

TAPPING INTO THE TALENT PIPELINE WHILE REPAIRING THE LEAKY PIPE

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“[T]alent is everywhere, opportunity is not.”¹

INTRODUCTION

Diversity in the legal profession matters. It helps legitimize our legal system, giving everyone confidence that they will be treated fairly. Diverse legal teams make it more likely that the team will understand different perspectives and avoid “group think.” Having diverse groups make, enforce, and interpret laws leads to better outcomes.² And yet, the legal profession is one of the least diverse in the country.³ The vast majority of lawyers are White men even though women constitute half of the population and about 40% of the U.S. population is not White.⁴ The percentage of Black lawyers has remained virtually unchanged in the last decade.⁵ Demographics besides race and gender are also telling. For example, only about one of every four law students are first-generation college students as compared to over 50% of undergraduate students.⁶ Law schools must redouble

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1. LEGAL DEF. FUND, AFFIRMATIVE ACTION IN HIGHER EDUCATION: THE RACIAL JUSTICE LANDSCAPE AFTER THE SFFA CASES 26 (Oct. 2023), https://www.naacpldf.org/wp-content/uploads/2023_09_29-Report.pdf.

2. See Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/> (stating that diverse teams lead to more creativity and better decisions).

3. Sybil Dunlop & Jenny Gassman-Pines, *Why the Legal Profession is the Nation’s Least Diverse (And How to Fix It)*, 47 MITCHELL HAMLINE L. REV. 129, 130 (2021).

4. *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RH1125222> (last visited Feb. 8, 2024); AMERICAN BAR ASSOCIATION, ABA PROFILE OF THE LEGAL PROFESSION 22 (2023).

5. AMERICAN BAR ASSOCIATION, *supra* note 4, at 24 (reporting that “Black lawyers were 4.8% of the profession in 2013 and 5% in 2023.”).

6. Melissa A. Hale, *Guest Post: The Importance of Supporting First-Generation Law Students*, L. SCH. SURV. OF STUDENT ENGAGEMENT: INSIGHTS BLOG (Nov. 9, 2022), <https://lssse.indiana.edu/blog/guest-post-the-importance-of-supporting-first-generation-law-students>. One researcher found that the legal profession is the “second most inheritable” profession, after medicine. See Staci Zaretsky, *Children of Lawyers 17 Times More Likely to Become Lawyers*, ABOVE THE L. (Apr. 1, 2019, 2:14 PM), <https://abovethelaw.com/2019/04/children-of-lawyers-17-times-more-likely-to-bec>

their efforts, particularly after the Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard and University of North Carolina* and anti-diversity, equity, and inclusion ("DEI") laws in several states, to prevent falling further behind.

This Essay proceeds in four parts. Part I seeks to address one argument made by anti-DEI activists who claim that diversity efforts are discriminatory because they are rooted in equity, which they see as incompatible with equality, which is what the law requires. Part II explores the idea that equality must include equal opportunity, given that a person's value largely depends on their family lineage. Part III provides a few suggestions for neutralizing the accident of our births, where advantage—and disadvantage—are meted out based largely on the families we are born into. Part III also describes two pipeline initiatives that the University of Tennessee College of Law is undertaking to help diversify law school and the legal profession. Part IV recognizes the role that public and private virtue play in diversity efforts.

I. THE DISRUPTION OF DEI

George Floyd was killed on May 25, 2020, by a police officer who kneeled on his neck for nine minutes and twenty-nine seconds while two fellow officers failed to intervene.⁷ Mr. Floyd's death ignited a racial reckoning throughout the country. Almost every ABA-accredited law school adopted an antiracist statement and many hired DEI professionals.⁸ But DEI has since come under attack in boardrooms, law firms, classrooms, and beyond, from shareholder proposals seeking to rollback corporations' DEI initiatives⁹ to lawsuits brought against law firms' diversity fellowships¹⁰ to the banning of DEI initiatives in public universities in Florida and Texas¹¹ to the Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard and University of North Carolina*, which makes

ome-lawyers/ (discussing SAM FRIEDAN & DANIEL LAURISON, *THE GLASS CEILING: WHY IT PAYS TO BE PRIVILEGED* (2019)); Ilana Hamilton, *56% of All Undergraduates are First-Generation College Students*, FORBES ADVISOR (June 13, 2023, 2:53 PM), <https://www.forbes.com/advisor/education/first-generation-college-students-by-state/>.

7. Press Release, U.S. Attorney's Off., Dist. of Minn., Three Former Minneapolis Police Officers Convicted of Federal Civil Rights Violations for Death of George Floyd (Feb. 24, 2022), <https://www.justice.gov/usao-mn/pr/three-former-minneapolis-police-officers-convicted-federal-civil-rights-violations-death>.

