faculty votes on diversity statements as part of tenure process).

120. Adrienne Lu, *Diversity Statements Are Being Banned. Here's What Might Replace Them.*, CHRON. HIGHER EDUC. (Oct. 6, 2023), https://www.chronicle.com/article/diversity-statements-are-being-banned-heres-what-might-replace-them [https://perma.cc/83SF-GRMW] (cataloguing diversity statement bans).

121. Soucek, *supra* note 117, at 2061–62 (concluding that there is a way to narrowly tailor DEI institutional values and an impediment on faculty's freedom of speech).

122. *See, e.g.*, Univ. Comm. on Affirmative Action, Diversity, & Equity & UC Systemwide Equal Opportunity/Affirmative Action Adm'rs Grp., *The Use of Contributions to Diversity, Equity, and Inclusion (DEI) Statements for Academic Positions at the University of California: Joint Recommendations*, UNIV. OF CAL. ACAD. SENATE (Jan. 23, 2019), https://senate.universityofcalifornia.edu/_files/reports/rm-mb-divchairs-use-of-dei-statements.pdf [https://perma.cc/AF5H-UATL].

DEI websites are perhaps the most prolific site of diversity messaging in higher education.[123] Such materials provide an opportunity for schools to announce values related to diversity, promote diversity-related initiatives and events, broadcast diversity-related information such as campus and community demographics, and develop visual narratives around diversity—for example, by showcasing photos of faculty and students of color.[124] I am unaware of any research documenting who actually looks at DEI websites, but the potential audience for such websites presumably includes current and prospective students, faculty, staff, administrators, and other stakeholders such as alumni and donors. DEI websites are evidence of how a school wants to be viewed by the rest of the world.

Some diversity messaging might track a school's substantive racial justice efforts: for example, a DEI website that describes recent race-related curricular offerings at a school. Other messaging may be intended to project an image rather than accurately communicate substance: for example, a DEI website that proclaims an institutional allegiance to diversity while providing no concrete information. Regardless, diversity messaging has become pervasive, with virtually every college and university engaging in some version.[125]

D. AFFIRMATIVE ACTION IS DEAD, LONG LIVE DIVERSITY?

As diversity messaging reached new heights, the diversity rationale reached the Supreme Court yet again in 2021.[126]

123. NANCY LEONG, IDENTITY CAPITALISTS 13–16, 23–29 (2021) (exploring why and how public universities decide to showcase diversity to prospective students and potential donors).

124. Researchers found that Black and Asian students were photographically overrepresented by more than double in the viewbooks of colleges and universities. Scott Jaschik, *Viewbook Diversity vs. Real Diversity*, INSIDE HIGHER ED (July 1, 2008), https://www.insidehighered.com/news/2008/07/02/viewbook-diversity-vs-real-diversity [https://perma.cc/R4RC-H9X8]. In some instances, schools have even amplified the appearance of diversity through Photoshop. Scott Jaschik, *When Colleges Seek Diversity Through Photoshop*, INSIDE HIGHER ED (Feb. 3, 2019), https://www.insidehighered.com/admissions/article/2019/02/04/york-college-pennsylvania-illustrates-issues-when-colleges-change [https://perma.cc/EQF8-XS9M].

125. *See* LEONG, *supra* note 123, at 16–17 (discussing the significance of communicating diversity).

126. Students for Fair Admissions, Inc. v. President of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023).

Converging lawsuits against Harvard and the University of North Carolina were the culmination of a lengthy campaign by Edward Blum—a billionaire the *New York Times* described as "a one-man legal factory with a growing record of finding plaintiffs who match his causes, winning big victories and trying above all to erase racial preferences from American life."[127] Blum previously backed Abigail Fisher's lawsuit against the University of Texas.[128] When that lawsuit failed to dismantle race-conscious admissions, he decided on a different strategy: recruiting Asian plaintiffs.[129] He created a website to recruit plaintiffs for litigation that prominently featured photos of Asian American students.[130] This effort led to the creation of Students for Fair Admissions.[131]

In 2014, the group initiated the lawsuits against Harvard and UNC.[132] The district court in each case found for the universities following a bench trial.[133] After the First Circuit decided in favor of Harvard, the Supreme Court granted certiorari and consolidated the two cases.[134]

The Court in *SFFA* held the higher education admissions procedures at issue were invalid.[135] The majority opinion, authored by Chief Justice Roberts, reasoned that the procedures "lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a

127. Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard.*, N.Y. TIMES (Nov. 19, 2017), https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html [https://perma.cc/8RRA-U6KY].

128. *Id.*

129. LEONG, *supra* note 123, at 137–41.

130. *Id.* at 138.

131. *See id.* (discussing Blum founding the organization).

132. *See id.*

133. Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (holding that University of North Carolina's admissions policy withstood strict scrutiny under the Equal Protection Clause), *rev'd sub nom.* Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141 (2023); Students for Fair Admissions, Inc. v. President of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (holding that Harvard's admissions policy did not violate Title VI), *aff'd,* 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023).

134. Students for Fair Admissions, Inc. v. President of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021), *rev'd sub nom. SFFA*, 143 S. Ct. 2141 (2023).

135. *SFFA*, 143 S. Ct. at 2166.

negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points."[136] The Court was particularly critical of the diversity rationale itself.[137] Harvard's brief identified several educational benefits flowing from diversity: "(1) 'training future leaders in the public and private sectors'; (2) preparing graduates to 'adapt to an increasingly pluralistic society'; (3) 'better educating its students through diversity'; and (4) 'producing new knowledge stemming from diverse outlooks.'"[138] The Court responded that "[a]lthough these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny."[139] It criticized Harvard's articulation of the benefits associated with diversity, stating that such benefits are incapable of measurement by courts and therefore not susceptible to a determination of when they have been reached.[140] Finally, it described many objectives associated with diversity as "standardless"[141]—evoking Lawrence's critique of diversity as "substanceless"[142]—and therefore "plainly worthy [but] inescapably imponderable."[143]

The Court also expressed skepticism regarding the link between diversity and race-conscious admissions.[144] It held that schools "fail to articulate a meaningful connection between the means they employ and the goals they pursue."[145] It criticized the imprecision of the racial categories that Harvard employs as both overbroad and arbitrary.[146] It noted that, because college admissions are inherently zero-sum, race is intrinsically used as

136. *Id.* at 2175.

137. *Id.* at 2169–70 ("[B]y accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate . . . stereotyping."); *see also* Students for Fair Admissions, Inc. v. President of Harvard Coll., 980 F.3d at 185–87 (1st Cir. 2020) (discussing the diversity rationale), *rev'd*, 143 S. Ct. 2141 (2023).

138. *SFFA*, 143 S. Ct. at 2166 (quoting Students for Fair Admissions, Inc. v. President of Harvard Coll., 980 F.3d at 173–74).

139. *Id.*

140. *Id.* at 2166–67.

141. *Id.* at 2167.

142. Lawrence, *supra* note 21, at 765.

143. *SFFA*, 143 S. Ct. at 2167.

144. *Id.* ("It is far from evident . . . how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.").

145. *Id.*

146. *Id.* at 2167–68 (criticizing categories of "Asian," "Hispanic," and "Middle Eastern" as vague).

a negative for some students—a practice particularly disfavored by the Equal Protection Clause.[147] It also emphasized that race-based affirmative action leads to stereotyping.[148] And finally, it emphasized that *Grutter* had "imposed one final limit on race-based admissions programs[:] At some point . . . they must end."[149] A more exhaustive critique of diversity is difficult to imagine.

The Court noted that "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."[150] But admissions committees cannot use this information to make decisions on the basis of racial *identity*—rather, an applicant's narrative involving race can be evaluated only by reference to some non-racial value, such as courage, determination, leadership, or accomplishments.[151]

The Court did not explicitly overrule *Grutter*, nor did it state that diversity could never be a compelling interest that would justify race-conscious admissions in higher education.[152] But in practice, the decision effectively invalidated higher education admissions processes that consider an individual's race in order to achieve the benefits of student body diversity—that is, it invalidated the processes used by Harvard, UNC, and nearly every other school that uses race-conscious admissions.[153] The vast

147. *Id.* at 2169 ("How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?").

148. *Id.* at 2170 ("[R]espondents' programs tolerate . . . stereotyping.").

149. *Id.* at 2165.

150. *Id.* at 2176; *see also* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1147–51 (2008) (arguing that "likely race cannot be excised" from the admissions process, and further that efforts to do so will disparately disadvantage applicants of color and others to whom race is important).

151. *See SFFA*, 143 S. Ct. at 2176 ("A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university.").

152. *Id.* at 2173–76 (discussing compelling interests and *Grutter*'s narrow view of appropriate race-based admission programs).

153. *See id.* The issue of whether diversity could serve as a compelling interest that would justify using individual race as a factor in admission to military

majority of schools view the decision as prohibiting consideration of an individual applicant's race, and some have altered their processes so that admissions officials are actually unaware of racial demographic information.[154] And after the Court's withering critique of diversity, it is hard to imagine many admissions programs for which the diversity rationale would be sufficient to supply a compelling interest.

SFFA prompted disappointment rather than surprise. But the initial response to *SFFA* from colleges and universities was one of outward determination to continue to seek diversity via permissible mechanisms,[155] the Court's many criticisms

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academies is currently being litigated in federal court. *See* Students for Fair Admissions v. U.S. Mil. Acad. at W. Point, No. 7:23-CV-08262 (S.D.N.Y. filed Sept. 19, 2023). Further, *SFFA* does not explicitly rule out the type of program at issue in *Fisher II*, in which the University of Texas filled the first seventy-five percent of its class through racially neutral means (guaranteeing admission to students who graduate in the top ten percent of each high school) and used a *Grutter*-like holistic consideration for the remaining slots. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 369–75 (2016). But some of the critiques *SFFA* raises—for example, that Harvard's and UNC's plans were insufficiently focused, used race in a negative manner with respect to some applicants, or involved racial stereotypes—could be said to apply to the final twenty-five percent of the University of Texas program at issue in *Fisher II*, and therefore might invalidate such a hybrid program as well. *See SFFA*, 143 S. Ct. at 2166.

154. *See, e.g.*, Pericles Lewis & Jeremiah Quinlan, *An Update on Yale College's Response to the Supreme Court Ruling on Race in Admissions*, YALE COLL. (Sept. 7, 2023), https://yalecollege.yale.edu/get-know-yale-college/office-dean/messages-dean/update-yale-colleges-response-supreme-court-ruling [https://perma.cc/X22G-T368] ("Reviewers will not have access to applicants' self-identified race and/or ethnicity, and admissions officers involved in selection will not have access to aggregate data on the racial or ethnic composition of the pool of applicants or admitted students."). Common App, a nonprofit organization that allows applicants to apply to 1,000 schools through a single portal, will also provide schools with the option to suppress self-disclosed race and ethnicity information provided by applicants. *Common App and Equitable Admissions*, COMMON APP, https://www.commonapp.org/race-in-admissions [https://perma.cc/J64E-BA4C].

155. *See, e.g.*, Marc Tessier-Lavigne, *President's Message Regarding Supreme Court Ruling on Race-Conscious University Admissions*, STAN. UNIV.: STAN. REP. (June 29, 2023), https://news.stanford.edu/report/2023/06/29/presidents-message-regarding-supreme-court-ruling-race-conscious-university-admissions [https://perma.cc/FT6Q-9FP8] ("Stanford will continue seeking, through legally permissible means, the broadly diverse student body that will benefit your educational experience and preparation for success in the world, and that will benefit our mission of generating knowledge."); Liz Magill & John L. Jackson, Jr., *A Statement on the Supreme Court Affirmative Action Decision*,

notwithstanding. This stated commitment to diversity prompted the investigation I have undertaken in this Article.

II. LAW SCHOOL DIVERSITY MESSAGING

The Supreme Court's decision in *SFFA v. Harvard* offers a unique opportunity to observe schools' diversity messaging behavior. I chose law schools as a case study for several reasons. First, much of the conversation about diversity has been led by law schools and their professors.[156] Second, law schools are likely to have a strong understanding of the scope and import of the Court's decision. Third, law schools train future lawyers who will be "public citizen[s] having [a] special responsibility for the quality of justice,"[157] and both racial justice and diversity implicate this core mission.

I then selected three contexts to examine the impact of *SFFA* on diversity messaging: law school application materials, discussed in Part II.A; law faculty hiring announcements, discussed in Part II.B; and law school DEI websites, discussed in Part II.C.

Two framing comments are in order for this Part. First, I am not claiming that a change in any individual law school's diversity messaging is the result of *SFFA*. Individual schools might have changed their messaging for any number of reasons. Second, I am not commenting on the legality or desirability of any law school's diversity-related practices or messaging.

A. APPLICATION MATERIALS

This section examines the diversity messaging in law schools' application materials. *SFFA* effectively invalidated higher education admissions processes that consider individual race in order to achieve the benefits of student body diversity,[158]

UNIV. PA.: PENN TODAY (June 29, 2023), https://penntoday.upenn.edu/announcements/statement-supreme-court-affirmative-action-decision [https://perma.cc/D5JN-A5R8] ("[W]e remain firm in our belief that our academic community is at its best when it is diverse across many dimensions. . . . This decision will require changes in our admissions practices. But our values and beliefs will not change.").

156. *See supra* notes 78–107 and accompanying text (reviewing scholarly literature on diversity).

157. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 1983).

158. *See supra* notes 131–54 and accompanying text (discussing the implications of the Supreme Court's holding in *SFFA*).

but the Court made clear that schools can still "consider[] an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[159] Given the timing of the *SFFA* decision, I hypothesized that application materials would change more between 2022 and 2023 than in the previous year, and that in the aggregate they would change by less overtly soliciting information about race and diversity.

1. Methodology

I sought information about the race- and diversity-related content in the application materials of the top fifty law schools in the *U.S. News and World Report* rankings in 2023.[160] Law schools typically inquire about race or possible proxies for race in three places. First, most application materials invite (but do not require) applicants to check one or more boxes indicating their racial identity.[161] Second, some application materials invite applicants to discuss race or possible proxies for race in their personal statement.[162] Third, some application materials invite applicants to discuss race or possible proxies for race in a supplemental essay.[163] In my research, I focused on the second and third components because the first component is characterized

159. Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2176 (2023).

160. *2024 Best Law Schools*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?_sort=my_rankings-asc [https://perma.cc/8EDG-6BPH]. My use of the *U.S. News* rankings is not an endorsement of their methodology, but rather an acknowledgment that the rankings are influential among students and faculty. The top fifty schools were diverse with respect to geography, public/private status, size, and composition of student body. *Id.* But the top fifty also omit important information. For example, there are no law schools associated with historically Black colleges and universities (HBCUs) among those ranked in the top fifty by *U.S. News*. *Id.* In future work I hope to consider the differences in the purpose and content of diversity messaging among these schools. The top fifty schools in the *U.S. News* rankings are also unrepresentative in other ways: for example, the median LSAT and GPA of students at those schools is likely higher, and on average those schools likely have greater financial resources than lower-ranked schools. *Id.*

161. *See* Camille Gear Rich, *Decline to State: Diversity Talk and the American Law Student*, 18 S. CAL. REV. L. & SOC. JUST. 539, 539–41, 539 n.1 (2009) (discussing an applicant's option to not report their race).

162. *See infra* Table 1.

163. *See id.* In some application materials the supplemental essay is explicitly termed a "diversity statement"; in others it is simply described as an additional essay.

as collecting demographic information and therefore the opportunity for diversity messaging is minimal.[164] Information about the personal statement and supplemental essay generally can be found on the application materials themselves; some schools' websites also restate the essay prompts.

For each of the fifty schools in my sample, I sought information about their personal statement prompt and any supplemental essays for the application materials released in the fall of 2021, 2022, and 2023.[165] A variety of methods were used to gain information about law schools' application materials. First, I was able to obtain information about most schools' 2023 application materials from their websites.[166] Second, to obtain copies of previous application materials, I contacted all schools via email in October or November 2023 to request copies of the application materials that prospective students used to apply in 2021 and 2022.[167] Schools responded in a variety of ways: five

164. Although not the topic of my research, courts and commentators have discussed that in some instances demographic questions may have a signaling function. *See, e.g.*, Naomi Mezey, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1704–06 (2003) (describing how the census reflects, polices, and constitutes racial identity); Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM. L.J. 1, 6–8 (2006) (describing problems of categorizing multiracial individuals in university admissions).

