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Country Club Sports: The Disparate Impact of Athlete Admissions at Elite Universities

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Country Club Sports: The Disparate Impact of Athlete Admissions at Elite Universities

*William B. Morrison**

While conservative advocacy groups criticize affirmative action as anti-meritocratic, many universities give similar admissions preferences based on ostensibly race-neutral characteristics that highly correlate with wealth and whiteness. Using data made public through the recent legal challenge to Harvard's affirmative action policies, statisticians have shown that the greatest boost to an applicant's admission chances at elite universities is not minority status or high test scores, but rather appearing on a coach's list of potential recruits. At Harvard, where 70% of athletes are white, these athletic recruitment lists are often for "country club sports" that require expensive tutoring and are rarely played outside of predominantly white suburbs. Our current legislative framework is insufficient to challenge facially race-neutral admissions policies that have the effect of discriminating on the basis of race, like athlete preferences. In response, I propose legislative modifications to Title VI and internal policy changes within the Ivy League to limit this indirect discrimination.

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INTRODUCTION

In the recent case of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*,¹ a nonprofit challenged Harvard's admissions policy as unlawfully discriminating on the basis of race. The nonprofit, Students for Fair Admissions (SFFA), alleges Harvard's use of affirmative action to benefit African American and Hispanic applicants is a "thinly disguised quota system" that overly burdens Asian American applicants.² Harvard asserts that affirmative action is the most effective method for it to achieve its compelling interest in diversity.³ The lengthy trial resulted in a ruling in favor of Harvard.⁴ Finding no error in the trial court opinion, the

1. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

2. Camille G. Caldera, *Lead Trial Lawyer for SFFA Criticizes Ruling in Harvard Admissions Lawsuit*, HARV. CRIMSON (Oct. 9, 2019), <https://www.thecrimson.com/article/2019/10/9/sffa-lawyer-criticizes-ruling/>.

3. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 133–34, 177 (D. Mass. 2019), *aff'd* 980 F.3d 157 (1st Cir. 2020) ("[N]o workable race-neutral alternatives will currently permit Harvard to achieve the level of racial diversity it has credibly found necessary for its educational mission.").

4. *Id.* at 204–06.

First Circuit affirmed.⁵ Nevertheless, SFFA intends to take the case to the Supreme Court.⁶

Though *SFFA v. Harvard* presents new questions to affirmative action jurisprudence—unlike past cases, the plaintiffs are Asian American,⁷ and the defending university is a private institution—the case falls in line with affirmative action cases previously decided by the Supreme Court. The crux of the decision in *SFFA v. Harvard*, as it was in *Grutter v. Bollinger*⁸ and *Regents of University of California v. Bakke*,⁹ was the school's compelling interest in diversity.¹⁰ Over forty years ago, the Supreme Court of the United States determined the benefits of diversity outweigh the racial discrimination inherent to affirmative action.¹¹ Because Harvard demonstrated it has a compelling interest in diversity and that its affirmative action policy is the most efficient way of achieving that interest, its case has prevailed thus far.¹²

However, despite its use of affirmative action to admit diverse students, Harvard uses several other ostensibly race-neutral admissions preferences that help admit white applicants.¹³ Harvard gives advantages in admissions based on an applicant's status as an

5. *Students for Fair Admissions*, 980 F.3d at 204.

6. Bianca Quilantan, *Appeals Court Rules in Favor of Harvard in Affirmative Action Case, Paving Way for Supreme Court Challenge*, POLITICO (Nov. 12, 2020, 10:17 AM), <https://www.politico.com/news/2020/11/12/harvard-affirmative-action-case-ruling-436282> (describing Edward Blum, president of SFFA, as “vow[ing]” to take the case to the Supreme Court).

7. For a compelling indictment of SFFA's use of Asian American plaintiffs to muddle the affirmative action debate, see Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

8. *Grutter v. Bollinger*, 539 U.S. 306, 328–30 (2003).

9. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978).

10. *Students for Fair Admissions*, 397 F. Supp. 3d at 133–34, 203–06; see also *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210–13 (2016). Edward Blum, the conservative activist who is funding the SFFA case also organized the plaintiffs in *Fisher*. See Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html>.

11. *Bakke*, 438 U.S. at 320 (“[T]he State has a substantial interest [in diversity] that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.”).

12. *Students for Fair Admissions*, 397 F. Supp. 3d at 203–04.

13. For the purposes of this paper, “white” refers to white individuals who are not Hispanic or Latino.

athlete, legacy applicant,¹⁴ dean's list applicant,¹⁵ or as the child of a faculty member.¹⁶ Together, these admissions preferences are referred to as ALDC tips. Unlike the admissions preferences granted to minority applicants through affirmative action, ALDC tips do not advance diversity. In fact, by advantaging white applicants, they actively hinder it.

Peter S. Arcidiacono, an economics professor at Duke University who acted as the expert witness for SFFA in their lawsuit against Harvard, recently co-authored a study of ALDC preferences at Harvard.¹⁷ Using data made publicly available through the Harvard litigation, the study analyzed the magnitude and racial skew of ALDC tips.¹⁸ Arcidiacono and his co-authors found that not only are the vast majority of ALDC applicants white,¹⁹ but that, without their preferred status, three quarters of admitted white ALDC applicants would have been rejected.²⁰ Whereas less than 16% of admitted minorities received an ALDC preference, more than 43% of admitted white applicants did.²¹ White students given spots at Harvard due to their ALDC status take up spots in the admitted class of students, pushing out

14. Legacy applicants are those with immediate family who attended the university they are applying to. See Joe Pinsker, *The Real Reasons Legacy Preferences Exist*, ATLANTIC (Apr. 4, 2019), <https://www.theatlantic.com/education/archive/2019/04/legacy-admissions-preferences-ivy/586465/>.

15. Applicants on the dean's list are generally those whose families have donated large sums of money to the university. See Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), <https://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/>.

16. Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard* 15-16 (Nat'l. Bureau of Econ. Rsch., Working Paper No. 26316, 2019), <https://www.nber.org/papers/w26316.pdf>. The influence of these race-neutral factors became a central component of another admissions controversy: the "Varsity Blues" scandal, where wealthy parents bribed coaches to include their children on athlete lists that would essentially guarantee their acceptance into an elite college. See Karen Weintraub & Nick Anderson, *Several Coaches Plead Not Guilty in College Admissions Bribery Scandal*, WASH. POST (Mar. 25, 2019, 10:05 AM), https://www.washingtonpost.com/local/education/coaches-are-expected-in-federal-court-to-face-charges-in-college-admissions-bribery-scandal/2019/03/25/f18beab4-4f08-11e9-a3f7-78b7525a8d5f_story.html.

17. Arcidiacono et al., *supra* note 16, at 2-7.

18. *Id.*

19. *Id.* at 42.

