Foreword:
EPOCH 2023 Symposium
Going Forward: The Role of Affirmative Action, Race, and Diversity in University Admissions and the Broader Construction of Society

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INTRODUCTION

The third annual EPOCH symposium, a partnership between the *Seattle University Law Review* and the Black Law Student Association took place in late summer 2023 at the Seattle University School of Law.[1] It was

* Professor of Law and Associate Dean of Planning and Strategic Initiatives, Seattle University School of Law. Viveca Burnette, the *Seattle University Law Review* Symposium Chair and a BLSA member, was instrumental in helping to organize and oversee the EPOCH gathering, and Sr. Administrative Assistant Lori Lamb kept all the trains running. Thanks also to Ryan Saunders for his research support on this piece and to Vinay Harpalani for his help in suggesting and inviting some of the EPOCH participants.

1. For the written record of the first EPOCH symposium, *see* Symposium, *Epoch: Going Beyond a Racial Reckoning*, 44 SEATTLE U. L. REV. 623 (2021). The second EPOCH symposium, held in 2022, was titled *EPOCH: Institutional Transformation and the Law*, published at Symposium, *EPOCH: Institutional Transformation and the Law*, 45 SEATTLE U. L. REV. 785 (2022). This year's gathering in 2023, titled as *Going Forward: The Role of Affirmative Action, Race, and Diversity in University Admissions and the Broader Construction of Society*, was sponsored by the *Seattle University Law Review*, the Black Law Student Association, the Berle Center at Seattle University School of Law, the Seattle University Office of Diversity and Inclusion, Michigan State School of Law, and the

intended to uplift and amplify Black voices and ideas, and those of allies in the legal community. Prompted by the swell of public outcry surrounding ongoing police violence against the Black community, the EPOCH partnership marked a commitment to antiracism imperatives and effectuating change for the Black community.

As soon as national attention focused on the Black community's experiences, backlash against Black thought and Black progress took hold or amplified.[2] The reaction targeting Black thought came primarily in the newly launched national campaign to silence the teaching of Critical Race Theory (CRT) in schools.[3] The backlash against Black progress was evidenced by the latest and sharpest blow to the tool of affirmative action delivered by the Supreme Court in its *SFFA* decision in the context of higher education and perhaps beyond.[4] The decision recognized how affirmative action in education is a gateway to group advances in material equality, which is something CRT has instructed matters far more than mere formal legal equality.[5] Backlash steeped in white supremacy had challenged the modest affirmative action measures adopted or practiced by some U.S. schools—high school, and college undergraduate and graduate institutions—almost from their implementation.

Two key junctures in the ongoing struggle for group material change and the ongoing backlash against progress were highlighted in this year's

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King County Bar Association. I was honored by being asked to help plan the 2022 gathering, and again when the Black Law Student Association accepted my proposal to align the 2023 theme with affirmative action in admissions.

2. More accurately, Black struggle has existed as long as Black racial subordination, and backlash has accompanied any moments of racial progress, most profoundly around the dictates of formal legal equality announced in *Brown v. Board of Education*, 347 U.S. 483 (1954). *See generally* FRANCISCO VALDES, STEVEN W. BENDER & JENNIFER J. HILL, CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY ch. 2 (2021).

3. CRT had managed to stay off the radar screen until a series of laws were enacted starting in 2021 to control the teaching of race in public schools, especially K-12, and government employment trainings. *See* Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/ [https://perma.cc/SP3H-8GHS] (summarizing the laws enacted by fall 2021). CRT also became a cultural flashpoint in 2021 for backlash against the perception of Black progress and influence. *See also* Lis Power, *Fox News' Obsession with Critical Race Theory, by the Numbers*, MEDIAMATTERS AM. (June 15, 2021), https://www.mediamatters.org/fox-news/fox-news-obsession-critical-race-theory-numbers [https://perma.cc/3GUP-6GEV] (counting that Fox News had mentioned CRT more than 1,900 times in a period of three and a half months in 2021).

4. *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). Affirmative action was never a full replacement for the damage to Black applicants done through structural racism to exclude them from higher education. *See* George B. Shepherd, *Defending the Aristocracy: ABA Accreditation and the Filtering of Political Leaders*, 12 CORNELL J.L. & PUB. POL'Y 637, 647 (2003) (detailing the harmful impacts of accreditation measures that were emplaced to exclude applicants based on identity, contending that "affirmative action returns to blacks only a small fraction of the law school [seats] that accreditation takes away").

5. *See* VALDES, BENDER & HILL, *supra* note 2, at §2.2.

EPOCH symposium. At those junctures are themes of academic activism, racial repair, interest convergence and its limits, and resilience and long-haul campaigns. The first juncture is marked by the academic activism of law professors literally hitting the streets in an unprecedented display of symbolism and fervor—the Society of American Law Teachers (SALT)-organized C.A.R.E. March (Communities Affirming Real Equality) held during the January 1998 Association of American Law Schools (AALS) annual meeting in San Francisco. This feat of academic activism and organizing, taking place twenty-five years before the 2023 EPOCH symposium, was believed to be the first direct action demonstration organized by and for U.S. law professors in the history of the civil rights movement. SALT organizers and leaders at the time of the C.A.R.E. March, including Sumi Cho, Linda Greene, and Margaret Montoya, joined the EPOCH symposium, along with speakers from the rally that concluded the March, such as Frank Valdes and Linda Greene. The timing of the C.A.R.E. March and its venue were not by happenstance. Rather, the March came after the voter-enacted ban in California of "preferential treatment" on the basis of race and other specified identity grounds in public education, employment, and contracting.[6] Approved in November 1996 (and enjoined until the injunction was vacated in 1997),[7] that ban and the kismet of the AALS conference held in California enabled the SALT March to pose an advocacy challenge on the ban's own turf.

At that same time, the jurisprudential terrain nationally was no more favorable for advocates of race consciousness and material progress. For its part, at the time of the SALT March twenty-five years ago, the Supreme Court had only spoken to the validity of affirmative action in higher education in the 1978 *Bakke c*ase, which struck down an admissions system at the UC Davis Medical School reserving 16 of 100 seats in the entering class for minority and economically or educationally disadvantaged

6. CAL. CONST. art. 1, § 31 (Proposition 209, known as the Affirmative Action Initiative, was on California's ballot as a proposed constitutional amendment on November 5, 1996; it was approved and became Section 31 of the California Constitution); *see California Proposition 209, Affirmative Action Initiative (1996)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996) [https://perma.cc/2JFZ-CL4J] (last visited Mar. 28, 2024); *see also Resolution in Support of SALT C.A.R.E. March*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Dec. 1997, at 12 (1997).

7. *See* Coal. for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (vacating the preliminary injunction based on finding the challengers to the Proposition 209 did not demonstrate a likelihood of success on their equal protection or other claims for invalidation); *see also* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary, 572 U.S. 291 (2014) (holding no authority in federal Constitution allowed set aside of amendment to Michigan Constitution prohibiting affirmative action in public education, employment, and contracting, and enacted in response to the so-called Michigan cases of *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) allowing race-conscious affirmative action in university admissions).

students.[8] The *Bakke* opinion, written by Justice Powell, did specify that the attainment of a diverse student body was a sufficient justification for a limited racial classification that did not rely on quotas, although no other justice joined in the so-called diversity rationale. The Fifth Circuit treated that part of the opinion as not binding in its 1996 *Hopwood* case, which rejected the diversity rationale and invalidated the race-conscious admission system of the University of Texas School of Law as contrary to the Fourteenth Amendment.[9] Although the Supreme Court had recognized subsequent to *Bakke* that the need to remedy the effects of prior discrimination could justify affirmative action measures in other settings,[10] *Hopwood* required findings, which were unmet, that the law school itself was the past discriminator, and that it had adopted its race-conscious admission program to remedy the present effects of that past discrimination.[11] At the time of the SALT C.A.R.E. March, then, affirmative action measures stood on tenuous ground. Under *Hopwood*, which was seen by many legal observers as the blueprint for future Supreme Court rulings, race-conscious admission programs in higher education were unlikely to pass constitutional muster, and even if they did, state bans on affirmative action programs like California's might permissibly snuff those efforts.[12] This was the landscape twenty-five years ago and one we navigate again today in the wake of the other juncture defining the 2023 EPOCH symposium.