165. The fall 2021 application would have been submitted during academic year 2021-2022 for the entering class of fall 2022. The fall 2022 application would have been submitted during academic year 2022-2023 for the entering class of fall 2023. And the fall 2023 application would have been submitted during academic year 2023-2024 for the entering class of fall 2024. For the remainder of the Article, I will refer to these applications as the 2021, 2022, and 2023 applications. Further, I will identify each application in the main text by school and year. Footnotes will refence the name of the university affiliated with the law school, to the extent it is unambiguous (e.g., Harvard Law School is referred to as "Harvard" and University of California, Irvine School of Law is referred to as "Irvine," but the University of Pennsylvania Carey Law School is referred to as "University of Pennsylvania" so that it is not confused with Penn State Dickinson Law). If available, citations to the Wayback Machine will be provided. If not, it will be marked as on file with the *Minnesota Law Review*.

166. The schools for which I was not able to gain this information are Boston College, Georgia, SMU, Virginia, and Wake Forest.

167. The text of the email was sent from my institutional email account and identified me as a professor at the University of Denver. In the pertinent part, it stated: "Would it be possible for you to provide me with a copy of your JD application, or a description of the application requirements, for the entering class of 2022 (i.e. those who applied during AY 2021-2022) and the entering class of 2023 (i.e., those who applied during AY 2022-2023)?"

schools readily furnished their materials,[168] eight schools replied to resist furnishing their materials,[169] and thirty-six schools did not reply.[170] When a school provided its application materials, I used the materials that it provided. When a school did not provide its application materials or a description of its application materials, I sought the materials from an alternative source, such as an Internet archive, LSAC database, or colleague who worked at the school. I excluded a law school from the data set if I could not obtain materials for all three years. Thirteen law schools were excluded for this reason, leaving thirty-seven.[171]

For those thirty-seven schools, the following classification system was used, and each school was assigned only one classification:

> 0=Application materials did not solicit information about diversity other than for purposes of data collection
>
> 1=Personal statement prompt uses the word "diversity"[172]

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168. These schools were Duke, Indiana, UCLA, and Utah. Michigan provided their application form but did not include their personal essay prompt or optional essay prompts.

169. In this category were four schools that expressly refused to furnish their materials (Cornell, University of Texas, Washington & Lee, and Yale), three schools that asked for more information about how the materials would be used (Columbia, Kansas, and Northwestern), and one school stated that an official public records request would have to be made through its public records office (Irvine). Given the time constraints of the project, I chose to seek application materials for these schools from an alternative source rather than undertaking individual correspondence with each school.

170. These schools were Alabama, ASU, Baylor, Berkeley, Boston College, Boston University, BYU, University of Chicago, Emory, Florida, Fordham, George Mason, George Washington, Georgetown, Georgia, Harvard, Illinois, Iowa, Minnesota, Notre Dame, NYU, Ohio State, University of Pennsylvania, Pepperdine, SMU, Stanford, Texas A&M, UNC, University of Washington, University of Southern California, Vanderbilt, Villanova, Virginia, Wake Forest, William & Mary, and Wisconsin.

171. The schools for which I could not obtain all three years of application materials were: Baylor, Boston College, Boston University, Fordham, Georgia, Harvard, Minnesota, Northwestern, SMU, Vanderbilt, Virginia, Wake Forest, and William & Mary.

172. For the initial coding, I did not create a separate code for the use of the word "race" and the use of the word "diversity" because the goal was to create a system of coding in which each school would fall into exactly one category. Moreover, every school that used the word "race" also used the word "diversity." Instead, I noted separately whether schools used the terms "race," "diversity," a close synonym of diversity, or some combination of the three, and Tables 2 and 3 distinguish changes related to those words.

2=Personal statement prompt uses analogous phrases such as "unique contribution" that could prompt discussion of diversity

3=Optional diversity statement

4=Optional statement that could be about diversity

5=Both personal statement and optional statement reference diversity or a related concept

6=Neither personal statement nor optional statement reference diversity but the application materials state diversity is an admissions priority

These categories were mutually exclusive: that is, if a school was included in one category it could not be included in a different category.

Finally, to identify other possible influences, I coded schools according to the federal circuit in which they were located and whether the school was public or private.

2. Findings and Analysis

In the three admissions cycles examined in the research, no school in the data set *required* applicants to identify their race or ethnicity or to discuss race or ethnicity in any part of the application materials. The most common way that law school application materials addressed diversity was by providing applicants with the opportunity to write an optional diversity statement, with between ten and fifteen schools offering that option in each year application materials were coded. The coding is summarized in Table 1, and the full results are available in Appendix A.

Table 1: Classification of Diversity-Related Content in Law School Application Materials

Category	2021	2022	2023
0=Application did not solicit information about diversity other than for data collection	5	5	3
1=Personal statement prompt uses the word "diversity"	2	4	2
2=Personal statement prompt uses analogous phrases such as "unique contribution" that could prompt discussion of diversity	2	2	6
3=Optional diversity statement	14	15	10
4=Optional statement that could be about diversity	2	2	7
5=Both personal statement and optional statement prompt reference diversity or a related concept	6	5	7
6=Neither personal statement nor optional statement references diversity but application states diversity is an admissions priority	6	4	2
Total	37	37	37

I next examined the use of diversity messaging terms across all parts of schools' application materials. Specifically, I examined the use of the terms "race," "diversity," and close synonyms of diversity.[173]

Overall, references to "race" and "diversity" decreased between 2022 and 2023, while references to synonyms of diversity increased. Just three schools in the data set explicitly continued to invite applicants to discuss race in 2023: Berkeley, Michigan, and Texas A&M. Berkeley's 2023 application materials included an optional essay on an applicant's "perspective and experience," which states: "In the past, applicants have included information about characteristics such as: race/ethnicity, gender identity, sexual orientation, disability, socioeconomic background, first generation college or professional school student, student parent, re-entry student, geographic diversity, ideological diversity, and others."[174] Michigan's 2023 personal statement prompt includes many suggested topics, including "issues of identity, such as gender, sex, race, or ethnicity; particular political, philosophical, or religious beliefs; socioeconomic challenges; atypical

173. The following words and terms were counted as conceptual synonyms of diversity: experiences of discrimination and bias, distinctive contribution, contribute uniquely, unique life experience, significant life experience in applicant's background, breadth of perspectives in the classroom, broad range of characteristics and perspectives, different kind of lawyer, inclusive excellence, identity contributes to the community, and overcoming adversity.

If a school's materials included a diversity statement, then I counted it as a "reference to diversity"; if the description of the diversity statement then included a reference to a synonym of diversity, I did not *also* count it as a "reference to a synonym of diversity." For example, in 2023 Columbia had a diversity statement for which the prompt was: "Tell us about an aspect of your own perspective, viewpoint or lived experience that is important to you, and describe how it has shaped the way you would learn from and contribute to Columbia's diverse and collaborative community." Colum. Application (2023) (on file with Minnesota Law Review). Although this description includes both the word "diverse" and synonyms to diversity such as "aspect of your own perspective, viewpoint or lived experience," I counted it only in the "reference to diversity" category. However, if a school's personal statement included a synonym of diversity and the school *also* had a separate diversity statement, then I counted that school in both the "reference to diversity" and the "reference to a synonym of diversity" category.

174. *Ready to Apply*, UC BERKELEY SCH. OF L. (Sept. 21, 2023), [https://web.archive.org/web/20230921150424/https://www.law.berkeley.edu/admissions/jd/applying-for-jd-degree/ready-to-apply/#bb18-perspective-and-experiences-2].

backgrounds" and many other possible issues.[175] Texas A&M mentions race in the prompt for its "Contribution Addendum," which invites applicants to "discuss how you have been shaped" by eighteen different factors including "racial and ethnic identity."[176]

The total number of schools that used the word "diverse" or "diversity" decreased from twenty-five to sixteen, a thirty-six percent decrease.[177] For example, NYU's 2022 application materials included instructions for submitting additional information in order "to aid the committee in selecting a diverse student body."[178] In 2023, the instructions stated that the law school "seeks to enroll a student body from a broad spectrum of society"—thus discarding the term "diverse."[179] Similarly, Florida had a "Diversity and Inclusion Statement" in 2021, a "Diversity, Inclusion and/or Need Statement" in 2022, and eliminated its diversity statement in 2023.[180]

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175. *Apply to the JD Program*, THE UNIV. OF MICH. L. SCH. (Sept. 24, 2023), [https://web.archive.org/web/20230924131107/https://michigan.law.umich.edu/admissions/apply-jd-program].

176. *J.D. Admission Program Process*, TEX. A&M UNIV. SCH. OF L. (2023) (on file with Minnesota Law Review).

177. The sixteen schools that referenced diversity in 2023 were Berkeley, Chicago, Columbia, Duke, Florida, Illinois, Kansas, Michigan, Ohio State, University of Pennsylvania, University of Washington, University of Southern California, Utah, Washington University, Washington & Lee, and Wisconsin. *See infra* Appendix A.

178. *JD Admissions: Admissions Information and Instructions*, N.Y. UNIV. SCH. OF L. (May 20, 2022), [https://web.archive.org/web/20220520111628/https:/www.law.nyu.edu/jdadmissions/applicants/admissionsinformationand instructions].

179. *JD Admissions: Admissions Information and Instructions*, N.Y. UNIV. SCH. OF L. (Nov. 20, 2023), [https://web.archive.org/web/20231120041441/https:/www.law.nyu.edu/jdadmissions/applicants/admissionsinformationand instructions].

180. *Compare Standards for J.D. Admission*, UNIV. OF FLA. LEVIN COLL. OF L. (Oct. 18, 2021), [https://web.archive.org/web/20211018014734/http:/www.law.ufl.edu/admissions/apply/standards-for-admission], *and Standards for J.D. Admission*, UNIV. OF FLA. LEVIN COLL. OF L. (Sept. 29, 2022), [https://web.archive.org/web/20220929053528/http:/www.law.ufl.edu/admissions/apply/standards-for-admission], *with Standards for J.D. Admission*, UNIV. OF FLA. LEVIN COLL. OF L. (Oct. 4, 2023), [https://web.archive.org/web/20231004035813/https://www.law.ufl.edu/admissions/apply/standards-for-admission]. In its 2023 materials, Florida continued to state: "UF Law seeks to enroll a class with varied backgrounds and academic skills. Such diversity contributes to the learning environment of the law school and historically has produced graduates who

The decreased use of the terms "race" and "diversity" corresponded to an increase in references to related concepts.[181] Between 2022 and 2023, the number of schools that referenced a concept related to diversity, such as "life experiences" or "unique background," increased from eight to twenty, a 150% increase.[182]

Finally, some schools revised the way that they referred to diversity and race but neither added nor removed references to race and diversity.[183]

Table 2 summarizes changes in the use of specific diversity messaging terms during the three years I examined application materials. The total for each column exceeds thirty-seven, the total number of schools, because some schools fell into more than one category. For example, in 2023, Berkeley's application materials referenced both race and diversity.[184]

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have served all segments of society and who have become leaders in many fields of law." *Standards for J.D. Admission*, UNIV. OF FLA. LEVIN COLL. OF L. (Oct. 4, 2023), [https://web.archive.org/web/20231004035813/https://www.law.ufl.edu/admissions/apply/standards-for-admission].

181. *See supra* note 173; *infra* Table 2.

182. The twenty schools that referenced a synonym of diversity in 2023 were: Alabama, ASU, BYU, Cornell, George Washington, Indiana, Iowa, Irvine, Notre Dame, NYU, University of Pennsylvania, Pepperdine, Stanford, University of Texas, Texas A&M, UCLA, UNC, Utah, Villanova, and Yale. *See infra* Appendix A.

183. Between 2021 and 2022, Florida and Pepperdine fell into this category. *See infra* Appendix A. Between 2022 and 2023, Kansas, Michigan, Notre Dame, and Washington & Lee fell into this category. *See infra* Appendix A. Michigan's revisions are an instructive example: the school revised its nine optional essay prompts, but the prompts continued to reference diversity. In 2022 one optional essay prompt stated, "Describe an experience that speaks to the problems and possibilities of diversity in an educational or work setting. As a lawyer, what measures might you take to develop diversity, equity, and inclusion?" Mich. Application (2022) (on file with Minnesota Law Review). In 2023 one of the prompts stated "One of the goals of our admissions process is to enroll students who will enrich the quality and breadth of the intellectual life of our law school community, as well as to expand and diversify the identities of people in the legal profession. How might your experiences and perspectives contribute to our admissions goals?" Mich. Application (2023) (on file with Minnesota Law Review).

184. *See Ready to Apply*, UC BERKELEY SCH. OF L. (Sept. 21, 2023), [https://web.archive.org/web/20230921150424/https://www.law.berkeley.edu/admissions/jd/applying-for-jd-degree/ready-to-apply].

Table 2: Number of Law Schools Whose Application Materials Refer to Race and/or Diversity by Year

	2021	**2022**	**2023**
Reference to race/racial	13	12	3
Reference to diverse/diversity	26	26	17
Reference to a synonym of diversity	8	8	20
Total	47	46	40

I next analyzed trends in the changes that schools made to their application materials, including both changes that resulted in a change to the coding (e.g., adding or removing an optional diversity statement) and changes that did not result in a coding change but that still meaningfully altered a schools' diversity messaging (e.g., deleting the word "race" from the prompt for an optional diversity statement, but maintaining the optional diversity statement as part of the application materials).

A number of patterns emerged from this analysis. First, *SFFA* coincided with a greater number of revisions to the diversity content of law school application materials than in the previous year. Between 2021 and 2022, a total of six schools (16%) made at least one change to the diversity content of their application materials, and three of those schools (8%) changed their application materials in a way that altered the coding of the diversity messaging.[185] There were significantly more changes between 2022 and 2023. During that time frame, nineteen schools (51%) changed their application materials in a way that altered the classification of the diversity messaging,[186] and a total of

185. George Washington, Pepperdine, and Wisconsin made changes that altered their coding; Columbia, Florida, and Irvine made changes that did not alter their coding. *See infra* Appendix A.

186. These schools were Alabama, Berkeley, BYU, Columbia, Cornell, Duke, Florida, Georgetown, Indiana, Iowa, Notre Dame, NYU, Pepperdine, Stanford,

thirty-seven schools (73%) made at least one change to the diversity content of their application materials.[187] Put differently, more than four times as many schools made changes to their application materials for 2023 as in the previous year.

Between 2022 and 2023, eight out of eleven schools altered a prompt for either a personal statement or an additional statement to eliminate an explicit mention of race or ethnicity—a 73% decrease.[188] For example, in 2022, Stanford included an optional diversity essay that explicitly invited applicants to discuss their racial identity, among other characteristics.[189] In 2023, Stanford changed its application materials so that the prompt for the personal statement instead invited applicants to discuss the "distinctive contribution" they could make.[190] Similarly, in 2022 the University of Pennsylvania invited applicants to submit an optional essay with the prompt, "[d]escribe how your background or experiences will enhance the diversity of the Penn Carey Law community" and explicitly listed race and ethnicity as potential identities to discuss.[191] In 2023, Penn continued to invite applicants to submit a statement regarding diversity, but no longer explicitly prompted applicants to discuss race or ethnicity.[192]

The elimination of references to race or ethnicity in schools' personal or diversity statements exceeds what the Supreme Court required in *SFFA*. The Court explicitly indicated that

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University of Texas, Texas A&M, UNC, Wisconsin, and Yale. *See infra* Appendix A.

187. These schools were Alabama, ASU, Berkeley, BYU, University of Chicago, Columbia, Cornell, Duke, Florida, Georgetown, Indiana, Iowa, Kansas, Michigan, Notre Dame, NYU, University of Pennsylvania, Pepperdine, Stanford, University of Texas, Texas A&M, UNC, University of Southern California, Utah, Washington & Lee, Wisconsin, and Yale. *See infra* Appendix A.

188. The schools that removed an explicit reference to race or ethnicity were the University of Chicago, Duke, Florida, University of Pennsylvania, Pepperdine, Stanford, University of Texas, and University of Southern California. *See infra* Appendix A.

189. *Step by Step to SLS*, STANFORD L. SCH. (Oct. 3, 2022), [https://web.archive.org/web/20221003081446/https:/law.stanford.edu/apply/how-to-apply/jd-application-process].

190. *Step by Step to SLS*, STANFORD L. SCH. (Oct. 5, 2023), [https://web.archive.org/web/20231005062957/https://law.stanford.edu/apply/how-to-apply/jd-application-process].

191. *Application Instructions*, UNIV. OF PENN. CAREY L. SCH. (2022) (on file with Minnesota Law Review).

