# After the End of Affirmative Action: Pathways Forward

Only a few hours after the *SFFA* ruling was issued, the then President-elect of Harvard University, Claudine Gay, released a video in response. In it, Guy acknowledged that the decision would “change *how* we pursue the educational benefits of diversity,”[[1]](#footnote-1) adding that: “In the coming weeks, we will be working to understand the decision and its implications for our policies.”[[2]](#footnote-2) Other universities, public officials, and commentators began evaluating the implications of the *SFFA* decision, which ended the use of once permissible race-conscious admission programs.[[3]](#footnote-3) They joined a growing body of scholarship, having expected this outcome, was endeavoring to evaluate its implications for institutions of higher education as well as for the education system, government, and the workforce.[[4]](#footnote-4) This literature, focusing on the *how* question—the ways universities are still permitted to increase racial diversity in their school—is only likely to grow in the coming months and years.

A no less important aspect of the *SFFA* decision that warrants public and scholarly attention is the *why* question. The conservative supermajority of the 2023 Court was not convinced that race-conscious affirmative action should be saved.[[5]](#footnote-5) And even before the *SSFA* decision was issued, it was clear to many that the battle to save these measures was doomed. Now, it is the fight for public opinion concerning affirmative action that matters, and affirmative action seems to be losing in that sphere as well. Americans are losing sight of what is at stake in jettisoning affirmative action and why this issue is vital. According to several recent surveys, most Americans today think college admissions programs should not consider race and ethnicity.[[6]](#footnote-6) While affirmative action has always been a controversial issue in the United States, I argue that that the utilitarian case for diversity, which has become the controlling rationale for affirmative action, does not adequately or effectively explain to the public what is at stake in the battle over affirmative action.

First, it is important to diagnose the problem correctly. Some critics mourn the defeat of remedial rationales for racial discrimination and warn that diversity is “a serious distraction in the ongoing efforts to achieve racial justice.”[[7]](#footnote-7) It is argued in this article, however, that there is nothing wrong with the diversity rationale per se. Rather, as my analysis shows, diversity is an empty—neutral—vessel that can carry different values. According to the Merriam-Webster Dictionary, diversity is “the condition of having or being composed of differing elements. [E]specially: the inclusion of people of different races . . . cultures, etc. in a group or organization.”[[8]](#footnote-8) The question of *why* this measure is worth fighting for is a totally different one than that of its *what*, or its specific content. As this paper shows, the answers to the *why* question have shifted dramatically over time: from an interest in rectifying past injustice and democratic aspirations towards utilitarian pedagogical and market benefits.[[9]](#footnote-9)

The hyper-utilitarian approach to diversity, which came to control the discourse about affirmative action in the debate over the *Fisher* cases and, even more dramatically in the *SFFA* litigation, fails, I argue, to articulate the stakes in banishing race-conscious affirmative action. Jack Balkin observed that “‘diversity’ [has evolved into] a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment.”[[10]](#footnote-10) Amicus briefs are indeed highly strategic documents, but they also indicate to the public what matters and why.[[11]](#footnote-11) Furthermore, the utilitarian strategy appears to have grown to such an extent over time as to consume the essence of affirmative action and, in fact, to take over the discourse over the issue within and outside the courts.[[12]](#footnote-12) In Claudine Guy’s aforementioned video, released just hours after the *SFFA* decision was issued, the president-elect of Harvard University not only reaffirmed Harvard’s commitment to diversity but also explained to current and future students at Harvard and to the public at large why student body diversity matters. Clarifying the values that Harvard is fighting for when it defends race-conscious admission policies, Guy declared that: “[f]or nearly nine years, Harvard vigorously defended our admissions process and our belief that we all benefit from learning, living, and working alongside people of different backgrounds and experiences.”[[13]](#footnote-13) Continuing, she assured her viewers that Harvard would comply with the Court’s decision but that this would not change the values in which Harvard believes. “We continue to believe—deeply—that a thriving, diverse intellectual community is essential to academic excellence and critical to shaping the next generation of leaders. Every day, this is borne out in Harvard classrooms, where our students have the chance to put their ideas into conversation with other points of view, experiences, and perspectives.” [[14]](#footnote-14)