That other juncture informing the 2023 symposium was the Supreme Court's significant step backward by invalidating the admissions programs at Harvard College and the University of North Carolina in a ruling at the end of June 2023, just two months before the EPOCH symposium. Serving as another multi-decade anniversary of sorts, the 2023 *SFFA* opinion marked the effective end of the deference to higher education admissions systems under the diversity rationale that had been accorded by the Court twenty years earlier in *Grutter v. Bollinger*,[13] decided in 2003. The 2023

8. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

9. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996) (the challenged system was designed to benefit Black and Mexican American applicants).

10. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (affirmative action in awarding government contracts).

11. *Hopwood*, 78 F.3d at 952.

12. *See* Sylvia A. Law, *Law Professors as Political Activists*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Dec. 1997, at 9, 13 (Noting at the verge of the SALT March that "affirmative action, and hence integration and diversity, are in jeopardy. Proposition 209 prohibits any effort to achieve integration or diversity in California, the Fifth Circuit [in *Hopwood*] has prohibited affirmative action within its jurisdiction and other repressive measures are in the pipeline.").

13. 539 U.S. 306, 307 (2003) (upholding University of Michigan Law School admissions policy seeking a critical mass of diversity that furthered the "compelling interest in obtaining the educational

ruling in *SFFA*[14] was the culmination of years of targeted backlash to race-conscious affirmative action that carefully selected schools and plaintiffs (white women,[15] and then Asians in *SFFA*) while awaiting the intentional sculpting of the current Court composition to deliver colorblind outcomes that fail to see or care how racism continues to organize law and society.[16]

The timing of the 2023 EPOCH symposium, then, was marked by two anniversaries, one (twenty-fifth anniversary of the SALT C.A.R.E. March) inspiring and the other (twenty years under *Grutter* before its recent undoing) deflating.[17] This juxtaposition of inspiration and deflation has marked identity-based subordinations, and the struggle against them, throughout history. Legal victories, particularly those enabled by interest convergence, tend to be fleeting.[18] What is enduring, however, are the ingredients that underlay the SALT C.A.R.E. March that continue to animate and inspire activists to action, especially during the 2023 EPOCH symposium. Those ingredients include the power of collectivizing and the collective that resulted. I remember the joy of marching in San Francisco with a huge number of law professors, along with lawyers and law students, turning out to honor the campaign for diverse campus admissions and diversity in the legal profession. I also remember seeing how the supporters that winter day cut across identity-based lines of race, ethnicity, and gender, suggesting the campaign had meaningful traction and the potential to

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benefits that flow from a diverse student body"), *see also* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan undergraduate admissions approach of awarding a fixed number of points to minority applicants rather than an individualized consideration of applicants).

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

15. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365 (2016) (plaintiff Abigail Fisher, a white woman). *See generally* Wendy Leo Moore, *Affirmative Action Benefits White Women Most*, TEENVOGUE (Mar. 30, 2022), https://www.teenvogue.com/story/affirmative-action-who-benefits (asking why white women as the primary beneficiaries of affirmative action programs since the 1960s have aligned themselves with challenges to affirmative action rather than with women and men of color to protect these programs).

16. *See Students for Fair Admissions*, 600 U.S. at 407 (J. Jackson, dissenting). Justice Jackson, in dissent, wrote:

> With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. . . . No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better.

Id.

17. On the day of oral argument in the Michigan affirmative action cases, on April 1, 2003, SALT held a march in support of affirmative action that began and Georgetown law school and headed toward the Supreme Court. For reports on the 2003 march and rally, see *SALT Supports Affirmative Action*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Apr. 2003, at 7–18.

18. Interest convergence is the theory and reality that progress for subordinated groups seems to come, if at all when that progress coincides with the interests (financial and otherwise) of the majority group in power. *See* VALDES, BENDER & HILL, *supra* note 2, at 118–19.

foment coalition. I remember seeing determination and resolve, but also unbridled joy at the moment of collective resistance and the statement it made to legal and nonlegal actors about how a broad swath of law professors chose to spend their time during the annual AALS conference that had focused in the past and since on scholarship, pedagogy, and teaching, but rarely on academic activism.

That same spirit—the joy of the collective in the face of daunting challenges and setbacks—marked the 2023 EPOCH symposium, held in-person at the Seattle University School of Law. Although held just two months after the *SFFA* outcome, almost every attendee had anticipated the Court's ruling—the conservative dream team Court majority for rolling back anti-subordination gains was emplaced after Justice Barrett was appointed in haste in late 2020 and was looking for the right case to do its preordained work, as it will surely do in other settings in the Court terms ahead. Once the Court took review of the Harvard and North Carolina cases in 2022, those scholars who see the existence and reality of systemic racial outcomes that are obscured for those who think and act somehow "colorblind," began preparing for life without the deference to the diversity rationale that had enabled modest affirmative action measures on the basis of race in university admissions. The question was less whether the Court would strike down the admissions programs at those schools and more how much damage it would cause in its ruling, particularly how that ruling would affect programs to attract, retain, and help minority students thrive in their education such as through pipeline programs, scholarships, and other initiatives, and later in the workplace through race consciousness in summer fellowships and ultimately in post-graduation hiring. These questions, and more generally how to move forward to foster material progress for subordinated societal groups, dominated the EPOCH symposium panels and discussion.

The published symposium in this volume encompasses some, but not all, the ideas and vision detailed in the live symposium. Here, I summarize the content of this published symposium of contributed articles, but I also try to convey some of the ideas and discussion outside the submitted articles, with the aim of providing a more cohesive sense of the gathering and to preserve the many ideas shared as a catalyst for future organizing and action.

I. SITUATING EPOCH 2023 IN ACADEMIC ACTIVISM AFFIRMING REAL EQUALITY

The impetus for the 2023 EPOCH symposium's focus on affirmative action came from my idea to revisit and celebrate the SALT C.A.R.E. March (and Rally) from 1998 during its twenty-fifth anniversary while

knowing the Supreme Court was poised to roll back affirmative action programs. Although the previous EPOCH symposium was held during the spring semester, I was able to secure the agreement to push it back to late summer, in the fall academic semester, in order to ensure the Court had ruled on *SFFA* by then (they did only on June twenty-ninth) and that speakers would have some time to reflect (slightly more than two months) on the expected outcome before we gathered to celebrate, critique, complain, coalesce, and contemplate for the future.