192. *Application Instructions*, UNIV. OF PENN. CAREY L. SCH. (2023) (on file with Minnesota Law Review).

schools may allow applicants to discuss race: as the majority stated, "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."[193] A possible explanation is that law schools draw a distinction between allowing applicants to discuss race and explicitly inviting applicants to discuss race. Perhaps they fear either that the latter is illegal or that it could be used as evidence of impermissible intent in an admissions-related lawsuit.[194]

While overall the amount of diversity messaging decreased from 2022 to 2023, seven schools' materials displayed the opposite trend.[195] For example, Texas A&M added an optional "Contribution Addendum" stating that applicants might wish to discuss racial and ethnic identity, along with a list of other identities.[196] Cornell added synonyms for diversity to its personal statement prompt, inviting applicants to discuss "discrimination" or "how communities of which you have been part have shaped your perspective."[197] Alabama added guidance on its personal statement prompt encouraging applicants to discuss their "unique life experiences."[198]

Table 3 describes how schools changed their diversity messaging during the three years studied. The numbers do not add up to thirty-seven because many schools fit into more than one category.

193. Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2176 (2023).

194. *Id.*; *see also infra* notes 303–10 and accompanying text.

195. These schools were Alabama, BYU, Cornell, Indiana, Iowa, Notre Dame, and Texas A&M. *See infra* Appendix A.

196. *J.D. Admission Program Process*, TEX. A&M UNIV. SCH. OF L. (2023) (on file with Minnesota Law Review).

197. *J.D. FAQ*, CORNELL L. SCH. (Sept. 21, 2023), [https://web.archive.org/web/20230921074233/https:/www.lawschool.cornell.edu/admissions/jd-admissions/jd-faq].

198. *J.D. Frequently Asked Questions*, UNIV. OF ALA. SCH. OF L. (Apr. 19, 2024), [https://web.archive.org/web/20240419211535/https://www.law.ua.edu/admissions/application/faq].

Table 3: Changes in References to Race and Diversity in Law School Application Materials

Type of Change	Between 2021 and 2022	Between 2022 and 2023
Removed reference to race	1	9
Removed reference to diversity	1	8
Added reference to race	0	1
Added reference to diversity	2	2
Added reference to a synonym of diversity	2	6
Revised reference to diversity	2	4
Revision that resulted in a change in coding category from Table 1	3	19
No changes	32	10

I did not identify any trends in application materials related to a school's geographical region, federal circuit, or public/private status.[199] One limitation was the number of schools in my sample; perhaps a larger sample would provide sufficient information to reveal trends.

3. Takeaways

Law schools' application materials confirmed both of my hypotheses. First, more law schools changed the diversity messaging in their application materials after *SFFA*: only 8% of schools changed those materials between 2021 and 2022, while 50% of schools did so between 2022 and 2023.[200] Second, most of the changes involved either removing references to race or references to diversity. The review of application materials thus reveals a correlation between the *SFFA* decisions and a greater rate of change, as well as a greater number of changes that track the decision's approach to racial diversity.

B. FACULTY HIRING ANNOUNCEMENTS

Law school faculty hiring announcements are another site of diversity messaging. The Supreme Court has never approved diversity as a justification for using race in hiring,[201] and *SFFA* was silent on its implications, if any, for the employment context.[202] But the Court's majority opinion emphasized that, beyond college admissions, it has only approved government decision-making using racial classifications in two contexts: remedying "specific, identified instances of past discrimination that violated the Constitution or a statute"; and "avoiding imminent and serious risks to human safety in prisons."[203] This emphasis allows a reasonable inference that the Court would be resistant to a race-conscious hiring program at either a public or a

199. For the complete data set, see *infra* Appendix A.

200. An additional ten schools made changes to the diversity content of their application materials that did not result in coding changes, so a total of seventy-four percent of schools made at least one revision to the diversity content of their application materials. *See infra* Appendix A.

201. *See supra* notes 42–77.

202. *See generally* Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141 (2023).

203. *Id.* at 2162 (first citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007); and then citing Johnson v. California, 543 U.S. 499, 512–13 (2005)).

private school. I therefore hypothesized that law schools would be more cautious about diversity messaging in their 2023 job announcements than is facially required by *SFFA*. I further hypothesized that I would, again, see more changes to job postings between 2022 and 2023 than between 2021 and 2022, and that those changes would reduce the amount of diversity messaging present in hiring announcements.

1. Methodology

The primary location for law school hiring announcements is the Placement Bulletin issued by the American Association of Law Schools (AALS).[204] Law school hiring announcements vary in content, usually including information about the institution, position requirements and benefits, and what applicants must do to apply. Many announcements include diversity messaging. For example, some schools require or allow applicants to write a "diversity statement," while others explicitly state that they seek or welcome applicants who would enhance the diversity of the school. Figure 3 depicts the first page of the 2021 Placement Bulletin, which includes an announcement from the University of Alabama and part of an announcement from Albany.[205]

204. *Placement Bulletin*, THE ASS'N OF AM. L. SCHS., https://www.aals.org/recruitment/candidates/placement-bulletin [https://perma.cc/QK23-D57Q]. Law schools also post hiring announcements on their own websites. Websites such as PrawfsBlawg open a forum for posting hiring information each year. *See, e.g.*, Sarah Lawsky, *Hiring Plans and Hiring Committees 2023-2024*, PRAWFSBLAWG (July 11, 2023), https://prawfsblawg.blogs.com/prawfsblawg/2023/07/hiring-plans-and-hiring-committees-2023-2024.html [https://perma.cc/5TLG-SYPH]. And law faculty circulate job postings on listservs and social media.

205. I selected this page solely because it is the first page. *AALS Placement Bulletin*, THE ASS'N OF AM. L. SCHS. 1 (Aug. 11, 2021) [hereinafter *2021 Placement Bulletin*] (on file with Minnesota Law Review).

Figure 3: A Page from the 2021 Placement Bulletin

AALS Placement Bulletin

AALS MEMBER AND FEE-PAID SCHOOLS

Faculty Positions

Tenure-Track Entry-Level Teaching Positions at Member Schools

THE UNIVERSITY OF ALABAMA SCHOOL OF LAW

Location: Tuscaloosa, AL
Subjects: Contract Law; Environmental Law; Regulatory Compliance Law; Family Law
Start Date: August 16, 2022

The University of Alabama School of Law seeks to fill up to three tenure-track positions for the 2022-23 academic year. Candidates must have outstanding academic credentials, including a J.D. from an accredited law school or an equivalent degree (such as a Ph.D. in a related field). Entry-level candidates should demonstrate potential for strong teaching and scholarship. The primary focus of these positions is in Contracts, Environmental Law & Regulatory Compliance, and Family Law; however, qualified applicants in other areas may be considered. We welcome applications from candidates who approach scholarship from a variety of perspectives and methods. The University embraces diversity in its faculty, students, and staff, and we welcome applications from those who would add to the diversity of our academic community.

Interested candidates should apply online at https://facultyjobs.ua.edu/postings/48458. Salary, benefits, and research support will be nationally competitive. All applications are confidential to the extent permitted by state and federal law; the positions remain open until filled. Questions should be directed to Adam Steinman, Chair of the Faculty Appointments Committee (facappts@law.ua.edu).

The University of Alabama is an Equal Employment/Equal Educational Opportunity Institution. All qualified applicants will receive consideration for employment without regard to race, color, religion, national origin, sex, sexual orientation, gender identity, gender expression, pregnancy, age, genetic or family medical history information, disability, or protected veteran status, or any other legally protected basis, and will not be discriminated against because of their protected status. Applicants to and employees of this institution are protected under Federal law from discrimination on several bases. Follow the link below to find out more.

"EEO is the Law" https://www.eeoc.gov/sites/default/files/migrated_files/employers/poster_screen_reader_optimized.pdf

"EEO is the Law" Poster Supplement http://www.dol.gov/ofccp/regs/compliance/posters/pdf/OFCCP_EEO_Supplement_Final_JRF_QA_508c.pdf

ALBANY LAW SCHOOL

Location: Albany, NY
Subjects: Property; Trusts & Estates; Estate Planning; Employment/Labor Law; Criminal Law; Constitutional Law; Evidence; and Introduction to Lawyering
Start Date: July 1, 2022

Assistant Professor of Law

Job Id: 243
Number of Openings: 3

Albany Law School invites applications from entry level candidates for three (3) tenure-track positions beginning in the 2022-23 academic year. We welcome applications from qualified candidates across all areas and specializations, but we have particular interest in the areas of Property, Trusts & Estates, Estate Planning, Employment/Labor Law, Criminal Law, Constitutional Law, Evidence, and Introduction to Lawyering.

Applicants must hold a J.D. degree (or the equivalent) and should have a record of academic excellence, substantial academic or practice experience, a passion for teaching, and a record of, or potential for, accomplish-

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To learn about the way that schools signal about race and diversity in their hiring announcements, I identified AALS member and fee-paid schools that posted an announcement for at least one entry-level or lateral tenure-track position in the

Placement Bulletin in August 2021, August 2022, and August 2023.[206] Sixty-three schools met these criteria.[207]

Each law school hiring announcement was coded for inclusion in the following categories:

0=No mention of diversity or a related concept

1=Descriptive diversity messaging[208]

- "students and faculty thrive in our diverse, supportive, scholarly community"[209]
- "a population of 21,000 diverse students"[210]

2=Message of valuing inclusive practices

- "candidates should have . . . a record of inclusion"[211]
- "encourages applications from candidates prepared to contribute, through research, teaching, and service, to a diverse and inclusive community of inquiry"[212]

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206. Four issues of the Placement Bulletin are issued every year, so I chose to code the first issue in order to standardize the comparison between schools. *See Placement Bulletin*, *supra* note 204. Most law schools establish their hiring priorities at the end of the spring semester and then advertise for those priorities at the beginning of the fall semester to coincide with the release of the Faculty Appointments Register (a compilation of information about all candidates on the market in a particular year). *See FAR Information*, THE ASS'N OF AM. L. SCHS., https://www.aals.org/recruitment/candidates/far-information [https://perma.cc/9KJA-LBZK]. A preliminary inspection of the other issues of the Placement Bulletin indicated that new announcements released at other times of the year disproportionately reflected anomalous events such as gifts and cluster hires. Informal conversations with several law school deans confirmed this pattern.

207. A total of 172 schools posted hiring announcements in at least one of the three years. I limited coding to the schools that posted hiring announcements in all three years to examine trends at a consistent set of institutions. The sixty-three schools that fell into this category are listed in Appendix B.

208. The announcements in this category included a wide array of information. For example, Albany's 2022 hiring announcement stated: "Our students—23% of whom come from a diverse background—are among the best in the nation." Albany did not explain what it meant by a "diverse" background. *AALS Placement Bulletin*, THE ASS'N OF AM. L. SCHS. 2 (Aug. 11, 2022) [hereinafter *2022 Placement Bulletin*] (on file with Minnesota Law Review) (providing Albany's hiring announcement for faculty positions).

209. *AALS Placement Bulletin*, THE ASS'N OF AM. L. SCHS. 3 (Aug. 14, 2023) [hereinafter *2023 Placement Bulletin*] (on file with Minnesota Law Review) (providing Baltimore's hiring announcement for a tenure-track position).

210. *Id.* (providing Baylor's hiring announcement for an Assistant Professor of Law).

211. *Id.* at 5 (providing Boston University's hiring announcement for multiple teaching positions).

212. *Id.* at 6 (providing Buffalo's hiring announcement for full-time faculty positions).

3=Message of valuing diverse identities

- "embraces diversity in its faculty, students, and staff"[213]
- "strong institutional commitment to the principle of diversity"[214]

4=Message of actively seeking diverse identities

- "encourages applications from persons who will contribute to [] diversity"[215]
- "actively seeks applicants who reflect the nation's diversity"[216]

5=Required diversity statement

6=Optional diversity statement

7=Nondiscrimination or Equal Employment Opportunity / Affirmative Action (EEO/AA) language

Announcements could be included in multiple categories, and many were. For example, in 2023, Drake's announcement stated: "Diversity is one of Drake's core values and applicants need to demonstrate an ability to work with individuals and groups of diverse socioeconomic, cultural, sexual orientation, disability, and/or ethnic backgrounds."[217] This announcement reflected both a Category 2 message of valuing inclusive practices ("demonstrate an ability to work with individuals and groups") and a Category 3 message of valuing diverse identities ("[d]iversity is one of Drake's core values"), and was coded accordingly.[218]

If a school advertised for multiple positions, I coded a school for inclusion in all categories for which at least one hiring announcement qualified. When a school advertised for more than one position, virtually all of the diversity content was standardized and fell into the same categories.[219]

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213. *Id.* at 1 (providing Alabama's hiring announcement for five tenure-track positions).

214. *Id.* at 22 (providing Montana's hiring announcement for tenure-track positions).

215. *Id.* at 18 (providing Louisville's hiring announcement for tenure-track positions).

216. *Id.* at 11 (providing Drake's hiring announcement for tenure-track positions).

217. *Id.*

218. *Id.*

219. Exceptions occurred when the position itself related to race or diversity. In an advertisement stating that its "primary curricular need is in the area of American Indian and/or Tribal Law," Montana included substantively related information such as that it has twelve Tribal Nations and is home to the first Indian Law clinic in the country. *2022 Placement Bulletin*, *supra* note 208, at 29.

Finally, I coded the federal appellate circuit in which each school was located and whether the school was public or private.

2. Findings and Analysis

Nearly all schools had some form of diversity messaging in their hiring announcements. The only school that did not have any diversity messaging in any of the three years was Ohio Northern;[220] Albany did not have any diversity messaging in 2021 and Arkansas (Little Rock) did not have any diversity messaging in 2023.[221]

The most common form of diversity messaging consisted of an Equal Employment Opportunity / Affirmative Action statement (Category 7), although there was not a clear trend in the use of such statements: they appeared in forty-eight schools' announcements in 2021, fifty-three in 2022, and forty-four in 2023.[222] Next most common was a statement that a school valued diverse identities (Category 3) or actively sought diversity (Category 4). The coding is summarized in Table 4, and full results are available in Appendix B.[223]

220. *See 2021 Placement Bulletin*, *supra* note 205, at 27; *2022 Placement Bulletin*, *supra* note 208, at 32; *2023 Placement Bulletin*, *supra* note 209, at 25.

221. *See, e.g.*, *2021 Placement Bulletin*, *supra* note 205, at 1–2; *2023 Placement Bulletin*, *supra* note 209, at 3.

222. The coding does not reflect that some schools revised their EEO/AA statements. For example, Chicago-Kent included a more robust EEO/AA statement in 2023 than in the previous year, as did the University of Tennessee. *Compare 2023 Placement Bulletin*, *supra* note 209, at 8 (using a detailed eighty-nine-word EEO/AA statement in Chicago-Kent's 2023 posting), *and 2023 Placement Bulletin*, *supra* note 209, at 42 (using a detailed 194-word EEO/AA statement in Tennessee's 2023 posting with several more provisions than that of the 2022 posting), *with 2022 Placement Bulletin*, *supra* note 208, at 9 (using a more concise thirty-eight-word EEO/AA statement in Chicago-Kent's 2022 posting), *and 2022 Placement Bulletin*, *supra* note 208, at 44 (using a more concise sixty-one-word EEO/AA statement in Tennessee's 2022 posting).

223. *See infra* Appendix B.

Table 4: Diversity Messaging in Hiring Announcements, 2021–2023

	2021	**2022**	**2023**
0=No diversity content	2	1	2
1=Descriptive diversity	7	9	7
2=Valuing inclusive practices	15	14	20
3=Valuing diverse identities	36	36	34
4=Actively seeking diversity	33	32	27
5=Required diversity statement	9	8	6
6=Optional diversity statement	1	1	2
7=EEO/AA statement	48	53	44

Analysis of the coding revealed several trends. First, there was a decrease in the number of schools that indicated that they valued diverse identities (from thirty-six to thirty-four, a 6% decrease), actively sought diversity (from thirty-two to twenty-seven, an 18% decrease), and required a diversity statement (from eight to six, a 25% decrease). But these changes were accompanied by an increase in number of schools whose hiring announcements reflected that they valued inclusive *practices*: the number of schools in this category increased from fourteen to twenty between 2022 and 2023—a 33% increase.

More schools changed their hiring announcements than the total number of schools in each category revealed. Between 2021 and 2022, twenty schools (32% of schools in the sample) made at least one change in their hiring announcement's diversity messaging that resulted in a change in coding, while between 2022 and 2023, twenty-eight schools (44% of schools in the sample) did so.[224] In other words, 40% *more* schools made changes in the year immediately after *SFFA* than in the year immediately before. But schools did not always make changes in the same direction: for example, between 2022 and 2023 some eliminated messaging indicating that they sought diversity, while others added such messaging.[225] In calculating the number of schools in each category in each year, these opposing changes cancelled one another out, causing the rate of change to appear lower than it actually was.

The presence of opposing changes suggests that schools' changes to their hiring announcements might reflect an array of motivations. Some schools might have revised the diversity messaging in their announcements out of a concern for legal liability. Other schools might have maintained or even bolstered the diversity messaging in their announcements to show that *SFFA* has not changed their priorities or to avoid suggesting that their practices were of questionable legality.