20. *Id.* at 49.

21. *Id.* at 16.

minorities who would have otherwise been admitted.²² The numbers are clear: ALDC tips benefit white students to the detriment of minorities.

Legacy preferences at elite universities have been largely criticized because they give an extra benefit to applicants who already have the privilege of highly educated parents.²³ However, athlete preferences, though seen as meritocratic, provide an even greater admissions boost than other ALDC considerations and have a similar correlation with privilege. At Harvard, where athletes make up 20% of the student body and squash and rowing have as much support as football and basketball,²⁴ white applicants comprise the only ethnic or racial group benefitted by athlete preferences overall.²⁵ As such, athlete preferences at elite

22. *Id.* at 42.

23. See, e.g., Kathryn Ladewski, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577 (2010); John D. Lamb, *The Real Affirmative Action Babies: Legacy Preference at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993); The Editorial Board, *Opinion, End Legacy College Admissions*, N.Y. TIMES (Sept. 7, 2019), <https://www.nytimes.com/2019/09/07/opinion/sunday/end-legacy-college-admissions.html>; Gene Nichol, *End the Legacy Preference in College Admissions*, NEWS & OBSERVER (Mar. 19, 2019, 6:53 PM) <https://www.newsobserver.com/opinion/article228077844.html>; Robert Verbruggen, *Harvard's 'Legacy' Preferences Are a National Disgrace*, NAT'L REV. (Sept. 23, 2019, 6:30 AM) <https://www.nationalreview.com/2019/09/harvard-legacy-preferences-national-disgrace/>.

24. Arcidiacono et al., *supra* note 16, at 70; 2019–20 Harvard Men's Squash Roster, GOCRIMSON, <https://gocrimson.prestosports.com/sports/msquash/2019-20/roster> (last visited Oct. 21, 2020); 2019–20 Harvard Women's Squash Roster, GOCRIMSON, <https://gocrimson.com/sports/womens-squash/roster/2019-20> (last visited Oct. 21, 2020); 2019–20 Men's Basketball Roster, GOCRIMSON, <https://gocrimson.com/sports/men-basketball/roster> (last visited Oct. 21, 2020); 2019–20 Men's Heavyweight Crew Roster, GOCRIMSON, <https://gocrimson.com/sports/men-heavyweight-rowing/roster> (last visited Oct. 21, 2020); 2018–19 Men's Lightweight Crew Roster, GOCRIMSON, <https://gocrimson.com/sports/men-lightweight-rowing/roster/2018-19> (last visited Oct. 21, 2020); 2019–20 Radcliffe Heavyweight Crew Roster, GOCRIMSON, <https://gocrimson.com/sports/womens-heavyweight-rowing/roster/2019-20> (last visited Oct. 21, 2020); 2019–20 Radcliffe Lightweight Crew Roster, GOCRIMSON, <https://gocrimson.com/sports/womens-lightweight-rowing/roster/2019-20> (last visited Oct. 21, 2020); Football–2019 Roster, GOCRIMSON, <https://gocrimson.com/sports/football/roster/2019> (last visited Oct. 20, 2020); Harvard Women's Basketball 2019–20 Roster, GOCRIMSON, <https://gocrimson.com/sports/womens-basketball/roster/2019-20> (last visited Oct. 21, 2020). Counting the players listed on its rosters online, Harvard has 34 basketball players, 108 football players, 189 rowers, and 25 squash players.

25. See Arcidiacono et al., *supra* note 16, at 32. Though some individual nonwhite students benefit from athlete preferences, the net effect of removing athlete preferences as a whole is either positive (Asian, Hispanic) or neutral (Black) for nonwhite racial/ethnic groups. *Id.*

universities essentially have the effect of affirmative action for white applicants.²⁶

This Note adds to the current academic discussion by exploring the viability of disparate impact challenges to athlete admissions preferences. In Part I, I briefly summarize the current legal process for making a disparate impact claim on the basis of race in university admissions. Then, in Part II, I review how that framework has been used in analyses of racial disparate impact in other areas of university admissions, namely standardized test scores and legacy preferences. After establishing this background, I apply the disparate impact framework to athlete preferences in Part III, showing that, even though Ivy League athlete preferences have a clear disparate impact on applicants of color, our current jurisprudence would be unlikely to support such a claim. In Part IV, I propose legislation that would facilitate lawsuits against universities for policies that have the effect of discriminating on the basis of race. Lastly, in Part V, I propose changes that Harvard and other Ivy League universities could make that would mitigate the discriminatory impact of athlete preferences. I conclude with some brief remarks on the importance of combatting all discrimination, even when its scope seems relatively innocuous, as it does here.

I. LEGISLATIVE FRAMEWORK FOR DISPARATE IMPACT CLAIMS AGAINST UNIVERSITIES

Disparate impact claims are generally made under either the Fourteenth Amendment or a provision of the Civil Rights Act of 1964.²⁷ Because the Fourteenth Amendment applies to government action and not private action,²⁸ it may not be used in an action against private universities, like those in the Ivy League. Therefore, subjects of disparate impact discrimination through private university admissions must make their claims through Title VI of the Civil Rights Act of 1964,²⁹ which prohibits discrimination on the basis of race, color, or national origin in activities or programs that

26. Because they are unlikely to receive a bump from ALDC tips and ineligible for an affirmative action boost, Asian American applicants are in an especially difficult position when applying to elite universities.

27. Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1143 (2010).

28. *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

29. Jennifer C. Bracer, *Killing the Messenger: The Misuse of Disparate Impact Theory to Challenge High-Stakes Educational Tests*, 55 VAND. L. REV. 1111, 1117-18 (2002).

receive federal funding.³⁰ Harvard receives federal funding, so it is subject to Title VI.³¹

Disparate impact litigation under Title VI is difficult. First, Title VI does not contain a cause of action for disparate impact; the action is only available due to a Department of Education regulation that prohibits federal involvement with programs that “have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”³² In *Alexander v. Sandoval*, the Supreme Court ruled that no such right existed because the regulation was promulgated under a section of Title VI that did not create a private right of action for disparate impact claims.³³ Though some scholars,³⁴ including a dissenting Justice Stevens,³⁵ believe a disparate impact private right of action could be authorized under 42 U.S.C. § 1983, such a path to litigation has not been tested in the nineteen years since *Sandoval*.

With no private right of action available, the Department of Education holds the keys to Title VI disparate impact litigation against universities. The Department of Education may investigate disparate impact complaints filed by private parties and refer cases to the Department of Justice,³⁶ but its resources are limited. Commentators have highlighted the inefficiencies of agency bureaucracy and the influence of private rights of action in swaying public opinion in the civil rights movement.³⁷

30. 42 U.S.C. § 2000d.

31. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd* 980 F.3d 157 (1st Cir. 2020) (“Although Harvard is not a state actor . . . Harvard University . . . receives federal funds and intentionally provides tips in its admissions process based on students’ race. Harvard [University] is therefore subject to the same standards that the Equal Protection Clause imposes upon state actors for the purposes of a Title VI claim.” (citation omitted)); ADAM ANDRZEJEWSKI & THOMAS W. SMITH, *OPEN THE BOOKS, OVERSIGHT REPORT: IVY LEAGUE, INC.* (2017).

32. 34 C.F.R. § 100.3(b)(2) (1980); *Braceras*, *supra* note 29, at 1118.

33. *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001).

34. William C. Kidder & Jay Rosner, *How the SAT Creates “Built-in-Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 176–83 (2002).

35. *Sandoval*, 532 U.S. at 299–300 (Stevens, J., dissenting).

36. Brencé D. Pernell, *Aligning “Educational Necessity” with Title VI: An Enhanced Regulatory Role for Executive Agencies in Title VI Disparate Impact Enforcement*, 90 N.Y.U. L. REV. 1369, 1380 (2015).

37. Dan McCaughey, Note, *The Death of Disparate Impact Under Title VI: Alexander v. Sandoval and Its Effects on Private Challenges to High-Stakes Testing Programs*, 84 B.U. L. REV. 247, 274 (2004) (citing Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REGUL. 167, 168 (1985)).

Furthermore, the loss of a private right of action leaves the decision of whether to pursue Title VI disparate impact claims up to the discretion of the executive branch, which may disagree with antidiscrimination policies. For example, the Trump administration has considered removing disparate impact regulations entirely.³⁸ As such, government protections from indirect discrimination are largely inconsistent.

Additionally, due to its investigatory procedures, if the Department of Education chooses not to pursue a claim, courts are unable to create case law to guide future litigation. If the Department rules against a university following an investigation, schools may simply comply with the ruling to avoid enforcement litigation in federal court. For example, in 1988, the Department opened investigations into Harvard and UCLA for admissions procedures that allegedly had discriminatory effects against Asian Americans.³⁹ Ultimately, the Department determined Harvard had not discriminated against Asian American applicants, but that UCLA had.⁴⁰ UCLA modified its policies to comply with the order issued by the Department and made belated offers to previously rejected Asian American students.⁴¹ Were these actions pursued privately, they would have likely resulted in—at the very least—motions to dismiss that could have helped fill gaps in our scant Title VI disparate impact jurisprudence. However, because the Department of Education resolved the claims without contact with a courtroom, disparate impact standards remain ambiguous.

Because Title VI jurisprudence is so undeveloped,⁴² courts often interpret it through the lens of Title VII.⁴³ Title VI and Title VII are largely similar: whereas Title VI prohibits discrimination on the

38. Laura Meckler & Devlin Barrett, *Trump Administration Considers Rollback of Anti-Discrimination Rules*, WASH. POST (Jan. 3, 2019, 5:00 AM), https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html.

39. Note, *The Harvard Plan That Failed Asian Americans*, 131 HARV. L. REV. 604, 607 (2017). Though these actions were pursued before *Sandoval* struck down a private cause of action for disparate impact under Title VI and likely could have been made by private plaintiffs, no private plaintiff brought a claim to federal court.

40. *Id.*

41. *Id.*

42. Braceras, *supra* note 29, at 1147 (describing Title VII as the “Disparate Impact Prototype” in the title of the section).

43. Pernell, *supra* note 36, at 1393–95.

basis of race, color, or national origin in programs receiving federal financial assistance,⁴⁴ Title VII prohibits employers from engaging in that same discrimination.⁴⁵ Nevertheless, there is not explicit parity between Title VII and Title VI disparate impact interpretation.⁴⁶ While several circuit courts have determined that Title VI disparate analysis should follow Title VII jurisprudence directly,⁴⁷ the Supreme Court has yet to affirm this ruling.

In accordance with circuit court precedents, establishing a disparate impact racial discrimination claim follows a burden-shifting framework.⁴⁸ First, plaintiffs must establish the challenged program has a substantial disparate racial impact.⁴⁹ In a Title VII employment context, the Supreme Court has avoided rigid mathematical formulas, instead requiring plaintiffs to show that the racial disparity is “sufficiently substantial” to raise an “inference of causation.”⁵⁰ Several numerical tests have been employed by courts to determine whether a “legally significant statistical disparity exists.”⁵¹ Courts may also weigh statistical disparities with their “practical impact,” considering the larger societal effects of the disparity.⁵²

After plaintiffs establish the challenged program has a substantial disparate impact, the burden shifts to the defendant to demonstrate the program is “educationally justified.”⁵³ This standard, known as educational necessity, originates from the

44. 42 U.S.C. § 2000d.

45. 42 U.S.C. § 2000e-2. Title VII also prohibits discrimination on the basis of religion or sex. Discrimination on the basis of sex in federally assisted programs is prohibited by Title IX of the Education Amendments of 1972. 20 U.S.C. § 1681.

46. *Braceras*, *supra* note 29, at 1149 (“[T]he lack of consensus as to the theoretical basis of disparate impact law requires that each attempt to transfer the model to a body of law outside of the employment arena be judged separately and on its own merits.”).

47. *See, e.g., Powell v. Ridge*, 189 F.3d 387, 393 (3d Cir. 1999) (citing *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995)) (overruled on other grounds by *Alexander v. Sandoval*, 532 U.S. 275 (2001); *City of Chicago v. Lindley*, 66 F.3d 819, 829 & n.12 (7th Cir. 1995); *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993)); *see also Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 & n.9 (9th Cir. 1984).

48. *Kidder & Rosner*, *supra* note 34, at 183–84.

49. *Id.* at 183.

50. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 (1988).

51. *GI Forum Image De Tejas v. Tex. Educ. Agency*, 87 F. Supp. 2d 667, 675 (W.D. Tex. 2000).

52. *Id.* at 676.

53. *Kidder & Rosner*, *supra* note 34, at 183–84.

business necessity exception in Title VII jurisprudence.⁵⁴ To establish educational necessity, as with business necessity, the defendant must demonstrate that the challenged practice is related to success within the institution.⁵⁵

If a school can demonstrate that its admissions practice is an educational necessity, the burden then shifts back to the plaintiffs, requiring them to show that there is “an equally effective and less discriminatory alternative.”⁵⁶ This standard is exacting. Even if a plaintiff can demonstrate a less discriminatory alternative exists, as long as the effectively discriminatory policy is at least slightly better at accomplishing the university’s stated educational necessity, the university may keep its original policy.⁵⁷ Though a Title VI disparate impact claim, unlike one made under the Fourteenth Amendment,⁵⁸ does not explicitly require plaintiffs to demonstrate discriminatory intent,⁵⁹ current jurisprudence makes it difficult for a disparate impact claim to prevail without it.⁶⁰

II. PREVIOUS DISPARATE IMPACT CLAIMS AGAINST ADMISSIONS POLICIES

Although no federal court has heard a case alleging disparate racial impact based on athletic admissions preferences in universities, courts have found racially discriminatory effects in several related areas. This section will review disparate

54. *Ga. State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1418 (11th Cir. 1985) (citing *Bd. of Educ. v. Harris*, 444 U.S. 130, 151 (1979)).