President-elect Guy was right; these benefits of diversity are important. The stakes in losing the battle over affirmative action, however, are about so much more, and it is time, I argue, to openly admit it. Back in 2013, aiming to convince the then-swing justice on the bench, Kennedy, it made strategic sense for academic amici like Harvard to confine their arguments to the utilitarian benefits of diversity.[[15]](#footnote-15) With the changing composition of the Court to a six-to-three majority for striking down race-conscious affirmative action,[[16]](#footnote-16) however, and with growing public objections to the practice, it is time to remind Americans that it racial justice that is at stake in this fight.

Justices Sotomayor and Jackson have already begun. In brave dissents that no longer confine themselves to the narrow utilitarian understanding of diversity, they reconnect affirmative action to its historical roots in the civil rights movement’s Second Reconstruction of the 1950s and 1960s and infuse diversity with remedial and democratic values.[[17]](#footnote-17) Justice Jackson resists the Court’s adherence to the narrow diversity rationale as adopted in Justice Powell’s plurality opinion in *Bakke* and invests substantial parts of her opinion in placing this current battle over affirmative action in its proper historical and moral context. “History speaks,” Justice Jackson writes. “In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”[[18]](#footnote-18) Not allowing colleges to take race into account in their admission programs “condemns our society to never escape the past that explains how and why race matters to the very concept of who ‘merits’ admission.”[[19]](#footnote-19) For Justice Jackson, it is the ability to address racial injustices that is at stake in losing affirmative action. Justice Sotomayor took a seemingly safer approach, confining herself more closely to the diversity framework but recharging it with egalitarian ideals. In the concluding paragraph of her opinion, she addressed the public, writing:

Notwithstanding this Court’s actions . . . society’s progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society’s needs for diversity in education. Despite the Court’s unjustified exercise of power, the opinion today will serve only to highlight the Court’s own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, “the arc of the moral universe” will bend toward racial justice despite the Court’s efforts today to impede its progress. Martin Luther King “Our God is Marching On!” Speech (Mar 25, 1965).[[20]](#footnote-20)

In this remarkable passage, Justice Sotomayor calls on universities and other institutions to continue to pursue diversity not because it is good for the educational process, better prepares students for the workforce, or promotes the creation of knowledge, but because it is a matter of racial justice.

Affirmative action is one of the few institutional responses to racial injustice. Therefore, the way universities, public officials, business, civil-society organizations, professionals, and courts define their commitment to these efforts is important for both law and politics. Despite the continued influence of race on educational opportunities, the utilitarian paradigm hinders the public’s ability to acknowledge this reality fully. Overlooking historical and current racial inequalities and their significance today enables individuals and institutions to disregard how much race still matters. Therefore, universities and other advocates of affirmative action should consider ceasing to operate on autopilot mode as they embrace a purely utilitarian and market-driven approach to diversity. With additional challenges to race-conscious but race-neutral admission policies anticipated,[[21]](#footnote-21) universities and other advocates of affirmative action cannot risk discarding diversity altogether. Instead, they should follow the dissenters’ lead and reinfuse the diversity framework with egalitarian meanings that can, over time, change the terms of debate over racial inequality in America in the courtroom and on campus.

