Race, Class, and Higher Education: A Response to Ruth Colker

ANTHONY J. GAUGHAN*

TABLE OF CONTENTS

I. INTRODUCTION

It is an honor to write this brief response to Ruth Colker's article, *The Tyranny of Personhood*. Professor Colker is one of the most distinguished constitutional law scholars of her generation. Her work has deepened, broadened, and enriched our understanding of both constitutional law and disability justice. Only a select group of legal academics can boast of a scholarly influence comparable to that of Professor Colker over the last forty years.

The breadth of Professor Colker's scholarship is awe-inspiring. She has authored sixteen books and more than fifty articles.[1] Her books have won national awards and have been published by leading publishers and top law journals.[2] But Professor Colker's scholarly impact is even more impressive than her extraordinary productivity. Her scholarship has been cited by courts around the country, including twice by the United States Supreme Court.[3] Fellow scholars have cited her books and articles more than 5,000 times.[4]

* Visiting Professor of Law, University of Iowa College of Law; Kern Family Chair in Law and Professor of Law, Drake University Law School; Senior Fellow, Election Law Program, The Ohio State University Moritz College of Law.

[1] *Ruth Colker Biography*, THE OHIO STATE UNIV. MORITZ COLL. OF L., https://moritzlaw.osu.edu/ruth-colker-ba-jd [https://perma.cc/E5Y8-TYPR].

[2] *Id.*

[3] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 614 (2023) (Sotomayor, J., concurring); Tennessee v. Lane, 541 U.S. 509, 526 n.15 (2004).

[4] *See* Ruth Colker, GOOGLE SCHOLAR, https://scholar.google.com/citations?user=vutgaKgAAAAJ&hl=en [https://perma.cc/24MD-JZ22].

II. STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT & FELLOWS OF HARVARD COLLEGE

Professor Colker's latest article, *The Tyranny of Personhood*,[5] is an excellent example of why she is such an influential scholar. *The Tyranny of Personhood* challenges the Roberts Court's affirmative action jurisprudence on the grounds that it is inconsistent with both originalist methodology and the Court's approach to disability justice. Professor Colker focuses on the Court's 2023 ruling in *Students for Fair Admissions v. Presidents and Fellows of Harvard College* ("*SFFA*").[6] As she explains in her introduction, *The Tyranny of Personhood* critiques the *SFFA* decision "by reviewing the historical record and offering a disability justice perspective to show how the Court's purported methodology cannot justify its wildly different treatment of race and disability equality."[7]

In *SFFA*, the Supreme Court held that race-based college admissions policies violated the Fourteenth Amendment's Equal Protection Clause.[8] The ruling reversed the 2003 decision in *Grutter v. Bollinger* in which the Court had held that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[9] Writing for the Court in *SFFA*, Chief Justice Roberts declared that:

> [W]e have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[10]

The Court's analysis focused on its assertion that the Equal Protection Clause "applies without regard to any differences of race, of color, or of nationality" and "is universal in [its] application."[11] The Court invoked history in support of its interpretation of the amendment. In *SFFA*, Chief Justice Roberts approvingly quoted President James Garfield for the assertion that the Fourteenth Amendment was intended to "hold over every American citizen, without regard to color, the protecting shield of law."[12]

---

[5] Ruth Colker, *Tyranny of Personhood*, 86 OHIO ST. L.J. (forthcoming Spring 2025).

[6] Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 600 U.S. 181 (2023).

[7] Colker, *supra* note 5 (manuscript at 2).

[8] *Students for Fair Admissions*, 600 U.S. at 213.

[9] Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[10] *Students for Fair Admissions*, 600 U.S. at 213.

[11] *Id.* at 206.

[12] *Id.* at 202.