55. *Id.*

56. *Kidder & Rosner*, *supra* note 34, at 184 (citing U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., *THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICY-MAKERS* 54–58 (2000)).

57. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 177–83 (D. Mass. 2019), *aff’d* 980 F.3d 157 (1st Cir. 2020). SFFA identifies several less discriminatory alternatives to affirmative action, but, because the alternatives would not allow Harvard to achieve its educational goal – in this case, diversity – at the same level as it does with affirmative action, the alternatives do not meet the equally effective and less discriminatory standard. Though looking at direct discrimination and not disparate impact discrimination, the “equally effective and less discriminatory” standard the court uses here is the same.

58. *Washington v. Davis*, 426 U.S. 229, 239–41 (1976).

59. *Guardians Ass’n v. Civ. Serv. Comm’n of N.Y.*, 463 U.S. 582, 584 (1983).

60. *See id.* at 584 (“[U]nless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations.”). However, this drawback is mostly irrelevant because the Department of Education is the only entity currently allowed to bring forth Title VI disparate impact claims.

impact claims against standardized tests and legacy admissions. However, due to the decision in *Sandoval* prohibiting Title VI from being used in a private disparate impact claim, much of the surrounding case law is from before 2001. Because the area has been largely abandoned for nearly two decades, it is difficult to accurately predict how modern courts will approach the subject. Nevertheless, these analogues provide helpful insight on how courts have traditionally approached disparate impact claims in higher education.

A. High-Stakes Decision-Making Tests

Much of the case law in disparate impact Title VI claims involve attempts to strike down standardized tests that schools use in high-stakes decision-making.⁶¹ For example, in *Larry P. ex rel. Lucille P. v. Riles*,⁶² the Ninth Circuit found that an IQ test used to place a disproportionate amount of African American children into special classes for individuals with mental disabilities was not educationally necessary because the state could not establish the test was able to accurately identify mentally handicapped individuals.⁶³

In *Larry P.*, the evidence of disparate impact was overwhelming: in the 1968 school year, even though black children made up only about 9% of the state school population, they comprised 27% of the population classified as “educable mentally retarded” by the standardized test.⁶⁴ The plaintiffs’ expert witness testified that the “overenrollments could not be the result of chance” and that “there [was] a less than a one in a million chance that the overenrollment of black children and the underenrollment of non-black children in [classes for the mentally retarded] would have resulted under a color-blind system.”⁶⁵

61. See U.S. DEP’T OF EDUC. OFF. FOR CIV. RTS., THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS, at ii (2000) (“Examples of high-stakes decisions include: student placement in gifted and talented programs or in programs serving students with limited English proficiency; determinations of disability and eligibility to receive special education services; student promotion from one grade level to another; graduation from high school and diploma awards; and admission decisions and scholarship awards.”).

62. *Lucille P. ex rel. Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

63. *Id.* at 981–83.

64. *Id.* at 973.

65. *Id.* at 973.

The burden then shifted to the school districts to rebut the prima facie claim by showing the policy was an educational necessity. The school districts could not do so because the standardized test they used as the sole determinate of an individual's placement in classes for the mentally retarded was not properly validated for its specific purpose.⁶⁶ As such, the court found that the school districts had violated Title VI due to the disparate impact of the policy, even though the court did not find the school districts intended to discriminate.⁶⁷

In *Georgia State Conference of Branches of NAACP v. Georgia*,⁶⁸ a group of black schoolchildren had less success with a similar claim. At the time of the case, many schools in Georgia assigned students to classes based on their level of academic achievement, which was usually determined by scores on standardized tests.⁶⁹ Black schoolchildren, supported by the NAACP, alleged Georgia school districts' use of "achievement grouping" violated Title VI because it disproportionately placed black students in classes with fewer resources.⁷⁰ At trial, the district court judge found that the plaintiffs had established a prima facie case of disparate impact by showing that the racial composition of achievement-based classrooms differed from what a random distribution would predict.⁷¹ The circuit court did not question this prima facie finding because it instead determined the policy was educationally necessary.⁷²

To evaluate educational necessity, the circuit court merely assumed that the tests were properly vetted as implicit within the district judge's opinion, which failed to mention the subject.⁷³ This was improper; the adequacy of a test is a key component of establishing educational necessity and should be directly supported, not merely implied. Under this loose standard, the school districts successfully demonstrated

66. *Id.* at 980–83.

67. *Id.* at 983–84.

68. *Ga. State Conf. of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985).

69. *See id.* at 1409–11.

70. *Id.* at 1408.

71. *Id.* at 1417.

72. *Id.*

73. *Id.* at 1420 (citing *Rowley v. McMillan*, 502 F.2d 1326, 1334 (4th Cir. 1974)).

educational necessity and rebutted the disparate impact identified by the schoolchildren.⁷⁴

Because the school districts had established educational necessity, the burden shifted back to the schoolchildren to propose less discriminatory and equally effective alternatives.⁷⁵ The court found that the alternative to achievement grouping that plaintiffs proposed—randomly assigned classes—was insufficient because they could not demonstrate its superiority over achievement grouping.⁷⁶ Even though the scientific evidence supporting achievement grouping was mixed at best,⁷⁷ the Eleventh Circuit found the alternative insufficient because the plaintiffs could not provide evidence that would demonstrate integrated grouping would produce the same educational benefits as achievement grouping.⁷⁸ *Georgia State Conference of Branches of NAACP* shows that the current framework tips the odds in defendants' favor. Defendants were able to continue using effectively discriminatory policies because the court deferred to the school's assertion that those policies helped to achieve a valid educational goal.

Standardized college admissions tests like the SAT and ACT have been criticized for their racial disparate impact.⁷⁹ Those who benefit from a high score on a standardized test—college applicants whose test scores are higher than their GPAs would predict—are disproportionately white and male.⁸⁰ Likewise, those who are harmed by standardized tests—college applicants whose test scores are lower than their GPAs would predict—are disproportionately women and racial minorities.⁸¹ Though this discrepancy is partially explained by correlations between race and socioeconomic status, white students from families with incomes of

74. *Id.* at 1420.

75. *Id.* at 1420–21.

76. *Id.*

77. Comment, *Ability Grouping in Public Schools: A Threat to Equal Protection?*, 1 CONN. L. REV. 150 (1968).

78. *Ga. State Conf. of Branches of NAACP*, 775 F.2d at 1420.