8. LISA SONIA TAYLOR & BELINDA DANTLEY, *THE BOTTOM LINE: LAW SCHOOLS NEED TO GET SERIOUS ABOUT THE WORK OF DIVERSITY, EQUITY, & INCLUSION* 7 (2021), https://digitalcommons.wcl.american.edu/fasch_rpt/66/.

9. Michael Delikat et al., *DEI Initiatives Under Attack by Activists*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 7, 2022), <https://corpgov.law.harvard.edu/2022/10/07/dei-initiatives-under-attack-by-activists/>.

10. Tatyana Monnay, *Perkins Coie DEI Suit Ended by Anti-Affirmative Action Group*, BLOOMBERG L. (Oct. 11, 2023), <https://news.bloomberglaw.com/business-and-practice/perkins-coie-dei-suit-dropped-by-anti-affirmative-action-group>.

11. Mary Bohannon, *Texas Lawmakers Pass Ban on Diversity Programs at Public Colleges—Possibly Joining Florida*, FORBES (May 29, 2023, 5:05 PM), <https://www.forbes.com/sites/mollybohannon/2023/05/29/texas-lawmakers-pass-ban-on-diversity-programs-at-public-colleges-possibly-joining-florida/?sh=1e90e52c5918>.

it harder for universities to pursue race-conscious admissions.¹² Who is behind these attacks? Students for Fair Admissions' ("SFFA") mission "is to support and participate in litigation that will restore the original principles of our nation's civil rights movement."¹³ Conservative think tanks have influenced Florida Governor DeSantis's anti-DEI stance.¹⁴ They have penned and disseminated playbooks containing model legislation with such titles as "Abolish DEI Bureaucracies and Restore Colorblind Equality in Public Universities"¹⁵ and "Critical Social Justice in Tennessee Higher Education: An Overview."¹⁶ These two papers were authored by the Manhattan Institute, whose website says it "works to keep America and its great cities prosperous, safe, and free" and the Goldwater Institute, who describes itself as a defender of "individual liberty."¹⁷ The Goldwater Institute takes credit for recent DEI backslides in several states, including Arizona, Florida, and Texas.¹⁸ These groups tend to conflate DEI and Critical Race Theory ("CRT"), which they see as a "racially discriminatory worldview"¹⁹ and a "hateful ideology."²⁰ This conflation might be attributable to Former President Trump, who issued an executive order in September 2020 that banned the teaching of so-called "divisive concepts," "race or sex stereotyping," and "race or sex scapegoating" to military and federal employees.²¹

Rather than respond to this bluster, this Essay replies to an argument rooted, however tangentially, in the law. The argument is embodied in a statement by

12. See generally *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (ruling race-conscious admissions programs at Harvard and the University of North Carolina unconstitutional).

13. *About*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about/> (last visited Feb. 8, 2024).

14. Alcino Donadel, *4 Ways States and Schools Choose to Dismantle DEI Offices*, UNIV. BUS. (June 16, 2023), <https://universitybusiness.com/4-ways-states-and-schools-choose-to-dismantle-dei-offices/>.

15. Christopher F. Rufo et al., *Abolish DEI Bureaucracies and Restore Colorblind Equality in Public Universities*, MANHATTAN INST. (Jan. 18, 2023), <https://manhattan.institute/article/abolish-dei-bureaucracies-and-restore-colorblind-equality-in-public-universities>.

16. ARTHUR MILIKH ET AL., *CRITICAL SOCIAL JUSTICE IN TENNESSEE HIGHER EDUCATION: AN OVERVIEW* (Feb. 2022), <https://velocityconvergence.com/wp-content/uploads/2022/02/CSJ-in-Tennessee-Higher-Education-February-2022-1.pdf>.

17. MANHATTAN INST., <https://manhattan.institute> (last visited Feb. 8, 2024); *Our Story*, GOLDWATER INST., <https://www.goldwaterinstitute.org/about/> (last visited Feb. 8, 2024).

18. *Goldwater Defeats "Diversity Statements" at Arizona Universities*, GOLDWATER INST. (Aug. 8, 2023), <https://www.goldwaterinstitute.org/goldwater-defeats-diversity-statements-at-arizona-universities/>; *Goldwater Frees Texas Higher Ed From Radical DEI's Tentacles*, GOLDWATER INST. (June 16, 2023), <https://www.goldwaterinstitute.org/goldwater-frees-texas-higher-ed-from-radical-deis-tentacles/>.

19. See *Goldwater Defeats "Diversity Statements" at Arizona Universities*, *supra* note 18.

20. See MILIKH ET AL., *supra* note 16, at 3. CRT posits that racism is embedded in societal structures and systems like the legal system. Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS'N HUM. RTS. MAG. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.