Fittingly, we started the summit with a panel addressing the C.A.R.E. March, with the speakers seated in front of a rotating display of captivating photos from that event, that we had procured only days before. As Linda Greene, SALT President at the time of the March, had expressed years before, the March "visibly and proudly assert[ed] the importance of diversity in legal education, as well as in the legal profession."[19] Deborah Rhode, the AALS President in 1998, wrote that for her and many of those who marched, it was their first protest organized by law professors.[20] She noted the protest signs and the chants that accompanied the March were not the "usual measured prose of academic discourse,"[21] but were passionately felt. Thousands of law professors, lawyers, and law students walking the city streets and chanting slogans of diversity such as "Educate, Don't Segregate" seemed far removed from the usual work of professors in the classroom and in the print of law reviews. In fact, even within SALT, which organized the March as part of its "Action Campaign," there was tension around how far and how fervent academic activism should extend beyond what traditionally draws institutional rewards for those within legal academia. As former SALT co-president Phoebe Haddon revealed, action initiatives at the time sparked emotion-laden conversation within the SALT Board between those who demanded "total devotion" and those who preferred their activism to take the traditional and more mild form of "scholarly ruminations and experimenting with more inclusive classroom methodology."[22]

Launched in 1996, SALT's multi-year "Action Campaign" for Diversity aimed to "reconstruct merit and affirm diversity in legal education,"[23] with the C.A.R.E. March among its initial activities to "represent

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19. Linda S. Greene, *President's Column: It's A Great Time for SALT*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Dec. 1997, at 2.

20. Deborah L. Rhode, *The AALS Statement at the SALT March on Diversity*, ASS'N OF AM. L. SCHS. NEWSL., Feb 1998, at 6.

21. *Id.*

22. Phoebe A. Haddon, *Coalescing With SALT: A Taste for Inclusion*, 11 S. CAL. REV. L. & WOMEN'S STUD. 321, 334–35 (2002).

23. Sumi Cho, *SALT Launches "Action Campaign for Diversity"*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Sept. 1997, at 1.

a collective, catalytic act of civic courage to counter the rising tide of race-based reaction."[24] That campaign sketched a broad intervention in law and policy that included three tiers of activism: (1) developing alternative admissions that focused on the entry into law school and encompassed LSAT critiques and devising progressive admissions approaches; (2) cultivating social justice curriculum and practice that focused on the law school experience and the pathway to law practice, encompassing a SALT alternative to the MacCrate Report,[25] the creation of social justice jobs, and reforming the bar exam; and (3) activating a legal and political resistance task force to implement the outcomes of the Action Campaign, encompassing organizing political action, establishing multi-media materials, and coordinating litigation support.[26] That resistance task force took the lead in planning the C.A.R.E. March.[27]

By the time I had assumed the co-presidency of SALT in 2010, to my recollection, the Action Campaign had lapsed in its active status within SALT, although SALT's organizational commitment to diversity and reform never lessened and some of the substantive Action Campaign initiatives were pursued through other named committees. As legal academics, we are rewarded institutionally, first and foremost, for traditional publications, based on the caliber of placement and the number of legal citations. Secondarily, but still important, is teaching as reflected by student and sometimes peer reviews. Service is rewarded to a lesser but still measurable degree, particularly service within the host institution but also in prestigious national organizations. Activism outside of these roles is even less valued and rewarded at most schools. Not only is activism less rewarded, but also at some schools and among some faculty and legal professionals, it is seen as problematic and contrary to the decorum of academia to remain above the fray.

In 1997, law professor and former SALT president Sylvia Law expressed her disagreement with what she called "the dominant view . . . that academics should not be activists."[28] She felt instead that legal theory had to be informed by immersion in practice and struggle. Because she could not name a single example of professors organizing demonstrations, she understood the SALT C.A.R.E. March as marking a change in approach for even "activist" law professors; a shift from encouraging and playing a

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24. *Id.*

25. *See generally* E EUGENE CLARK, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (known as the MacCrate Report).

26. *SALT Action Campaign*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Apr. 1998, at 10.

27. *See* Elvia Arriola, *March!*, 19 CHICANO-LATINO L. REV. 1, 5 (1998) (observing how LatCrit scholars working through SALT were instrumental in organizing the C.A.R.E. March).

28. Law, *supra* note 12, at 9.

supportive role for actions organized by others, to professors actually taking the lead role in activist political organizing.[29] As Law put it, the urgency of the prevailing situation when affirmative action was in dire peril "demand[ed] a dramatic response" in the form of academic activism.[30]

Now, in 2023, we are returned to the same moment of urgency, having been "borne back ceaselessly into the past"[31] by the Court. Many of the proposals and ideas suggested at the 2023 EPOCH symposium, and even the containment of the damage from the *SFFA* decision to its context of higher education admissions, will require organizing, culture shift, and perhaps political action. As just one example, reimaging and reforming K-12 school funding toward true equality of funding will require retooling most every state's school financing model or perhaps the Supreme Court overturning *San Antonio Independent School District v. Rodriguez*[32] to treat education as a fundamental right invoking strict scrutiny toward funding equality. And prevailing culture buttressing that judicial outcome must regard public education as essential, in a move away from the neoliberal trend to devalue and defund public education and resort to private alternatives for those who can afford them.[33]

Although detailed in the medium of traditional legal scholarship, the articles included in this published symposium, and the ideas from the oral symposium that I share below, in the aggregate amount to the necessary blueprint to reinforce, and in some cases, to lead the organizing and political action that must follow in order to keep the struggle from being borne back not just twenty-five years, but all the way back to the 1960s and before when law schools were the "bastion of elite white men"[34] and law firms were no more diverse.

II. EPOCH SYMPOSIUM OVERVIEW

The 2023 EPOCH symposium was spread over two days with more than three dozen speakers participating in eight panel discussions, punctuated by two keynote addresses by law deans central to the symposium themes; one by Dean Angela Onwuachi-Willig from a school, Boston University School of Law, known for its antiracism curriculum, and the other

29. *Id.* at 10, 13 (pointing out the need for the shift in the unusual times where anti-affirmative action measures "pose a profound threat to equality, democracy, diversity and any sensible concept of merit").

30. *Id.* at 13.

31. F. SCOTT FITZGERALD, THE GREAT GATSBY 218 (1925).

32. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

33. *See* Lois Weiner, *Privatizing Public Education: The Neoliberal Model*, 19 RACE, POVERTY & ENV'T 35, 35–37 (2012).

34. Law, *supra* note 12, at 13.

Dean Linda Greene, from Michigan State University College of Law, who was SALT's president at the time of the C.A.R.E. March.

Friday's opening panel centered the academic activism of the C.A.R.E. March and featured key professors from the legal academy who organized or spoke (or both) at the rally following the March. Titled "Commemorating the SALT C.A.R.E. (Communities Affirming Real Equality) 25th Anniversary: Academic Activism and Acting Affirmatively," that opening panel also included current SALT leadership speaking about that organization's longtime activism around equality and affirmative action. As current SALT Co-Presidents Olympia Duhart and Allyson Gold detailed, the occasion both marked the twenty-fifth anniversary of the March but also the fiftieth anniversary of SALT's founding. They discussed how SALT has deployed a multi-faceted approach to navigate the differences among institutions in their tensions around diverse admissions and diversity missions, and how SALT has particularly tried to support faculty in vulnerable jurisdictions and in vulnerable career positions. SALT judicial activism around affirmative action has included an amicus brief with the Equal Justice Society that Justice Sotomayor cited in her *SFFA* concurrence,[35] and previously an amicus brief in the *Fisher* case,[36] together with SALT joining the rally held outside the Court during the *SFFA* oral argument in October 2022. SALT webinars and op-eds spoke to the need for diversity and helped organize the academy, and SALT faculty pipeline work helps diversify the legal academy.