1. *See* minute 0:05 *in*, Harvard University, President-Elect Claudine Gay Message to the Community, YouTube (Jun. 29, 2023), <https://www.youtube.com/watch?v=AoGjh3tbPm4>. [↑](#footnote-ref-1)
2. *Id.* (minute 1:29). [↑](#footnote-ref-2)
3. ? [↑](#footnote-ref-3)
4. Magnat schools and more [↑](#footnote-ref-4)
5. *See* supra part \_\_\_ [↑](#footnote-ref-5)
6. *See* [Gabriella Borter](https://www.reuters.com/authors/gabriella-borter/), *Most Americans think college admissions should not consider race -Reuters/Ipsos poll*, Reuters (Feb. 16, 2023), <https://www.reuters.com/world/us/most-americans-think-college-admissions-should-not-consider-race-reutersipsos-2023-02-15/> (“*Sixty-two* percent of Americans say race and ethnicity should not be considered at all in college admissions, according to new Reuters/Ipsos polling on policies at the center of high-profile cases before the U.S. Supreme Court this spring. The public opinion poll, which surveyed 4,408 adults from Feb. 6-13, found that 73% of Republicans and 46% of Democrats said they were against race-conscious admissions, or affirmative action, which is a practice used by colleges and universities to boost racial diversity within their student bodies.”); *see also* John Gramlich, *Americans and affirmative action: How the public sees the consideration of race in college admissions, hiring*, Pew Research Center (Jun. 16, 2023), <https://www.pewresearch.org/short-reads/2023/06/16/americans-and-affirmative-action-how-the-public-sees-the-consideration-of-race-in-college-admissions-hiring/> (“In a survey conducted in spring 2023, *half* of U.S. adults said they disapprove of selective colleges and universities taking race and ethnicity into account in admissions decisions in order to increase racial and ethnic diversity. A third of adults approved of this, while 16% were not sure.”). Past surveys showed greater support of race-conscious affirmative action, *see* **Thomas A. Johnson, *Survey Indicating Whites Favor Affirmative Action Is Questioned***, N.Y. Times (Feb. 21, 1979), https://www.nytimes.com/1979/02/21/archives/survey-indicating-whites-favor-affirmative-action-is-questioned.html?searchResultPosition=4 (“The survey. found that, “as long as there are no rigid quotas,” by a margin of 70 to 21 percent, a majority of whites favored special training for women and minorities to improve their employment prospects and, by 71 to 21 percent, special programs for college and graduate school admission.”). It is important to note, however, that public opinion about affirmative action is difficult to measure and is influenced by the wordings of the survey. [↑](#footnote-ref-6)
7. Derrick Bell, *Diversity’s Distractions*, 103 Colum. L. Rev. 1622, 1622 (2003). [↑](#footnote-ref-7)
8. *See* *Diversity*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/diversity> (last visited Aug. 7, 2023); *see also diversity*, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/diversity> (last visited Aug. 7, 2023) (“the fact of many different types of things or people being included in something; a range of different things or people”). [↑](#footnote-ref-8)
9. See supra part \_\_\_. [↑](#footnote-ref-9)
10. Sanford Levinson, Wrestling with Diversity 45 (2003) (quoting a letter from Jack Balkin). [↑](#footnote-ref-10)
11. See supra [↑](#footnote-ref-11)
12. For examples of the contemporary utilitarian interpretation in university documents, *see* [↑](#footnote-ref-12)
13. Harvard University, *President-Elect Claudine Gay Message to the Community*, YouTube (Jun. 29, 2023), <https://www.youtube.com/watch?v=AoGjh3tbPm4>. (minute 0:17). [↑](#footnote-ref-13)
14. *Id.* (minute 0:33) [↑](#footnote-ref-14)
15. *See supra* part [↑](#footnote-ref-15)
16. *See supra* [↑](#footnote-ref-16)
17. *See supra* part \_\_ and specifically notes \_\_\_\_. [↑](#footnote-ref-17)
18. *Students for Fair Admissions* v. *Harvard,* No. 20-1199, slip op. at 11 (U.S. Jun. 29, 2023) (Jackson, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-18)
19. *Id.* at 15. [↑](#footnote-ref-19)
20. *Students for Fair Admissions* v. *Harvard,* No. 20-1199, slip op. at 69 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-20)
21. Next cases [↑](#footnote-ref-21)