21. Exec. Order No. 13,950, 3 C.F.R. 433 (2021), *revoked by* Exec. Order No. 13,985, 3 C.F.R. 409 (2022).

Texas Governor Greg Abbott's office that, "[e]quity is not equality."²² Equality, as the touchstone, can be traced to the preamble in the Declaration of Independence, which provides that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights."²³ The notion of equality expressed there, without a doubt, was merely aspirational given that slavery was legal and women had few, if any rights, including the right to vote, when the Declaration of Independence was adopted in 1776. Some ninety years later in 1868, after the pro-slavery Confederates lost the Civil War, the Fourteenth Amendment was added to the Constitution. Section 1 of the Fourteenth Amendment provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."²⁴

Despite the Civil War and the ratification of the Fourteenth Amendment, racism persisted.²⁵ Southern states responded by enacting racial segregation laws, which were legally authorized by the U.S. Supreme Court in *Plessy v. Ferguson*.²⁶ Schools remained racially segregated with the U.S. Supreme Court's blessing until 1954.²⁷ Next came the federal Civil Rights Act in 1964, which made discrimination based on race in employment and public places illegal.²⁸ It also required the integration of public schools. Upon the passage of this landmark legislation, President Johnson remarked that:

We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of these blessings—not because of their own failures, but because of the color of their skin.²⁹

DEI critics argue that these laws require equal treatment but not necessarily fairness. Consider the popular image on the internet of three kids of different heights who have the opportunity to watch a baseball game from outside the stadium while looking over a fence.³⁰ Although giving all three kids the chance to see over the fence might be called "equality," the opportunity is meaningless to all

22. Josh Moody, *Texas Governor Warns Against DEI in Hiring Practices*, INSIDE HIGHER ED (Feb. 8, 2023), <https://www.insidehighered.com/news/2023/02/09/texas-latest-state-attack-dei-targeting-hiring> (quoting Renae Eze, a spokesperson for Texas governor Greg Abbott).

23. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

24. U.S. CONST. amend. XIV, § 1.

25. For a contrary view, see Exec. Order No. 13,950, *supra* note 21, which provided that "racialized views of America... were soundly defeated on the blood-stained battlefields of the Civil War."

26. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (ruling Louisiana law that mandated racially segregated railway cars for white and non-white passengers constitutional).

27. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494-95 (1954).

28. Civil Rights Act of 1964, 42 U.S.C. § 2000a(e).

29. Radio and Television Remarks Upon Signing the Civil Rights Bill, 2 PUB. PAPERS 842 (July 2, 1964).

30. See, e.g., *Illustrating Equality VS Equity*, INTERACTION INST. FOR SOC. CHANGE (Jan. 13, 2016), <https://interactioninstitute.org/illustrating-equality-vs-equity/>.

except for a kid who has the unearned advantage of height inherited from their parents.³¹ DEI critics presumably would oppose offering assistance to kids who, by accident of their birth, are shorter or have fewer resources because doing so “requires active discrimination against those who’d do too well under equal treatment.”³² This worldview maligns DEI efforts as doing “whatever it takes to produce matching results for disparate groups” and as “replac[ing] as our national goal the equal protection of all Americans”³³ with an “equity of results”³⁴ that is viewed as Marxist.³⁵

II. EQUALITY OF OPPORTUNITY

“America used to be thought of as the land of opportunity. Today, a child’s life chances are more dependent on the income of his or her parents than in Europe, or any other of the advanced industrial countries for which there are data.”³⁶

Although “[t]he law recognizes that we are created equal and have equal protection under the law, . . . ensuring equality requires that Americans have equal opportunity.”³⁷ To decide otherwise would be a perverse result. What anti-woke warriors seem to ignore is that, while people might be created equally, social conditions promote inequality. Justice Jackson, in her dissent in *SFFA*, referred to the “gulf-sized race-based gaps” in “the health, wealth, and well-being of American citizens.”³⁸ “Every moment these gaps persist,” she said, “is a moment in which this great country falls short of actualizing one of its foundational principles—the ‘self-evident’ truth that all of us are created equal.”³⁹ Justice Jackson’s points are well-taken. “[E]liminating explicit, lawful discrimination” by ratifying the Fourteenth Amendment and enacting civil rights laws “does not undo patterns of disadvantage.”⁴⁰

31. Alessandra DiCorato, *Scientists Uncover Nearly All Genetic Variants Linked to Height*, HARV. MED. SCH. (Oct. 14, 2022), <https://hms.harvard.edu/news/scientists-uncover-nearly-all-genetic-variants-linked-height> (finding height largely is an accident of birth).

32. Dan Morenoff, *We Must Choose “Equality,” Not “Equity”*, AM. CIV. RTS. PROJECT: BLOG (Apr. 25, 2022), <https://www.americancivilrightsproject.org/blog/we-must-choose-equality-not-equity/>.

33. *Our Mission*, AM. CIV. RTS. PROJECT, <https://www.americancivilrightsproject.org/our-mission/> (last visited Feb. 8, 2024).