Opening panel discussion questions and topics included the role that law professors can and should play in contentious societal issues, particularly affirmative action, that have been pulled into the raging cultural wars; whether and how law professors must teach constitutional law any differently against the backdrop of Court outcomes that question its legitimacy; the role law professors can play in the formation of coalitions toward anti-subordination outcomes; how law professors can organize around material (critical) justice rather than mere formal legal equality; and,[37] if we could redesign legal education, and education more generally in ways that would not depend on affirmative action so that diversity would happen naturally,

35. *See generally* Brief for 25 Diverse California-Focused Bar Associations, Lawyers Associations, Civil Rights Organizations, and Community Foundations as Amici Curiae in Support of Respondents, President & Fellows of Harvard Coll. and University of North Carolina, 600 U.S. 181 (2023) (Nos. 20-1199 & 21-707).

36. *See generally* Brief for Society of American Law Teachers as Amicus Curiae Supporting Respondents, University of Texas at Austin, 579 U.S. 365 (2016) (No. 14-981).

37. The naming of the SALT March as C.A.R.E., Communities Affirming Real Equality, was meant in part to contest the shortcoming of mere formal, symbolic legal equality, instead demanding "real" (material) equality as judged by outcomes and not promises. *See* Margaret E. Montoya, *Memories of an Affirmative Action Activist*, 47 SEATTLE U. L. REV. 1029, 1044–45 (2024) (explaining the significance of each word in the acronym C.A.R.E.).

what would that education look like? In her remarks at the event and in her written symposium piece, Margaret Montoya, one of the C.A.R.E. March organizers, spoke about her personal history as a beneficiary of affirmative action as the first Latina to attend Harvard Law, while situating Harvard as the biggest beneficiary of its affirmative action policies drawing a more diverse student body. She spoke too about the architecture and role of the March, in which diverse academics wrapped their "disfavored bodies in the [academic regalia] gowns of privilege."

Sumi Cho, a longtime law professor and now the Director of Strategic Initiatives at the African American Policy Forum, spoke about what, in hindsight, was commemoration-worthy about the C.A.R.E. March and provides the most guidance now. Her insights included how the March was meant to offer a principled critique of liberal institutions as enablers of exclusion—implicating the law schools in which we work—in addition to targeting the exclusionary architects and the extremists themselves. She noted that while previously the SALT organization itself looked much like the elite law schools in terms of its diversity, the ranks of diverse board members expanded to a critical mass before the March with some intentionality around diversity beyond mere tokenism. She spoke about how the messaging at the C.A.R.E. March and Rally was meant to convey an understanding of the interconnectedness of all forms of exclusionary oppression and the struggle against them. Cho talked too about the importance of a lifelong commitment to embed struggle in our own lives and to act collectively in response, as SALT did by means of the March.

In his remarks and comprehensive symposium submission, University of Miami law professor Frank Valdes explained how CRT, race-conscious affirmative action in higher education, and DEI (Diversity, Equity, and Inclusion) became "the principal bogey monsters for today's rightist reactionaries."[38] As a response to those Fascist forces, he maps the resources for and of critical scholars in the U.S. legal academy, supplying the first overview of the current critical landscape in legal academia, as well as a roadmap of actions to better connect and coordinate these resources to meet the moment.

Once the summit had been framed by these opening themes of praxis, organizing, and academic activism deploying the anti-subordination means of color consciousness, we looked at the rubble of the affirmative action remedy after the *SFFA* decision. The key takeaway of the panelists examining "The Supreme Court's Affirmative Action Jurisprudence Under and After *SFFA*: Where it Stands, Where it Might Extend" was that

38. Francisco Valdes, *Defeat Fascism, Transform Democracy: Mapping Academic Resources, Reframing the Fundamentals, and Organizing for Collective Actions*, 47 SEATTLE U. L. REV 1057, 1072 (2024).

affirmative action as a remedy was left wounded but not vanquished. Panelists differed in their assessment of the damage. Jeff Hoagland, a judicial clerk for the New Mexico Court of Appeals,[39] was among the most skeptical of panelists, opining he did not believe the Court would approve any admission system using race given the majority's zero-sum analysis in *SFFA*.[40] Vinay Harpalani from the University of New Mexico School of Law agreed, pointing to the *SFFA* language that diversity admission programs cannot burden any groups, which he saw as effectively overturning *Grutter*. In contrast, Jonathan Feingold from Boston University School of Law suggested that although virtually all media headlines on *SFFA* declared affirmative action dead, the decision did not formally and doctrinally do that.[41] Steve Ramirez, a Loyola University Chicago law professor, added that Chief Justice Roberts in the majority opinion was trying to walk a narrow line by throwing some "red meat" to the Trump constituency while not fully cracking down on affirmative action. An example he cited of remaining life for affirmative action is the exclusion of military schools from the *SFFA* decision[42] because those schools have potentially distinct interests and weren't a party to the lawsuit. Ramirez interrogated that exclusion to suggest it could include law schools, especially Jesuit law schools that have a social justice mission, which could be characterized as potentially distinct. Moreover, no Jesuit schools were a party to the *SFFA* litigation. In his written article in this symposium,[43] Ramirez develops his argument that the Court did not overrule or materially limit its treatment

39. Jeff, a former research assistant for Vinay Harpalani, is pointing toward a career in the legal academy; his published work includes Jeffrey D. Hoagland, *Holistic Admissions and the Intersectional Nature of Racial Identity*, UNIV. OF PITT. CTR. FOR CIV. RTS. & RACIAL JUST. (Feb. 14, 2023), https://www.civilrights.pitt.edu/holistic-admissions-and-intersectional-nature-racial-identity-jeffrey-d-hoagland-jd [https://perma.cc/FG8F-H7S5].

40. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 218–19 (2023) ("[Harvard and North Carolina] nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. . . . College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.").

41. Jonathan's interpretation of *SFFA* and its context is more broadly detailed in Jonathan Feingold, *The Next Fight for Racial Justice Starts Now*, NEW AMERICA: BLOG (Sept. 14, 2023), https://www.newamerica.org/education-policy/edcentral/the-next-fight-for-racial-justice-starts-now/ [https://perma.cc/6A3C-75HN].

42. *Students for Fair Admissions*, 600 U.S. at 213 n.4. Rachel Moran suggested a more invidious reason for the military school "exception" as signaling the continued salience of race, through racial profiling, as targets of border and law enforcement. Equally cynical, as one attendee pointed out, is that the footnote is helping ensure the possibility that Black and Brown people are recruited for the front lines of war. *See* Zoom Recording: EPOCH Going Forward: The Role of Affirmative Action, Race, and Diversity in University Admissions and the Broader Construction of Society (2023) (on file with author) [hereinafter EPOCH Recording].

43. Steven A. Ramirez, *Students for Fair Admissions: Affirming Affirmative Action and Shapeshifting Towards Cognitive Diversity?*, 47 SEATTLE U. L. REV. 1281 (2024).

of race-conscious college admissions policies, particularly when these policies are bound tightly to institutional mission.

Danieli Evans, my colleague at Seattle University School of Law, situated the *SFFA* outcome as one that causes expressive harms beyond its practical impacts on admission procedures. The expressive harms come from the Court's pronouncement that considering race for purposes of inclusion is invidious in the same way that race has traditionally been used for exclusion.[44] She interrogated the terminology and current framing of "affirmative action" as problematic by signifying some deviation from existing colorblind meritocracy in student selection. Rather, nothing in the existing admissions process is race-neutral, as every criterion reflects racial reality and differences in treatment and opportunity that are baked in. She saw a sliver of potential left in the *SFFA* outcome to permit race-conscious admissions for diversity if the educational objectives of that engineering were concrete enough, particularly the objective of diversity as essential to create an educational environment of belonging for all groups.