The changes in hiring announcements over time are summarized in Table 5. For each column, I included both the raw numbers and percentage change. So, for example, in Category 1, two additional schools added descriptive diversity messaging between 2021 and 2022—a twenty-eight percent increase. I also

224. Sixteen schools (twenty-five percent) made no changes—not even minor textual changes that did not result in a coding change—to the diversity messaging in their hiring announcements in any of the three years. *See infra* Appendix B.

225. For example, New Mexico added language indicating that it actively sought diversity for the first time in 2023 (Category 4), while in the same year Cardozo for the first time added language requesting an optional diversity statement (Category 6). *Compare 2022 Placement Bulletin*, *supra* note 208, at 30, *and 2023 Placement Bulletin*, *supra* note 209, at 23 (adding "[w]e highly value candidates from diverse backgrounds and perspectives" to the University of New Mexico's faculty posting), *with 2022 Placement Bulletin*, *supra* note 208, at 56, *and 2023 Placement Bulletin*, *supra* note 209, at 7 (removing "Cardozo Law values diversity and aims to build a team with a multiplicity of backgrounds, identities, and lived experiences that inform and strengthen our work" from Cardozo's posting).

included year-by-year changes as well as the overall change from 2021 through 2023.

Table 5: Changes in Hiring Announcements over Time

	Change 2021–2022	**Change 2022–2023**	**Change 2021–2023**
0=No diversity content	-1 (-50%)	1 (+100%)	0
1=Descriptive diversity	2 (+28%)	-2 (-22%)	0
2=Valuing inclusive practices	-1 (-7%)	6 (+43%)	5 (+33%)
3=Valuing diverse identities	0 (0%)	-2 (-6%)	-2 (-6%)
4=Actively seeking diversity	-1 (-3%)	-5 (-16%)	-6 (-18%)
5=Required diversity statement	-1 (-11%)	-2 (-25%)	-3 (-33%)
6=Optional diversity statement	0 (0%)	1 (+100%)	1 (+100%)
7=EEO/AA statement	5 (+10%)	-9 (-17%)	-4 (-8%)

To provide context for the quantitative information in the previous paragraphs, I offer some illustrative examples of my findings. Overall, several schools gradually weakened their

diversity messaging. One general trend was to revise language from "actively seeks diversity" (Category 4) to "values diverse identities" (Category 3).[226] This type of revision in diversity messaging suggests that schools no longer *prefer* faculty candidates from underrepresented identity categories; rather, they simply value them. If the change reflects a school's actual behavior, it might have legal significance: actively seeking diversity may constitute an impermissible affirmative action program, while valuing diversity is legally unproblematic. Another trend was the shift from "values diverse identities" (Category 3) to "values inclusive practices" (Category 2).[227] This revision shifts focus from identity to behavior, also perhaps reducing legal exposure still further because it shifts focus away from a suspect classification.

A typical example is Southwestern Law School, whose advertisements progressed as follows:

> 2021: "We especially welcome applications from candidates who will enhance the diversity of the law faculty" (Category 4)[228]
>
> 2022: "For 110 years, the school's mission has been to provide students from diverse backgrounds with a first-rate legal education" (Category 3)[229]
>
> 2023: "Our mission includes . . . cultivating inclusion and belonging" (Category 2)[230]

Although I am not suggesting that Southwestern (or any other school) is responding to *SFFA* by changing its diversity messaging, the words in its advertisements are consistent with the overall trend of gradually softening diversity messaging. A similar trend emerged in Missouri's hiring announcements: the 2021 and 2022 announcements stated that the school "embraces diversity" and "welcomes applications from persons who would add to the diversity of our academic community"; in 2023, this language disappeared and new language was introduced stating that the school is "fully committed to achieving the goal of an inclusive academic community of faculty, staff and students."[231]

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226. *See supra* Table 5; *see also infra* Appendix B.

227. *See supra* Table 5; *see also infra* Appendix B.

228. *2021 Placement Bulletin*, *supra* note 205, at 37.

229. *2022 Placement Bulletin*, *supra* note 208, at 42.

230. *2023 Placement Bulletin*, *supra* note 209, at 40.

231. *Compare 2021 Placement Bulletin*, *supra* note 205, at 22, *and 2022 Placement Bulletin*, *supra* note 208, at 28, *with 2023 Placement Bulletin*, *supra* note 209, at 20. A range of similar examples were found in many schools'

The shift from "valuing diverse identities" to "valuing inclusive practices" also may have legal significance because a preference on the basis of behavior stands on sounder footing than one based on identity.

Another trend concerned schools' requirement of or request for a diversity statement. In 2021 and 2022, the University of Hawaii instructed applicants to submit a "[s]tatement explaining their contributions to diversity, equity, and inclusion, including how their work will contribute to [the University of Hawaii Law School's] mission to serve the needs of our diverse state and student population."[232] In 2023, their announcement was revised to solicit a "[s]tatement explaining how they would contribute to furthering the mission and values of the Law School and UH Mānoa."[233] Cornell's announcements showed a similar trend: in 2021 and 2022 the school required applicants to submit a "diversity statement," while in 2023 it did not request such a statement.[234] Similarly, in 2021 and 2022 Ohio State instructed applicants to submit a "statement of work they have done to promote diversity and inclusion," but did not request such a statement in 2023.[235] The timing of these revisions correlates with the *SFFA* decision.

A final trend concerned schools' use of phrases such as "ideological diversity" and "viewpoint diversity" that are more

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announcements. In its 2021 and 2022 announcements Mitchell Hamline stated that it "encourage[d] those who attended HBCU law schools . . . to apply"; in 2023 that language was deleted. *Compare 2021 Placement Bulletin*, *supra* note 205, at 22, *and 2022 Placement Bulletin*, *supra* note 208, at 28, *with 2023 Placement Bulletin*, *supra* note 209, at 21. In its 2021 and 2022 announcements Wyoming stated: "We especially welcome applications from candidates who would enhance the diversity of our faculty"; in 2023 the word "especially" was deleted but the remainder of the statement remained the same. *Compare 2021 Placement Bulletin*, *supra* note 205, at 42, *and 2022 Placement Bulletin*, *supra* note 208, at 48, *with 2023 Placement Bulletin*, *supra* note 209, at 48.

232. *See 2021 Placement Bulletin*, *supra* note 205, at 14; *2022 Placement Bulletin*, *supra* note 208, at 16.

233. *2023 Placement Bulletin*, *supra* note 209, at 13.

234. *Compare 2021 Placement Bulletin*, *supra* note 205, at 9, *and 2022 Placement Bulletin*, *supra* note 208, at 11, *with 2023 Placement Bulletin*, *supra* note 209, at 10.

235. *Compare 2021 Placement Bulletin*, *supra* note 205, at 57, *and 2022 Placement Bulletin*, *supra* note 208, at 32, *with 2023 Placement Bulletin*, *supra* note 209, at 26.

commonly associated with conservatives.[236] In many schools' announcements, these terms appeared for the first time in 2023. For example, the University of Massachusetts Dartmouth added language encouraging applications from those "whose background, experience, and viewpoints would contribute to a diverse and inclusive environment."[237] The University of Minnesota added the phrase "people with varied ideological and methodological approaches" to a long list of valued identities.[238] The University of Tennessee added "viewpoints" to a list of forms of diversity it desires.[239] One possible explanation is that schools came to recognize the value of viewpoint or ideological diversity between posting their 2022 and 2023 hiring announcements. An alternative explanation is that schools added the "viewpoint" or "ideology" language in order to communicate that their desire for diversity is a permissible one.

I did not identify any trends in hiring announcements related to a school's geographical region, federal circuit, or public/private status.[240] One limitation was the number of schools in my sample; perhaps a larger sample would provide sufficient information to reveal trends.

3. Takeaways

Forty percent more law schools changed their hiring announcements in 2023 than in 2022—a difference that is correlated with the timing of the *SFFA* decision—and during that time frame forty-four percent of schools overall made changes that were captured by my coding. In the aggregate, schools reduced the amount of diversity messaging, including a decrease

236. *See* Kathryn A. Howard et al., *On the Varieties of Diversity: Ideological Variations in Attitudes Toward, and Understandings of Diversity*, 48 PERSONALITY & SOC. PSYCH. BULL. 1039, 1039 (2022) ("Conservatives reported more positive attitudes toward viewpoint diversity, and liberals [reported] more positive attitudes toward demographic diversity."); *see also* Avi Woolf, *A Conservative Definition of Diversity*, JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Nov. 29, 2019), https://www.jamesgmartin.center/2019/11/a-conservative-definition-of-diversity [https://perma.cc/PY83-QM7J] (arguing that conservatives are more frustrated with the "diversity administrative machine" than they are with diversity itself).

237. *2023 Placement Bulletin*, *supra* note 209, at 51.

238. *Id.* at 20.

239. *Id.* at 42.

240. For complete data, see *infra* Appendix B.

in the number of schools requiring applicants to submit diversity statements.

C. DEI WEBSITES

This Section examines whether and how the diversity messaging on law schools' DEI websites changed after *SFFA*. The decision did not say anything explicit about the DEI content on schools' websites. Even so, I hypothesized that, similar to hiring announcements, schools' revisions to their DEI websites would be more extensive than what is required to reflect changes in the law after *SFFA*.

1. Methodology

Many law school websites contain a message related to diversity.[241] Many also have a hyperlink or a drop-down menu on the law school's homepage that guides the user to diversity-related content. Such content often includes a message from law school leadership; information about diversity-related personnel (for example, many schools have a chief diversity officer); a statement of school values related to diversity; information about diversity-related programming at the school; and information about student affinity groups (for example, the Black Law Students Association or Asian Pacific American Law Students Association).

For the same fifty law schools as in Part II.A,[242] I located and saved all the diversity-related content on the law school's DEI website in the three weeks prior to the release of the opinion in *SFFA*.[243] I then revisited and resaved the diversity-related

241. The number may have decreased since the time of my study. As of February 2024, eight bills have been passed prohibiting some manifestation of diversity, equity, and inclusion programs. Vimal Patel, *Utah Bans D.E.I. Programs, Joining Other States*, N.Y. TIMES (Feb. 1, 2024), https://www.nytimes.com/2024/02/01/us/states-anti-dei-laws-utah.html [https://perma.cc/L552-U5VQ]. Utah's program "prohibits any program, office or initiative that has 'diversity, equity and inclusion' in its name," while other states have undertaken other measures such as banning diversity statements. *Id.*; *see also* Lu, *supra* note 120.

242. *2024 Best Law Schools*, *supra* note 160.

243. This work took place between June 1, 2023, and June 25, 2023. The *SFFA* opinion was released on June 29, 2023. All content on the DEI homepage and all DEI content linked from the DEI homepage was saved as either a PDF or HTML file depending on which was most appropriate for the school's specific website content. Links to the Wayback Machine will be provided if available.

content four to five months later.[244] The pre- and post-*SFFA* versions of the websites were subjected to a side-by-side comparison and coded for inclusion in the following categories:

0=No changes
1=Deletion of explicit mention of race
2=Deletion of explicit mention of diversity
3=Deletion/modification of other DEI-related language
4=Page revised beyond language edits
5=Entire page deleted or redirected to a different link
6=Addition of explicit mention of race or diversity

I coded a law school's DEI homepage separately from the other diversity-related content linked from that homepage. This allowed me to determine whether there were differences between the changes to schools' DEI homepages and the changes to the array of other content linked from the homepages. To complement my coding, I also recorded the specific language that schools changed in their website revisions.

2. Findings and Analysis

A majority of schools—twenty-seven, or 54%—made at least one change to the diversity messaging on their DEI websites.[245] Thirteen schools (26% overall, or 48% of the schools that made changes) deleted an explicit reference to race or diversity or both.[246] Sixteen schools (32%) deleted or modified other diversity-related language.[247]

Thirty-three law schools out of fifty did not make any changes to their DEI homepages during the relevant time

244. The second round of work took place between October 15, 2023, and November 30, 2023. All DEI-related content was again saved as a PDF or HTML file. Irvine was inadvertently omitted from the second sample, so that school's coding is based on an Internet Archive Wayback Machine capture from January 12, 2024.

245. *See infra* Table 6 (tabulating the number and percentage of law schools that revised their DEI websites).

246. These schools were Boston College, University of Chicago, Columbia, Fordham, Georgetown, Kansas, Minnesota, Northwestern, University of Texas, Texas A&M, University of Southern California, Wisconsin, and Yale. *See infra* Appendix C.

247. These schools were Boston College, Boston University, Columbia, Indiana, Iowa, Kansas, Minnesota, Northwestern, University of Pennsylvania, SMU, Stanford, University of Texas, Texas A&M, University of Southern California, Vanderbilt, and Wisconsin. *See infra* Appendix C.

period.[248] This number includes two schools, BYU and Notre Dame, that maintained no DEI page either before or after *SFFA*.[249]

Seventeen schools made at least one change to their DEI homepage.[250] Three schools—Kansas, Minnesota, and Yale—deleted an explicit mention of race from their DEI homepage, six schools deleted an explicit mention of diversity,[251] and ten schools deleted or modified other DEI-related language.[252]

Some schools made more substantial edits. Eight schools reworked at least one aspect of their homepage beyond language edits—for example, by deleting large sections of content or changing imagery.[253] And four schools—ASU, Florida, Vanderbilt, and Yale—deleted their pre-*SFFA* DEI homepage, although at the time this Article goes to press, all four schools also continue to host some DEI-related content.[254]

Not all of the post-*SFFA* changes involved deletion of DEI content. A few schools *added* explicit references to race or diversity. For example, Georgia added a link to its "Diversity, Equity, Inclusion and Belonging plan,"[255] and Vanderbilt added a section

248. *See infra* Table 6; *infra* Appendix C.

249. *See infra* Appendix C.

250. These schools were ASU, Boston College, Boston University, Florida, George Washington, Georgia, Indiana, Kansas, Minnesota, Ohio State, University of Pennsylvania, SMU, University of Texas, Texas A&M, University of Southern California, Vanderbilt, and Yale. *See infra* Appendix C.

251. These schools were Boston College, Minnesota, University of Texas, Texas A&M, University of Southern California, and Yale. *See infra* Appendix C.

252. These schools were Boston College, Boston University, Indiana, Kansas, Minnesota, University of Pennsylvania, SMU, University of Texas, Texas A&M, and Vanderbilt. *See infra* Appendix C.

253. These schools include Florida, George Washington, Minnesota, SMU, University of Texas, University of Southern California, Vanderbilt, and Yale. *See infra* Appendix C.

254. *See infra* Appendix C.

255. *Compare Diversity and Inclusion*, UNIV. OF GA. SCH. OF L. (June 9, 2023), [https://web.archive.org/web/20230609224615/https://www.law.uga.edu/diversity] (omitting the mention of the school's "Diversity, Equity, Inclusion and Belonging" plan), *with Diversity and Inclusion*, UNIV. OF GA. SCH. OF L. (Oct. 14, 2023), [https://web.archive.org/web/20231014122135/https://www.law.uga.edu/diversity] (linking the school's "Diversity, Equity, Inclusion and Belonging" plan).

describing the "Mission" of its Office of Diversity, Equity, and Community.[256]

Non-homepage DEI content revisions were similar to homepage revisions. Thirty-three law schools out of fifty did not make any changes.[257] Of these schools, ten were schools that had made at least one change to their homepage, while twenty-three were schools that did not change their homepage.[258]

Among the seventeen schools that made at least one change to their non-homepage content, nine (18%) deleted an explicit reference to race or diversity or both,[259] and nine (18%) deleted or modified other diversity-related language.[260]

Table 6 summarizes law schools' modifications to their DEI homepages, non-homepage DEI content, and overall modifications.[261] For each category, I list both the number and percentage (in parentheses) of schools in that category. Some schools fell into more than one category for coding purposes, so the total numbers add up to more than fifty. The full results of the coding are available in Appendix C.[262]

256. *Compare Diversity, Equity and Community*, VANDERBILT UNIV. L. SCH. (June 13, 2023) (on file with Minnesota Law Review) (omitting the mission statement), *with Diversity, Equity, and Community*, VANDERBILT UNIV. L. SCH. (Oct. 14, 2023), [https://web.archive.org/web/20231014032940/https://law.vanderbilt.edu/diversity-equity-and-community] (including the Office of Diversity, Equity, and Community's mission statement).

257. *See infra* Appendix C.

258. *See infra* Appendix C.

259. These schools were the University of Chicago, Columbia, Fordham, Georgetown, Minnesota, Northwestern, University of Texas, University of Southern California, and Wisconsin. Notably, among these nine, Minnesota, University of Texas, and the University of Southern California deleted references to both race and diversity. *See infra* Appendix C.