The Court's reliance on history created a challenge for it. Nineteenth-century America was anything but equal. As the historian Eric Foner has explained, "[r]acism was pervasive in mid-nineteenth-century America and at both the regional and national levels constituted a powerful barrier to change."[13] Thus, at the time of the Fourteenth Amendment's adoption, the white majority in the United States did not interpret the Equal Protection Clause as prohibiting race-based policies. In recognition of that undeniable fact, Roberts conceded that the country "quickly failed to live up to the [Equal Protection] Clause's core commitments."[14] He added that "[t]his Court played its own role in that ignoble history" of racial segregation.[15] Roberts lamented that the Court's ruling in the 1896 case of *Plessy v. Ferguson* cleared the way for "the separate but equal regime that would come to deface much of America."[16]

Nevertheless, Roberts insisted that the Equal Protection Clause's original meaning barred the government from engaging in race-based policies even when adopted in good faith for benign purposes. In his view, the historical record did not undermine the Court's conclusion that the "core purpose" of the Equal Protection Clause was "do[ing] away with all governmentally imposed discrimination based on race."[17] Moreover, he contended that "[e]liminating racial discrimination means eliminating all of it," regardless of motivation.[18]

The Chief Justice's sweeping language created a second analytical challenge for the Court. Although Roberts declared that the Equal Protection Clause required "eliminating all" racial discrimination, the Supreme Court has long permitted race-conscious policies for benign purposes. For example, as Roberts himself conceded, the Court has permitted legislatures to pursue policies that remediated past discrimination and prevented race riots in prisons.[19] But he insisted that such examples were exceptions that proved the rule. As he explained:

> Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." . . . That principle cannot be overridden except in the most extraordinary case.[20]

---

[13] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at xxv (1988).

[14] *Students for Fair Admissions*, 600 U.S. at 202–03.

[15] *Id.* at 203.

[16] *Id.*

[17] *Id.* at 206.

[18] *Id.*

[19] *Id.* at 207.

[20] *Students for Fair Admissions*, 600 U.S. at 208 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

In the Court's view, the race-based admissions policies adopted by Harvard University and the University of North Carolina ("UNC") failed to qualify for exceptional treatment under the Equal Protection Clause. Writing for the Court, the Chief Justice asserted that:

> [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. We have never permitted admissions programs to work in that way, and we will not do so today.[21]

III. THE TYRANNY OF PERSONHOOD

In the *Tyranny of Personhood*, Professor Colker critiques the *SFFA* decision as bad history and poor legal reasoning. In her article, she makes a compelling case that the Fourteenth Amendment arose from a benign, race-conscious effort by northern Republicans to prevent the subordination of African Americans in the post-Civil War era. As she explains, the Fourteenth Amendment's "central purpose" was "to eradicate the effects of U.S. slavery."[22] Consequently, in her view, the Fourteenth Amendment's use of the word "'person' should not be understood as an attempt to denigrate group-based conceptions of equality."[23] Congress, she points out, enacted civil rights legislation in the 1860s and 1870s for the express purpose of extending "greater rights to racial minorities so that their rights would be similar to those 'enjoyed by white citizens.'"[24] She asserts that the Court in *SFFA* willfully ignored the undeniable historical fact that the Civil War Amendments sought "to create affirmative assistance for the newly freed slaves."[25] Consequently, she concludes, the Court reached an "overly individualized understanding of the Fourteenth Amendment."[26]

Professor Colker makes an equally persuasive case that the Court's hostility to race-based affirmative action is inconsistent with its endorsement of disability-based affirmative action. She notes that "[w]hile the Court's framing of disability issues is far from perfect, it does reflect a recognition that the Equal Protection Clause can protect 'persons' as individuals while also recognizing their history of subordination by society."[27] Indeed, the Supreme Court has permitted group-based statutory protections in the context of persons with intellectual disabilities.[28] In *City of Cleburne v. Cleburne Living Center*, for

---

[21] *Id.* at 230.
[22] Colker, *supra* note 5 (manuscript at 3).
[23] *Id.* at 20.
[24] *Id.* at 22.
[25] *Id.* at 29.
[26] *Id.*
[27] *Id.* at 37.
[28] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985).