Reginald Oh, a law professor at Cleveland-Marshall, focused too on expressive harm of erasure and invisibility, suggesting that Asian Americans lost rather than won the *SFFA* case on that ground.[45] He opined that *SFFA* did not overrule *Grutter*,[46] which is particularly evident when comparing *SFFA* to the recent *Dobbs*[47] decision that speaks explicitly about overruling *Roe v. Wade*.[48] Oh invoked the film *Honey I Shrunk the Kids* to suggest the current movie should be called Honey I Shrunk *Grutter*, thereby acknowledging it is still alive. To survive scrutiny in this shrunken reality, Oh suggested that affirmative action programs must include some durational limit, schools must develop (with the help of educational researchers) measurable learning outcomes that flow from diversity, and schools must refrain from using race to dramatically harm other racial groups in the composition of the entering class. He suggested one way to eliminate this zero-sum game challenge is to significantly increase the size of the entering class at the last minute, thereby demonstrating that race-based admissions actually *increased* opportunity for other groups given the increase in the overall number of admitted students. Oh also offered some race-neutral options as an alternative to race consciousness in admissions to avoid strict scrutiny, starting with what the *SFFA* majority opinion suggested of an essay on individualized racial experience, ostensibly

44. EPOCH Recording, *supra* note 42.

45. Jonathan Feingold pointed out during the panel that there is a new dynamic that antiracism means anti-Asian, and we will need a collective strategy to change that communication and consciousness. *Id.*

46. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

47. *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

48. *See generally* Roe v. Wade, 410 U.S. 113 (1973).

drawn from experience rather than skin color. Other admissions criteria Oh suggested (while explaining how each could be seen as facially race-neutral) include admission priorities to decedents of enslaved persons, victims of Jim Crow segregation, members of Native American tribes, and applicants from underrepresented global regions.[49]

Finally, Erika Wilson, from the University of North Carolina School of Law, which was party to the *SFFA* litigation, lamented that the affirmative action defense strategy by universities in *SFFA* and earlier cases has been rooted in defenses that don't rely on remedial justifications for those admission programs.[50] She focused on descendants of slaves to make the normative argument for a remedial justification for affirmative action race consciousness in their admission. She pointed to the vast underrepresentation of these Black descendants in the student body, particularly in top law schools, as part of the strong evidence supporting remedial programs and potentially informing a more robust litigation strategy.

Even accepting the most pessimistic of interpretations in the jurisprudence panel about where affirmative action stands post-*SFFA*, and what might further topple the remedy in the years and judicial outcomes ahead, hope emerged in the next panel, titled "National Lessons from the Frontlines in California, Washington, the *Hopwood* Era, and Beyond: Navigating Local Constitutional Restrictions." Professors and former law deans from several states constrained by local laws or judicial outcomes prohibiting consideration of race in higher education admissions shared insights of how schools in those jurisdictions were able to mitigate or surmount those restrictions to deliver diversity outcomes. Rachel Moran, a former dean at UCLA School of Law and now at Texas A&M, spoke about the California experience under Proposition 209, which abolished preferences in public university admissions, governing both undergraduate and graduate admissions. Moran talked about doubling down on targeted outreach and recruitment while moving away from race-based to need-based financial aid. Merit was also redefined, using a holistic file review with additional admission criteria. Public universities did not abandon the diversity goal (particularly given that the Court at the time before *SFFA* had embraced the legality of the diversity goal as a matter of federal constitutional law); the effect of the California Proposition was more to change the means of achieving that diversity goal than its end. Moran suggested that targeted outreach may now be subject to post-*SFFA* challenge, along with race-based financial aid and anything that might be seen as racially

49. EPOCH Recording, *supra* note 42.

50. *See* VALDES, BENDER & HILL, *supra* note 2, at 933 (discussing how student intervenors in the Michigan affirmative action litigation sought to unveil the dirty laundry of past discrimination and thus support justifications beyond the diversity rationale).

motivated. Overall, she said the University of California experience is instructive but may be unique in its political moment and its local demography, which makes diversity easier to achieve there than other regions.

Mario Barnes spoke from experience in both California at UC Irvine as a professor and UC Berkeley as a law student, and in Washington as the former dean at the University of Washington School of Law. He framed affirmative action as not dead but as on life support now, suggesting those schools that are litigation and risk averse will turn to what public schools did in places like California, Washington, and Michigan for guidance on how they navigated their analogous state race-consciousness restrictions while still honoring a diversity mission. He mentioned a variety of race-neutral mechanisms previously deployed, such as a focus on first-generation students and overcoming life challenges, but warned that in the wake of *SFFA*, race-based motivations to promote diversity will be challenged despite their facially neutral methods. Barnes also spoke about the value of race-conscious pipelines reaching down to high school students but warned that, while these were seen as complying with restrictive state law, they may now be challenged post-*SFFA*. He also questioned whether challenges were coming for public-private diversity scholarship partnerships.

Darren Hutchinson, now at Georgia's Emory University after teaching at places such as Southern Methodist University in Texas and the University of Florida for almost a decade, spoke to his experience, particularly in Florida. Florida's anti-affirmative action restriction, in contrast to the other states discussed, derived from former Governor Jeb Bush's "One Florida" executive order. It spurred a guaranteed admission program in the vein of the Texas 10% approach meant to pursue diversity through a facially race-neutral means. Hutchinson suggested that measuring impact by looking merely at the numbers of diverse students admitted after the restriction is skewed, as the key indicator is the demography of dramatic rises in diverse state population not reflected in university admissions. He expressed the need going forward to think and work collectively toward the diversity mission, which was a clear theme that emerged among conference participants. Finally, Kimberly West-Faulcon from Loyola Los Angeles spoke about how right-wing extremists aim to do more than eradicate affirmative action. Rather, using the Trojan Horse metaphor, she showed how the purveyors of anti-affirmative action in admissions litigation orchestrated a long-term agenda to eliminate the 1960s federal civil rights laws by casting them as anti-white racism. Her insights are included in her published piece in this symposium.[51]

51. *See generally* Kimberly West-Faulcon, *The* SFFA v. Harvard *Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355 (2024).

Panelists also mentioned American Bar Association standards for accredited law schools as likely to come under challenge. Currently, the ABA standards mandate a commitment to diversity and inclusion as evidenced by the school's admitted student population as well as by its diverse faculty and staff.[52] The ABA had resolved the potential for conflict with contrary state law by saying that those restrictions are not a justification for noncompliance with accreditation standards,[53] but has not yet spoken to the impact of *SFFA*.

Friday's panels concluded with a discussion featuring several Jesuit law deans. Titled "Religious Freedom and Diversity Missions: Insights from Jesuit Law Deans," the deans centered discussion on how diversity mission-driven religious institutions should react to the *SFFA* outcome and whether they should seek special constitutional protection based on their religious mission.[54] Given the centrality of Jesuit identity to the

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52. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023–2024 15 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2023-2024/23-24-standards-ch2.pdf [https://perma.cc/663L-LWVX]. Standard 206, "Diversity and Inclusion" reads:

> (a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.
>
> (b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.

Id.