260. These schools were Columbia, Iowa, Northwestern, Stanford, University of Texas, Texas A&M, University of Southern California, Vanderbilt, and Wisconsin. *See infra* Appendix C.

261. *See infra* Table 6 (tabulating the number and percentage of law schools that revised their DEI websites).

262. *See infra* Appendix C.

Table 6: Number and Percentage of Law Schools That Revised Their DEI Websites

Category	Homepage Revisions	Non-Homepage Revisions	Overall Revisions
No changes	33 (66%)	33 (66%)	23 (46%)
Deletion of explicit mention of race	3 (6%)	7 (14%)	9 (18%)
Deletion of explicit mention of diversity	6 (12%)	5 (10%)	8 (16%)
Deletion/modification of other DEI-related language	10 (20%)	9 (18%)	16 (32%)
Page reworked beyond language edits	8 (16%)	0 (0%)	8 (16%)
Entire page deleted	4 (8%)	2 (4%)	4 (8%)
No DEI content either before or after *SFFA*	2 (4%)	2 (4%)	2 (4%)
Total schools making one or more changes after *SFFA*	17 (34%)	17 (34%)	27 (54%)

The data show a meaningful reduction in diversity messaging between June and October/November of 2023. To contextualize the trends I have reported, I will also provide several specific examples. Although I am not claiming that the schools whose websites I describe modified their content in response to *SFFA*, the selected examples are typical of the overall trend I observed in the post-*SFFA* time period.

The University of Florida undertook a significant revision of its DEI content. On June 13, 2023, its DEI homepage was titled "Our Commitment to Diversity" and featured a statement from Dean Laura Rosenbury that included the language: "We are committed to fighting systemic racism and helping students develop the skills needed to work for justice."[263] The Dean's statement was followed by a number of links to policies and resolutions relating to racial justice, relevant student organizations, and other resources.[264]

Then, at some point before October 30, 2023, the University of Florida deleted this DEI page and all subpages; visitors to the previous link are now redirected to a different page called "Diversity at UF Law."[265] That page states "Non-discrimination is not only the best and morally correct course of action; it is University policy."[266] The page then restates the University's nondiscrimination policy.[267] Figures 4 and 5 respectively depict the June and October homepages.

263. *Our Commitment to Diversity*, UNIV. OF FLA. LEVIN COLL. OF L. (June 13, 2023) (on file with Minnesota Law Review).

264. *See id.*

265. *See Diversity at UF Law*, UNIV. OF FLA. LEVIN COLL. OF L. (Oct. 4, 2023) [hereinafter *Diversity at UF Law Oct. 2023*], [https://web.archive.org/web/20231004031703/https://www.law.ufl.edu/about/diversity-at-uf-law]. The first Internet archive of this page I was able to locate was on March 16, 2021—that is, it was not created to replace the deleted DEI website. *See Diversity at UF Law*, UNIV. OF FLA. LEVIN COLL. OF L. (Mar. 16, 2021), [https://web.archive.org/web/20210316054713/https://www.law.ufl.edu/diversity-and-inclusion/diversity-at-uf-law].

266. *Diversity at UF Law Oct. 2023*, *supra* note 265.

267. *See id.* (describing how the university promotes equal opportunity policies and practices by conforming to laws against discrimination).

Figure 4: University of Florida Diversity Homepage, June 2023

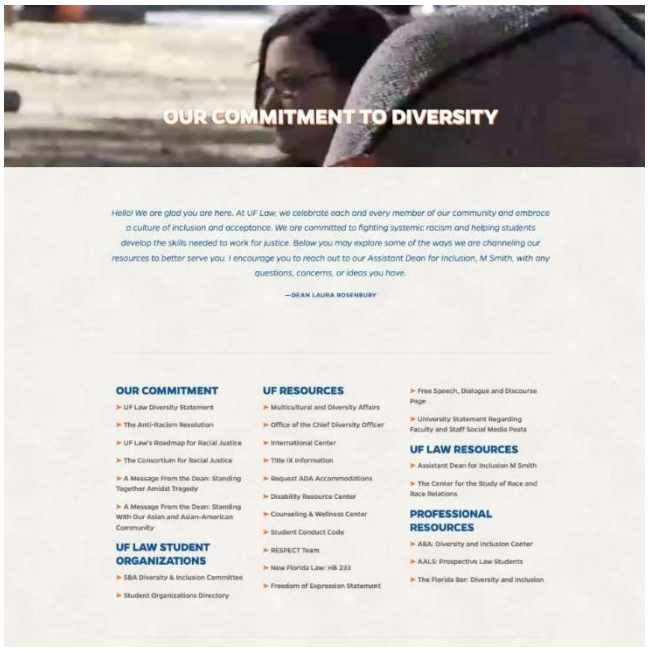
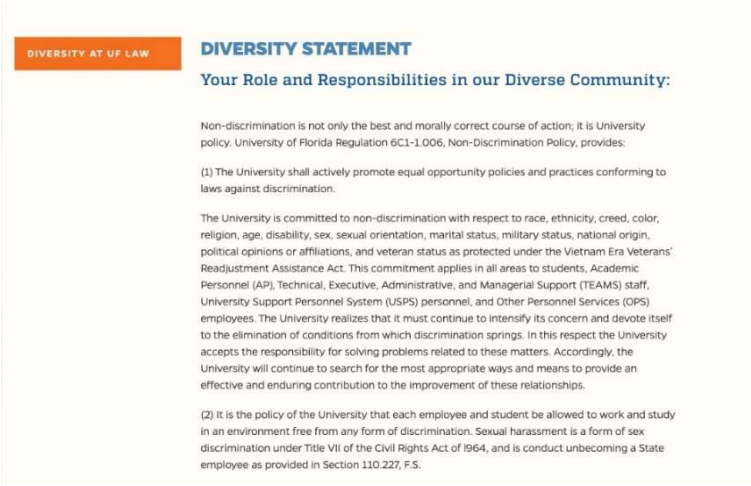


Figure 5: University of Florida Diversity Homepage, October 2023



Florida's modifications bore similarities to those at some other schools.[268] As described in the introduction to this Article, Yale substantially modified the content of its DEI homepage and condensed two separate pages—one labeled "Diversity at YLS" and the other labeled "Diversity & Inclusion"—into a single page titled "Equity, Inclusion, and Belonging."[269] Other schools that made significant changes are identified in Appendix C.[270]

Several schools made smaller-scale edits removing explicit references to race or diversity. In June 2023, Georgetown's DEI website included an FAQ with the question, "How racially diverse is the Georgetown Law student population?" (Figure 6).[271] By October 2023, the question had been rephrased to "How diverse is the Georgetown Law student population?" (Figure 7).[272] In June 2023, the answer to this question included information about faculty who identified as persons of color; by October 2023, it no longer included that information.[273] Further, the data on students of color provided in June 2023 were amplified in

268. Florida may be a unique case due to contemporaneous state legislative activities initiated by Governor Ron DeSantis to prohibit race-conscious admissions, see *infra* notes 303–08 and accompanying text, but its revisions are typical.

269. *Compare Diversity at YLS*, YALE L. SCH. (Mar. 21, 2023), [https://web.archive.org/web/20230321103639/https://law.yale.edu/student-life/diversity-inclusion/diversity-yls], *and Diversity & Inclusion*, *supra* note 1, *with Equity, Inclusion, & Belonging*, *supra* note 6.

270. *See infra* Appendix C.

271. *Frequently Asked Questions*, GEORGETOWN L. (June 3, 2023) [hereinafter *Georgetown FAQ June 2023*], [https://web.archive.org/web/20230603195129/https:/www.law.georgetown.edu/your-life-career/diversity-inclusion/equity-inclusion-office/frequently-asked-questions].

272. The closest date to October 2023 available on the Wayback Machine is February 2, 2024. *Compare Georgetown FAQ June 2023*, *supra* note 271 (including the term "racially" within its language), *with Frequently Asked Questions*, GEORGETOWN L. (Feb. 2, 2024) [hereinafter *Georgetown FAQ Feb. 2024*], [https://web.archive.org/web/20240202041958/https://www.law.georgetown.edu/your-life-career/diversity-inclusion/equity-inclusion-office/frequently-asked-questions] (omitting the term "racially" within its language).

273. *Compare Georgetown FAQ June 2023*, *supra* note 271 (detailing Georgetown Law's "41 Full-Time Faculty of Color"), *with Georgetown FAQ Feb. 2024*, *supra* note 272 (omitting language regarding faculty who identify as people of color).

October 2023 by information about nationality and first-generation status.[274]

Figure 6: Georgetown Law Diversity FAQ, June 2023

How racially diverse is the Georgetown Law student population? What are the demographics of Washington, D.C.?

- 2018 Demographics: 518 J.D. Students of Color; 41 Full-Time Faculty of Color. For more information, **view the 2020 ABA 509 report for Georgetown Law**. Please visit the U.S. Census website for details on **Washington D.C. demographics**.

Figure 7: Georgetown Law Diversity FAQ, October 2023

How diverse is the Georgetown Law student population? What are the demographics of Washington, D.C.?

- The 2023 entering J.D. class includes students from 14 foreign countries and, when combined with our LL.M. students, we have 76 nationalities in the class. 35% are students of color and 10% are first-generation college students. For more information, **view the 2020 ABA 509 report for Georgetown Law**. Please visit the U.S. Census website for details on **Washington D.C. demographics**.

Northwestern's website also reveals an instance of smaller-scale changes to diversity messaging. A page titled "About the Office of Diversity, Equity & Inclusion" stated in June 2023 that the office works to "*attract[] and retain[]* diverse students, staff, and faculty"; by October 2023, that mission had changed to "foster[ing] a diverse and inclusive Law School community that *supports* the diversity of its student body, staff, and faculty."[275] The

274. *Compare Georgetown FAQ June 2023*, *supra* note 271 (noting the lack of further data regarding nationality and first-generation status), *with Georgetown FAQ Feb. 2024*, *supra* note 272 (noting how Georgetown Law has "76 nationalities in the class[,] 35% are students of color and 10% are first-generation college students").

275. *Compare About the Office of Diversity, Equity & Inclusion*, NW. UNIV. PRITZKER SCH. OF L. (June 4, 2023) [hereinafter *Northwestern DEI Off. June 2023*] (emphasis added), [https://web.archive.org/web/20230604224834/https://www.law.northwestern.edu/diversity/about], *with About the Office of Diversity,*

text was also revised from "support and guidance for diverse students, staff, and faculty" to "support and guidance for students, staff and faculty with identities that are historically underrepresented in law schools and in the legal profession."[276] Figures 8 and 9 compare the text describing Northwestern's Office of Diversity, Equity & Inclusion.

Figure 8: Northwestern Law DEI Website, June 2023

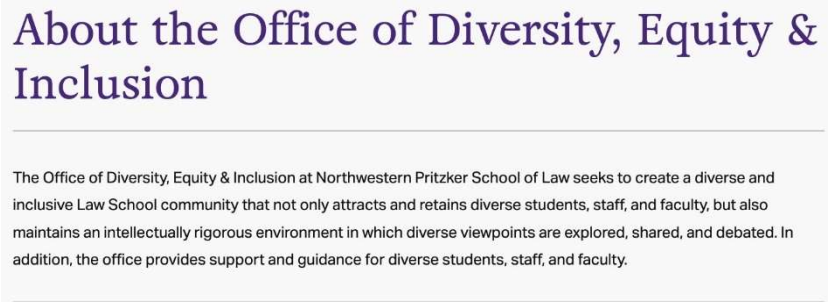
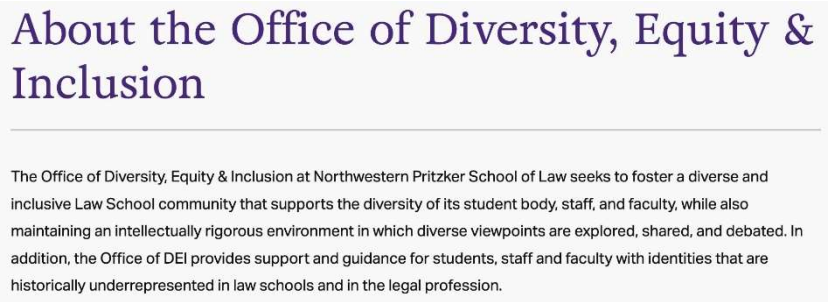


Figure 9: Northwestern Law DEI Website, October 2023



Some website modifications might reflect substantive changes to a school's practices or might be pure diversity messaging changes. On the University of Texas's DEI website, the language describing the school's Pipeline Program was changed

Equity & Inclusion, NW. UNIV. PRITZKER SCH. OF L. (Oct. 12, 2023) [hereinafter *Northwestern DEI Off. Oct. 2023*] (emphasis added), [https://web.archive.org/web/20231012191445/https://www.law.northwestern.edu/diversity/about].

276. *Compare Northwestern DEI Off. June 2023*, *supra* note 275, *with Northwestern DEI Off. Oct. 2023*, *supra* note 275.

from "promoting access to legal education for students who are first-generation, low-income, or members of groups underrepresented in the legal profession" to "promoting access to legal education for students who are first-generation or low-income."[277] In a similar vein, the "Diversity, Equity, Inclusion, and Belonging Committee" was renamed the "Community Engagement Committee," and the description of its work was changed from "help[ing] [to] promote an inclusive educational environment" to "supporting the school's efforts to ensure that all of our students are fully welcome in, and a valued part of, our community."[278] The rebranded committee includes most of the same members and appears at the same link on Texas's website.[279] Figures 10–13 depict these changes in the University of Texas's materials.

Figure 10: University of Texas Pipeline Program, June 2023


Pipeline Program

OUR GOAL IS TO SUPPORT ASPIRING LAWYERS FROM UNDERREPRESENTED BACKGROUNDS AND TO HELP PRODUCE A LEGAL PROFESSION THAT REFLECTS THE DIVERSITY OF THE STATE OF TEXAS.

The University of Texas School of Law is committed to improving opportunities for all Texans to pursue careers as lawyers. Our Pipeline Program works to advance that aim in Texas high schools and colleges by promoting access to legal education for students who are first-generation, low-income, or members of groups underrepresented in the legal profession. Through education, mentoring, and scholarship support, we are preparing the next generation of attorneys from diverse backgrounds for law school admission and success.

277. *Compare Pipeline Program*, THE UNIV. OF TEX. AT AUSTIN SCH. OF L. (May 5, 2023), [https://web.archive.org/web/20230505193145/https:/law.utexas.edu/pipeline-program], *with Pipeline Program*, THE UNIV. OF TEX. AT AUSTIN SCH. OF L. (Dec. 2, 2023), [https://web.archive.org/web/20231202170343/https:/law.utexas.edu/pipeline-program].

278. *Compare Diversity, Equity, Inclusion, and Belonging Committee*, THE UNIV. OF TEX. AT AUSTIN SCH. OF L. (June 15, 2023) (on file with Minnesota Law Review), *with Community Engagement Committee*, THE UNIV. OF TEX. AT AUSTIN SCH. OF L. (Sept. 29, 2023), [https://web.archive.org/web/20230929140438/https://law.utexas.edu/belonging/committee-members].

279. *See Community Engagement Committee*, *supra* note 278 (observing that despite the updates to the webpage and branding changes, the committee members have nonetheless stayed consistent).

Figure 11: University of Texas Pipeline Program, October 2023

Pipeline Program

The University of Texas School of Law is committed to improving opportunities for all Texans to pursue careers as lawyers. Our Pipeline Program works to advance that aim in Texas high schools and colleges by promoting access to legal education for students who are first-generation or low-income. Through education, mentoring, and scholarship support, we are preparing the next generation of attorneys for law school admission and success.

Our goal is to support aspiring lawyers from a range of backgrounds and to help produce a legal profession that reflects the State of Texas.

Figure 12: University of Texas Diversity, Equity, Inclusion, and Belonging Committee, June 2023

Diversity, Equity, Inclusion, and Belonging Committee

Dean Chesney has appointed a committee of students, staff, and faculty to help promote an inclusive educational environment at The University of Texas School of Law. Activities of the Diversity, Equity, Inclusion, and Belonging ("DEIB") Committee include; meetings with students and student organizations to learn more about their law school experiences, hosting inclusive classroom workshops for faculty, disseminating information about relevant resources, and discussing how to strengthen connections between students and alumni.

Figure 13: University of Texas Community Engagement Committee, October 2023

Community Engagement Committee

The Community Engagement Committee is charged with supporting the school's efforts to ensure that all of our students are fully welcome in, and a valued part of, our community.

