

**KIM FORDE-MAZRUI:** OK, let's get started. Thank you all for being here. My name is Kim Forde-Mazrui. I'm the director of the Center for the Study of Race and Law, and we're pleased to have you for this discussion on the affirmative action cases and their potential implications. We thought given their recent oral arguments and their news coverage lately, it would be useful for the law school to hold an event with legal experts to discuss legal aspects of the cases.

I'm going to hand it off to my amazing-- well, she's not directly my student, but all of our students are my students-- who will then take it over from here. So this is Birdy Assefa, class of '24, and she is the education chair of the Black Law Students Association, one of the sponsors of this event. She's also an editorial board member of the *Virginia Law Review*.

And she's also an editor with the *Virginia Journal of International Law* and a Jack Kent Cooke graduate scholar. And this past summer she was a judicial intern for the Honorable Judge Amit Mehta on the United States District Court for the District of Columbia. Thank you, Birdy.

**BIRDY ASSEFA:** Thank you for that lovely introduction. Hi, everybody. I'm Birdy Assefa, and as you guys know, I'm a 2L. I'm the education chair for the Black Law Student Association and I want to thank you all for coming and for showing out, and I want to thank the panelists in advance for sharing their time and their thoughts with us. And first, I would also like to thank the co-sponsors for this event, the Black Law Student Association, the Latin America Law Organization, and Women of Color for co-sponsoring the event.

So first, I'll make some housekeeping notes and then I will do a quick remark about the motivations behind this panel, and then I'll introduce the panelists before handing over the conversation to them. So before I wanted to begin, I wanted to let everybody that this event is being recorded, including the Q&A. The format of this panel will move in two parts.

The first part will explore the history and existing law on affirmative action in K through 12 education. During this portion, each panelist will have five minutes to speak on their respective topic. Then we will move on to the second portion, which will be in a Q&A format, and it will explore the potential implications of the court's eventual rulings on these recent affirmative action cases.

So during this time I will start off by posing a general question to the panelists, and then from there they'll be taking questions from the audience. So I hope you came prepared with questions. So before I introduce the panelists, I wanted to briefly remark on why I think having an open discussion about these cases is important. As I'm sure many of you have noted, some of the most canonical Supreme Court cases of the 20th and 21st century have had to do with education.

More recently, the modern conception of affirmative action in education is one that's captured the American imagination for over half a century, and to me, that reveals two things. One, race is as an animating of a subject within the law as it always was, particularly within education law. And two, the question of who does and does not have access to education remains a loaded subject in American society.

That's because education means opportunity. It means opportunity for economic mobility, but it also means opportunity to live as informed and critical members of our community and this nation as a whole. While there are differing understandings of how race, education, and the law should interact, one thing I hope we can all agree on is that even though the outcomes of these affirmative action cases, whatever they may be, would disproportionately affect students of color, particularly Black, Brown, and Indigenous students.

That doesn't mean affirmative action is not a greater national issue. As a matter of fact, not only is access to quality education a right everyone deserves, but also American democracy, particularly right now, can't afford to leave any mind without a quality education of one form or another. So having said that, it's my honor to introduce the panelists.

Professor Kimberly Robinson is a professor at the School of Law, as well as a professor at both the School of Education and Human Development and the Batten School of Leadership and Public Policy. She's one of the nation's leading education law experts and speaks throughout the United States about K through 12 educational equity, school funding, education and democracy, equal opportunity, civil rights, among other issues.

Before Robinson began her career as a professor, she practiced law in the General Counsel's office of the US Department of Education and as an education litigation attorney with Hogan Lovells in Washington DC. She also served as a clerk for the Ninth Circuit in San Francisco. Robinson graduated with her JD from Harvard Law School and her BA from the University of Virginia.

Professor George Rutherglen is the Earle K. Shawe Professor of Employment Law here at the law school. His areas of expertise include civil procedure and employment discrimination. Prior to becoming a professor, Professor Rutherglen clerked on the Ninth Circuit in San Diego as well as on the Supreme Court four Justices William O. Douglas and John Paul Stevens. He received both his undergraduate and law degree at the University of Berkeley, where he served as articles editor of the California Law Review.

Professor Scott Ballenger is the director of the Appellate Litigation Clinic here at UVA Law. In the past he clerked on the Ninth Circuit, and then on the Supreme Court for Justice Antonin Scalia. He also served as senior counsel to the Assistant Attorney General in the Antitrust Division of the Department of Justice.

Prior to taking over the Appellate Litigation Clinic, Professor Ballenger was a partner in the appellate practice at Latham & Watkins, where he worked on the legal teams defending the University of Michigan in *Grutter v. Bollinger* and the University of Texas in both *Fisher I* and *Fisher II*. Professor Ballenger received both his undergraduate and law school degrees from the University of Virginia.

And last but certainly not least, Professor Kim Forde-Mazrui is the Mortimer M. Caplin Professor of Law and the Director of the Center for the Study of Race and Law here at the law school. Professor Forde-Mazrui is a scholar of constitutional law, employment discrimination, criminal law, and race and the law.

After law school, Professor Forde-Mazrui clerked on the Sixth Circuit before joining Sidley Austin in Washington DC. He received his undergraduate and law degree both from the University of Michigan. So with that said, Professor Robinson, why don't you start us off?

**KIMBERLY  
ROBINSON:**

Great. So thanks for that introduction, Birdy. I'm really excited to see so many of you here to discuss these issues. So I wanted to start off with a bit of data about public opinion about these issues. So recent polls show, if you look at Pew Research, 73% of Americans actually oppose considering race or ethnicity in admissions. And are the-- there are disparities.

Majorities of Hispanic, Black, and Asians, as well as Republicans and Democrats, indicate that they oppose this. Majorities instead favor relying upon high school grades and standardized test scores. They also, in general, oppose considerations of legacy, athletic ability, first generation status, or gender in admissions processes. So what's behind this data? Why does this matter? It matters because other data shows that people actually think that students get an equal opportunity in America's public schools.

So when asked, do you feel that students of color are afforded the same education opportunities as their peers? 81% of whites say yes, 43% of African-Americans say yes, and 72% of Hispanics say yes. They did not give the data on the Asian-American response. But I share that data because it's counterfactual.

The landscape of educational opportunities in the United States are vastly unequal, and if we go to a system that relies solely on the education that students receive in public schools, then we will continue to bake into college admissions the inequality that we tolerate at the K-12 level. So let me give you a bit of an anatomy of the opportunity gap, and I'm just going to highlight some additional data. If you're ever in any of my classes-- and I hope, given all of this interest in education, that I see all of you in the spring and my education law classes.

I teach two of them. One, race, education, opportunity. This is my brief commercial. Two, education law survey. And I also teach a class on Title IX, so I hope all of you are interested after this panel in learning more about these issues. We do discuss them in my classes. OK. Back to the data.

The data about our public schools shows that they are deeply unequal. Let me give you one number. If you only remember one number-- I tell you, I'm often throwing data at my students because I love a good research finding. Here's a number. 23 billion. \$23 billion. What is that? That is the gap that EdBuild found in the disparity between schools that are 75% white or more and 75% minority or more. \$23 B, billion, gap.