34. *Id.*

35. See Wai Wah Chin, *The Equity Delusion and its Marxist Roots*, REALCLEAR EDUC. (Feb. 10, 2023), https://www.realcleareducation.com/articles/2023/02/10/the_equity_delusionand_its_marxist_roots_110821.html. The author is an adjunct fellow at the Manhattan Institute. The slogan “from each according to his ability; to each according to his need” is most commonly attributed to Karl Marx, a philosopher and socialist (internal quotation marks omitted). Luc Bovens & Adrien Lutz, “*From Each According to Ability; to Each According to Needs*” Origin, Meaning, and Development of Socialist Slogans, 51 HIST. OF POL. ECON. 237 (2019).

36. Joseph Stiglitz, *America is No Longer the Land of Opportunity*, FIN. TIMES (June 25, 2012), <https://www.ft.com/content/56c7e518-bc8f-11e1-a111-00144feabdc0>.

37. See Martha Minow, *Equality vs. Equity*, 1 AM. J. OF L. AND EQUAL. 167, 176 (2021).

38. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 384 (2023) (Jackson, J., dissenting).

39. *Id.*

40. See Minow, *supra* note 37, at 170.

Consider a Black male whose parents divorced when he was a toddler. The child lives with his mother who has a high school education and works as a certified nursing assistant, making \$40,000 of pre-tax income a year, which is less than what a person spent annually in every state except Mississippi during 2022.⁴¹ The child attends public school in his low-income neighborhood. His father has been absent from his life since the divorce. This child, and others like him, are at greater risk for experiencing adversity—such as abuse, neglect, and family dysfunction—that may affect his physical and mental well-being later in life.⁴² For this child and others like him, these disadvantages are mere accidents of birth rather than anything they have earned or deserve. Likewise, being White and raised in a higher-income neighborhood by post-secondary educated parents in environments with physical and emotional safety and largely without family dysfunction are unearned advantages. They are not things that the child earned; they are simply things given to them. Where does equality of opportunity exist when unearned advantages and disadvantages are meted out by the accident of our births and accumulate, or compound, over time? We rejected the concept that a person's value depends on their family lineage when we claimed our independence from Great Britain.

This sobering narrative, though hypothetical, is not fantastical. Consider the massive disparity between the net worth of White and Black families.⁴³ In 2022, the median net worth was \$44,100 for Black families and \$284,310 for White families, a more than six-fold multiple.⁴⁴ Thus, for every dollar of wealth held by a typical White family, its Black counterpart held just sixteen cents. Children of wealthier families are more likely to graduate from college, generally resulting in higher lifetime earnings as compared to those who do not graduate from college.⁴⁵ But even Black families whose children go to college are burdened with more student loan debt than White families.⁴⁶ Similar disparities exist with respect to income. The typical Black family in 2019 made \$41,000, which was only 66% of

41. *Personal Consumption Expenditures by State, 2002*, BUREAU OF ECON. ANALYSIS (Oct. 4, 2023), <https://www.bea.gov/news/2023/personal-consumption-expenditures-state-2022>.

42. See Alison Giovanelli et al., *Adverse Childhood Experiences in a Low-Income Black Cohort: The Importance of Context*, 148 PREV. MED. 1, 6-7 (2021).

43. Net worth measures the value of assets owned—such as homes, cars, financial assets like stocks and bonds, and retirement accounts—less liabilities owed.

44. *Survey of Consumer Finances, 1989 – 2022*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Nov. 02, 2023), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Net_Worth;demographic:racecl4;population:1,2,3,4;units:median. The median net worth is the number that lies midway between the family with the highest net worth and the family with the lowest net worth. *Survey of Consumer Finances, 1989 – 2022*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Nov. 02, 2023), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Net_Worth;demographic:racecl4;population:1,2,3,4;units:mean;range:1989,2022. The mean net worth in 2022 was \$1,361,810 for a White family and \$211,600 for a Black family. The median is a better representation of the net worth of a typical family whereas the mean, which is the arithmetic average of all families' net worth, is skewed by the super-wealthy whose net worth pulls up the mean. *Id.*

45. Benjamin Harris et al., *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T OF TREASURY (Sept. 15, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap>.

46. *Id.*

the income of a typical White family (\$62,000).⁴⁷ Black workers “are underrepresented in higher-wage industries” and instead almost “half of Black workers [are] concentrated in low-paying healthcare, retail, food services, and accommodations roles.”⁴⁸

For some readers, these facts will be uncomfortable. They are not intended to kick the beehive. But discomfort cannot be an excuse to look away, akin to interactions that many have with homeless people. We avoid making eye contact and generally ignore them. Maybe we look away because we do not want to see another human being suffer. Or because seeing human suffering makes us feel guilty for our own advantages. Some might assume homeless people are somehow responsible for their situations and thus, are undeserving. Maybe we look away because we have no intention of helping them and that decision is internalized as shame. Coming to terms with our biases against the homeless somehow seems less fraught than our racial and ethnic biases. Perhaps focusing on helping children to flourish will be less fraught because a family’s circumstances are beyond the control of the children. Investments in human capital to help kids flourish should be a priority. And yet, the federal government spends much more on seniors aged sixty-five and over than it does on children under nineteen.⁴⁹