79. See Kidder & Rosner, *supra* note 34; Benjamin Landy, *Why It's Time for Colleges to Rethink the SAT*, CENTURY FOUND. (Feb. 21, 2014), <https://tcf.org/content/commentary/why-its-time-for-colleges-to-rethink-the-sat/?session=1>.

80. Krista D. Mattern, Emily J. Shaw & Jennifer L. Kobrin, *A Case for Not Going SAT-Optional: Students with Discrepant SAT and HSGPA Performance*, COLLEGEBOARD (May 3, 2010), <https://files.eric.ed.gov/fulltext/ED563419.pdf>.

81. *Id.*

less than \$10,000 still have significantly higher SAT scores than the national mean for all African Americans.⁸² Others have theorized the racial disparity is due to more limited resources and attention given to black students.⁸³ Furthermore, the history of college admissions testing itself is mired in racist ideology; the first standardized college admissions test, the SAT, was created by a eugenicist with the primary purpose of proving white supremacy.⁸⁴ Increased understanding of these disparities has led some schools to drop their standardized testing requirements for undergraduates, including, most prominently, the University of California system of schools.⁸⁵

Though federal litigation challenging the SAT has dropped off since *Sandoval*,⁸⁶ the pre-*Sandoval* cases demonstrate the potential of Title VI disparate impact claims. In *Cureton v. National Collegiate Athletic Association*,⁸⁷ a federal district court granted summary judgment for a disparate impact claim against the National Collegiate Athletic Association (NCAA) for its use of SAT scores as a cutoff for athletes to compete. The plaintiffs established a prima facie case by showing the SAT cutoff would result in the ineligibility of approximately 25% of black athletes, but only

82. *The Widening Racial Scoring Gap on the SAT College Admissions Test*, 29 J. BLACKS HIGHER EDUC. 88 (2005).

83. *The SAT as a Major Roadblock to Black Students' Aspirations to Higher Education*, 29 J. BLACKS HIGHER EDUC. 85, 85-88 (2000).

84. Sidney Fussell, *The Problem with the SAT's Idea of Objectivity*, ATLANTIC (May 18, 2019), <https://www.theatlantic.com/technology/archive/2019/05/college-board-sat-adversity-score/589681/>.

85. Press Release, Univ. of Cal., University of California Board of Regents Unanimously Approved Changes to Standardized Testing Requirement for Undergraduates (May 21, 2020), <https://www.universityofcalifornia.edu/press-room/university-california-board-regents-approves-changes-standardized-testing-requirement>.

86. *But see* Anemona Hartocollis, *University of California Is Sued over Use of SAT and ACT in Admissions*, N.Y. TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/us/sat-act-uc-lawsuit.html>. A coalition of students recently challenged the University of California system of colleges for its use of standardized testing in admissions. *Id.* However, the plaintiffs sued in state court, arguing the use of standardized tests violates the equal protection clause in the California Constitution. *Id.* Furthermore, the plaintiffs alleged direct discrimination, not Title VI disparate impact discrimination. *Id.* The case was made moot by the University of California's decision to drop its standardized testing requirement for undergraduates. *See* Univ. of Cal., *supra* note 85.

87. *Cureton v. Nat'l Collegiate Athletic Ass'n*, 37 F. Supp. 2d 687 (E.D. Pa. 1999) (reversed on other grounds by *Cureton v. Nat'l Collegiate Athletic Ass'n*, 198 F.3d 107 (3d Cir. 1999)).

roughly 5% of white athletes.⁸⁸ The NCAA attempted to rebut this with a claim that SAT cutoffs were an educational necessity to improve student athlete graduation rates and close the graduation gap between black and white athletes.⁸⁹

This argument did not persuade the district court. The court found the NCAA had not validated the SAT or the ACT as predictors of student-athlete graduation rates and that the cutoff was “abstractly rational,” looking only at SAT scores to predict graduation and failing to include important variables like high school grades and other forms of academic achievement.⁹⁰ Furthermore, the plaintiffs provided different models to predict academic achievement that had resulted in similar graduation rates as the NCAA’s SAT/ACT cutoff but with a less racially discriminatory effect.⁹¹ Noteworthy here is that the different models have slightly lower predicted graduation rates than the NCAA’s SAT/ACT cutoff.⁹² However, because the NCAA’s only stated goal was to increase graduation rates and all of the plans did so, the court found the NAACP’s models equally effective as the NCAA’s.⁹³ Despite its later reversal on separate grounds,⁹⁴ *Cureton* provides a helpful blueprint of a successful disparate impact claim against testing procedures.⁹⁵

Getting rid of standardized college admissions testing entirely, however, is a much more difficult legal battle. The Department of Education could likely establish a *prima facie* claim based on the disparate impact that standardized admissions tests have on minorities, but universities can demonstrate that their use is educationally justified because they help admissions staff create a more qualified incoming class. Standardized admissions test scores have been shown in several studies to help predict

88. *Id.* at 698.

89. *Id.* at 701.

90. *Id.* at 708–10.

91. *Id.* at 713–14.

92. *Id.*

93. *Id.* at 714.

94. *Cureton v. Nat’l Collegiate Athletic Ass’n*, 198 F.3d 107 (3d Cir. 1999) (reversing without criticizing the disparate impact analysis after finding that the NCAA had not received federal funds and therefore was not subject to Title VI).

95. See also *Sharif by Salahuddin v. N.Y. State Educ. Dep’t*, 709 F. Supp. 345 (S.D.N.Y. 1989) (ruling that merit scholarships based solely on SAT scores have an unjustified disparate impact on women under Title IX).

applicants' college GPAs and graduation rates.⁹⁶ Universities have a strong interest in recruiting the best students possible and therefore would be likely to prove test scores are a legitimate means of effecting that goal. Though litigants could argue an admissions scheme that does not use standardized test scores is equally as effective as one that does,⁹⁷ standardized tests provide a slight bump in predictive power that likely would overcome the equal effectiveness standard.⁹⁸ As such, courts lack the means to remedy the negative effects of standardized admissions tests on underrepresented minorities.

B. Legacy Admissions

Many universities provide an admissions bump to applicants whose parents graduated from the university, work as faculty, or have made large donations to the university.⁹⁹ These tips are significant; a survey of 30 highly selective colleges and universities found that legacy status more than tripled an applicant's odds of admission.¹⁰⁰ Though the Department of Education's Office for Civil Rights (OCR) found in its 1990 investigation of Harvard that

96. Christopher M. Berry & Paul R. Sackett, *Individual Differences in Course Choice Result in Underestimation of the Validity of College Admissions Systems*, 20 PSYCH. SCI. 822 (2009); Mattern et al., *supra* note 80.