Why does that matter? It matters because the data shows that schools where children of color are in the majority, or particularly when they're in what they call hyper segregation where they're 90% to 100%, those schools are found to be generally under-resourced, staffed with less experienced teachers, poorer facilities, and don't have the rich curriculum and other opportunities that would prepare them well to succeed in college admissions.

Other data. If you look at school segregation, unfortunately-- I know we all learned in civics class that *Brown versus Board of Education* outlawed segregated schools. Unfortunately, however, we never fully desegregated the schools. The courts paused that effort and then segregation began to roll back.

So while we eventually had significant desegregation, particularly in the South, which was the place of the country that was most under court order, you have now growing racial isolation in schools such that children often are not educated with those who do not look like them. Too often. So I'll give you some data about that. About 34% of Black students attend schools that are 90% to 100% Black and Latino.

So this is a school where they're really not seeing anyone that different from themselves other than the significant Black and Latino interaction. In addition, data shows that minority students are also more likely to have inexperienced teachers and they're-- for example, Black students are four times more likely to be suspended or expelled from school. So what you see is that we have vastly unequal schools, and then some of these students go on to apply to college.

And so you can see why the consideration of that is a relevant factor for looking at the educational experiences that students have had and how they look at admissions. So I'll just take 30 seconds and explain the case law about this at the K-12 level. So one of the reasons that we have trouble addressing this opportunity gap is because the Supreme Court, in a case called *Parents Involved*, struck down two admissions policies for public schools that sought to look at race, that sought to bring students together of different races.

And instead the court said, no, the use of race here was not necessary in the Louisville and Seattle Public School Districts and it was not-- you're not sufficiently exhausted race neutral alternative. And so the signal that that sent to school districts is, we can't even try to break up this racial isolation that we have in our schools by looking at things such as race to create integrated schools. And so the challenge is we have growing racial segregation that also feeds this opportunity gap. And so that is the K-12 landscape for how we then apply to higher education admissions.

**GEORGE**

**RUTHERGLEN:**

So I'm going to talk about how we got to the oral arguments in the pending affirmative action cases. I'm going to start with *Regents of the University of California against Bakke*, and then I'm going to turn over the discussion to Professor Scott Ballenger, who worked on the subsequent litigation in the Supreme Court. Now, many of you perhaps have not taken constitutional law so let me just give you a little lecture on the general background.

Which is that if you have a government classification or decision that explicitly considers race, it must be justified as narrowly tailored to serve a compelling government interest. One compelling government interest is remedying past discrimination. So the federal courts, fairly routinely after *Brown against Board of Education*, ordered race conscious measures in order to desegregate the schools.

As Professor Robinson has just said, the Supreme Court phased out those efforts before they were truly successful. Now, if we turn to *Bakke*, what we find is a badly divided Supreme Court. Justice Brennan, with three other Justices, wrote an opinion which, in my view, takes the correct approach to affirmative action. That is, very lenient scrutiny of government programs in which the majority discriminates against itself.

The majority always has the power to eliminate those programs. Justice Brennan concluded that the University of California could consider race as part of its broad power to remedy discrimination. I believe that this is the correct approach, but it's, as Professor Robinson just said, wildly unpopular politically. In addition to the surveys that she's mentioned, nine states have barred the use of race in admission to higher education.

Some of these states are remarkably liberal, such as California and Washington. And in every referendum that has put affirmative action on the ballot, affirmative action has lost. So although I think the best constitutional approach is the one adopted by Justice Brennan, I acknowledge that it has hardly any constituency in the political sphere. The alternative, which was put forward by Justice Stevens on behalf of four Justices, did not look at the Constitution.

Instead, it looked at Title VI of the Civil Rights Act of 1964. That statute prohibits consideration of race by institutions that receive federal funds. Almost all institutions of higher education receive federal funds. That approach, which I also think has a lot of doctrinal simplicity, is simply an approach of colorblindness.

Now, to be sure, it's a statutory approach. So we have four Justices in *Bakke* taking a broad approach under the Constitution. We have four Justices in *Bakke* taking a strict approach under Title VI of the Civil Rights Act of 1964. Justice Powell, speaking only for himself, split the difference between these opposed views.

And what he said, which was almost unprecedented at the time, is that the University of California could consider race to serve the compelling interest in educational diversity, so long as it did so flexibly and as part of that holistic review. I think there is almost nothing that can be said doctrinally in defense of Justice Powell's view. But as a matter of pragmatism and compromise, it was a stroke of genius.

So that's where the law stands today. The doctrinal approaches that can be easily defended really either allow affirmative action in almost all circumstances or not at all. The approach that we follow for 45 years since *Bakke* tries to strike some pragmatic balance between them. And the question is, will that pragmatic balance survive? What do you think, Scott?

**SCOTT  
BALLENGER:**

Let's table that for a second. So I banished myself over here because I have a late breaking sore throat. I don't want to get them sick if I am. But I was going to talk a little bit about the *Grutter* and *Fisher* cases that I worked on in private practice. These were, in the early 2000s, parallel challenges to the admissions programs at the University of Michigan undergrad and law school. Two cases went on at the same time.

The undergrad school had essentially a point system that had explicit points for racial categories. The law school used something holistic that the lower courts made a finding that was indistinguishable from what Justice Powell had described in the *Bakke* case that Harvard was doing.

And there was an extensive trial about the educational benefits of diversity, at which the district court made a whole bunch of findings that really, I think, have never been meaningfully challenged about the importance of racial diversity in the classroom and on campus to a wide variety of educational goals. And I think it's easy for the opponents of affirmative action to lampoon the importance of diversity to the teaching of math or chemistry or what [INAUDIBLE] you always hear.

But the trial record in the *Grutter* and *Gratz* cases actually contained a lot of evidence that it makes a big difference to the teaching of even core science and math kinds of subjects that people not feel isolated and uncomfortable in the classroom. And in any event, half of the cases were the University of Michigan Law School, and it's not a bit difficult to understand how racial diversity might be relevant to the teaching of, say, employment discrimination or criminal justice at the law school setting.

But even beyond all of that, it's important to understand that the educational benefits of diversity that were articulated in those cases and ever since have never really been limited to the classroom, right? John Payton, who-- Wilmer Cutler, who represented the undergrad school, used to tell this great story about George Washington's farewell address.

So the one that everybody's familiar with about entangling alliances and all of that. It was actually, I think, Hamilton's draft that he talked Washington into giving. The speech that George Washington actually wanted to give was calling for a national university in Washington DC because it was his belief that it was really the Continental Army that had created America, and he felt the country already starting to fall apart.

And he thought, look, the only way we're going to be able to fuse a nation out of these different colonies is if we bring young people from all over the country together and have them live together for a while and transcend differences of class and geography and everything else. It's an enormous piece of what the University of Michigan was trying to do with its admissions policy is to try and bring people together from different places and different cultures and get them talking to each other.

And another big piece of it always has been that the University of Michigan articulated its goal as the training of leaders for a diverse society, right? And it's just not possible to train leaders for a diverse society in isolation from the diversity of the society that they are hoping to lead.

And it's also not possible to put forward a roster of people as the next generation of federal judges and prosecutors and legislators who don't look a thing like America itself. People don't talk about that as part of the educational benefits of diversity as much as they should, but it's right there in the greater opinion and you have to take it seriously. So the holding of the two cases was that the undergrad school lost and the law school won.