53. *Id*. ABA Standard 206, Interpretation 206-1 states:

> The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity, or national origin in admissions or employment decisions is not a justification for a school's non-compliance with Standard 206. A law school that is subject to such constitutional or statutory provisions would have to demonstrate the commitment required by Standard 206 by means other than those prohibited by the applicable constitutional or statutory provisions.

Id.

54. The panel is transcribed at *Religious Freedom and Diversity Missions: Insights from Jesuit Law Deans*, 47 SEATTLE U. L. REV. 1427 (2024). *See generally* Natasha T. Martin, *Diversity on Campus Must Be a Top Priority*, MEDIUM: CONVERSATIONS ON JESUIT HIGHER EDUCATION (July 21, 2023), https://conversationsmagazine.org/diversity-on-campus-must-be-a-top-priority-e161781eee38 [https://perma.cc/YL9M-Z3WN] (detailing the inclusive religious mission of Jesuit education); Kent Greenfield & Eduardo Peñalver, *How the First Amendment Can Save Affirmative Action*, HILL (July 19, 2023), https://thehill.com/opinion/congress-blog/4104184-how-the-first-amendment-can-save-affirmative-action/ [https://perma.cc/A5TM-KXH6] (discussing the foundational principles of Jesuit institutions that a strict colorblindness standard might interfere with); Juan F. Perea, *Affirmative Action Ruling Prevents Steps Toward Racial Equality*, MEDIUM: CONVERSATIONS ON JESUIT HIGHER EDUCATION (July 6, 2023), https://conversationsmagazine.org/affirmative-action-ruling-prevents-steps-toward-racial-equity-2ddd31d5f296 [https://perma.cc/N9XL-MX22] (advocating that the Jesuit values of equity and justice demand remedial action for past and present discrimination against persons of color).

symposium host institution, I decided to include a transcript of that panel discussion in this symposium issue, including audience questions. The key takeaway among the deans was a reluctance to seek special constitutional protection in order to better situate the Jesuit schools in coalition and collective work toward protecting diversity interests and missions of U.S. law schools generally.

Dean Angela Onwuachi-Willig closed the day with a keynote demonstrating how the Court's move away from explicit race consciousness in university admissions in *SFFA* will deepen, rather than lessen, the impacts of racial bias. Relying on social science research, she detailed how colorblindness in admissions makes it impossible to remove and counter implicit and explicit racial bias from the admissions evaluation process. Rather than comport with the lived realities of people of color, *SFFA* offered a white-washed narrative about a colorblind Constitution, country, and Court that may stifle diversity at some institutions. In response, she urged those who value diversity, inclusion, equity, and belonging to tell their counterstories in venues from admissions essays to the classrooms and courtrooms, which can collectively reshape the dominant narratives causing exclusion.

Saturday featured four panels, starting with one that continued the summit's law dean focus on color consciousness, by hearing from several of the record number (twenty-seven at the time of the event) of Black women deans in the legal academy; Nicky Boothe (University of Illinois Chicago), Marcilynn Burke (University of Oregon), Tamara Lawson (University of Washington), Camille Nelson (University of Hawai'i), and Eboni Nelson (University of Connecticut). Titled "Insights Going Forward from Law Deans on Diversity and Race-Consciousness," the panel emphasized admissions as well as how to foster belonging for diverse students once admitted to the academy and included discussion of the deans' own experience, and that of their schools, in these formally colorblind, but still color consequential, times. The deans spoke to their experiences as Black women in leadership roles and to their experiences and responsibilities in their leadership positions to enhance diversity in the academy and the legal profession. They recognized that affirmative action was never a silver bullet to remedy the dearth of diversity and spoke to what should be done to pursue diversity without relying on affirmative action as it has been traditionally practiced within higher education, which ran afoul of the Constitution in *SFFA*. Among the many valuable suggestions was an emphasis on pipeline work in high schools (and even middle schools) through repeated and sustained interaction, with the importance of designating someone within the institution responsible for pipeline engagement. Collaboration with undergraduate institutions and organizations doing pipeline

work, such as Just the Beginning,[55] add to the pipeline and its sustainability in hopes of making an early difference in a young person's life and potentially bringing diversity into the legal academy, and ultimately, the legal profession.

Another Black woman law dean, Linda Greene, followed the dean panel with a lunchtime keynote that looked back to the SALT C.A.R.E. March as an example of coalition to promote inclusion. She suggested inclusion took hold in the Court decision that followed addressing the University of Michigan,[56] but that opponents took their opposition to the ballot box by proposing anti-affirmative action initiatives, as was done in her state of Michigan, and the Court later upheld that restrictive approach.[57] Greene then looked forward while remembering the past, urging the audience to reimagine and restate the terms of the struggle for access to legal education toward equal justice and citizenship under law and toward joining the privilege and power of the legal profession for underserved communities. She looked at statistics of the dearth of Black judges and the history of Black exclusion from law schools to urge institutions to do the hard work of refining their admission policies under *SFFA*, rather than overcorrecting and diluting their approaches to diversity based on overstated media reporting of the decision's reach. She reminded the audience of the work that was done post-*Plessy*[58] to overcome its false separate but equal premise and compelled us to meet the moment with the imperative to innovate and overcome.

Next, I moderated a roundtable meant to build on the prior panels and offer a forward-looking opportunity for academics to organize and develop advocacy projects, or the theory undergirding them, toward equality in higher education admissions. Titled "Strategizing Responses and Next Steps to Ensure Diversity in Education and Law," this panel featured the largest number of speakers who suggested a variety of novel theories and strategies, both tested and untested, toward diversity under, and despite, law. Kim Forde-Mazrui from the University of Virginia focused on theory by addressing originalism within the Court's jurisprudential approaches, particularly with regard to colorblindness and the Fourteenth Amendment.

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55. *See Just the Beginning: A Pipeline Organization*, JUST THE BEGINNING, https://jtb.org/ [https://perma.cc/N4TZ-699D]. In the summer of 2024, the Seattle University and University of Washington Schools of Law will partner with Just the Beginning and local lawyers and judges to offer a high school pipeline event.

56. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

57. *See generally* Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equality by Any Means Necessary, 572 U.S. 291 (2014) (upholding Michigan anti-affirmative action initiative against constitutional challenge).

58. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding racially "equal but separate" facilities as constitutional).

He suggested that if you looked at what was happening at the time of its adoption, states were excluding and segregating on the basis of race within higher education to preserve whites-only institutions, and the federal government acquiesced in it. Therefore, he noted, racial segregation was and is consistent with originalism. Using an originalist lens to justify race consciousness through affirmative action perhaps opens the door to racial segregation as well—race consciousness used against, rather than to further, the interests of people of color. This example in the context of university admissions suggests how dangerous originalism can be by binding us to dead, abhorrent hands.

Marc-Tizoc González from the University of New Mexico framed the moment as a manifestation of white power, with the Roberts Court aiming to undo the civil rights progress of past decades and redeem white power through violently distorting the equal protection clause and its jurisprudence. In response, he exhorted us to expose and teach this framing and reality to our students.

Athena Mutua from the University of Buffalo challenged the audience to go on offense. She said that institutions should simply expect to be sued. She framed the mass litigation strategy underway as meant to do more than destroy the federal Civil Rights Act protections; rather, this is a larger move to reimpose elite white power through law, using colorblindness. In response, collectivity is needed along with stronger weaponized messaging and a recognition of the interconnectedness of class analysis in any racial understanding.[59]

Darren Rosenblum from McGill University spoke from a corporate governance and leadership perspective. Using a CRT/LatCrit framing, Rosenblum suggested that as the corporate world becomes more diverse around them, the detractors of affirmative action are rebelling against who they fear will gain and hold power. But he argued for invoking the power of the reality that the world's mega-companies hold a strong financial self-interest in diversity and inclusivity.