example, the Court invalidated a zoning ordinance that discriminated against housing for intellectually disabled persons.[29] But the Court pointedly noted that:

> [T]he distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.[30]

Professor Colker emphasizes that "*City of Cleburne* is far from a perfect decision because it rests on stereotypes about people with intellectual disabilities."[31] But she rightly contends that the case remains important because it "makes . . . clear that Congress and the states may engage in affirmative action with respect to people with disabilities."[32] As she points out, *City of Cleburne*:

> [A]ffirmed the existing affirmative measures such as federal nondiscrimination law and special education laws. While it overturned a city ordinance that was based in hostility and stereotypes towards people with intellectual disabilities, it also made clear that cities and states could enact affirmative measures on behalf of people with disabilities.[33]

The upshot, she explains, is that "[t]he *SFFA* majority rejects the ability of courts to distinguish between benign and invidious uses of race, but the courts have long been able to distinguish between benign and invidious uses of disability."[34] She concludes that the Justices "consider race and disability to be in separate silos and never consider how the jurisprudence from the one field could influence the other."[35]

The Tyranny of Personhood is a major contribution to our understanding of the inconsistencies in the Roberts Court's equal protection jurisprudence. But disability justice cases are not the only line of parallel cases that sit uneasily next to the Supreme Court's *SFFA* ruling. The Court's deferential approach to the military's affirmative action programs provides another important example.

IV. THE MILITARY'S APPROACH TO RACIAL DIVERSITY

The Roberts Court has acknowledged that it takes a different approach to military educational institutions than to their civilian counterparts. For example,

---

[29] *Id.* at 435.
[30] *Id.* at 443.
[31] Colker, *supra* note 5 (manuscript at 38).
[32] *Id.*
[33] *Id.*
[34] *Id.* (manuscript at 39).
[35] *Id.* (manuscript at 36).

in his *SFFA* opinion, Chief Justice Roberts stressed that the Court's ruling did not apply to the military academies. In a footnote, he explained:

> The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.[36]

The footnote was noteworthy because it showed the Court's openness to the idea that the military academies may have "distinct interests" that justify race-based admissions systems. The Justices might soon need to address that issue in more than a footnote. In December 2024, a federal judge in Maryland ruled that the Naval Academy's race-based admissions policies are constitutionally permissible.[37] After a nine-day bench trial, the court concluded that the Academy's race-conscious admissions program "survives strict scrutiny because the Naval Academy has established a compelling national security interest in a diverse officer corps in the Navy and Marine Corps."[38] As the judge explained, the Naval Academy considered race in admissions decisions to ensure that the officer corps represented both "the country it protects" and the enlisted personnel that "it leads."[39] The military has long viewed racial diversity in the officer corps as a national security priority. Accordingly, the judge ruled that "[t]he Academy has proven that this national security interest is indeed measurable and that its admissions program is narrowly tailored to meet that interest."[40] The judge added that courts must defer "to the executive branch with respect to military personnel decisions" because "under Article II of the Constitution, the President of the United States, not any federal judge," ultimately makes such decisions.[41]

A New York federal judge reached a similar conclusion in a case involving admissions policies at the United States Military Academy at West Point.[42] In denying the plaintiff's request to enjoin West Point's race-conscious admissions process, the judge emphasized the distinction between civilian and military educational institutions.[43] The judge asserted that the pro-diversity arguments rejected by the Supreme Court with regard to civilian universities "may in fact

---

[36] *Students for Fair Admissions*, 600 U.S. at 213 n.4.

[37] Students for Fair Admissions v. U.S. Naval Acad., No. 23-2699, 2024 WL 5003510, at *2 (D. Md. Dec. 6, 2024).

[38] *Id.* at *3.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See* Students for Fair Admissions v. U.S. Mil. Acad. at West Point, 709 F. Supp. 3d 118 (S.D.N.Y. 2024).