And the undergrad school system in which there was an explicit points system was held to be unconstitutional. But the court reaffirmed what Justice Powell had said in *Bakke* that if what you're doing is sort of more holistic consideration of race as one factor among many in a genuine search for broad based diversity-- not just racial diversity, but racial diversity-- I mean, diversity writ large, then you can do it as long as race doesn't become the defining feature of the process.

You can't use quotas, the courts said in *Grutter*, but you can pay some attention to the numbers because the educational benefits of diversity don't exist in isolation from the numbers. It is the reduction of isolation and increasing opportunities for cross-cultural contact that constitute the benefits of diversity on a college campus, and those have, at least to some extent, a lot to do with the numbers.

Universities have to seriously consider race neutral alternatives, but they don't have to change their mission or accept substantial dilution of academic objectives. Justice Scalia made a big deal in the argument in the *Grutter* case about an accusation that, Michigan, you don't really care about racial diversity. What you really care about is being a super duper law school and maintaining your US News ranking.

And the court said very clearly, look, Michigan is allowed to pursue both. You're allowed to care about academics and diversity at the same time. As for the other race neutral alternatives that were proposed, it was clear on the record of those cases that there wasn't anything more that Michigan could be doing by way of recruiting or outreach that would do any good. They were already doing as much as was reasonably possible.

And it was also clear that there was no amount of consideration of socioeconomic factors by itself that would produce racial diversity. The problem, essentially, is that there are so many more poor white students in the relevant score ranges that there's no amount of socioeconomic affirmative action that would actually get you there. Justice O'Connor's opinion for the court, though, put a time limit on it and said, we expect that in 25 years this won't be necessary anymore.

So it doesn't have necessarily a built in self destruct switch, but the opinion has something pretty close to that. The *Fisher* case is-- I'll just mention briefly. So the University of Texas, before *Grutter*, had been forced by the Fifth Circuit to abandon affirmative action in admissions, and as reaction, the Texas legislature forced the University of Texas to take the top 10% of every high school in Texas.

This was, to my way of thinking, kind of a cynical ploy to capitalize on the segregation of Texas high schools to ensure that the University of Texas at Austin didn't resegregate, but it worked to a substantial extent. That grew to consume about 75% of the University of Texas class, but they still had 25% that they could admit holistically. After *Grutter*, UT wanted to go back to considering race within that 25%, right?

And it was challenged and the challenge was basically, the gain's not worth the candle. You're only having race effect 1% of your admissions decisions within this little thing. You're not doing enough affirmative action for it to be worth it so it should be illegal. Sort of ironic, right? And the case went to the Supreme Court twice. We lost the first time and we decisively won the second time.

The court ultimately said, no, that's not right. I mean, actually, the modesty of Texas's affirmative action program is a mark in its favor, not a reason to declare it unconstitutional. But critically, the court also said that we're not sure this Texas 10% plan is so great. Right? And one of the arguments that the plaintiffs had made was that, look, Texas can achieve whatever it wants to achieve just by expanding the top 10% plan.

Rather than having it fill 75% of the class, have it fill 100% of the class. You'll get reasonable racial diversity that way. And the court basically said, look, the only reason that policy was adopted was to engineer a particular racial result, and it really doesn't have anything going for it educationally other than the racial result that it engineers and so it's not really clear to us that this is a race neutral alternative at all. And that's where we stand going into the current Harvard and North Carolina cases.

**KIM FORDE-  
MAZRUI:**

Sorry, I was going to turn this up. All right. Thank you. Yeah, so I just wanted to conclude this section with telling you what's going on in the current two cases. The two cases are called *Students for Fair Admissions or SFFA against the University of North Carolina*, and also *SFFA against Harvard University*.

Both lawsuits were filed five to seven years ago or so. And they both make two similar arguments, and then I'll describe the differences in a moment. The two arguments are essentially, one, both schools are violating existing doctrine, so the doctrine that our panelists have just described. So even holding *Bakke*, *Grutter*, and *Fisher* as good law, they're not compliant with that.

And then the second argument they make is even if they are compliant, they still should lose because the Supreme Court should overturn those doctrines and forbid all uses of race. So in the UNC case, it's a little bit simpler on the first argument. The argument that they're violating *Grutter* is the main case for the modern doctrine. Their main claim is that there are race neutral alternatives that could use.

So, as has been said, it's not considered narrowly tailored if there are workable race neutral alternatives that wouldn't compromise the academic excellence and the like. And they basically said, you could-- there's a lot of detailed things, increasing financial aid, recruiting low income high schools. I think that the most prominent one is a claim that you could get the highest achieving high school students, especially low income high school students in the state, and the assumption would be that they would all come to UNC.

And so they said, therefore, you're violating *Grutter* because there are race neutral alternatives you could use. And then the second argument is just a full out assault on the use of race. They rely on *Brown versus Board of Education* for the proposition that race cannot be a factor in sorting school children or adults, by implication, and that's, I think, what their ultimate goal is.

And then in the Harvard case, again, they also make those two types of arguments. On the case that the argument that says you're violating *Grutter*, in the Harvard case they-- first case you're wondering, Harvard's private so why are they subject to the Constitution? As Professor Rutherglen pointed out, it's Title VI that also applies to recipients of federal funds. And the court, since *Bakke*, has interpreted Title VI to prohibit race discrimination by recipients of federal funds to the same extent as the Equal Protection Clause prohibits of public universities.

So the reasoning goes, if the Supreme Court decides that the Equal Protection Clause should be interpreted to mandate colorblindness then that would mean Title VI mandates colorblindness, and so that's why it applies to Harvard. So they make four points about why Harvard is violating *Grutter*.

The first is similar to the UNC case in that they say there are race neutral alternatives, and they have various experts who propose different ways of looking at socioeconomic status, et cetera. Some other parts of the race neutral alternatives that they focused on in the Harvard case was that preferences are given to-- I believe they call them ALDCs. Athletes, legacies, meaning children of alumni.

D is either donors or dean's list, but it's children of people who the university wants to please. And then faculty children, and all of them get preferences. And that group, they argue, is overwhelmingly white. Even the athletes are 75% white, a lot of fencing and sailing and squash.

And so they said, if you dropped those preferences then you would have substantially more racial diversity, including Asian diversity and also Black and Brown diversity without using race. And I should have said that the Students for Fair Admissions are an organization created for these lawsuits, but they represent Asian applicants or applicants of Asian descent, meaning Asian in a racial sense, not nationality sense.

So they're claiming that both these school's policies are discriminatory towards Asians. So the first part is that there are race neutral alternatives. The second claim they make is that you're giving too much weight to race. So it's violating the *Grutter*, *Fisher*, *Bakke* principle that it should just be one of many factors. It's too dominant a factor.

A third somewhat related is that you're essentially pursuing a quota, that over time the percentages of the different racial groups is too similar to be coincidence or result of a truly individualized holistic review of the applications so you must be aiming for a particular share of each racial group each year, which would also violate *Grutter*. And then the final claim, and the one that I think is most controversial, understandably, is that Harvard is penalizing Asian applicants through personality scores.

So one of the measures that goes into the total score is a personality score that looks at things like are you confident, are you likable, are you a leader, do you have good character, are you outgoing, things like that. And they presented evidence that suggested that Asian applicants are systematically given lower scores for those kinds of ratings based on stereotypes about Asian personalities, and that also is inconsistent with *Grutter*.