While most schools reduced the diversity messaging on their DEI websites, a few schools increased their diversity messaging. For example, NYU's "Strategic Plan in Action" page added a section titled "Strengthening Law School Diversity," which provides information about the diversity of entering classes and recruitment of underrepresented groups in faculty hiring.[280] Other schools likewise bolstered, rather than reduced, their diversity messaging.[281]

3. Takeaways

The *SFFA* decision was correlated with meaningful changes in the diversity messaging on law schools' DEI websites. Most changes reduced or eliminated diversity messaging and the vast majority of these changes were not required by the *SFFA* decision. While no individual change could be attributed to *SFFA*, the overall trend was that schools excised explicit references to race and diversity and replaced them with euphemistic synonyms for those concepts—or with nothing at all.

As with application materials and faculty hiring announcements, my study of DEI websites suggests that schools are engaging in a complex calculus regarding their diversity messaging. The next Part will consider the implications of schools' decision-making—what it reveals about their processes and motivations, and what it means for diversity and racial justice.

III. FROM SIGNAL TO SUBSTANCE

This Part considers the implications of law schools' responses to *SFFA*. Schools are not only reshaping the substance of their application processes, as required by *SFFA*, but also revising a broad sphere of diversity messaging not addressed by

280. *Compare Strategic Plan in Action: Diversity and Inclusion*, N.Y.U. (June 14, 2023) (on file with Minnesota Law Review), *with Strategic Plan in Action: Diversity and Inclusion*, N.Y.U. (Oct. 19, 2023), [https://web.archive.org/web/20231019173105/http:/www.law.nyu.edu/about/strategic-plan-in-action/diversity-inclusion] (noting that thirty-eight percent of NYU's entering JD class identifies as a person of color while also detailing that the law school is working "to recruit first-rate faculty from underrepresented groups").

281. *See, e.g.*, *Inclusive Excellence Overview*, THE OHIO STATE UNIV. MORITZ COLL. OF L., https://moritzlaw.osu.edu/about/inclusive-excellence-initiatives/inclusive-excellence-overview [https://perma.cc/SJ8W-MYSL] (adding a link to the statement by Big Ten law deans affirming their commitment to diversity after *SFFA*).

the decision. These changes provide an opportunity to consider the significance of diversity messaging in higher education and beyond.

Part III.A considers schools' institutional incentives and discusses a range of possible explanations for their diversity messaging behavior. Part III.B then offers a hopeful perspective regarding racial justice after *SFFA*. I suggest that diversity messaging is not intrinsically linked to racial justice, and therefore that its decline need not interfere with racial justice reforms. Indeed, the resources schools previously dedicated to diversity messaging might be beneficially redirected into substantive racial justice measures.

A. WHY DIVERSITY MESSAGING DECLINED

This Section considers explanations for the revisions in diversity messaging. One possibility is that schools are worried about the legal, political, and social risks associated with diversity messaging. I will call this the practical explanation. Another possibility is that schools never actually cared that much about diversity; after *SFFA*, therefore, schools have reduced their diversity messaging because they view diversity messaging as costly to maintain and convenient to discontinue. I will call this the cynical explanation.

1. The Practical Explanation

An array of practical concerns may be motivating the decline in diversity messaging. First, schools are likely concerned both about liability and about the threat of litigation. Prior to *SFFA*, many schools' admissions programs considered individual applicants' race,[282] so unsurprisingly, we have seen changes both to law schools' admissions processes and to the materials that describe those processes.[283]

Concern for litigation also could explain why schools are revising their materials beyond what *SFFA* itself requires. Even though diversity statements are not prohibited by *SFFA*, and *SFFA* said nothing about either faculty hiring or DEI websites,

282. DeSilver, *supra* note 14 (noting that within their study of 123 colleges, 74% consider race and ethnicity, with 8% deeming it an important factor).

283. *See supra* Part II.A (detailing how diversity messaging has changed post-*SFFA* within the context of admission processes and application materials).

schools are likely concerned that strong statements in support of racial diversity might provide circumstantial evidence regarding their motivations or practices.[284] A school that has a long record of statements about desiring and fostering racial diversity is surely a more attractive litigation target than one that literally has no content on its DEI page.[285]

Such litigation may be divided loosely into three categories. First, a plaintiff might allege that a school straightforwardly violated *SFFA* by considering racial identity in its evaluation of individual applicants.[286] The threat of such litigation is not hypothetical: both Edward Blum, the architect of *SFFA*, and the conservative legal group America First Legal sent letters to schools threatening litigation if they did not comply with the Supreme Court's decision.[287] So a school that is concerned about

284. *Cf.* Salib & Krishnamurthi, *supra* note 13, at 133–36 (arguing that while universities will have to change how they talk about admissions, nothing will have to change regarding how universities actually admit applicants).

285. See, for example, the content-less page hosted at a link labeled "diversity-equity-belonging" in the url. BYU L. (Feb. 2, 2024), [https://web.archive.org/web/20240202193904/https://law.byu.edu/students/diversity-equity-belonging] (containing no content at any time recorded on the Internet Archive Wayback Machine).

286. This threat is more immediate for some schools than others. At one end of the spectrum, Students for Fair Admissions sued Yale University in 2021, but the case was stayed pending resolution of *Students for Fair Admissions v. President of Harvard College* after the Supreme Court granted cert in that case. *See* Order Granting Motion to Stay, Students for Fair Admissions, Inc. v. Yale Univ., No. 3:21-cv-00241 (D. Conn. May 13, 2021). After *Students for Fair Admissions v. President of Harvard College* was decided, Yale reached an agreement with Students for Fair Admissions and the parties agreed to dismiss the case. *See* Joint Stipulation of Voluntary Dismissal at 1, Students for Fair Admissions, Inc. v. Yale Univ., 3:21-cv-00241 (D. Conn. Sept. 7, 2023). However, all schools are almost certainly aware of the possibility of litigation. *See, e.g.*, Douglas Belkin, *Affirmative-Action Plaintiff Warns of Consequences if Schools Defy Supreme Court Ruling*, WALL ST. J. (July 13, 2023), https://www.wsj.com/articles/affirmative-action-plaintiff-warns-of-consequences-if-schools-defy-supreme-court-ruling-52865e04 [https://perma.cc/4242-WXDW].

287. *See* Belkin, *supra* note 286 ("The man behind the [*SFFA*] lawsuits . . . sent letters this week to 150 selective colleges and universities warning them not to ignore the court's ruling."); Karen Sloan, *Conservative Legal Group Threatens to Sue Law Schools Over Racial Preferences*, REUTERS (July 5, 2023), https://www.reuters.com/legal/government/conservative-legal-group-threatens-sue-law-schools-over-racial-preferences-2023-07-05 [https://perma.cc/JE46-8UQX] (noting that the conservative legal group America First Legal sent letters to "200 U.S. law schools" threatening litigation "if they extend any 'discriminatory preferences' based on race, gender or national origin").

this possibility might be particularly cautious about explicit references to race itself.[288] Such schools might modify their application materials to refer instead to diversity in general or might remove such references altogether.[289]

Second, plaintiffs might attempt to challenge admissions programs on the ground that they attempt to achieve racial diversity, even without taking individual applicants' race into account. A program susceptible to such a challenge might take the form of the Texas Top Ten Percent Law used to fill a majority of the class at the University of Texas: the program was motivated by a desire to achieve racial diversity but achieved that goal through race neutral means (admitting the top ten percent of each high school) rather than through use of racial classifications.[290] None of the justices in *Fisher II* concluded that the Top Ten Percent Law alone was unconstitutional,[291] but the implications of *SFFA* for such a program are unclear.

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288. *See supra* Table 2 (summarizing the changes in the usage of specific diversity messaging terms during the examination period).

289. *See supra* notes 185–92 and accompanying text (discussing the increase in revisions to diversity content of law school application materials post-*SFFA*, with a notable percentage of schools eliminating mentions of race and ethnicity).

290. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 373–74 (2016) (acknowledging the university's broad desire to achieve racial diversity through a facially race neutral, holistic-review process); *see also supra* notes 65–72 and accompanying text (discussing how Texas's Top Ten Percent Law did not violate the Equal Protection Clause and how affirmative action was buttressed by the diversity rationale). Despite the race-conscious motivation of these programs, scholars have argued that they should be upheld. *See, e.g.*, Eboni S. Nelson et al., *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2216–17 (2017) ("Some law schools may be able to abandon the use of race in their admissions and continue to yield a critical mass of racial diversity by using socioeconomic questions that align closely with the racial diversity they seek to achieve."); Yuvraj Joshi, *Racial Indirection*, 52 UC DAVIS L. REV. 2495, 2503–05 (2019) (describing how admission plans that use race neutral criteria have been deemed constitutional in the past).

291. *Fisher II*, 579 U.S. at 387–89 (upholding both the *Grutter*-style holistic review as well as the Texas Top Ten Percent Law); *id.* at 437 (Alito, J., dissenting) ("*What is not at stake* [in this case] is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups."); *see also* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1145 (2016) ("None of the justices who joined the majority opinion in *Fisher v. University of Texas* expressed any doubt that the 'Top Ten Percent plan,' which

Nonetheless, a school might be concerned about a lawsuit alleging that their admissions process unconstitutionally attempted to achieve racial diversity, even if their evaluation of any individual applicant does not take account of race. Post-*SFFA*, one example of such litigation is *Coalition for TJ v. Fairfax County School Board*,[292] in which an advocacy organization comprised of parents challenged the admissions scheme adopted by a highly selective magnet high school.[293] The magnet school allocated each middle school within its district a number of seats in the incoming freshman class equal to 1.5% of that school's eighth grade student population.[294] Then, within that middle school, each prospective student was evaluated on the basis of grade point average, a "portrait sheet" describing the applicant's skills, a problem solving essay, and a set of "experience factors."[295] After each school's allocated seats were filled, all remaining applicants competed under the same criteria for approximately 100 remaining seats.[296] The evaluation of applicants was literally race blind: as the concurrence emphasized, "[t]o ensure race does not impact an individual student's chance for admission, evaluators are not told the race or ethnicity of applicants they are considering. Evaluators are not even given applicant

was framed in race-neutral terms but plainly aimed at increasing racial diversity, was constitutional." (footnote omitted)).

292. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023).

293. *Id.* at 871–72 (noting how the plaintiff challenged the constitutionality of TJ's admission scheme, which aimed to broadly promote diversity within the high school); *see also* Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm., 89 F.4th 46, 56–58 (1st Cir. 2023) (holding that an admission scheme for three selective high schools that allocated admission based on grades and zip codes did not violate the Equal Protection Clause); Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ. (*AFEF II*), 617 F. Supp. 3d 358, 373 (D. Md. 2022) (rejecting a claim, made prior to the *SFFA* decision, that an admission plan for highly selective middle schools was motivated by discriminatory intent).

294. *Coal. for TJ*, 68 F.4th at 875 ("Under the Board's adopted policy, which was used to select TJ's class of 2025, each public middle school within TJ's participating school divisions is allocated a number of seats in the incoming freshman class equal to 1.5% of that school's eighth grade student population.").

295. *Id.* at 874–75. The experience factors included "the applicant's special education status, eligibility for free or reduced-price meals, status as an English-language learner, and attendance at a historically underrepresented public middle school." *Id.* at 874.

296. *Id.* at 875 (detailing that the approximate 100 remaining seats were evaluated under the same criteria regardless of their attending middle school, which included both private and home-school students).

names, lest they betray some hint about a student's race or ethnicity."[297]

The Fourth Circuit upheld the magnet school's admissions scheme in *Coalition for TJ*.[298] While the Supreme Court denied certiorari,[299] in what will surely serve as an invitation for future plaintiffs, Justices Alito and Thomas dissented from the denial and would have vacated the Fourth Circuit's reasoning.[300] So concern about a lawsuit similar to the one in *Coalition for TJ* might motivate schools not only to remove website content directly related to admissions, but also to remove any content that expresses a preference for racial diversity.[301] Even a statement expressing a generalized commitment to diversity or a desire for the law school to reflect the composition of the community might provide evidence that the school is attempting to engage in pursuit of racial diversity through race-neutral means. Even if the school believes it would ultimately prevail (as did the school in *Coalition for TJ* before the Fourth Circuit), a cautious administrator who is worried about the resources and publicity associated with litigation might conclude that the safest course is to remove all diversity messaging other than content that is so enervated as to be essentially meaningless.[302]

Third, some schools also may be concerned about lawsuits brought under state constitutional or statutory provisions that place restrictions on the use of race beyond those that *SFFA*

297. *Id.* at 889 (Heytens, J., concurring).

298. *Id.* at 887–88 (holding that in the context of higher education, promoting a broad spectrum of student diversity qualifies as a legitimate or compelling state interest, thereby deeming the admission scheme constitutional).

299. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023), *cert. denied*, 218 L. Ed. 2d 71 (2024).

300. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 218 L. Ed. 2d 71, 71 (2024) (Alito, J., dissenting) (denouncing the Fourth Circuit's "patently incorrect and dangerous understanding of what a plaintiff must show to prove intentional race discrimination").

301. In *Coalition for TJ*, the school's principal stated in June 2020 that "the TJ community did not reflect the racial composition" in the school district and that the school should adopt a curriculum to "prepar[e] TJ graduates for a truly diverse and culturally responsive world." *Coal. for TJ*, 68 F.4th at 873 (citation omitted).

302. *See, e.g.*, *supra* notes 1–7 and accompanying text (discussing how Yale opted to remove or alter much of its diversity messaging).

imposes.[303] In Florida, for example, race-conscious admissions in public colleges and universities have been prohibited by executive order since 1999.[304] But recently the state has taken more extreme measures to eliminate race-consciousness from public life. In May 2023, Governor Ron DeSantis signed a bill prohibiting public colleges and universities from spending state or federal money to promote, support, or maintain programs or campus activities that "advocate for" diversity, equity, and inclusion.[305] The law took effect on July 1, 2023, just two days after *SFFA* was decided.[306] While the only Florida public school in my dataset is the University of Florida, that school significantly changed its diversity messaging, deleting its entire DEI

303. Some states limit affirmative action in admissions, hiring, and government contracting. *See, e.g.*, CAL. CONST. art. I, § 31 (prohibiting discrimination in public employment, education, and contracting); ARIZ. CONST. art. II, § 36 (same); WASH. REV. CODE § 49.60.400 (2024) (same); NEB. CONST. art. I, § 30 (same); OKLA. CONST. art. II, § 36A (same); MICH. CONST. art. I, § 26 (same); N.H. REV. STAT. ANN. § 21-I:52 (2024) (prohibiting discrimination in "employment in the classified service"). In other states, various efforts to limit activities related to "DEI" provide additional restrictions. *See, e.g.*, Chronicle Staff, *DEI Legislation Tracker*, CHRON. HIGHER EDUC., https://www.chronicle.com/article/here-are-the-states-where-lawmakers-are-seeking-to-ban-colleges-dei-efforts [https://perma.cc/9UJZ-SU9V] (noting various anti-DEI legislation that has been passed across the US within the past year); David A. Lieb, *GOP States Targeting Diversity, Equity Efforts in Higher Ed*, ASSOCIATED PRESS (Apr. 17, 2023), https://apnews.com/article/diversity-equity-inclusion-legislation-7bd8d4d52aaaa9902dde59a257874686 [https://perma.cc/FUF7-ZUBZ] (detailing how Republican lawmakers in at least a dozen states have proposed more than thirty bills in 2023 to target DEI initiatives in higher education).

304. Fla. Exec. Order No. 99-281 (Nov. 9, 1999), https://lrl.texas.gov/scanned/archive/1999/5838.html [https://perma.cc/K3YR-PYNB] (prohibiting "racial and gender set-asides, preferences and quotas" in government employment, state contracting, or public higher education).

305. S.B. 266, 2023 Leg., 125th Sess. (Fla. 2023); *see also* Jaclyn Diaz, *Florida Gov. Ron DeSantis Signs a Bill Banning DEI Initiatives in Public Colleges*, NPR (May 15, 2023), https://www.npr.org/2023/05/15/1176210007/florida-ron-desantis-dei-ban-diversity [https://perma.cc/K2NU-VGEN] ("Florida Gov. Ron DeSantis signed a bill into law Monday banning the state's public colleges and universities from spending money on diversity, equity and inclusion programs.").

306. Fla. S.B. 266; *see also* Diaz, *supra* note 305 (noting that the bill goes into effect July 1, 2023).

page[307] and revising (although not eliminating) the way it referenced diversity in its application materials.[308]

The perilous legal landscape schools face after *SFFA* may explain the changes in their diversity messaging. These legal concerns are likely compounded by concerns about political or social fallout.