97. This argument may be gaining more traction with time. See Paul Tough, *What College Admissions Offices Really Want*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/interactive/2019/09/10/magazine/college-admissions-paul-tough.html>. Universities that have removed their standardized testing requirement have found no significant difference between the grades of those who choose not to submit their scores and those who do. *Id.* After introducing this practice and thereafter dropping down in ranks on U.S. News's list of best liberal arts colleges, professors at Trinity College urged its board of trustees to continue with the policy of allowing applicants to choose not to submit their test scores in their application. *Id.* The professors described the new students as having "a refreshing array of qualities that were all too rare in prior years: intellectual curiosity, openness of mind and spirit and genuine will to engage with their peers," and regarded the change as "one of the most exciting transformations Trinity has witnessed in many years." *Id.*

98. Braceras, *supra* note 29, at 1193 (describing such a line of thinking as "unwarranted intrusions into education policy").

99. Steve D. Shadowen, *Personal Dignity, Equal Opportunity, and the Elimination of Legacy Preferences*, 21 GEO. MASON U. CIV. RTS. L.J. 31, 31-32 (2010) (citing Chad Coffman, Tara O'Neil & Brian Starr, *An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities*, in AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 101, 119-21 (Richard D. Kahlenberg ed.) (2010)).

100. Michael Hurwitz, *The Impact of Legacy Status on Undergraduate Admissions at Elite Colleges and Universities*, 30 ECON. EDUC. REV. 480 (2011).

its policy of legacy preferences did not violate Title VI regulations,¹⁰¹ the OCR only looked into legacy preferences' effect on Asian Americans, not other minority groups.¹⁰² Scholarship has since reasserted the viability of Title VI in striking down legacy admissions policies.¹⁰³ Despite a disparate impact on the basis of race, universities claim to have a strong interest in maintaining legacy admissions,¹⁰⁴ primarily based on the belief that it increases alumni donations.¹⁰⁵ Ultimately, under our current judicial framework, successfully litigating a Title VI disparate impact claim for legacy admissions is unlikely given the deference courts provide universities in establishing educational necessity.

The prima facie case of disparate impact on the basis of race here is strong. Because more overtly racist policies made previous generations of college students less diverse than today's applicants, granting admissions based on past generations' college attendance perpetuates the effects of direct discrimination from the past.¹⁰⁶ Legacy applicants are therefore overwhelmingly white.¹⁰⁷ At Harvard, almost 70% of legacy applicants are white,¹⁰⁸ even though only 41% of Harvard applicants are white.¹⁰⁹ For the first

101. See Lamb, *supra* note 23, at 508. Though the OCR acknowledged disparities in acceptance rates among white and Asian American applicants were largely due to Harvard's legacy preferences and athlete recruitment, it concluded that legacy and athlete preferences had legitimate, nondiscriminatory purposes and therefore did not violate Title VI regulations. *Id.*

102. *Id.*

103. Ladewski, *supra* note 23.

104. Lamb, *supra* note 23, at 508–09.

105. Pinsker, *supra* note 14.

106. Ladewski, *supra* note 23, at 583.

107. Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1197 (1997) (“At Harvard College, for instance, more whites gain entry as legacies than do all the black, Hispanic, and Native American students combined, including those admitted as part of the regular admissions stream and those who received special consideration in the admissions process as members of disadvantaged groups.”).

108. Arcidiacono et al., *supra* note 16, at 42.

109. *Id.* at 43. This number is derived from adding up the *N* value for white applicants and then dividing by the total *N* value for applicants. It appears other data submitted by Harvard differs; the court in *SFFA v. Harvard* cites to a non-public exhibit showing that 20% of applicants are Black or Hispanic (despite making up more than 30% of the U.S. population) and 22% are Asian American (despite making up less than 6% of the national population). *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 177–79 (D. Mass. 2019), *aff'd* 980 F.3d 157 (1st Cir. 2020). The trial exhibit from *SFFA v. Harvard* with more detailed applicant demographic information is not publicly available, but, assuming 2% of Harvard applicants are Native American or Pacific Islander, roughly 56% of

universities to institute legacy preferences, discrimination was a feature, not a bug: Harvard and Yale originated legacy preferences during the nationalist boom following World War I primarily to hinder Jewish-Americans' chances of admittance.¹¹⁰

However, legacy admissions serve several interests that universities can use to rebut a prima facie case of racial discrimination. The Department of Education dropped its 1990 investigation of racial discrimination in Harvard admissions in response to Harvard's assertion that it used legacy preferences to "1) encourage alumni volunteer services; 2) encourage alumni financial contributions; and, 3) maintain community relations."¹¹¹ More recently, in *SFFA v. Harvard*, the court recognized that eliminating legacy tips, including applicants on the dean's interest lists and children of faculty, would "adversely affect Harvard's ability to attract top quality faculty and staff and to achieve desired benefits from relationships with its alumni and other individuals who have made significant contributions to Harvard."¹¹² These effects are disputed,¹¹³ but, as with eliminating standardized tests,¹¹⁴ courts are currently ill-equipped to make the education policy decisions necessary to eliminate legacy admissions outright.

III. DISPARATE IMPACT OF ATHLETE PREFERENCES AT HARVARD

The disparate impact of athlete preferences at elite universities has received much less attention than legacy admissions. This is in part because athlete admissions lack the hypocrisy inherent in legacy admissions; whereas legacy preference essentially gives an affirmative action boost to privileged white people, athlete admissions at elite universities are earned through hard-fought

Harvard applicants are white. Because Arcidiacono et al. have provided their data more transparently, I will use the 41% figure. However, even with the 56% figure, there is a significant disproportionality for ALDC tips to favor white applicants.

110. Ladewski, *supra* note 23, at 579-83.

111. Lamb, *supra* note 23, at 509 (quoting Statement of Findings of Office for Civil Rights, Compliance Review 01-88-6009 9 (1990)).

112. *Students for Fair Admissions*, 397 F. Supp. at 177-79.

113. Ladewski, *supra* note 23, at 585-91. Ladewski compared fundraising data for eight selective public universities from before and after they eliminated their legacy admissions preferences. Ladewski found no significant change in donations following the removal of legacy preferences. However, the results could be different when measuring ultra-selective private colleges like those in the Ivy League.

114. *See supra* Section II.A.

mastery in a sport.¹¹⁵ In some ways, athletes in the Ivy League are in a worse position than those at other universities because they do not receive scholarships.¹¹⁶ Nevertheless, Harvard grants admissions tips to athletes that are far greater than those it gives to legacy applicants or racial minorities.¹¹⁷ In Arcidiacono and his colleagues' analysis of Harvard admissions data, they found that, while legacy status made an applicant eight times more likely to be admitted, athlete status made admission *five thousand* times more likely.¹¹⁸ In this Part, I first explain Harvard's general admissions process, then I address the role of athletics in the Harvard's culture. After establishing this factual background, I predict how courts would handle a Title VI disparate impact challenge to Harvard's athlete preferences, using the burden-shifting framework explained in Part I.