In fact, that's not really even affirmative action. That's just flat out discrimination. But if they could prove that, that's also, under existing law, illegal. So both cases went to trial. At the Harvard case, the trial court held a lot of findings, statisticians on both sides, and ended up concluding that the evidence didn't prevail on any of the claims. So that the admissions policy is compliant with *Grutter* and there wasn't sufficient evidence that Asians are being penalized in the Harvard case.

And then in the UNC case, sort of like with the Michigan case that Ballenger described, they were routinely reviewing race neutral alternatives. They had tried financial aid. They continue to. They tried SES, but that, it just wouldn't work. And then similarly in the UNC case, yeah, the trial courts one ruled in favor of both schools in both cases. It went up to the Circuit court in the Harvard case. They upheld the district court.

In the UNC case, the plaintiffs appealed directly to the Supreme Court, which happened in the college case, actually, *Gratz*, as well. And so the Supreme Court just took it without it actually being decided at the Court of Appeals. So those are the two cases before the Supreme Court of whether each school is complying with *Grutter*, and then alternatively, whether *Grutter* should be overruled and race should be banned completely. Thank you.

**BIRDY ASSEFA:** Thank you so much for that. So now we're going to move on to the second portion of this, which is figuring out or speaking about the implications of these eventual rulings on the affirmative action cases. And I want to start off with a question which I'm sure is on everybody's mind, which is, what do you think the court will do in these affirmative action cases and where will that leave diversity or the use of race in admissions?

**KIMBERLY ROBINSON:** So I think it's quite possible, and many would say likely, that the court may overturn the *Grutter* decision. The Justices-- we are all aware that the court currently leans to the right, and for quite some time there have been major concerns about the use of race and the consideration of race and the impact that that has. So for example, if you look back at the *Parents Involved* case, Chief Justice Roberts says the way to stop discriminating on the basis of race is to stop discriminating on the basis of race.

While that sounds straightforward the challenge is, of course, that when you don't take efforts to dismantle our nation's history of discrimination, you actually simply reinforce discrimination. But it's clear that many of the Justices, a majority, do not favor the use of race. So they either will overturn the *Grutter* decision or they'll just strike a blow to it that is so difficult to comply that it essentially overturns. It's sort of death by a thousand cuts. So that's possible.

What will that mean for institutions? So I think there is a key thing that came up in the oral arguments that will actually enable universities to consider some diversity. I think that the box that people have to check will go away. In other words, you will not have a place in your application to higher education where it says your race is X.

However, plaintiff's counsel conceded that you could, however, talk about your experiences as an individual growing up in society that has an impact on race. In other words, if your background and your story that you're telling in your personal statement relates to race because that has impacted your experience in society, even those suing both universities said that would be permissible.

You could not require someone to never talk about their background. And so that would be still something that's permissible for a student to mention, for teacher to mention, for guidance counselors to mention.

However, we've already seen that in states where they completely eliminated affirmative action that there has been a significant drop in particularly the number of African-American and oftentimes Hispanic students who are admitted. And so you definitely could see a significant drop in many other universities, particularly depending on what the court says about how it's overturning these decisions and what is and is not permissible.

**GEORGE RUTHERGLEN:** I agree entirely with what Professor Robinson just said. I would just emphasize that there was a lot of discussion at oral argument of the question, what can universities do if we overrule these precedents allowing explicit consideration of race? And there were surprising concessions by the lawyers attacking the affirmative action plan that they could take account of these experiences.

**SCOTT BALLENGER:** Let me just toss in that race conscious consideration of diversity of experience is what the University of Michigan thought it was doing in *Grutter* 25 years ago, and for that reason, we actually-- in the *Grutter* case we thought about arguing that holistic admissions aren't a racial classification and shouldn't be subject to strict scrutiny at all.

But instead we're more like the redistricting cases where the court has held that, in cases like *Shaw versus Reno*, that lines drawn on a map don't classify anybody by race. They classify geographies as on one side of a line or not, right? And the outcome of admissions processes classify people as admitted or not admitted, nothing more beyond that. And what the court has said in those redistricting cases is strict scrutiny is triggered only if the outcomes are inexplicable on grounds other than race.

I wonder whether actually the court's dawning realization that race conscious consideration of experiential diversity, as it bears on things like resilience and grit and overcoming disadvantage, will ultimately push us toward a legal regime that is much more like the one that the court applies in districting cases and actually less rigorous than the one the court has been applying to affirmative action under *Bakke* all of these years. We'll see.

**KIM FORDE-MAZRUI:** I'm going to the board real quick. I think visually, which is ironic because I'm legally blind. This topic relates to-- oh. Oh, thanks. We built this city. A paper I wrote on race neutral affirmative action 21 years ago when I was concerned that I thought *Grutter* would strike down affirmative action, and I was pleasantly mistaken.

But I said that the next problem will be race neutral and people thought I was paranoid, but now, unfortunately, it's getting there. So the idea is just implicit in what's already been said is that right now it's considered suspect to target, as your admittees, underrepresented racial minorities, even if your goal is to ultimately get at different viewpoints or cultural experiences or racial experiences or victims of discrimination, if it's remedial like in *Crosby*, although it wasn't upheld.

Maybe grit and resilience, whatever, aspects of educational diversity you think will be gotten by giving a preference to underrepresented racial minorities. And so the problem with if you move to race neutral, means if they're being used as a proxy-- so if you use SES, socioeconomic status or first generation or top 10% of a high school class or some other geographical, or personal essays, and your goal is, aha, through these they'll correlate with race.

And like the top 10% was described, it correlates with segregated schools. And then that'll get us underrepresented minorities which will, in turn, get us these, then there's an argument to be made that should, nonetheless-- that should also be subject to strict scrutiny, which is typically going to result in it being invalidated. And it's because of an older line of cases that dealt with segregation.

So one example is the University of Mississippi raised its ACT score in order to screen out Black applicants, and the court said, no. Or *Gomillion versus Lightfoot* where the city redraws its boundaries. So it's using race neutral means. *Washington versus Davis* is a case where the court assumed that if you could show a police test exam was designed to screen out Black applicants, then it would be subject to strict scrutiny.

But in the case, the court said you had to prove that and you didn't. So if the court is really going to treat discrimination in favor of minorities to the same degree as discrimination against minorities, then you get the same kind of argument. So I think what was going on in the oral arguments is kind of realizing, well, what if instead we're just trying to ignore their race and just using these essays in socioeconomic status to get at these?

And if the court's convinced that's doable, then it should say, OK, well then you're actually complying because you're not trying to target. In other words, you don't use socioeconomic status to get Black people because you think they have diverse views, you use socioeconomic status to get low income people. But that's not suspect to get at diverse views.

The tricky part is, as was said with the oral argument argument, is what if what you're using, say, essays where it's cultural experiences. Well, again, a concession at oral argument was, that's different. They talked about maybe a Vietnamese person or West African moving to North Carolina and having an interesting experience growing up in a white neighborhood, and they said, well, culture is different from race.

And Kagan said something like, well, that's starting to slice the baloney pretty thin. But it is, and the way the court has tended to view it is something counts as race if it's necessarily tied to race. And culture, though highly correlated with race, is learned behavior where the conventional definition of race is biological. And this could apply too to victims of discrimination. You can be a victim of discrimination regardless of your race, even though it correlates with being a person of color.