Political criticism may come from federal and state elected officials who are examining schools' statements related to affirmative action. Just a few days after *SFFA*, Vice President-elect J.D. Vance wrote a letter to ten prominent institutions of higher education characterizing their post-*SFFA* statements as "openly defiant and potentially unlawful," and further stated that the schools "expressed open hostility to the decision and seemed to announce an intention to circumvent it."[309] Vance warned schools that "[t]he United States Senate is prepared to use its full investigative powers to uncover circumvention, covert or otherwise, of the Supreme Court's ruling."[310] He then posed a series of questions, one of which directly implicated diversity messaging: "If you have publicly committed to an interest in 'diversity,' how will you ensure that your commitment to that value does not entail direct or indirect race-based preferences?"[311] While the formal consequences of Vance's letter are uncertain, the letter received significant media coverage.[312] As a result, the schools

307. *See supra* notes 263–67 and accompanying text (highlighting how the University of Florida deleted Dean Laura Rosenbury's message regarding their commitment of fighting against systemic racism); *see also supra* Figures 4–5 (noting how the University of Florida's diversity messaging has changed on their DEI homepage).

308. *See supra* note 180 and accompanying text (noting how the University of Florida eliminated its diversity statement in 2023).

309. Letter from J.D. Vance, U.S. Sen., to Christopher Eisgruber, President, Princeton Univ. & Lawrence Bacow, President, Harvard Univ. (July 6, 2023), https://www.vance.senate.gov/wp-content/uploads/2023/07/063023_Affirmative-Action-Letter-FINAL1.pdf [https://perma.cc/7J73-ELJB]; *see also* Rebecca Shabad, *GOP Senator Presses Colleges to Comply With Supreme Court Affirmative Action Ruling*, NBC NEWS (July 6, 2023), https://www.nbcnews.com/politics/congress/jd-vance-presses-schools-supreme-courts-affirmative-action-ruling-rcna92948 [https://perma.cc/9CSB-K3X7].

310. Vance, *supra* note 309.

311. *Id.*

312. Michelle N. Amponsah & Claire Yuan, *Senator J.D. Vance Accuses Harvard, Other Universities of Planning to Defy Supreme Court Decision on Affirmative Action*, HARV. CRIMSON (July 11, 2023), https://www.thecrimson.com/

he singled out were required to manage their responses, both to Vance himself and in the media.[313]

Finally, schools may be concerned about their diversity messaging attracting attention and criticism on social media. While I found no examples of specific schools' diversity messaging attracting significant attention on platforms like X, TikTok, or Facebook, social media has long provided a forum for students with a range of views on race to critique their own and other institutions.[314] And of course, there is always the possibility that a journalist, scholar, or other commentator will investigate a school's diversity messaging.[315] Even when such investigation is relatively sympathetic,[316] schools might prefer to avoid the attention.

2. The Cynical Explanation

Institutions may reasonably fear the legal, political, and social risks that the previous section describes, and these concerns could be the explanation for some schools' decrease in diversity messaging. Yet my data suggest that this explanation is incomplete.

Consider the cost-benefit analysis that a hypothetical school might undertake. Prior to *SFFA*, when diversity was a legally permissible rationale for affirmative action, diversity messaging was a convenient way for a school to signal a vague, positive sentiment toward people of color and other historically marginalized groups. True, some conservative constituencies expressed

article/2023/7/11/affirmative-action-vance [https://perma.cc/6JYZ-NVBG] (noting then-current responses from academic institutions to Vance's letter).

313. *See id.* (detailing how every university named in Vance's letter issued a statement that they would comply with the Court's ruling, with no indication that they would attempt to defy the ruling).

314. *See, e.g.*, Christian Peña, *How Social Media Is Helping Students of Color Speak Out About Racism on Campus*, PBS News (Sept. 8, 2020), https://www.pbs.org/newshour/education/how-social-media-is-helping-students-of-color-speak-out-about-racism-on-campus [https://perma.cc/25Z9-A68F] (describing student efforts to speak more about racism via social media).

315. *See, e.g.*, *supra* Part III.A (examining school diversity messaging behavior).

316. *See, e.g.*, *supra* Part III.A (discussing issues schools might face regarding diversity messaging).

distaste for diversity.[317] But schools could make a plausible case that at least some iterations of diversity included conservatives as well.[318] As a result, diversity messaging remained a relatively costless way to appease racial progressives without unduly triggering conservative stakeholders.[319]

But after *SFFA*, the Supreme Court has clearly communicated that achieving diversity no longer justifies the use of an individual applicant's race in admissions decisions.[320] *SFFA* therefore has two consequences for a hypothetical school. First, diversity messaging has become significantly more fraught because achieving diversity is no longer a constitutionally permissible justification for affirmative action. Second and relatedly, a school's lack of diversity messaging is now both more understandable and more excusable.

So, in the post-*SFFA* world, a cynic might suggest that some schools have diminished or discontinued their diversity messaging because racial diversity never mattered that much to them in the first place. For these schools, perhaps *SFFA* actually solves a problem. With the rise of the Black Lives Matter movement and the murder of George Floyd in 2020, students and other stakeholders increasingly pressured schools to do better when it came to racial justice.[321] Some schools responded with substantive measures; many more responded with diversity messaging.[322] But as time went on, some schools grew uncomfortable with the pushback against their 2020 diversity

317. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., concurring in part and dissenting in part) ("'[D]iversity,' for all of its devotees, is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue."); GLAZER, *supra* note 24, at 52–75 (criticizing diversity rationale for affirmative action).

318. *Cf.* Brief for Columbia University et al. as Amici Curiae app. at 2, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188007, app. at *2 ("A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer.").

319. *See supra* notes 78–103 and accompanying text.

320. *See supra* notes 135–54 and accompanying text (discussing the holding in *SFFA*).

321. *See, e.g.*, Emma Whitford, *Going Behind the Rhetoric*, INSIDE HIGHER ED (Aug. 4, 2021), https://www.insidehighered.com/news/2021/08/05/naspa-report-examines-statements-wake-george-floyds-murder [https://perma.cc/AX8Z-FEK6] (detailing the levels of criticism that schools faced for their responses and their reactions to said criticism).

322. *Id.* (describing how some students wanted more than a mere statement on the matter).

messaging or felt uneasy about the underlying racial justice principles.[323] For these schools, *SFFA* provides a convenient excuse. Even a mild legal threat might provide cover for a school in this camp to discontinue its diversity messaging. "We have to be mindful of the *SFFA* decision," an administrator might say with a rueful shrug, offering frustrated students and other stakeholders a convenient explanation for why the school is not sending a stronger message about racial diversity after *SFFA*.

Several circumstances suggest that the cynical explanation for the decline in diversity messaging might be the correct one. First, my data show that some schools did not change their diversity messaging at all, including several schools that face heightened legal and political risks.[324] Consider, for example, Berkeley and Michigan—both schools in states where affirmative action was prohibited via referendum years before *SFFA*.[325] Despite the state-level hostility to affirmative action these schools faced, both schools maintained strong and consistent diversity messaging at all times captured in my research.[326] Both schools explicitly referenced race in their application materials before and after *SFFA*.[327] Berkeley did not change its hiring announcement.[328] And neither school changed its DEI website at any time captured by my research; indeed, their websites' diversity messaging remains untouched as of November 2024.[329]

323. Lindsay McKenzie, *Words Matter for College Presidents, but So Will Actions*, INSIDE HIGHER ED (June 7, 2020), https://www.insidehighered.com/news/2020/06/08/searching-meaningful-response-college-leaders-killing-george-floyd [https://perma.cc/9G6C-QU73] (showing increased calls for action in the wake of George Floyd's murder).

324. *See infra* Appendix A (highlighting the various schools that did not change messaging at all).

325. *See* CAL. CONST. art. 1, § 31; MICH. CONST. art. I, § 26.

326. *See infra* Appendices A–C.

327. *See infra* Appendix A

328. *See infra* Appendix B. Michigan did not place a hiring announcement in the August Placement Bulletin in all three years and therefore was not included in my hiring data set. *See 2021 Placement Bulletin*, *supra* note 205; *2022 Placement Bulletin*, *supra* note 208; *2023 Placement Bulletin*, *supra* note 209.

329. *Racial Justice*, UC BERKELEY SCH. OF L., https://www.law.berkeley.edu/racial-justice [https://perma.cc/7ZR7-BSWD]; *Diversity, Equity, and Inclusion*, THE UNIV. OF MICH. L. SCH., https://michigan.law.umich.edu/student-life/diversity-equity-and-inclusion [https://perma.cc/ZS8Q-8PZM]. Both schools' DEI websites include updates such as upcoming events, recent faculty publications, and curricular offerings that do not change the overall diversity messaging of the website.

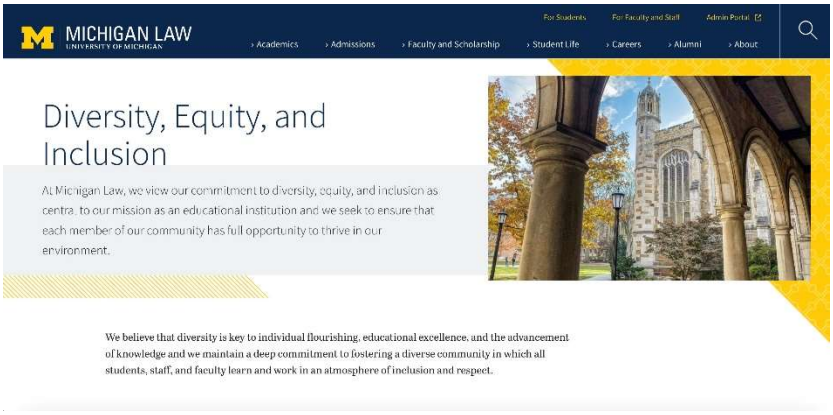
Further, both schools' websites are rich in content regarding racial justice and diversity. Berkeley's DEI homepage bears the text, "Combatting Bias: What We're Doing," features art created by a woman of color, and describes a wide array of racial justice initiatives, curricular offerings, and student affinity groups.[330] The first sentence of Michigan's homepage clearly affirms its commitment to diversity, equity, and inclusion, and the website also prominently highlights the school's pivotal role in defending affirmative action in the *Grutter* and *Gratz* cases.[331] Figures 14 and 15 depict the DEI homepages of Berkeley and Michigan.

Figure 14: Berkeley Law DEI Homepage, February 2024

330. *Racial Justice*, *supra* note 329 (showcasing the available events and opportunities to get involved with diversity initiatives).

331. *Diversity, Equity, and Inclusion*, *supra* note 329 ("The Law School's commitment to diversity was evident in the institution's role as defendants in lawsuits challenging the legality of admissions policies. Those lawsuits culminated with the landmark U.S. Supreme Court decisions *Gratz v. Bollinger* and *Grutter v. Bollinger*.").

Figure 15: Michigan Law DEI Homepage, February 2024



Berkeley and Michigan are confronting not only the same post-*SFFA* legal threats as other schools but also constitutional bans in their states.[332] Yet they have remained steadfast in their diversity messaging (and, judging by the concrete actions described on their websites, in their commitment to substantive racial justice as well).[333] Moreover, Berkeley and Michigan are far from alone: while my Article has shown a marked overall trend toward reducing diversity messaging, many schools left their materials untouched or even affirmed a stronger commitment to racial diversity post-*SFFA*.[334] The resilience of some schools in the face of legal, political, and social risks suggests that something other than these risks may have motivated the many schools that did make changes.

The breadth of some schools' revisions offers more support for the cynical explanation. As I have noted, few changes to diversity messaging are formally required by *SFFA*.[335] While schools may be justifiably worried that certain diversity messaging will invite litigation,[336] other revisions indicate an

332. *See* sources cited *supra* note 325 (illustrating the constitutional bans on DEI at the state level in California and Michigan).

333. *See supra* notes 326–31 and accompanying text (showcasing the continued commitment to DEI efforts through a lack of changes made post *SFFA*).

334. *See, e.g.*, *supra* Table 6 (showing that forty-six percent of schools made no changes to their DEI websites).

335. *See supra* note 284 and accompanying text.

336. *See supra* Part III.A.1.

extraordinarily cautious approach to diversity messaging.[337] For example, *SFFA* explicitly allows schools to give applicants the option of writing about race in their essays.[338] Nothing in the decision prohibits a school from employing a diversity statement prompt that specifically invites a discussion of racial diversity.[339] Indeed, nothing in *SFFA* itself would prohibit schools from *requiring* applicants to write a statement about how they would contribute to a diverse campus community, although in some states other legal mechanisms might prevent schools from requiring or requesting such statements.[340]

Likewise, in the context of faculty hiring and DEI websites, *SFFA* on its face changed nothing.[341] The decision did not speak about hiring, which in any event is controlled by precedent asserting remedial rather than diversity-based rationales.[342] Nothing in *SFFA* prohibits schools from expressing enthusiasm for hiring candidates who would diversify the faculty, signaling that candidates from diverse backgrounds are welcome, or inviting applicants to submit a statement describing how they would contribute to diversity.[343] DEI websites are similarly unaffected by *SFFA*.[344] Schools remain broadly able to express enthusiasm for racial diversity.

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337. *See infra* Appendix C (highlighting the amount and severity of some schools revisions).

338. Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141, 2176 (2023).

339. *See id.* (holding that these kinds of prompts are allowed but must focus on the individual's unique experiences and not their race).

340. *See id.* For some schools, mandatory diversity statements might be illegal for reasons beyond *SFFA*. Florida, North Carolina, North Dakota, and Texas have recently adopted laws banning diversity statements, the Idaho State Board of Education and Arizona Board of Regents have banned their use at public colleges and universities, and the University of Missouri system and University System of Georgia have also banned the practice. *See* Lu, *supra* note 120. At the federal level, a House bill introduced by Representative Dan Crenshaw proposes to withdraw federal funding from schools that require DEI statements. H.R. 6848, 118th Cong. (2023).

341. *See generally SFFA*, 143 S. Ct. 2141 (issuing no holding related to faculty hiring).

342. *See supra* notes 73–77 and accompanying text.

343. *Cf. supra* notes 201–03 and accompanying text. Again, the use of diversity statements might be limited by other legal mechanisms.

344. State measures could also affect the existence and content of DEI websites. *See, e.g.*, Megan Zahneis, *Diversity Offices, Statements, and Training Are Banned in Utah's Public Colleges*, CHRON. HIGHER EDUC. (Jan. 31, 2024),

A cautious observer might argue that schools' minimization of diversity messaging after *SFFA*, while not strictly necessary from a legal standpoint, is still the prudent choice. Even if expressing enthusiasm for diversity is legal, our cautious observer might say, doing so will increase schools' litigation exposure, particularly in the current climate of intense interest in schools' admissions procedures.[345]

But the cautious observer's argument simply revives our inquiry into the strength of schools' commitment to racial diversity. If a school is truly committed to pursuing racial diversity and is confident that its behavior is not illegal, then the mere threat of litigation should not deter the school from maintaining its clearly permissible diversity messaging. If a plaintiff brought a meritless claim against the school, the claim could be dismissed at the beginning of litigation.[346] The cost of filing a successful motion to dismiss on straightforward facts would be minimal, and for many schools their insurance would cover the costs. Negative publicity might ensue, but this is why schools have media relations personnel.[347] The fact that some schools are not willing to countenance even these minimal negative consequences suggests a weak commitment to racial diversity.

Moreover, it is uncertain whether the vast revisions to diversity messaging that schools have undertaken are actually good strategy.[348] Consider, again, a school that, prior to *SFFA*, invited applicants to write an optional statement discussing how they might contribute to diversity on campus. Such a statement is clearly permitted after *SFFA*, even if a student uses the essay as an opportunity to discuss the importance of their race-related experiences.[349] If the school maintains the optional statement

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https://www.chronicle.com/article/diversity-offices-statements-and-training-are-banned-in-utahs-public-colleges [https://perma.cc/LY7F-X2SR] (describing Utah ban on DEI offices or staff and noting pending bans in several states).

345. *See generally* Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141 (2023) (exposing schools to potential constitutional violation claims if they express their diversity messaging improperly).

346. Fed. R. Civ. P. 12(b)(6).

347. *Cf.* Whitford, *supra* note 321 (showing examples of schools' reactions to negative publicity).

348. *See infra* Appendix C (listing the number of revisions made by various schools with some making a substantial amount).

349. *See SFFA*, 143 S. Ct. at 2176 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of

after *SFFA*, it communicates that the statement was never used to incorporate racial identity as a factor in its decision-making.[350] But if the school eliminates the optional essay, it raises an inference that the essay was previously used to facilitate now-impermissible race-based decision-making. Further, revising a facially permissible essay also casts doubt on future iterations of the essay question. Suppose that a school eliminates a facially permissible essay ("How would you contribute to diversity on campus?") and replaces it with a differently worded, also facially permissible essay that is likely to elicit similar information ("How would you contribute to our campus community?"). The change suggests that the first essay prompt was code for something that is now impermissible and that by extension the second, replacement essay is as well.[351] In an environment of well-funded interests eager for a lawsuit, schools must be careful both to avoid engaging in impermissible behavior and to avoid *communicating* that they are engaging in impermissible behavior. Leaving facially innocuous diversity messaging unchanged may well be the better strategic choice.