[43] *Id.* at 134–35.

be compelling when raised in the context of West Point and national security interests."[44]

Both the Annapolis and West Point cases reflect the judiciary's deferential approach to the military. In a 2008 case, for example, the Supreme Court instructed lower courts to give "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[45] The Justices have defined "professional military judgments" to include the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force."[46] The Justices have also emphasized that "in the area of military affairs . . . . the Constitution itself requires such deference."[47]

Not surprisingly, therefore, the Supreme Court has been highly solicitous of the military academies' admissions policies. For example, the Court in *Grutter* emphasized that military leaders viewed a "highly qualified, racially diverse officer corps" as "essential to the military's ability to fulfill its principle mission to provide national security."[48] The Justices thus put great weight on the military's desire to "train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting."[49] In fact, the *Grutter* Court saw the military's endorsement of affirmative action as a compelling argument in favor of benign, race-conscious admissions policies at civilian educational institutions. Writing for the Court in *Grutter*, Justice Sandra Day O'Connor concluded that "[w]e agree that it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."[50]

But in *SFFA*, the Court refused to show the same deference to civilian educators that it shows for military educators. In her dissenting opinion, Justice Sotomayor contended that the *SFFA* court's exemption of military academies "only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions."[51] She further observed that "[t]he majority recognizes the compelling need for diversity in the military and the national security implications at stake, but it ends race-conscious college admissions at civilian universities implicating those interests anyway."[52]

Nevertheless, Sotomayor agreed with the Court's long-standing practice of deferring to the military's judgment. As she explained, "[t]op former military

---

[44] *Id.*

[45] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008).

[46] Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[47] Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[48] Grutter v. Bollinger, 539 U.S. 306, 331 (2003).

[49] *Id.*

[50] *Id.*

[51] Students for Fair Admissions v. Presidents & Fellows of Harvard Coll., 600 U.S. 181, 356 (2023) (Sotomayor, J., dissenting).

[52] *Id.* at 380.

leaders agree" that in their "professional judgment, the status quo—which permits service academies and civilian universities to consider racial diversity as one factor among many in their admissions practices—is essential to the continued vitality of the U.S. military."[53] She further warned that a lack of diversity in the officer corps could lead to "perceptions of racial/ethnic minorities serving as 'cannon fodder' for white military leaders."[54] She thus concluded that "lessons from decades of battlefield experience" supported the "longstanding military judgment" that a diverse officer corps was "essential" for the United States military to succeed in an "increasingly complex global security environment."[55]

If the Roberts Court upholds race-conscious admissions policies at the service academies, it will further underscore Professor Colker's argument that the Court has not followed a consistent path in equal protection cases. It will also clearly suggest that the Supreme Court views military education as more important than civilian higher education. But the Court has never adequately explained why racial diversity in the military is more worthy of protection than racial diversity in civilian institutions.

V. CLASS-BASED ADMISSIONS

So where does this leave higher education? Early evidence suggests that *SFFA* may have a major impact on elite institutions. In the fall of 2024, Harvard Law School reported to the American Bar Association a decline of over 50% in the number of first-year Black law students it enrolled, resulting in the smallest number of Black law students at Harvard since the 1960s.[56] Harvard also saw a 39% decline in the number of Hispanic law students.[57] However, at least thus far, there has not been an overall decline in the percentage of enrolled students of color in higher education. For example, the number of Black law students nationwide increased to 3,060 in 2024 from 2,969 in 2023, the year of the *SFFA* decision.[58] In fact, the overall percentage of *white* undergraduate students is declining nationwide.[59] In the fall of 2024, freshman enrollment rates increased

[53] *Id.* at 379.

[54] *Id.* at 379–80.

[55] *Id.* at 380.

[56] Stephanie Saul & Anemona Hartocollis, *Black Student Enrollment at Harvard Law Drops by More Than Half*, N.Y. TIMES (Dec. 16, 2024), https://www.nytimes.com/2024/12/16/us/harvard-law-black-students-enrollment-decline.html.