I think the real interesting one that was mentioned is racial experiences, because at that point you're saying your racial experience-- like someone posted, I forget which professor, what if your essay is just, I experience being Black. Will that be viewed as something that's distinct from race or so integrally related to one's race that the court won't allow it?

I think it might allow it based on the oral arguments, but only if the school would truly value the racial experience of any race. If they think that, oh, it's the race of Black, Brown, or Indigenous people, those are really interesting. But if it's about being an Asian or even a white experience, they don't give that any weight, then they'll say you're really targeting people based on their race, not their racial experience.

**SCOTT  
BALLENGER:**

Could I toss in another observation about that? I mean, as somebody who has litigated these cases against the opponents of affirmative action my whole career, the question for me is, where are these guys going to go next? Right? Because they always go somewhere next.

And given what the court has said in the oral arguments, it seems clear they're going to allow consideration of experiential diversity. What are Ed Bloom and Students for Fair Admissions going to say in the next case? They're going to say, I'm sure, that consideration of experiential diversity appears to have favored minority candidates over white candidates in the data that we can look at, right?

But if the university is entitled to care about grit and resilience and overcoming disadvantage, are these guys basically going to construct statistical models and say, well, look, the fact that the white applicants aren't getting as many points for overcoming disadvantage proves that there's some sort of illicit discrimination going on here. That's crazy. But I suspect that's where we'll get.

**GEORGE RUTHERGLEN:** Let me just add a point. This litigation has been enormously costly. There have been reports in the paper that Harvard has had to expend \$40 million defending its affirmative action program. It looks like the plaintiffs have spent about \$10 million. So one of the questions on my mind is, who is going to invest in this litigation with what prospect of success?

And where I come from, plaintiffs who are attacking affirmative action plans, especially these that are ostensibly race neutral, are going to have two big hurdles to get over. One is they're going to have to establish that, but for race, the university would not have adopted this race neutral alternative.

And then secondly, but for my race, I would have been admitted. Those are big hurdles that no individual applicant will attempt to surmount, so it's only very well funded litigation that could possibly go forward. I think we're not going to see many more cases like this. My experience in employment discrimination with statistical models is they're very difficult to construct. They require huge expenditure of time and money, and they can always be attacked.

**BIRDY ASSEFA:** OK. We're going to start taking questions from the audience if anyone wants to start us off. OK, Jella.

**INTERVIEWER 1:** Thank you. Howdy. Jella Shiver, 3L. One of the things that was mentioned in the litigation at the Supreme Court was that plaintiffs were saying that using other metrics that are ostensibly race neutral, such as legacy status of being an ancestor of an indentured slave or status as maybe you are a refugee are things that would potentially violate distinguishments as people who have some kind of historical legacy and therefore probably wouldn't meet the strict scrutiny to be-- wouldn't meet strict scrutiny and therefore wouldn't be constitutional.

So I'm unclear as to how exactly some of these ostensibly race neutral programs that are often promoted don't jive with strict scrutiny given that-- ostensibly, for example, someone could be a descendant of a former slave and be identified as white and could bring that up and would probably have a very unique experience of being someone who was-- I don't know, maybe their mother was half Black or something like that and their grandparents were white passing.

Probably be a very interesting experience for that person who is applying to law school or applying to undergraduate school, but yet plaintiff's claim that that would be a system that would be discriminatory-- would violate the strict scrutiny standard within the 14th Amendment.

**KIM FORDE-MAZRUI:** I think that's a fantastic observation, and I thought the same thing. Even Justice Thomas has said that to the extent the Freedmen's Bureau helped former slaves, then that's not race based. Edwin Meese's brief to the Supreme Court made that same argument.

So how does it become race based when you're the descendants of slaves any more than if you're the descendant of UVA alumni? I mean, it doesn't turn it into racial just because it's also inherited, so I was puzzled by that. I mean, the fact that slavery was race based doesn't make the status of being a slave a racial category.

**BIRDY ASSEFA:** Other questions? Yeah. Great. Oh, God. One second.

**INTERVIEWER** [INAUDIBLE]

**2:**

**BIRDY ASSEFA:** OK, great.

**KIMBERLY** Well, he can't--

**ROBINSON:**

**BIRDY ASSEFA:** It won't pick up? OK.

**INTERVIEWER** Hi, my name is Olive. I'm also a 3L. I thought that Justice Jackson had a really interesting standing question  
**3:** during-- I think it was the UNC case, saying if nobody is being admitted on race alone-- it's not like you check a box and, bam, you're admitted. What does this do for standing? Right? What's the concrete actualized injury here if nobody can explicitly say that race is the reason that I wasn't admitted? I was just wondering if you guys could talk a little bit about that because I found it fascinating.

**GEORGE** Well, I think-- purely as standing doctrine, I think the plaintiffs have a pretty good argument for standing based  
**RUTHERGLEN:** on diminished opportunity. But I agree entirely with your point on the merits because existing law-- opinions written by Justice Thomas say the background rule for proving discrimination is you have to show that, but for your race, you would have been admitted.

So, I mean, they're all over my field of employment discrimination law, and what we see here in these affirmative action cases is a strange turning of the tables. Which is plaintiffs in employment discrimination law face enormous hurdles to win, procedural, burden of proof. Suddenly, all those issues now have to be faced by reverse discrimination plaintiffs.

I'm not confident that they're going, willingly, to bring lawsuits when they are up against such fairly high hurdles. What I've been complaining about from the plaintiff side employment discrimination law now, now I see as a great advantage for universities and colleges in defending reverse discrimination lawsuits.

**BIRDY ASSEFA:** Any more questions?

**KIM FORDE-** I think I saw a hand over there. Did I?

**MAZRUI:**

**BIRDY ASSEFA:** A hand?

**KIM FORDE-** Oh, sorry.

**MAZRUI:**

**BIRDY ASSEFA:** Oh, no worries. It's OK. Oh, great.

**INTERVIEWER** So Professor Ballenger, I was wondering a similar thing about what the litigants are going to do next. And you  
**4:** mentioned the idea of treating this like redistricting cases, and I'm curious if there would be a difference in your mind for a public school like UNC and a private school like Harvard where they're pulling kids from all over the country, all over the world, and they're not looking to target a specific state like an in-state school would. I'm curious how you would get around that sort of problem in your proposed solution.

**SCOTT** Well, I think if you looked at it through a redistricting kind of lens the question would be, are the outcomes of this process inexplicable on grounds other than race? Right? And that may be a harder demonstration to make the more diverse your applicant pool becomes because the way that you would prove that the outcomes are inexplicable on any other grounds is to do a big regression, I suppose, to try to control for every other factor.

And the more diverse the pool is, the harder it is that who's going to do. I mean, the other thing that national universities have going for them that's different than single state institutions is that you can't do a percentage plan. So that alternative isn't on the table.

**INTERVIEWER** Thank you. Hi. I'm Richard Gardem with *Virginia Magazine*, and I'm curious what you would predict for the future of legacy admissions under these cases or just the way the law is developing with this court.