Lucy Jewell from the University of Tennessee implicated the rejection in the *Bakke* plurality opinion, written by Justice Powell, of the remedial use of affirmative action, suggesting it was gaslighting that ignored

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59. At the same time, simply substituting class-based preferences for race-conscious admissions will not deliver racial diversity. *See* Kimberle Crenshaw, *Playing Race Cards: Constructing a Pro-Active Defense of Affirmative Action*, 16 NAT'L BLACK L.J. 196, 213 (1998). As Professor Crenshaw writes:

> [C]lass does not capture the full extent to which race still misshapes participation in American institutions and attending only to class will do little to address the re-segregation that follows the demise of affirmative action. . . . Race is not simply a proxy for class, and to assume so is to embrace the myth that opportunity has been equalized along racial lines.

Id.

the lived experience of minorities. That rejection left the Court with only the diversity rationale to justify the admissions programs at Harvard and North Carolina, which it brushed away by finding it incoherent. She reminded of the Powell Memo,[60] that was a blueprint strategy for the conservative movement and urged that progressives must respond to attacks on antiracism with rhetoric that will help rather than hurt us.

Sheldon Bernard Lyke from Loyola University Chicago provocatively suggested that the Court actually channeled critical critiques that pointed out the flaws of the diversity rationale to reach its result. He encouraged the audience to let the diversity rationale go and to reframe the narrative, such as by using the remedial justification.

Shakira Pleasant from the University of Illinois Chicago suggested the inevitability of the moment we face, which should have caught no one off guard because the majority *SFFA* justices were simply being themselves through an opinion that, in her reading, forecloses reliance on the diversity rationale. Against that background, she framed next steps by asking how we can confront the rhetoric that has falsely framed inclusive practices as racial preferences, how a fourteen-word clause in the Fourteenth Amendment requires colorblindness, and more broadly, how we can play responsive chess and not checkers?

Finally, panelist Meera Deo from Southwestern School of Law drew more from reality than theory to frame her remarks regarding next steps, focusing on future admitted law students of color; how can we help them maximize their potential? She reminded the audience that law is one of the least diverse professions, despite decades of affirmative action. Her charge was to ensure a culture of belonging, which is highly correlated with academic success, and which is still lacking for students of color and other marginalized groups in higher education institutions. Her paper published in this symposium details how students of color, as well as students who are first-generation, disabled, LGBTQ, or otherwise marginalized report lower levels of belonging than other students. Deo situates the importance of creating and sustaining belonging, particularly in legal education for students of color as a response to the *SFFA* outcome and its expected damaging impact on minority admissions.

Two late additions to the final day program closed the summit, with the first, titled "*San Antonio v. Rodriguez*: Closing the Doors of Education Equality at Both Ends," addressing the shortcomings of affirmative action as a remedy for earlier structural failures, including K-12 educational quality and funding and housing inequities. Key to this systemic outcome is

60. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm. U.S. Chamber of Com. (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo [https://perma.cc/YTX5-PT99].

the Court's failure to recognize education as a fundamental right.[61] Craig Jackson from Texas Southern University's Thurgood Marshall School of Law delivered a critique of how the Court in *San Antonio* saw education as neither a fundamental right nor a fundamental interest, which he situated comparatively as contrary to most of the rest of the world, at least on paper. Jackson suggested that the opinion author, Justice Powell, two months after joining the *Roe* outcome, was driven to support local rather than federal control of education. Ediberto Roman, who conceived and titled the panel, expands his remarks in a published paper in this symposium that contributes new insights on how the *SFFA* decision closes any "doors of equality in education" that *San Antonio* had left open.[62]

Raquel Aldana from UC Davis reminded us that affirmative action was always an imperfect tool and directed our focus to the structural barriers that prompted the modest response of affirmative action. She spoke to the school financing experience in California, a colorblind-by-law jurisdiction under Proposition 209, but also a state where education is recognized as a fundamental right. Since 2013, educational funding is now more equitable than in many other states, yet inadequate in amount compared to the national average of local wealth allocated to students. Aldana pointed to racialized achievement gaps that remain despite gains in equity. She implicated and explained the correlation between neighborhood segregation and poverty that equity in school funding is not able to overcome, thus deepening the challenge of structural barriers facing students of color.

Stella Emery Santana from Faculdades Integradas Espírito Santenses (FAESA) in Brazil supplied a comparative analysis from a country engaging in remedial measures in higher education that, in its Constitution, situates education as a human/fundamental right. Brazil's approach as a civil law country, with free public university education and identity-based scholarships at private universities, deploys a quota system based on race (later adding disability) that survived constitutional scrutiny. She spoke during audience questioning to the role of social media in publicizing everyday racial realities that helped build a favorable culture in Brazil for racial repair. Her published paper in this symposium further develops the contrast between the United States and Brazil, with Brazil's constitutionally embedded right to education underlying a burgeoning affirmative

61. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Relatedly, housing is not a fundamental right under the constitution. *See, e.g.*, Lindsay v. Normet, 405 U.S. 56 (1972).

62. Ediberto Roman, SFFA v. Harvard College*: Closing the Doors of Equality in Education*, 47 SEATTLE U. L. REV. 1333 (2024).

action approach while affirmative action in U.S. higher education is under siege.[63]

The final panel, titled "DEI Director Perspectives," addressed the role of law school administrators charged with DEIB (with the B standing for Belonging) responsibilities in an increasingly hostile environment, as evidenced by the *SFFA* decision delivered against a cultural backlash against race-conscious programs and progress for subordinated groups. Three diversity deans at law schools, Kristin DiBiase from Seattle University, Jermaine Cruz from Albany, and Akita Mungaray from the University of Southern California, shared their insights on the role and structure of the diversity dean within legal academia in this climate, often unprotected in security of position and underfunded, with some states (notably Florida) outlawing DEIB positions altogether. The most important piece of the candid panel conversation, from my perspective, was the emphasis on belonging, which is the part of the DEIB dean job that requires the most work but is vital for retention and success of students from underrepresented groups who gain admission to and then must navigate law school.

III. EPOCH TAKEAWAYS: TENSIONS AND OPPORTUNITIES

A key takeaway expressed by many speakers was that racism and bias are systemic in nature, rather than the work of a few individual bad actors. Despite sounding daunting, critical scholars already understand the way to confront systemic action that subordinates on the basis of identity. As Meera Deo reminded, individuals alone cannot beat structural racism; rather, collective and coalitional action is required. The blueprint for this includes the Critical Legal Collective (CLC),[64] and the inaugural summit of the CLC in fall 2023 at Duke University School of Law that created space for race law centers to work towards coalition and collectivity in contrast to the prevailing law school model of competition. Other examples of collectivity to combat structural racism include the revision of ABA Standard 303, which now requires law school curriculum around race, bias, and cross-cultural competence in the legal profession and the law and was prompted by a letter urging adoption signed by law school deans of almost every then-ABA accredited institution.[65]

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63. *See generally* Stella Emery Santana, *We Shall Overcome: The Evolution of Quotas in the Land of the Free and the Home of Samba*, 47 SEATTLE U. L. REV. 1243 (2024).

64. For the origins of the CLC, see Francisco Valdes, *Mapping and Mobilizing Legal Criticalities: Making the Move from Diaspora to Collective or Legal Scholars Making a Difference as Cultural Warriors*, 100 DENV. L. REV. 625, 654–58 (2023).