[57] *Id.*

[58] *Id.*

[59] Lee Gardner, *Affluent White Students Are Skipping College, and No One Is Sure Why*, CHRON. HIGHER EDUC. (Dec. 3, 2024), https://www.chronicle.com/article/affluent-white-students-are-skipping-college-and-no-one-is-sure-why?utm_source.

much faster among Black, Hispanic, and Asian students than among white students.[60]

Lost amid the debate over race-conscious admissions is the fact that elite private institutions have long discriminated against students from lower-income families of all racial backgrounds. For instance, a November 2023 National Bureau of Economic Research ("NBER") study by scholars at Harvard and Brown found that highly selective private colleges "currently admit students from high-income families at substantially higher rates than students from lower-income families with comparable academic credentials."[61] The study's authors concluded that elite colleges "perpetuate privilege across generations."[62] Likewise, a November 2024 NBER study found that the representation of lower-income students at elite colleges has not significantly increased since World War II.[63]

The authors concluded that "colleges today are still heavily segregated on the basis of parental income, with most students at elite colleges coming from high-income families."[64] The unseemly reality is that financial considerations encourage elite colleges and universities to draw most of their student body from high-income families. For example, according to a recent report by the *Wall Street Journal*, a pending lawsuit against several elite universities has revealed a systematic pattern of college admissions officials "bowing to financial pressures to admit wealthy students over potentially more qualified candidates."[65]

The pro-wealth bias is reflected in higher education's obsession with endowment income. In recent decades, elite colleges and universities have gradually morphed into tax-free investment platforms. Harvard is the leading case in point. A 2018 study by two Brookings Institute scholars found that "Harvard and other elite schools' endowments pay more in management fees than they pay out in scholarships."[66] The authors further observed that "[m]ost

---

[60] *Current Term Enrollment Estimates: Fall 2024*, *Tab 3 ("Freshmen")*, NAT'L STUDENT CLEARINGHOUSE RSCH. CTR. (Jan. 23, 2025), https://nscresearchcenter.org/current-term-enrollment-estimates/ [https://perma.cc/QQT8-X8S3].

[61] Raj Chetty, David Deming & John Friedman, *Diversifying Society's Leaders? The Determinants and Causal Effects of Admission to Highly Selective Private Colleges* 52 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31492, 2023).

[62] *Id.*

[63] Ran Abramitzky, Jennifer A. Kowalski, Santiago Pérez & Joseph Price, *The G.I. Bill, Standardized Testing, and Socioeconomic Origins of the U.S. Educational Elite over a Century* 3 (Nat'l Bureau of Rsch., Working Paper No. 33164, 2024).

[64] *Id.* at 2.

[65] Douglas Belkin, *Lawsuit Reveals How Colleges Really Talk About Rich Applicants*, WALL ST. J. (Dec. 17, 2024), https://www.wsj.com/us-news/education/college-financial-aid-lawsuit-rich-students-families-c1a3a41c?st=rFHMwM&reflink=article_email_share.

[66] Anne Klein & Richard V. Reeves, *New College Endowment Tax Won't Help Low-Income Students, Here's How It* Could, BROOKINGS (Feb. 22, 2018), https://www.brookings.edu/articles/new-college-endowment-tax-wont-help-low-income-students-heres-how-it-could/ [https://perma.cc/P59T-FTQT].

people think of Harvard University as an educational institution. But from a distance it looks worryingly like a large hedge fund, operating a small university on the side in order to secure non-profit status."[67]

Harvard's non-profit status looks even more questionable with the passage of time. In 2018, Harvard's endowment was $37 billion.[68] In 2024, Harvard's endowment exceeded $53 billion, an astounding amount for a university that enrolls a total of about 25,000 students.[69]

In the meantime, the cost of higher education has skyrocketed. In 2024, student loan borrowing in the United States reached $1.6 trillion.[70] The 2024 data reflected a 42% increase in student debt in just ten years.[71] Disenchantment with the quality of college education has also risen sharply. A Pew Research Center study in 2024 found that 35% of young college graduates with student loans to pay off do not believe their college degree was worth the cost.[72]