**KIMBERLY ROBINSON:** I'll take that one. So there seems to be significant public opposition to legacy admissions, but universities are quite committed to upholding them, in part because these are the alumni that donate to the school, and there is not a constitutional basis to challenge legacy admissions. So I do think that legacy admissions are likely to continue. And actually, what's interesting is legacy admissions, for a very long time, have been criticized because they reduce diversity.

Given our history of exclusion in higher education and K-12 education they overwhelmingly, for most schools, favor white students. So it's ironic that schools that are seeking to increase diversity still hang on to that, but the reason, of course, is the fiscal bottom line. They're seeking to support those who are supporting them, and so I don't think that they are likely to be abandoned by institutions. Whatever the court says, I don't think they're likely to be gotten rid of.

**BIRDY ASSEFA:** I have a quick follow up to that question, actually. I don't know if you had a chance to listen to the oral argument and the hypothetical that Justice Jackson posed where she speaks about--

**GEORGE RUTHERGLEN:** [INAUDIBLE]

**BIRDY ASSEFA:** Right? Oh. Yeah. She speaks about how if legacy applicants can talk about their family history in their application in order to tell about their personal story. But let's say a Black applicant who also wants to speak about their family history, but their family history is so bound up in race that they might not be able to under the potentially new race neutral regime. Could that pose an equal protection violation?

**KIMBERLY ROBINSON:** Yeah. So I love this question. I partly am very partial to Justice Jackson. She was my law school roommate, so I'm a big, big fan of hers. But brilliant question about, basically what she was getting at was, is this court going to try to engage in what would be erasure? In other words, you can't ever talk about-- it's almost like you can't ever-- don't say race. Right?

And what she was identifying was this could be an equal protection problem if the only people that can't talk about race are racial minorities. And so she was flagging an issue that could be raised in the future if the court really goes so far as to say, not only are we going to stop the checking of the box, but you just can't ever mention race. She was flagging that this could also be an equal protection problem, and I think that's very possible.

Because then what you have is only some people can talk about their full experiences and others can't. And because race is so tied up in our reality and our nation, you would greatly disadvantage many people of color from expressing sort of their background, their experience, what life experiences have meant for them when they're applying for college.

And so I don't think-- I feel like she was giving a cautionary flag to the other Justices, particularly because it was critical during the UNC case because she's not allowed to ask questions or participate in the Harvard case. So I thought that was a brilliant insertion into the argument.

**BIRDY ASSEFA:** Agreed.

**KIM FORDE-MAZRUI:** And a point about legacies, which also allows me to suggest another way the court could just limit the use of race even more rather than banning it completely, as Professor Robinson had mentioned earlier. One thing that came up in the discussion at oral argument was within *Grutter*, the framework where you have to seriously consider race neutral alternatives, one form of race neutral alternative would be to stop using legacies and stop using some of the other donor kids and faculty kids.

And I think one of the Justices was saying, is it a compelling interest to have a great squash team if you just drop those scholarships? And so I think until now, it seems like the court would more kind of take the status quo of the school and say, well, is there kind of a race neutral add on you could do that would work better?

But they're almost saying you could-- they seem to be thinking, well, one way to consider race neutral alternatives is what could you abandon in your current admissions practice? And that would make it just that much harder to comply because you would not only have to say, we've tried financial aid, we've tried socioeconomic status, but we've also gotten rid of policies we have. Early admissions is another one that tends to have a white favorable skew.

You have to get rid of all these policies that may have legitimate reasons behind them but tend to skew white. But another point about legacies is how the court rules could depend on whether schools face at least some sort of legal pressure to get rid of legacies. So if the court rules to maintain *Grutter* but in this even stricter sense where you got to consider abandoning various other admissions practices, that could put at least some pressure on schools.

I agree that they would resist it somewhat. But they really would say, look, if we want to have a diverse school, maybe we got to at least reduce how much we have in legacy so we can say we considered race neutral alternatives. But if the court goes further and says you can't use race at all, period, then that actually takes away the pressure to let go of legacy, at least the legal pressure, because now there's no form of narrow tailoring that would satisfy the court.

You just can't consider race at all. They still might want to get rid of legacies to get diversity as a sort of voluntary policy. But a colorblind mandate would mean there's no tailoring to be had, so no pressure to get rid of legacies, whereas a kind of keeping within the *Grutter* framework could actually impact other things that have a racially disparate impact because it has to be considered as part of tailoring.

**KIMBERLY ROBINSON:** One thing we haven't talked about I just want to flag is that universities do have a First Amendment interest in establishing their particular aims and goals, which diversity, for many of them, is among them. And so it's important to understand that. I do believe that the court will-- I think the court is not going to focus so much on trying to change what the universities are pursuing.

So in other words, change and stop them from pursuing diversity. It's really so much how they can go about doing it. But the court will be mindful that institutions do have their own First Amendment interests in constituting their student bodies and pursuing particular objectives. And so they will be mindful of that and not basically-- in the K-12 context they're always saying, we don't want to become a super federal schoolhouse.

In the same way, they don't want to take over universities and tell them how to run. And I think requiring them to get rid of things like legacies and athletes and other things would be a total takeover of universities by the Supreme Court that I do not think that they are willing to do that. I don't think they're willing to go that far.

**GEORGE RUTHERGLEN:** I agree, but they are not willing to go that far in these cases. And I think we won't really know, until there is subsequent litigation, the extent to which racially motivated, race neutral criteria can be used by admissions officers. So I think there's going to be a lot of uncertainty, even in June when these decisions come down.

**BIRDY ASSEFA:** I saw a couple hands over there. You said? Did you have one? OK. I was like, over here?

**INTERVIEWER 6:** You know I got my hand up. Thank you so much. I wanted to ask you a question, Professor, because earlier you had mentioned this tension between school's desire to maintain their elite status and diversity. And I guess my question-- one question is, can you illuminate that tension a little bit more?

And secondly, if a school-- suppose UVA were to decide, we're actually going to stop caring about our ranking on US News. We're eighth. We can't get past Penn so we're just going to stop caring. Would that work in increasing racial diversity or would that just usher in more, say, low income white folks or something?

**SCOTT BALLENGER:** Yeah. I mean, so the argument that the plaintiffs made in the Harvard case was, but Harvard can fix this problem if they just decide to be Dartmouth. They literally said that. If you're willing to accept having 98th percentile SAT scores rather than 99th percentile SAT scores, everything will be fine. And Dartmouth is a great school, and so why don't you do that? I haven't dug deeply into their statistics.

I can tell you what we found in *Grutter* was that there's no easy fix that you can do at that sort of a level because there are so many more poor white and Asian students in the score ranges that are relevant to highly selective universities that if you were going to do something like a lot of readmissions above a particular threshold, say, in order to achieve racial diversity, you would have to set that threshold much, much further down the scale than you are now because if you just move it a little bit, sure, you're picking up more underrepresented minority students, but you're also picking up a huge number of white and Asian students.

And I don't think that-- the district court in the Harvard case didn't find the plaintiffs proposal D, right? They had this thing where, look, if you just tweak this and you tweak that, everything will be fine. If you push too hard on it, you discover that they're making really unrealistic assumptions.



So for example, in the North Carolina case, the proposal that the plaintiffs had that we can just easily fix this assumed that the top 750 underrepresented minority students in the state of North Carolina would all go to the University of North Carolina if the University of North Carolina made a sufficient effort to recruit them. Obviously not, right?