I have suggested that minimizing legal risk is an incomplete explanation for schools' diversity messaging revisions. Some schools were steadfast in expressing commitment to racial justice even after *SFFA*;[352] most diversity messaging revisions were

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how race affected his or her life, be it through discrimination, inspiration, or otherwise.").

350. This is so even if the school acknowledges that it included race as a factor in its decision-making before *SFFA*. Using race as a factor requires only the demographic information that most schools continue to allow applicants to supply. The essay, the school could argue, was used as a tool for applicants to supply decision-relevant information about themselves other than the now-impermissible racial characteristic.

351. Scholars have recently examined how courts evaluate laws in light of their prior iterations. *See, e.g.*, Rebecca Aviel, *Second-Bite Lawmaking*, 100 N.C. L. REV. 947 (2022) (providing a trans-substantive account of successive lawmaking and its evaluation by the Supreme Court); W. Kerrel Murray, *Discriminatory Taint*, 135 HARV. L. REV. 1190, 1196 (2022) (advancing a framework in which subsequent iterations of a policy are evaluated by "the earlier policy's operation" and "markers of material continuity"). But most of the diversity messaging examined in this Article has not been declared unconstitutional or otherwise illegal. Thus, we have successive iterations only if schools voluntarily change their materials.

352. *See supra* notes 326–33 and accompanying text.

not required by *SFFA*;[353] and even as a purely strategic maneuver revisions may not make sense. So, the question remains: did some schools secretly welcome *SFFA* because it provided cover to dispense with their diversity messaging?

On this point I have no inside information. My research examines the diversity messaging that schools present to the world; it does not reveal whether the reason some schools abandoned their diversity messaging is that they were quietly ambivalent about the pursuit of racial diversity itself. But experience teaches that they might be.

B. TOWARD RACIAL JUSTICE

My research has demonstrated that many law schools have responded to *SFFA* with a reduction in diversity messaging,[354] for which I have hypothesized both practical and cynical explanations.[355] Readers may decide for themselves which explanation is more plausible, or whether a blend of the two is most likely.

Regardless of which explanation is the true one, this section offers a more hopeful possibility—one rooted, ironically, in the flimsiness of the diversity rationale itself. Because diversity was a "substanceless" concept from its inception,[356] a great deal of diversity messaging consists of nothing more than vague positivity about the idea of a lot of different people coming together.[357] So perhaps the death of the diversity rationale and the reduction in diversity messaging will ultimately come at relatively little cost to racial justice. Indeed, once untethered from the conceptual haziness of the diversity rationale, racial justice efforts may gain new life, form, and substance. I suggest three reasons this may be so.

First, the decline in diversity messaging may not matter because *messaging*, without more, has little effect on racial justice measures. For instance, I am aware of no evidence that diversity messaging influences students' selection of a law school to

353. *See generally SFFA*, 143 S. Ct. 2141 (prohibiting race-based admissions programs, but not requiring changes to websites or hiring practices).

354. *See infra* Appendices A–C (highlighting schools that reduced DEI messaging).

355. *See supra* Part III.A.

356. Lawrence, *supra* note 21, at 765.

357. *See supra* notes 78–107 and accompanying text.

attend.[358] Indeed, available data supports the idea that for most students other factors outweigh diversity. One survey found that location (74%) is the most important decision factor for law students, followed by financial aid (57%), school ranking (48%), cost of tuition and board (47%), and networking opportunities (39%).[359] Campus culture was selected by 34%—while this category might have included the perceived diversity and inclusivity of the campus, which might in turn have been affected by diversity messaging, these possibilities were not specifically captured by the survey.[360]

Recruitment of faculty from racially underrepresented groups similarly bears little connection to diversity messaging. In many instances, faculty candidates only receive one offer of employment and accept the offer they receive. If a candidate is so fortunate as to receive multiple offers, in my experience they are influenced by factors such as location, salary, and perceived prestige of the institution. Diversity messaging is mostly unrelated to these factors.[361] By contrast, I am aware of very few faculty members who are totally indifferent to salary amount. A school that wants to compete successfully to hire a candidate from an underrepresented racial group might better expend its

358. After affirmative action was banned in California in 1997, research documented a decline in the application rates of highly qualified Black and Hispanic applicants to the University of California system. *See SFFA*, 143 S. Ct. at 2260 (Sotomayor, J., dissenting) ("At the University of California, Berkeley . . . the percentage of Black students in the freshman class dropped from 6.32% in 1995 to 3.37% in 1998. . . . Latino representation similarly dropped from 15.57% to 7.28% during that period . . . ." (citation omitted)). But it is unclear that this was the result of any change in diversity *messaging*, as opposed to the highly salient passage of Proposition 209.

359. *2021 Law School Preparedness*, BLOOMBERG L., https://aboutblaw.com/1Ll?utm_source=ANT&utm_medium=ANP [https://perma.cc/8DUZ-XENT] (presenting the results of a survey of over 1000 law students, law faculty, law librarians, and practicing attorneys).

360. *See id.* (having no options for prompt responses that related to diversity messaging).

361. One might tell a causal story about diversity messaging making a difference around the margins—for example, by calling a candidate's attention to the lesser-known diversity of a particular geographical location—but I am not aware of any research supporting this connection, and my own sense is that candidates overwhelmingly weigh the factors I have described.

resources on salary and benefits rather than DEI website redesign.[362]

One might still argue that diversity messaging influences the overall campus climate for members of underrepresented racial groups. Again, I know of no empirical evidence to support the claim that—all else equal—a campus with robust diversity messaging is more welcoming than one with no diversity messaging. Relying on my own experience as a woman of color who has spent the past forty-five years navigating one predominantly white institution after another, and the past twenty navigating predominantly white law schools, I agree that it can be meaningful to hear a powerful person such as a law school dean or professor validate concerns about welcomeness and belonging. But my experience is also that such validation can be quickly negated by efforts to tidily whitewash a university's racist past, or by a lack of concrete representation on the school's faculty. To send the message that someone is welcome, diversity messaging is seldom as effective as *actual* diversity and robust racial justice measures.

Second, no evidence has shown that diversity messaging is inextricably linked to any substantive racial justice goals. For instance, diversity messaging is not intrinsically related to achieving either a racially diverse student body or a racially diverse faculty. The soaring rhetoric of DEI websites bears at most an attenuated link to racial justice measures on campus, and reduced diversity messaging therefore does not automatically presage a less racially diverse class of students or round of faculty hiring.

Indeed, the presence of diversity messaging never guaranteed any particular substantive result. The fact that a law school admissions committee requested a diversity essay in its application materials never meant that the committee would consider the essay behind the closed doors of an admissions committee meeting.[363] The same is true for a diversity statement requested

362. Indeed, one might hypothesize that faculty of color, who are more likely to take out loans to attend law school, may be more sensitive to salary than white faculty.

363. There is some anecdotal evidence that some students may be unsure whether discussing race on their applications will help or hurt them, but no systematic examination. *See, e.g.*, Julianne Hill, *Minority Law School Applicants Lean on Personal Statements Post-Harvard Decision*, A.B.A. J. (Nov. 30,

by a law school hiring committee. A law school that cares about admitting or hiring members of underrepresented racial groups surely will care about that cause regardless of whether they requested a diversity statement or a statement of "inclusive teaching practices" or nothing. While diversity messaging may shape conversations, it has no inherent relationship to the end goal of increased racial diversity.

Some schools will find permissible ways to bolster their enrollment of students of color within the parameters established by *SFFA*,[364] and as previously mentioned *SFFA* has little direct impact on faculty hiring.[365] It is possible that others may simply ignore *SFFA* and continue to factor race into their decision-making without saying so. Peter Salib and Guha Krishnamurthi suggest that the latter category of schools may face little in the way of legal liability due to the challenges of proving discriminatory intent,[366] strict justiciability requirements,[367] and demanding pleading standards.[368] They further offer "legal and normative arguments that colleges could use to justify—even if only to themselves—defiance of the holding in *SFFA*."[369] Like Salib and Krishnamurthi, I take no position on whether schools should flout the commands of *SFFA*; the point is simply that

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2023), https://www.abajournal.com/web/article/minority-law-school-applicants-lean-on-personal-statements-post-harvard-decision [https://perma.cc/2CTP-UUJM] (documenting one student's reaction to the uncertainty following the *SFFA* ruling).

364. *See, e.g.*, Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 383 (2016) (describing Texas' Top Ten Percent Plan and its efficacy); Salib & Krishnamurthi, *supra* note 13, at 141–44 (describing conflicting information regarding enrollment of racially underrepresented students at California and Michigan schools after each state banned affirmative action).

365. *See supra* notes 129–49 and accompanying text (explaining that *SFFA* only impacts higher education admissions programs).

366. *See* Salib & Krishnamurthi, *supra* note 13, at 135–38.

367. Under *Clapper v. Amnesty International USA*, for example, it will be challenging for plaintiffs to demonstrate with the requisite degree of certainty that they were harmed by a school's admissions policies. 568 U.S. 398 (2013).

368. Ashcroft v. Iqbal, 556 U.S. 662 (2009) (establishing plausibility pleading standard). Salib and Krishnamurthi assume, however, that all members of a committee that is engaged in unspoken use of race as a factor in evaluation of applications will be aligned in their race-conscious goals; in reality, it seems possible that some committees will be challenged by internal whistleblowing (or the possibility of it).

369. Salib & Krishnamurthi, *supra* note 13, at 149.

noncompliance is possible and arguably justifiable.[370] In any event, the project of maintaining a racially diverse student body—whether through permissible or prohibited means—bears little relationship to diversity messaging.

This observation leads to my third and final point. Perhaps the decline in diversity messaging could free resources for some schools to talk less and do more. Scholars have long criticized diversity messaging as a way for predominantly white institutions to broadcast how impressive their diversity efforts are without actually producing much in the way of results.[371]

So perhaps the effort that schools have stopped channeling into designing DEI websites, staging racially diverse photos, and crafting *just* the right language for their hiring announcements may be profitably redirected. No longer able to lean on their diversity messaging, schools may have to come up with something more substantive. Both pre-*SFFA* experience and post-*SFFA* discourse have yielded a number of encouraging alternatives that can foster racial diversity and broader racial justice aims. That is, the downfall of the diversity rationale can provide not only an obstacle, but also an opportunity.

One possibility is that schools can create substantive programs that attract students and faculty of color and contribute to racial justice from within an educational institution. A leading example is UCLA Law School's Critical Race Studies program.[372] While affirmative action has been prohibited at public law schools in California since 1998,[373] the Critical Race Studies program serves as a magnet for renowned faculty and talented students who are interested in critical race theory.[374] Many, though not all, of these faculty and students are people of color.[375] The

370. *See id.*

371. *See, e.g.*, LEONG, *supra* note 123, at 13–40 (cataloging examples); NEWKIRK, *supra* note 108, at 200 (describing lack of racial diversity within many industries "despite decades of public pledges and the development of pricy apparatuses").

372. *See Critical Race Studies*, UCLA SCH. OF L., https://law.ucla.edu/academics/centers/critical-race-studies [https://perma.cc/LVC8-XUXN].

373. CAL. CONST. art. 1, § 31(a) ("The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

374. *See generally Critical Race Studies*, *supra* note 372 (laying out the foundations and objectives of the program).

375. *See generally id.*

Critical Race Studies program's rich curricular offerings and consistent programming also anchor the experiences of many students and provide a community centered around racial justice.[376] Other schools could develop similar programs focused on various aspects of racial justice in which there is a deep pool of talented faculty of color with relevant expertise and a large number of interested students.[377]

On the hiring front, schools could engage in "cluster hir[ing]" relating to racial justice, in which several positions are designated for faculty with expertise in issues related to anti-racism.[378] Such hiring builds a core group of faculty with race-related research interests and expertise.[379] It also enhances community by inviting collaboration among departments around campus on race-related issues and by creating a cohort of several faculty with related expertise.[380] From a messaging perspective, cluster hiring is particularly desirable because the signal *is* the substance. Rather than claiming to desire racial diversity in vague language on its DEI website, a school communicates that expertise in race-related issues is valuable and important by allocating money, time, and other institutional resources.

A final substantive measure involves financial support for students from underrepresented racial groups and students who plan to engage in racial justice work. Prior to *SFFA*, courts struck down financial aid that limited eligibility to certain racial groups,[381] but subsequent guidance from the Office of Civil

376. *See generally id.*

377. *See, e.g.*, *Center for the Study of Race and Law*, UNIV. OF VA. SCH. OF L., https://www.law.virginia.edu/academics/program/center-study-race-and-law [https://perma.cc/6QXN-PX4E] (showcasing UVA's attempts to study racial issues and the law); *Thurgood Marshall Civil Rights Center*, HOWARD UNIV. SCH. OF L., https://thurgoodmarshallcenter.howard.edu [https://perma.cc/M4J9-D6HS] (describing the Thurgood Marshall Civil Rights Center and its programming).

378. *See, e.g.*, Lauren Love, *Anti-Racism Faculty Hiring Moves Forward*, UNIV. REC. (Mar. 22, 2021), https://record.umich.edu/articles/anti-racism-faculty-hiring-moves-forward [https://perma.cc/SQ2K-4XV4] (describing a plan to add at least twenty tenured and tenure track faculty with expertise in "racial inequality and structural racism").

379. *See id.* (mentioning the selection criteria in these types of hirings).

380. *See id.* (describing the "collaborative" process facilitated by this practice).

381. *See, e.g.*, Podberesky v. Kirwan, 38 F.3d 147, 161–62 (4th Cir. 1994) (striking down a merit-based scholarship program at University of Maryland

Rights permitted financial aid that is awarded "at least in part, on the basis of race or national origin."[382] The guidelines establish principles for distributing aid; one states that race may be considered as a plus factor, along with other factors, in distributing aid if necessary to further an institution's interest in diversity.[383] Whether financial aid still may permissibly take into account an applicant's racial identity is uncertain after *SFFA*. But even if aid programs may not consider individual racial identity, schools may still designate funding for individuals who want to do racial justice work.[384]

What these measures require in common is money and resolve, which will serve as a test for institutions who have long positioned themselves as stakeholders in racial justice. Implementation will take clear vision and sharpened priorities, both by powerful business entities and by higher education administrators. The large corporations and law firms that have long messaged their commitment to diversity in amicus briefs[385] and DEI websites[386] should consider themselves morally committed to invest in the educational institutions that educate their labor force. And many schools will need to demonstrate a much

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for which only African-American students are eligible); Flanagan v. President of Georgetown Coll., 417 F. Supp. 377, 385 (D.D.C. 1976) (striking down scholarship program that reserved 60% of scholarship funds for minority students who were less than 11% of the student body).

382. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8,756, 8,756 (Feb. 23, 1994).

383. *Id.* at 8,757. For a comprehensive discussion, see Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851 (2010).

384. *See, e.g.*, *Racial Justice Fellowships*, COLUMBIA L. SCH., https://www.law.columbia.edu/community-life/diversity-equity-and-inclusion/racial-justice-fellowships [https://perma.cc/DLF8-XJZJ] (listing scholarships providing financial assistance during 3L year "to facilitate students' pursuit of careers in racial justice").

385. *See, e.g.*, Brief for Major American Business Enterprises as Amici Curiae Supporting Respondents at 4, Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707) (exemplifying a brief on behalf of sixty-nine major companies arguing that "a diverse university environment" leads to "increased profits, and business success").

386. *Cf.* Kira Hudson Banks & Richard Harvey, *Is Your Company Actually Fighting Racism, or Just Talking About It?*, HARV. BUS. REV. (June 11, 2020), https://hbr.org/2020/06/is-your-company-actually-fighting-racism-or-just-talking-about-it [https://perma.cc/L6TZ-EYPT] (identifying frustrations with messaging that is not backed up by substantive actions).

steelier response to public criticism than we have seen thus far. But if racial justice is to flourish after *SFFA*, there may be little other option.

CONCLUSION

This Article has demonstrated a significant decrease in diversity messaging after *SFFA*. But this shift need not stifle racial justice efforts. Indeed, the move away from diversity messaging liberates money, time, energy, and goodwill that could be better directed toward substantive reforms advancing racial equity. *SFFA* is the law; it dictates the shape of schools' admissions processes. But it still remains within schools' power to throw their resolve behind expansive and transformative racial justice measures. Time will tell whether they do.

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