Equality does not mean that every person has to have the same resources. But it can hardly be said that the Black child in the earlier example has an equal opportunity to thrive as the White child. Putting these two children against one another would be a one-horse race. Those two children have the opportunity to go to public school, but if the schools’ resources and the quality of teachers are vastly different and fail to account for the students’ different needs, then can it fairly be said that it is the same opportunity? Or theoretically, either person can apply to law school one day, but years of inequality mean that the person from the better neighborhood who grew up in a loving, stable family, with food security and physical and emotional safety will be privileged while the other applicant will be disadvantaged. We should want all students to have an equal opportunity to be admitted to law school by providing the needed resources for them to be able to compete equally. The states and the federal government enacted and enforced laws that affirmatively excluded Black people. That is incontrovertible. Nonetheless, this Essay does not suggest that White citizens be affirmatively excluded in favor of Black citizens to reverse past and ongoing discrimination. But how can we, as a democratic society, ensure that everyone secures equal opportunities to meaningfully participate in the economy and the social conditions that are a necessary feature of freedom?⁵⁰

47. *Survey of Consumer Finances, 1989 – 2022*, BD. OF GOVERNORS OF THE FED. RESRV. SYS. (Nov. 02, 2023), https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Before_Tax_Income;demographic:race14;population:all;units:median.

48. *What is Diversity, Equity, and Inclusion?*, MCKINSEY (Aug. 17, 2022), <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-diversity-equity-and-inclusion>.

49. *See Budgeting for the Next Generation: How Do Kids Fare?*, COMM. FOR A RESPONSIBLE FED. BUDGET (June 7, 2018), <https://www.crfb.org/papers/budgeting-next-generation-how-do-kids-fare>.

50. Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 314, 317 (1999).

III. MITIGATING DISADVANTAGE

This section addresses the extent to which the accident of our births can be neutralized. It seems uncontroversial to say that the promotion of economic prosperity is a proper role of government. At the federal level, Congress, along with the Treasury Department, implement fiscal policy, through taxes and government spending, and the Federal Reserve implements monetary policy, such as changes to interest rates, to influence economic conditions. The government, especially at the state and local levels, provides funding for public schools. Though certainly not intended to be all-inclusive, public school funding and reducing the racial wealth gap are two things that the government can reform to mitigate disadvantage. Also discussed in this section are certain strategies available to law schools in the wake of the *SFFA* decision, along with some of the initiatives being undertaken at the University of Tennessee College of Law.

A. *Public Schools*

K-12 public schools are largely segregated by race. White students attend majority-White schools where two of every three students are also White.⁵¹ Black students attend schools that are predominantly (47.1%) Black.⁵² School segregation mostly reflects neighborhood segregation, and “racial segregation and economic segregation frequently overlap in K-12 public schools. Black and Latino students, on average attend schools with a far higher share of poverty.”⁵³ Public schools are funded predominately by local and state, rather than federal, funds. At the local level, the funding mechanism often is local property taxes.⁵⁴ Given the segregated nature of American neighborhoods, public schools in poorer neighborhoods receive less local revenue.⁵⁵ Yet, students in poverty and with other disadvantages need more resources to do well in school, in part because many of them start school academically behind.⁵⁶ The same is true for students of color and English learners.⁵⁷ States can alleviate the disparities created by local property tax funding by providing disproportionately more funding to school districts that serve higher numbers of students from low-income households as well as students of color rather than merely providing the same per-pupil amount across all districts.

51. ERICA FRANKENBERG ET AL., *HARMING OUR COMMON FUTURE: AMERICA’S SEGREGATED SCHOOLS 65 YEARS AFTER BROWN 22* (2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>.

52. *Id.*

53. *Id.* at 23.

54. IVY MORGEN, *EQUAL IS NOT GOOD ENOUGH: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 12* (2022), <https://edtrust.org/wp-content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf>.

55. *Id.* (describing this approach as “inherently inequitable”).

56. *See* EMMA GARCÍA & ELAINE WEISS, *EDUCATION INEQUALITIES AT THE SCHOOL STARTING GATE 1* (2017), <https://files.epi.org/pdf/132500.pdf>.