**BIRDY ASSEFA:** One more question? OK.

**INTERVIEWER 7:** So I had a question about the possibility of a Title VI challenge to ALDC admissions. As the proportion of the American population gets increasingly diverse, but the proportion of students who are white and athletes, legacies, donors, children of donors, and then children of faculty-- as that is in an increasingly white, far whiter than the pool of applicants and also the pool of the student body more broadly, would it be possible to challenge ALDC admissions on the basis that this is an attempt to give a leg up to white students and an attempt to erode the base of non-white students in universities?

**GEORGE RUTHERGLEN:** You could try, but you wouldn't win. Under Title VI you have to get the trial court to find intentional discrimination on the basis of race. You can't show a significant disproportionate adverse impact on the basis of race. That's not sufficient under Title VI all by itself.

And these claims of proof of intentional discrimination by use of statistical disparities only work when you have what the Supreme Court has called the inexorable zero. No one from a particular racial group can get admitted or get the job. So I think people might try that, but it's a real long shot.

**BIRDY ASSEFA:** Any more questions? Oh, great.

**INTERVIEWER 8:** Hey. Thank you guys so much for this presentation. So I think I had a question about the *Davis v Washington* possibility of something that is facially neutral, but can be deemed to be intentional. And I guess-- well, the possibility of that happening. Let's say we could find a race neutral way that grit and resilience can be measured.

If you're from an underperforming school we don't take that as a higher measure in your application process, or finding some racially neutral ways of targeting folks that otherwise wouldn't be included. Well, I guess I'm kind of like-- I think my greater question is, what types of racially neutral avenues might be challenged in the future? And getting a little bit more clarity on whether those would be challenged at all.

**KIM FORDE-MAZRUI:** Well, I'll just kind of compare two examples, Texas and Florida. So when Texas adopted the top 10% plan, it was pretty clear from the legislative history that they were doing it to get racial diversity. So to challenge it under *Washington versus Davis*, you would have to prove that the school adopted the race neutral policy because of, not in spite of, its racial impact, that race was a but for a cause in the adoption of the policy.

And I think in the Texas case, that's pretty clear. I don't think they would have adopted it for other reasons without race being one of them. But when California adopted it, I think it's a top 4%. I believe that-- at least the legislative record doesn't talk about race.

I haven't looked into it in real carefully, but to the extent I did, it was a few years later and they might have recognized that that's risky or they might have just genuinely said, we really want geographical, economic diversity, et cetera. But it sort of serves a similar function. It still has somewhat of a racial impact in favor of racial minorities.

So the way the litigation goes down, as Professor Rutherglen was suggesting, is it starts facing the same challenges that people have faced on behalf of minorities since *Washington versus Davis* and other policies that say you have to prove it was intentional, and if it's race neutral and you don't have direct evidence of discriminatory intent, it's not the inexorable zero, you don't have anecdotal evidence of smoking gun evidence. Sorry. You just haven't proven it. So it'll be very fact based, but it'll really go to whether you can prove that but for the racial impact of the race neutral policy, they would not have adopted it.

**SCOTT BALLENGER:** There's a case right now working its way up about Thomas Jefferson High School in Fairfax that abandoned its admissions test last year, and a federal district judge has indicated belief that it was racially motivated reasons why they abandoned that test.

**KIM FORDE-MAZRUI:** Can you tell more about that case? That's really--

**SCOTT BALLENGER:** You, go ahead. I haven't followed it since that original decision.

**KIM FORDE-MAZRUI:** OK, yeah. Just a bit more facts. This prestigious high school, I think they had a rigorous test to get in and the largest percentage of people who were admitted-- it's in Northern Virginia-- were Asians and then whites, and then I think Latinos and then Blacks were close to-- I think Blacks were single digits. Asians might have been close to that.

And for years they really wanted to increase the number of Black and Brown students so they decided to abandon the test. It was controversial. But then they adopted different application criteria like, are you from a district that we haven't generally had represented here before? Are you first generation to-- I'm not sure-- this is a high school-- how that works. I'm just recalling the news article on it. Are you from English as a second language? Are you from lower-- don't what the income cut off was.

So it was very much a resort to race neutral policy, some of the ones that are anti-affirmative action people are proposing at this point. We'll see if they don't then challenge after it gets to there. But then parents complained and a trial court ruled in favor that they said that, you adopted this in order to reduce the number of Asian students.

Because after this policy change where they went to these race neutral economically correlated criteria, the number of Asian students went from, like, 70% to, like, 55%. White stayed roughly the same, and I think Black and Brown students came up into the mid-teens. And so they said it was-- the trial court said its discrimination against Asians notwithstanding race neutral criteria, and the Fourth Circuit, I think, reversed the temporary injunction, but I think it hasn't been ruled on beyond that.

**BIRDY ASSEFA:** Thank you. Yes? OK.

**INTERVIEWER 9:** So hi. I'm Rithika. I'm a first year undergrad at the university, and I had a question stemming on specifically the lawsuits that you had talked about. And so I know a lot of the schools that you mentioned included UNC, U Mich, Harvard. But I feel like for a lot of them you see a great difference between public versus private. So how do you think the effectivity of these lawsuits are going to differ based on the public versus private status of these schools? Yeah.

**GEORGE RUTHERGLEN:** I believe that the dimension on which most of the litigation is going to turn is how selective the school is, and a lot of these cases have been brought only against highly selective schools who turn down most of their applicants. So if you consider a defendant who, for financial reasons, has to accept most of its applicants, I think you're going-- I don't think that's going to be a promising site for litigation by plaintiffs attacking affirmative action.

**BIRDY ASSEFA:** Thank you. Any more questions? Hey.

**INTERVIEWER 10:** So the Solicitor General's office spent a lot of time talking about the effect on ROTC programs in the military academies, and I was just curious if you all had thoughts on if that's going to be effective in swaying any of the judges. And if not, was there another purpose? Was it just to give the SG's office an opportunity for oral argument? Just curious what those thoughts were.

**SCOTT BALLENGER:** I haven't thought about that. I mean, the most powerful amicus brief that was submitted in the *Grutter* case was submitted by a group of retired military leaders who basically explained that the army broke in the Vietnam War because of the enormous racial gap and resentment between the officer corps and the enlisted ranks. And that basically the-- it's not possible to have the army as an effective fighting force unless they can diversify the officer corps, and in order to do that, they have to have affirmative action at the service academies.

And not just at the service academies, at the universities that have ROTC programs that feed into the officers. So this is, actually, I think, a real issue. The SG's office isn't making it up. The military believes very, very strongly that-- I mean, a lot of people don't know this, but there's significant evidence that a majority of American officers who were killed in the Vietnam War were killed by their own men. There is huge national interest in the effectiveness of the army at stake.

**KIMBERLY ROBINSON:** I think one of the things, actually, that could come of that is that there could be a separate lawsuit specifically about the service academy. In other words, they may be able to show some kind of compelling national security interest that maybe a state school may not be able to show.

It was interesting, the attorney who was-- I think she was a general or a major was speaking about in favor of what the University of North Carolina and Harvard were doing, but also trying to preserve her argument for the service academies at a later point. In other words, even if they go down, we may not go down. Right? She was sort of dancing to say both.