Not coincidentally, public confidence in higher education has declined across all demographic groups. According to the Gallup Poll, the percentage of Americans reporting "a great deal" or "quite a lot" of confidence in higher education fell from 57% in 2015 to only 36% in 2023.[73] The decline extends across the partisan and ideological spectrum.[74] Demographic data indicates that even more trouble could be in store for higher education. According to the U.S. Census Bureau, the population of 18-year-olds will peak in 2025 and then decline for years and perhaps decades afterwards.[75]

The *SFFA* decision thus comes at an inflection point for higher education. Although the decision will lead to major institutional changes and years of follow-on litigation, it also offers historic opportunities for rethinking

---

[67] *Id.*

[68] *Id.*

[69] Sidney K. Lee & Thomas J. Mete, *Harvard Endowment Jumps to $53.2 Billion, Delivers 9.6% Returns in 2024*, HARV. CRIMSON (Oct. 18, 2024), https://www.thecrimson.com/article/2024/10/18/harvard-endowment-grows-in-2024/ [https://perma.cc/T5ZZ-C5LN]; *The People of Harvard*, HARV. UNIV., https://www.harvard.edu/about/ [https://perma.cc/D2MZ-CQES].

[70] Richard Fry & Anthony Cilluffo, *5 Facts About Student Loans*, PEW RSCH. CTR. (Sept. 18, 2024), https://www.pewresearch.org/short-reads/2024/09/18/facts-about-student-loans/ [https://perma.cc/9U6M-FKW5].

[71] *Id.*

[72] *Id.*

[73] Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLUP, (July 11, 2023), https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx [https://perma.cc/N8LU-CSMX].

[74] *Id.*

[75] *See* Dan Bauman, *Colleges Were Already Bracing for an 'Enrollment Cliff.' Now There Might Be a Second One.*, CHRON. HIGHER EDUC. (Feb. 7, 2024), https://www.chronicle.com/article/colleges-were-already-bracing-for-an-enrollment-cliff-now-there-might-be-a-second-one. *See also* Jennifer A. Kingson, *Schools are Bracing for the Looming "Enrollment Cliff"*, AXIOS (July 3, 2024), https://www.axios.com/2024/07/03/education-enrollment-cliff-schools [https://perma.cc/D2N3-YT8L].

admissions. With race-conscious policies no longer lawful, admissions offices should focus on increasing enrollment of working-class students of all racial backgrounds. Some institutions have made at least modest gestures in that direction. For example, the University of Wisconsin–Madison provides debt-free financing opportunities for lower-income students.[76] But to truly open the doors of opportunity to lower-income students, admissions offices must go far beyond simply providing additional scholarships to students from the working classes. Lower-income status should be a priority consideration for admissions, and not just for scholarships. Britain provides a potential model for American higher education. Universities in the United Kingdom use race-neutral measures of social-economic disadvantage as a significant part of admissions decisions.[77]

Preferencing working-class students in admissions decisions would transform American higher education. For generations, America's most prestigious academic institutions have served as gatekeepers protecting the social, professional, and financial status of rich, powerful, and well-connected families. For example, the 2023 study by researchers at Harvard and Brown found that 1 in 6 Ivy League students comes from a family in the Top 1% of incomes.[78] The study also found that children from wealthy families have significant non-academic advantages in admission to elite private universities.[79] Most striking of all, the study's findings indicated a strong bias against lower-income students in the admissions policies of elite institutions.[80] The authors concluded that "our results illustrate how economic advantage is passed down across generations through highly selective colleges, one of many selective groups in modern societies."[81] As the *New York Times* noted, the Harvard-Brown study "quantifies for the first time the extent to which being very rich is its own qualification in selective college admissions."[82]

The irony is that self-described "progressives" control most elite institutions. For example, over 80% of Harvard faculty consider themselves

---

[76] *University of Wisconsin Offers Debt-Free Education for Low-Income Students*, AM. COUNCIL ON EDUC. (Dec. 16, 2024), https://www.acenet.edu/News-Room/Pages/Member-Spotlight-UW-Madison-Buckys-Pell-Pathway.aspx [https://perma.cc/94V6-R35R].