57. *See id.*

B. Building Black Family Wealth

School funding alone is not a magic bullet, particularly if excellent teachers prefer “better” schools or kids from lower-income families lack the same familial and social supports as higher-income families. We also need to build Black family wealth. A typical Black family with an advanced degree will accumulate less wealth than a typical White family with the same level of education attainment.⁵⁸ In fact, a group of researchers determined that a Black family with a post-graduate education and a White family with some college or an associate degree have a comparable level of wealth.⁵⁹ Doing more to encourage home ownership for Black households could help reduce the racial wealth gap because a home typically comprises the largest asset held by Americans that tends to retain its value.⁶⁰ In addition, the government could reduce the wealth gap by taxing inheritances, which at present are excluded from the recipient’s income for federal income tax purposes.⁶¹ Eliminating the so-called “stepped-up basis” for heirs in any property inherited, which often results in lower capital gains taxes upon disposition of the property, would also help.⁶² Finally, there is a federal estate tax that is levied on a deceased person’s property but the tax currently applies only to estates worth more than \$13.61 million (\$27.22 million for married couples).⁶³ In 2020, only .07% of estates paid estate tax.⁶⁴

C. Certain Implications of *SFFA*

The Supreme Court in *SFFA* did not ban all race-conscious university admissions policies. Rather, the majority of the Court overturned Harvard’s and the University of North Carolina’s admissions programs because they “cannot be reconciled with the guarantees of the Equal Protection Clause.”⁶⁵ Both programs were said to “lack sufficiently focused and measurable objectives warranting the

58. WILLIAM DARITY JR. ET AL., WHAT WE GET WRONG ABOUT THE RACIAL WEALTH GAP 6 (Apr. 2018), <https://socialequity-staging.oit.duke.edu/cms/wp-content/uploads/2023/08/what-we-get-wrong.pdf>.

59. *Id.* (citing DARRICK HAMILTON ET AL., UMBRELLAS DON’T MAKE IT RAIN: WHY STUDYING AND WORKING HARD ISN’T ENOUGH FOR BLACK AMERICANS (2015)), https://www.insightcced.org/wpcontent/uploads/2015/08/Umbrellas_Dont_Make_It_Rain_Final.pdf; Tatjana Meschede et al., “Family Achievements?”: *How a College Degree Accumulates Wealth for Whites and Not For Blacks*, 99 FED. RES. BANK OF ST. LOUIS REV. 121-37 (2017).

60. DARITY ET AL., *supra* note 58, at 11.

61. I.R.C. § 102(a).

62. I.R.C. § 1014.

63. Rev. Proc. 2023-34(.41), 2023-48 I.R.B. 1287 (Nov. 9, 2023) and I.R.C. § 2010. Congress temporarily increased this exclusion amount for 2018 through 2025. I.R.C. § 2010(c)(3)(C). Beginning in 2026, the exclusion amount will revert automatically to the pre-2018 level of \$5 million (\$10 million for married couples), not including inflation, unless Congress intervenes to make the exclusion permanent. *Id.*

64. *Briefing Book, How Many People Pay the Estate Tax?*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax>.

65. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 230 (2023).

use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.”⁶⁶ Notably, the Court did not expressly overturn its decision in *Grutter v. Bollinger*, which held that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”⁶⁷ In response to an amicus curiae brief, the Court acknowledged that military academies may have “distinct interests” for purposes of a strict scrutiny analysis, which might allow other universities to distinguish their admissions policies from those at issue in *SFFA*.⁶⁸ Importantly, the Court also said 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.”⁶⁹ Finally, the Court recognized that “remediating specific, identified instances of past discrimination that violated the Constitution or a statute” was a compelling interest for purposes of the strict scrutiny analysis required to uphold race-based government action.⁷⁰ In doing so, it left open the possibility for race-conscious admissions to remedy past discrimination.⁷¹

In response to the *SFFA* decision, the U.S. Department of Justice’s Civil Rights Division and the U.S. Department of Education’s Office for Civil Rights issued a “dear colleague” letter along with a list of questions and answers to help colleges and universities navigate admissions in a post-*SFFA* environment.⁷² These resources confirm that higher education institutions can consider race when engaging in activities, such as pipeline programs and summer enrichment programs that seek to increase the diversity of applicant pools or help to make applicants more college-ready, provided participants have to compete for

66. *Id.* at 230.

67. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Most likely, the Court will be seen as at least partially overruling *Grutter*. See Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4549567.

68. See *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 213 n.4 (2023).

69. *Id.* at 230.

70. *Id.* at 207. The University of Tennessee and the College of Law have a history of past discrimination. See generally Briana Lynn Rosenbaum, *Deflect, Delay, Deny: A Case Study of Segregation by Law School Faculty Before Brown v. Board of Education*, 90 TENN. L. REV. 1 (2022) (documenting the role that certain University of Tennessee College of Law faculty played to deny Black students’ admission to our law school). In addition, the University of Tennessee was sued in 1968 by Rita Geier, a twenty-three-year-old Vanderbilt law student who was also teaching at Tennessee State University. Reginald Stuart, *The End of a Journey*, DIVERSE ISSUES IN HIGHER EDUC. (Oct. 18, 2006), <https://www.diverseeducation.com/faculty-staff/article/15082662/the-end-of-a-journey>. The litigation persisted for thirty-eight years, concluding in 2006 after a court determined that the state complied with the terms of a consent decree overseen by a court-appointed monitor. See *id.* *Geier v. Sundquist*, 128 F. Supp. 2d 519 (M.D. Tenn. 2001).