65. *See* Michelle Weyenberg, *ABA Passes Revisions to Accreditation Standards*, PRELAW (Apr. 5, 2022), https://nationaljurist.com/national-jurist/news/aba-passes-revisions-to-accreditation-standards/ [https://perma.cc/L2UL-LE5K]; *see also* Steven W. Bender, *Revised ABA Standard 303: Curricular, Pedagogical, and Substantive Questions*, 47 SEATTLE U. L. REV. SUPRA 1 (2024).

The biggest takeaway for me was what some may have perceived as the tension between whether we collectively declare affirmative action dead and build something completely new on the ruins, or we fight for and rebuild affirmative action using the rubble of what the Court left of the remedy. Rather than some crossroads and single path to be struck, there are ways to reconcile these visions and pathways for organizing and academic activism. One is the LatCrit recognition that multiple truths can be held at the same time.[66] The other is an application of the three-layered goals approach articulated in the Critical Justice textbook,[67] which recognizes the end game as something transformative, as something affirmative action never was and never will be. But at the same time, until that new transformative house is built, we need the amelioration of whatever tepid affirmative action approaches can be built to pass constitutional muster. The key is how that new trailer or shack of affirmative action, while providing immediate shelter for some, can serve as a means of helping to organize for more broad, transformative, and sturdy goals. At the same time, we must ensure that we do more than merely rebuild the tiny and rickety shack of affirmative action, as it can be blown down too easily by backlash and the elite actors of the Court.

So, what can we do collectively to play a short and long-haul game of chess at the same time? What did the Seattle summit add to that strategy? One key, I believe, was the interaction that came from the in-person summit of people who, while they had come together in other conferences and formations in the past, came together now with a singular purpose of organizing toward material equality in higher education admissions, belonging, and success for subordinated groups. Another key was the recognition that working to find breathing room in the Court's current jurisprudence only mattered if such work was connected to something more sustainable that would await a newly composed Court or be effective despite the Court's shifting composition from time to time. As just one example, existing K-12 educational funding models, though constitutionally permitted to be unequal, could change with sufficient political will and culture

66. Darren Rosenblum from McGill University addressed this reality and skill of holding multiple truths during the Saturday panel on "Strategizing Responses and Next Steps to Ensure Diversity in Education and Law." *See* EPOCH Recording, *supra* note 42.

67. *See* VALDES, BENDER & HILL, *supra* note 2, at 612. We describe the three-layers of advocacy for transformative material change as follows:

> The first layer goal looks much like traditional advocacy: the aim is to win ameliorative, often court-centered, legal remedies for individual clients or classes or collections of clients. The second layer—group power-building—requires systemic analysis of group domination and systemic solutions based, usually, on existing collective capacities. The third layer aims to shift cultural or mainstream understandings of "the problem" that, in turn, enable expanded solutions aiming for broader social transformations.

Id.

shift around equality of funding while surviving any constitutional challenge when dollars are equally spread by student. Culture shift is needed too around the adequacy of that funding, however equal. Other examples would be to eliminate existing racial preferences that impede diversity, such as legacy admissions, and to develop new standardized testing models that are less racially biased to aim in their design for racial equality in outcome rather than racial exclusion.[68] Yet another key is the collective commitment at the summit to emphasize pipeline programs in the law school context that reach out before college to mentor high school and middle school students on the possibility and promise of law as a career to work with communities they care about; and a collective commitment to continue to build a culture honoring and valuing diversity in higher education and the legal profession, which is not limited to Jesuit schools and should survive constitutional muster. Belonging, specifically, was identified as key to success for students and lawyers from underrepresented groups, and attention to ensure their wellbeing should not run afoul of *SFFA* either.[69]

CONCLUSION

Looking back, the *Grutter* outcome in 2003[70] was a short-lived performance of interest convergence rather than a meaningful remediation for past and present injustice toward minorities. In *Grutter*, the Court embraced the diversity rationale that encompassed the benefits to non-diverse students of learning how to work with diverse populations, thereby performing better in the workplace to their financial gain; a clear convergence of interest[71] that helped sell the outcome beyond minority college students.

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68. For discussion of the racialized context at the time of the origin and development of the LSAT, see Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1487–90 (1997), 10 LA RAZA L.J. 363 (1998); *see also* Leslie Yalof Garfield, *Ratings Fetishism*, 39 N.Y.U. REV. L. & SOC. CHANGE 409 (2015) (linking college "ratings fetishism" under school rating systems such as *U.S. News and World Report* to standardized testing that disfavors and thereby excludes minorities).

69. U.S. DEPT. OF EDUC.'S OFF. FOR CIV. RTS. & U.S. DEPT. OF JUST.'S EDUC. OPPORTUNITIES SECTION , QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA* (2023), https://www2.ed.gov/about/offices/list/ocr/docs/ocr-questionsandanswers-tvi-20230814.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= [https://perma.cc/MW5B-N5SX] (stating that colleges may legally foster belonging and support, particularly to their underrepresented students).

70. Grutter v. Bollinger, 539 U.S. 306 (2003).

71. *See* Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from* Brown *to* Grutter, 7 J. CONST. L. 809, 829 (2005) ("[T]he Court upheld only one of the Michigan admissions policies, using a multinational, multicultural capitalism-global policeman rationale, and limiting even that interest-convergence approach to racial remedy to a twenty-five-year window.") (footnote omitted).

As with other historical moments of interest convergence, the resulting propulsions of subordinated group interests tend to be fleeting, as was the case when *SFFA* was decided just twenty years later in 2023. In the end, then, affirmative action in the form and limitations of the diversity rationale was of limited utility and duration to minorities, but ultimately of great utility to those benefitting from staving off larger claims of reparations for racialized exclusions and harms that focusing on the material benefits of higher education as a justification for race-based admissions might invite. As a SALT resolution adopted in 1997 in support of the then-upcoming C.A.R.E. March warned:

> We must never forget the way some conservatives sought opportunistically to embrace limited forms of affirmative action precisely because they understood the depth, brea[d]th and compelling nature of the claims for justice these [equity] movements were advancing and believed that token forms of affirmative action could be used to limit and divert these more fundamental challenges.[72]

It is no coincidence that the newly announced judicial restrictions on affirmative action coincide with current broadscale efforts to silence critical theory. The farther in the past racial wrongdoing seems, the easier it is to distance and separate it from current calls for remedial action.[73] Critical theory that connects past to present racial subordinations, implicates systems including law in ongoing inequities, and measures progress by material outcomes rather than promises of formal equality, challenges the narrative that we have moved beyond subordination to equality. At the same time, as we work with the rubble left by *SFFA* to build a diverse collegiate student body, we must connect that work to the fight to protect critical theory and all that critical theory compels us to do to remedy ongoing racial harm.

Taking place within the gatekeeper venue to one of the least diverse professions, the EPOCH conference faces challenges in its sustainability if Black student admissions decline and critical theory gets swept out of discourse. Attendees at the 2023 event, comprised of a variety of racial backgrounds, committed to act affirmatively and tirelessly against those outcomes to ensure a more equitable future within law and society.

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72. *See also Resolution in Support of SALT C.A.R.E. March*, SALT EQUALIZER (Soc'y of Am. L. Tchrs.), Dec. 1997, at 12 (1997).

73. *See generally* CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 74 (1997) (discussing the "Big Lie" that racism has been overcome and only self-professed bigots are left).