[77] *See* Nathan L. Bennett Fleming, *After Affirmative Action: Contextual Admissions and the Future of African American Law School Enrollment*, 76 OKLA. L. REV. 629, 635 (2024).

[78] Chetty, Deming & Friedman, *supra* note 61, at 16 n.19.

[79] *Id.* at 24–25.

[80] *See* Aatish Bhatia, Claire Cain Miller & Josh Katz, *Study of Elite College Admissions Data Suggests Being Very Rich Is Its Own Qualification*, N.Y. TIMES (July 24, 2023), https://www.nytimes.com/interactive/2023/07/24/upshot/ivy-league-elite-college-admissions.html (quoting a Harvard economist's observation that "[w]hat I conclude from this study is the Ivy League doesn't have low-income students because it doesn't want low-income students").

[81] Chetty, Deming & Friedman, *supra* note 61, at 53.

[82] Bhatia, Miller & Katz, *supra* note 80.

"liberal" or "very liberal."[83] Yet, those same "progressives" have presided over decades of admissions policies that discriminate against lower-income applicants, which in turn reinforce socioeconomic hierarchies that have polarized the nation.[84]

There is no doubt that a class-based approach to admissions will hurt higher education's financial bottom line, especially for elite institutions. As described above, lawsuits have revealed the extent to which highly prestigious institutions depend on wealthy students. But the purpose of higher education should be educating students, not running hedge funds. In their mission statements, elite universities boast of their commitment to making the world a better place. For example, Yale's Mission Statement announces that:

> Yale is committed to improving the world today and for future generations through outstanding research and scholarship, education, preservation, and practice. Yale educates aspiring leaders worldwide who serve all sectors of society. We carry out this mission through the free exchange of ideas in an ethical, interdependent, and diverse community of faculty, staff, students, and alumni.[85]

Class-conscious admissions would give elite institutions, like Yale, an opportunity to belatedly practice what they preach. And, ironically, by focusing on class rather than race, colleges and universities can still achieve a high level of racial diversity. People of color make up 45% of the American working-class and will constitute a majority by 2032.[86]

Professor Colker concludes her article by noting that "[t]he Constitution can recognize people's individuality as persons without taking them out of the group-based context in which we think about their lives."[87] Although she offered that point in the context of racial and disability justice, it applies with equal force to issues of class justice. In a post-*SFFA* world, the time has come

---

[83] Meimei Xu, *More Than 80 Percent of Surveyed Harvard Faculty Identify as Liberal*, HARV. CRIMSON (July 13, 2022), https://www.thecrimson.com/article/2022/7/13/faculty-survey-political-leaning/ [https://perma.cc/8BDV-59WV].

[84] *See* Matt Grossman & David A. Hopkins, *The Most Important Divide in American Politics*, GOVERNING (Fall 2024), https://www.governing.com/magazine/the-most-important-divide-in-american-politics [https://perma.cc/96HV-E4EN].

[85] *Mission Statement*, YALE, https://www.yale.edu/about-yale/mission-statement [https://perma.cc/9UAW-42WJ].

[86] Aurelia Glass, *What Policymakers Need To Know About Today's Working Class*, CTR. FOR AM. PROGRESS (Apr. 6, 2023), https://www.americanprogress.org/article/what-policymakers-need-to-know-about-todays-working-class/ [https://perma.cc/XA3X-658M]("This trend is poised to continue, with estimates suggesting that workers of color will make up a majority of the working class in 2032—a full 11 years before the U.S. Census Bureau estimates that people of color will constitute more than 50 percent of the entire population of the United States.").

[87] Colker, *supra* note 5 (manuscript at 48).

for colleges and universities to embrace class justice as a central focus of higher education.