71. *Students for Fair Admissions*, 600 US at 227 n.8.

72. *Resources: Advancing Diversity and Opportunity in Higher Education Following the Students for Fair Admissions Decision*, DEP’T OF JUST. CIV. RTS. DIV. (Aug. 14, 2023), <https://www.justice.gov/crt/guidance-and-resources>.

admission.⁷³ Post-admissions policies and programs intended to aid in retention of diverse students, such as support for student organizations, also remain permissible so long as the programs are open to all students regardless of race.⁷⁴ Institutions are free to continue reviewing applicants holistically by considering things such as:

[F]inancial means and broader socioeconomic status; whether the applicant lives in a city, suburb, or rural area; information about the applicant's neighborhood and high school; whether the applicant is a citizen or member of a Tribal Nation; family background; parental education level; experiences of adversity, including discrimination; participation in service or community organizations; and whether the applicant speaks more than one language.⁷⁵

D. University of Tennessee College of Law Initiatives

In the spring of 2023, the University of Tennessee College of Law adopted a five-year strategic plan that includes as one goal to “recruit and retain a diverse and highly talented group of students, faculty, and staff with varying perspectives and viewpoints.”⁷⁶ To help achieve this goal, with respect to students, we are prioritizing our efforts at two stages of the talent pipeline. First, we will develop and implement a pipeline program for regional historically Black colleges and universities, as well as other University of Tennessee institutions, to heighten interest among underrepresented groups in the College of Law and in the legal profession as a whole. Second, we plan to implement early academic intervention and mentoring initiatives for middle and high school students at three Knoxville high schools, as well as certain middle schools that feed into them, that have disproportionately large populations of underrepresented students as compared to Knox County schools. In addition to exposing secondary school students to law school and the legal profession, we want to enhance students’ reading comprehension, critical and analytical thinking, oral and written communication, financial numeracy, study skills, advocacy, and other competencies needed for law school and the legal profession. Program participants also will learn about the law school experience and how to prepare for it, as well as stress management and mental health, professional ethics, and types of legal careers, among other things. Ultimately, we seek to nurture students’ potential and help them be college and law school ready while also serving as role models.

We are considering several metrics to assess these programs including: (1) annual number of program participants; (2) number of program participants who proceed to college; (3) number of participants who attend law school; and (4) number of participants who enter the legal profession. In addition, we will solicit

73. U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT’S DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA 4* (2023), <https://www.justice.gov/media/1310161/dl?inline>.

74. *Id.* at 6.

75. *Id.*

76. *Our College: Goal 4*, UNIV. TENN. COLL. OF L., <https://law.utk.edu/our-college/> (last visited Feb. 8, 2024).

evaluations from participants and their schools each year to assess and improve the programs. We also plan to measure students' progress, in terms of skills development, from the beginning to the end of the program. Our expectation is that the focus on skills development and mentoring will translate to enhanced scholastic motivation, improved school performance, and a narrowing of the education opportunity gap.

In addition to our focus on pipeline programs, our Admissions Committee has evaluated our process for holistically reviewing applications for admission, not only to verify compliance with the *SFFA* decision, but also to ensure that our recruitment strategies and practices will maximize our ability to enhance diversity in all its forms.⁷⁷

IV. PUBLIC VIRTUE AND THE COMMON GOOD

The government unarguably has a role in promoting economic growth. But unlike economic issues, the government's regulation of moral issues is fraught and controvertible.⁷⁸ The government simply is less equipped to fix certain societal issues that require citizens to change their hearts and minds. Dr. Martin Luther King, Jr. eloquently made this point in a 1966 address:

So it may be true that you can't legislate integration, but you can legislate desegregation. It may be true that morality cannot be legislated but behavior can be regulated. It may be true that the law cannot change the heart, but it can restrain the heartless. It may be true that the law cannot make a man love me, religion and education will have to do that, but it can restrain him from lynching me. And I think that's pretty important also. And so that while legislation may not change the hearts of men, it does change the habits of men.⁷⁹

We must appreciate the limits of the law and regulation. But this truth should not leave us despondent. We can appeal to public and private virtue.⁸⁰ Public virtue is the voluntary submission of our own self-interest for the common good.⁸¹ By contrast, private virtue is giving up one's personal advantage for another. Consider

77. U.S. DEP'T OF JUST., CIV. RTS. DIV. & U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., JOINT DEAR COLLEAGUE LETTER 2 (2023), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-2023> (recognizing that "information about an individual student's perseverance, especially when faced with adversity or disadvantage, can be a powerful measure of that student's potential.").