But partly because of what Professor Ballenger said, which is that they draw the officer corps not just from the service academies. They have to rely upon universities as well. And so if you eliminate affirmative action from the universities then you cripple their ability to accomplish this. And so part of what it seemed to me that they were trying to do in the oral argument was to establish the broad impact that the court's ruling could have.

This is not just about who gets into elite schools. I think sometimes the cases are disparaged in a way that says, this is just about whether you go to Harvard or Dartmouth, which there was a lot of chuckling about. Some people really appreciate Dartmouth, right? Dartmouth, of course, is a great school. That's not the question. The question is whether the path of leadership is visibly open to all racial groups.

And if we have the precipitous drop that we've seen in states that ban affirmative action across our nation, then we will be facing a situation where the path of leadership is not open and as a nation, we will be hurt by that. It will hurt our economic interests. It will hurt our interest in a safer nation. There's just a broad array of things that will be hurt if we do not have a diverse leadership that then leads to the results that we need for our nation.

**BIRDY ASSEFA:** I had a quick question actually about, let's say these cases are-- these cases overrule *Grutter*. And I know the media explanation is that the court has changed since then. It's more conservative. But while maintaining that, do you all think that there is an explanation-- there could be an explanation for that that's also more internal to the law that we can track, say, through an evolution of the doctrine as opposed to just this externalist argument? I don't if that makes sense.

**KIMBERLY ROBINSON:** I mean, the doctrine has very much been leaning toward colorblindness for quite some time, and so it would be entirely consistent with the lines in the cases that are just very focused on having a colorblind constitution, which they all claim to trace back to *Brown*. The challenge is if you look at *Brown*, though, *Brown* was about saying that separate is inherently unequal because they were denying admission to public schools for Black students not because it was less about race itself, more about the actual impact of that denial.

But that's been built upon to say we should just stop thinking and looking and considering race. But the line of cases that gets you to colorblind is very clear, and so I think they would have a lot of-- I know they would have a lot of precedent to build upon to get to that result. It wouldn't be a, oh, we made a dramatic turn here. It's that we've been building toward this for quite some time.

**BIRDY ASSEFA:** I ask that because I would assume that part of the media rhetoric is going to be, OK, the court has changed and now all of a sudden there's this drastic change in affirmative action doctrine. So I thought it was helpful to hear that.

**GEORGE RUTHERGLEN:** Justice Kavanaugh and Justice Barrett both made a big deal at argument too about Justice O'Connor's 25 year limit in *Grutter*, and the fact that it is impending. So you may get at least some opinions in these cases that say, you know what? We don't have to overrule *Grutter*. *Grutter* overrules itself.

**BIRDY ASSEFA:** Oh, yes. Toni.

**KIM FORDE-MAZRUI:** I'll just add while you're taking it. It reminds me a bit about the abortion issue because ever since *Roe versus Wade*, there's been a divided court and then we finally got a majority that's against abortion in that similarly, there's always been Justices against affirmative action, but now you have a majority.

**INTERVIEWER 11:** Hi, everyone. Thank you so much for this excellent panel. I'm Toni. I'm a 1L. And my question goes all the way back to Professor Robinson's statistics in the very beginning. I was struck by just how disjunctive they were. And I was wondering if you guys think that affirmative action has a PR problem and if there's any way that that could be solved, and if law has anything to do with that.

**GEORGE RUTHERGLEN:** Well, we've had 45 years to solve the PR problem since *Regents of the University of California against Bakke*, and it hasn't been solved.

**KIMBERLY ROBINSON:** Yeah. I mean, I think one of the challenges is that people in our nation don't really understand that we don't have equal educational opportunities. So this is where my life's work is. It's helping people understand that we have a very broken education system and we need to be adopting laws and policies that fix that. But because we think that we have equal opportunity, of course then we should all be-- if we're all starting on this level playing field, then of course admission should be on the same level playing field.

But unfortunately, that's just not the reality in our nation. And so because we have this myth of the American dream and this myth that we've accomplished as equal opportunity, well, then people think it sounds very fair. If everything is equal, then let's just keep admissions equal. But unfortunately, the foundation is broken and you're putting what you think to be an equal system on top of something that's very broken. And so that is the key problem with the admissions cases.

**INTERVIEWER 12:** Thank you all so much for doing this. This is really, really enlightening. My question, kind of thinking about the court-- obviously the last major case with *Dobbs* was this big case that also had lots of implications on other areas that's a lot, particularly around privacy. And I'm curious, assuming-- not knowing yet, obviously, how far the court's going to go with this decision, but these decisions on the Harvard and UNC cases.

But assuming they overturn *Grutter*, whatever they end up doing, I guess, are there any ripple effects in other areas of the law or connected areas of law that you all foresee being to look at, or some arguments that if other people see the plaintiffs making and seeing it being successful, that they could apply to other areas? Just thinking more broadly about the consequences of this decision.

**GEORGE RUTHERGLEN:** Well, if they hold affirmative action in higher education unconstitutional, they'll hold affirmative action in employment in violation of Title VII. It's crystal clear.

**BIRDY ASSEFA:** Yeah. Professor Robinson, let me if you-- any more questions? Oh, Jella.

**KIM FORDE-MAZRUI:** Why don't we make this the last one?

**INTERVIEWER 1:** Just a brief question. How do you think that this decision will potentially impact recruitment to universities? Because I know one of the things that was mentioned in the *Fisher* case was UT's Longhorn neighborhood program, which helps recruit under-represented minorities to the school but not to necessarily admit them. Would that still be implicated in this decision to say you're reaching out to X minority group, which is giving them a bump in the potential to be admitted to the university?

**KIM FORDE-MAZRUI:** It's a great question. I'm sorry. Go ahead.

**KIMBERLY ROBINSON:** Oh, no. Go ahead.

**KIM FORDE-MAZRUI:** I was thinking of Justice Stevens decision in *Bakke*. So first of all, you're right. The logic could say that recruiting is, itself, a government benefit, especially if it comes with any kind of benefits, bringing people to campus, maybe giving them scholarship money. But even just reaching out you could say, well, that's still government action motivated by race. I think intuitively, people don't have that much less of a hard time with recruiting.

Even Justice Stevens' decision in *Bakke* that said you can't take race into account at all under Title VI drops this footnote that said, of course, recruiting is different. Although that's a footnote 45 years ago. And then you'd have to-- the standing issue, right? If you had recruited me I would have come, but you didn't so I felt miffed. But yeah, especially depending on if it has actual tangible benefits to you other than being courted, people could challenge that.

**GEORGE** Non-applicants do very badly in employment discrimination cases.

**RUTHERGLEN:**

**BIRDY ASSEFA:** All right. I believe that will be our last question. Thank you so much, everybody, for coming, and thank you to the panelists for all their time and their knowledge. We really appreciate you all.

**KIM FORDE-** Thank you, Birdy.

**MAZRUI:**

**BIRDY ASSEFA:** Of course.

**KIM FORDE-** You did a great job.

**MAZRUI:**

**BIRDY ASSEFA:** Thank you.

**GEORGE** I'm going to run.

**RUTHERGLEN:**

**KIM FORDE-** Thank you so much.

**MAZRUI:**

**BIRDY ASSEFA:** Thank you. Of course. Thank for this opportunity.

**GEORGE** See you, Kim.

**RUTHERGLEN:**