A. Harvard's Admissions Process

Harvard is one of the most selective universities in the world.¹¹⁹ Each year, over 40,000 students apply to Harvard;¹²⁰ it admits roughly 5% of them,¹²¹ with its acceptance rate dwindling each year.¹²² In contrast, most colleges in the United States admit

115. *But see* Daniel Golden & Doris Burke, *The Unseen Student Victims of the "Varsity Blues" College-Admissions Scandal*, NEW YORKER (Oct. 8, 2019), <https://www.newyorker.com/books/page-turner/the-unseen-student-victims-of-the-varsity-blues-college-admissions-scandal> (finding some college athletes to have bought a spot on a team without even basic proficiency in their sport).

116. *Prospective Athlete Information*, IVY LEAGUE (July 28, 2017), <https://ivyleague.com/sports/2017/7/28/information-psa-index.aspx>.

117. *Students for Fair Admissions*, 397 F. Supp. at 199 ("The effect of African American and Hispanic racial identity on an applicant's probability of admission has been estimated at a significantly lower magnitude than tips offered to recruited athletes, and is comparable to tips for legacies . . .").

118. Arcidiacono et al., *supra* note 16, at 6.

119. *Top 100 - Lowest Acceptance Rates*, U.S. NEWS, <https://www.usnews.com/best-colleges/rankings/lowest-acceptance-rate> (last visited Sept. 17, 2020).

120. *Admissions Statistics*, HARV. COLL., <https://college.harvard.edu/admissions/admissions-statistics> (last visited Sept. 17, 2020); *Record 42,742 Apply to College Class of '22*, HARV. GAZETTE (Feb. 13, 2018), <https://news.harvard.edu/gazette/story/2018/02/record-42742-apply-to-harvard-college-class-of-22/>.

121. U.S. NEWS, *supra* note 119.

122. Camille G. Caldera & Sahar M. Mohammadzadeh, *Record-Low 4.5 Percent of Harvard College Applicants Accepted to Class of 2023*, HARV. CRIMSON (Mar. 29, 2019), <https://www.thecrimson.com/article/2019/3/29/2023-admit-numbers/>; Delano R. Franklin & Samuel W. Zwickel, *Record-Low 4.59 Percent of Applicants Accepted to Harvard Class*

most of those who apply.¹²³ To maintain its reputation and create the best freshman class possible, Harvard uses a sophisticated admissions regimen.

Harvard generally requires applicants to provide a wide base of information, including: “standardized test scores, high school transcript(s), information about extracurricular and athletic activities, intended concentration and career, a personal statement, supplemental essays, teacher and guidance counselor recommendations,” and in-depth family and socioeconomic information.¹²⁴ Admissions are based on a variety of factors, which are segmented into four metrics: academic, extracurricular, athletic, and personal.¹²⁵ Harvard looks closely at non-academic credentials because “85 percent of [their] applicants are academically qualified[,]” requiring the Admissions Committee to instead focus on what makes an applicant distinctive.¹²⁶

Applications are reviewed by an admissions officer, who assigns ratings for each metric.¹²⁷ These scores are generally ranked on a scale of 1 to 4, with 1 marking the most qualified and 4 the least qualified.¹²⁸ The scoring system also permits greater specificity by allowing admissions officers to give plus or minus scores, like 2+ or 3-.¹²⁹ There is no direct formula to balancing an applicant’s scores in each metric, which are then weighed holistically in combination with tips the university gives to special groups like ALDCs and racial minorities to create an overall rating.¹³⁰ Concurrent to the initial admissions officer review, though occasionally preceding it, most Harvard applicants are interviewed by a Harvard alumnus,

of 2022, HARV. CRIMSON (Mar. 29, 2018), <https://www.thecrimson.com/article/2018/3/29/harvard-regular-admissions-2022/>.

123. Drew Desilver, *A Majority of U.S. Colleges Admit Most Students Who Apply*, PEW RSCH. CTR. (Apr. 9, 2019), <https://www.pewresearch.org/fact-tank/2019/04/09/a-majority-of-u-s-colleges-admit-most-students-who-apply/>.

124. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 136 (D. Mass. 2019), *aff’d* 980 F.3d 157 (1st Cir. 2020).

125. *Id.* at 140.

126. Exhibit 55 (Interviewer Handbook) at 9–10, *Students for Fair Admissions, Inc. v. President & Fellow of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-ADB) [hereinafter Interviewer Handbook].

127. *Students for Fair Admissions*, 397 F. Supp. at 139–40.

128. *Id.* at 138.

129. *Id.* at 140.

130. *Id.* at 142–43 (“Harvard does not decide which applicants to admit based on any formula.”).

who scores them based on similar metrics.¹³¹ Looking at these two evaluations, the admissions officers discuss which applicants to recommend for admission in subcommittees and then as full committees.¹³²

Though Harvard does not determine admissibility based on a fixed formula, clear trends emerge over time. The athletics rating is the least stable of the bunch: a score of 1 on athletics means that the applicant is a recruited athlete and is almost certain to be admitted.¹³³ However, a high score in athletics is not as necessary for admission as other metrics; whereas most admitted students have scores of 1 or 2 in other metrics, only around 20% of admitted students have scores of 1 or 2 in the athletics metric.¹³⁴ Conversely, academic success is necessary, but not sufficient for admission, with less than 15% of the non-ALDC applicants in the top decile for academic performance being admitted.¹³⁵

The ideal Harvard applicant is one who has been groomed. This does not necessarily mean that they are a legacy applicant, though, as previously established, legacy status can help admission chances a great deal. Being groomed, however, means that the applicant has been preparing her whole life to be eligible to attend Harvard; not only must she be intelligent and personable, she must also be “interesting.”¹³⁶

The sample candidates Harvard assesses in its interview manual as likely to be admitted are “interesting” because they have top academic credentials and a full schedule of extracurricular activities. One student, given a score 2- in the extracurricular activity metric by an interviewer, performs intensive service within his community, participates in Model UN, earned his Eagle Scout award, and edits the school’s newspaper.¹³⁷ Another applicant swims competitively, volunteers as a swimming coach, and writes

131. *Id.* at 137–38. The only difference here is that the interviewer consolidates extracurricular and athletics scores into one metric. *See id.*

132. *Id.* at 140–44.

133. Arcidiacono et al., *supra* note 16, at 34 (“The advantages for athletes are especially large, with an average admit rate for recruited athletes of 86%.”).

134. *Id.* at 44.

135. *Id.* at 45.

136. *See* David H. Graham, *How to Raise a Child Who Will Get into Harvard*, QUARTZ (July 1, 2014), <https://qz.com/228841/how-to-raise-a-child-who-will-get-into-harvard/>.