78. See, e.g., Nathan Mech, *Should Morality Be Legislated?*, ACTION INST. (Sept. 21, 2021), <http://rlo.acton.org/archives/122466-should-morality-be-legislated.html>; Micah Watson, *Why We Can't Help But Legislate Morality*, PUB. DISCOURSE (Nov. 4, 2010), <https://www.thepublicdiscourse.com/2010/11/1792/>.

79. Martin Luther King, Jr., *1966 Convocation Page 4*, ILL. WESLEYAN UNIV., <https://www.iwu.edu/mlk/page-4.html> (last visited Feb. 8, 2024).

80. "Honesty, courage, compassion, generosity, fidelity, integrity, fairness, self-control, and prudence are all examples of virtues." Manuel Velasquez et al., *Ethics and Virtue*, MARKKULA CTR. FOR APPLIED ETHICS (Jan. 1, 1988), <https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/ethics-and-virtue/>.

81. See Richard Vetterli et al., *Public Virtue and the Roots of American Government*, 27 BYU STUD. Q. 29, 30 (1987).

a driver with the legal right-of-way who allows another vehicle to merge into the stream of traffic. The driver has no legal obligation to let in the other vehicle, but the driver can choose to yield as an expression of their private virtue.

The law cannot make a person philanthropic, but the law can encourage giving through, for example, a tax deduction for charitable donations. Taxes, more broadly, are an example where individual liberty or freedom accedes to the greater good. In the absence of laws requiring the payment of taxes to the government, citizens might very well prefer to keep all their income. Requiring them to remit a part of their income to the government might be said to infringe on the freedom to decide what to do with one's own earnings. But as Justice Oliver Wendell Holmes, Jr. said, "taxes are what we pay for civilized society."⁸²

Seeing the humanity of others and their desire for human dignity and flourishing is something all Americans should want for one another. Doing so serves the common good. Giving people opportunities to thrive and reach their full potential benefits not only those individuals, but also serves the common good. Our economy benefits when people are productive and full participants in the economy.⁸³ Work generates tax revenues to fund public goods—like roads, Medicare, Social Security, and defense of the homeland—and also serves as a means of redistributing income among taxpayers.

CONCLUSION

We continue to fall short of our country's ideals. "Our nation still works to secure, in its laws and culture, the respect for all persons our founding convictions require."⁸⁴ The Black population is underrepresented in the legal profession. Even though about 14.2% of the U.S. population is comprised of Black people, only about 5% of lawyers are Black.⁸⁵ Hispanic people are also underrepresented in the legal profession. In 2022, approximately 5.8% of lawyers were Hispanic whereas Hispanic people comprise 18.5% of the U.S. population.⁸⁶ Part of the explanation for these disparities could be underperformance on the LSAT entrance exam and lower law school admission rates.⁸⁷ Those disparities, in turn, might be explained

82. *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

83. Harris et al., *supra* note 45 ("When a significant share of the population is unable to fully participate in the economy, private consumption and investment suffers, stifling GDP growth.").

84. U.S. DEP'T OF STATE, REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS 6 (2020) (stating that the Commission on Unalienable Rights was established in 2019 by Michael Pompeo, who was Secretary of State under President Donald Trump. The Commission and its report are not without their critics.). See, e.g., Kenneth Roth, *Pompeo's Commission on Unalienable Rights Will Endanger Everyone's Human Rights*, HUM. RTS. WATCH (Aug. 27, 2020), <https://www.hrw.org/news/2020/08/27/pompeos-commission-unalienable-rights-will-endanger-everyones-human-rights>.

85. See AMERICAN BAR ASSOCIATION, *supra* note 4, at 31.

86. *Id.*

87. LAURA A. LAUTH & ANDREA THORNTON SWEENEY, LSAT PERFORMANCE WITH REGIONAL, GENDER, AND RACIAL AND ETHNIC BACKGROUNDS: 2011-12 THROUGH 2017-18 TESTING YEARS 24 Fig.13 (2022) (showing that Black and Hispanic LSAT test takers on average score lower than their White counterparts); AccessLex Institute, *AccessLex Institute Spring 2023 Legal Education Data Deck Presents Law School Admission, Bar Passage, and Financial Trends*, PR NEWswire (May 16,

by disadvantages that create opportunity gaps.⁸⁸ Treating people equally in a country where the destinies of children are largely determined by the accident of their births, coupled with unequal public school funding, and a huge wealth and income gap, hardly seems equitable. Law schools should act to fix the leaky talent pipeline to ensure underrepresented students are exposed to law school and the legal profession and that interested students receive appropriate mentoring and skill-building to be successful in law school and beyond. The legal profession, and the legal system more broadly, depend on it.

2023), <https://www.prnewswire.com/news-releases/accesslex-spring-2023-legal-education-data-deck-presents-law-school-admission-bar-passage-and-financial-trends-301825411.html> (“Seventy-eight percent of White applicants received at least one law school admission offer compared to 48 percent of Black applicants and 58 percent of Hispanic/Latine students.”).

88. *See supra* Parts II-III.