137. Interviewer Handbook, *supra* note 126, at 39–40. The handbook later described the assessment as “a bit generous.” *Id.* at 40.

poetry. She's the president of the Environment Club, an officer in her school's championship-winning Science League team, an officer in a service club, and an officer in her school's Chemistry Charter Club.¹³⁸ This sample candidate was given a 2+ rating for her extracurricular participation, a score which the handbook remarks was "a bit inflated."¹³⁹ Over half of the non-ALDC applicants and over 70% of the non-ALDC white and Asian American applicants that Harvard admits earn a 1 or 2 in their extracurricular score.¹⁴⁰ Being "interesting" enough for Harvard seems to mean that someone actively participates in multiple clubs or has world-class ability in one specific field.

B. Athletics at Harvard

Though not traditionally thought of as an athletics powerhouse,¹⁴¹ Harvard has 42 NCAA Division I varsity teams, more than any other college or university.¹⁴² Of Harvard's roughly 6,000 undergraduates, 20% participate in intercollegiate athletics.¹⁴³ The Ohio State University—a school with almost eight times as many enrolled undergraduate students as Harvard and a much stronger athletic reputation¹⁴⁴—has fewer student athletes than Harvard.¹⁴⁵ Harvard athletics have been successful, having won

138. *Id.* at 41–42.

139. *Id.* at 42.

140. Arcidiacono et al., *supra* note 16, at 44.

141. See Brad Crawford, *Top 25 College Programs Ranked by Athletic Success*, 247 SPORTS (July 8, 2018), <https://247sports.com/ContentGallery/Top-25-college-programs-ranked-by-athletic-success-119649026/> (Harvard not on the list); *25 Best Colleges for Student Athletes*, AFFORDABLE SCHS., <https://affordableschools.net/25-best-american-colleges-student-athletes/> (last visited Sept. 17, 2020) (Harvard not on the list); *The 30 Most Successful College Sports Programs of All Time*, BEST COLL. REVS., <https://www.bestcollegereviews.org/features/most-successful-college-athletics-programs/> (last visited Sept. 17, 2020) (Harvard not on the list). But see *Best NCAA Division 1 Colleges*, NCSA SPORTS, <https://www.ncsasports.org/best-colleges/best-division-1-colleges> (last visited Sept. 17, 2020) (Harvard ranked number four on the list of best D1 colleges).

142. Arcidiacono et al., *supra* note 16, at 70.

143. *Id.*

144. Justin Fox, *The Amazing Admissions Advantages for Athletes at the Apex of Academia*, BLOOMBERG (Mar. 22, 2019, 9:00 AM), <https://www.bloomberg.com/opinion/articles/2019-03-22/athletes-have-huge-college-admissions-advantages> (describing Ohio State as being "famous as a sports powerhouse").

145. Arcidiacono et al., *supra* note 16, at 70.

hundreds of national or NCAA championships,¹⁴⁶ performed well in competitions against other schools in the Ivy League,¹⁴⁷ and produced dozens of Olympic athletes.¹⁴⁸ Harvard, like other schools in the Ivy League, does not give scholarships to its athletes, but instead provides robust need-based financial aid regardless of athlete status.¹⁴⁹

Colleges within the Ivy League have agreed to only admit athletes who fit within the school's Academic Index (AI).¹⁵⁰ Each Ivy League applicant is given an AI based on her test scores and GPA.¹⁵¹ The average AI of all athletes at an Ivy League school must be within one standard deviation of the average AI of the entire incoming class. Therefore, Harvard is unlikely to admit an athlete with a poor academic record unless the athlete is so exceptionally talented at her sport—and the university finds success in that sport sufficiently important—as to warrant stricter academic standards for other athletes to balance the average AI.¹⁵² Though the AI creates an academic floor for aspiring Ivy League athletes, it still allows schools to use significantly lower academic standards for recruited athletes than the general populace.

Harvard provides limited public details about its process for recruiting athletes. Ivy League coaches send lists of potential athletic recruits to admissions,¹⁵³ but how an athlete gets on this list is a rather opaque process. Though the illicit bribes to coaches that made headlines in the recent “Varsity Blues” scandal are

146. *Athletics Recruiting Central*, GO CRIMSON, <https://gocrimson.com/sports/2020/5/5/information-recruiting-index.aspx> (last visited Oct. 9, 2020).

147. Jonathan Pollack, *A Decade in Ivy League Sports: Ranking the Eight Athletic Programs*, DAILY PENN. (Aug. 23, 2018, 8:45 PM), <https://www.thedp.com/article/2018/08/ivy-league-athletics-ten-year-update-brown-columbia-cornell-dartmouth-harvard-penn-princeton-yale-overall-rankings>.

148. *Athletics Recruiting Central*, *supra* note 146; Harvard Athletics Communications, *Harvard Represented at Olympics*, HARV. GAZETTE (July 10, 2012), <https://news.harvard.edu/gazette/story/2012/07/harvard-represented-at-olympics/>.

149. Bill Pennington, *Financial Aid Changes Game as Ivy Sports Teams Flourish*, N.Y. TIMES (Dec. 22, 2011), <https://www.nytimes.com/2011/12/23/sports/financial-aid-changes-game-as-sports-teams-in-ivies-rise.html>.

150. John R. Thelin, *Admissions, Athletics and the Academic Index*, INSIDE HIGHER ED (Apr. 3, 2019), <https://www.insidehighered.com/views/2019/04/03/how-admissions-and-athletics-intertwine-ivy-league-colleges-opinion>.

151. Antonio Buehler, *The Academic Index at Ivy League Schools*, ABROME (Oct. 1, 2015), <http://www.abrome.com/blog/academic-index>.

152. *Id.*

153. *Id.*

uncommon,¹⁵⁴ the path to an Ivy League coach's list still tends to require a lot of money.¹⁵⁵ The disparities in athletic participation start early. Children with household incomes over \$100,000 participate in sports at a much higher rate than those with household incomes under \$25,000.¹⁵⁶ White children also participate in sports at greater rates than all other races.¹⁵⁷ Later, wealthy East Coast suburbs and private schools act as pipelines for Ivy League athletics, with some private high schools sending dozens of athletes to the Ivy League.¹⁵⁸ Receiving the training necessary to develop skills that can place a student on a coach's recruiting list can require tens of thousands of dollars on tutoring.¹⁵⁹ Around half of Harvard athletes come from households earning more than \$250,000 a year, compared to about a third of the general student body coming from such households.¹⁶⁰ These social, geographic, and economic barriers result in a disparate impact on racial minorities.

The **table** in the appendix compares the racial demographics in the Ivy League with Division I sports as a whole.¹⁶¹ The table is grouped by each sport for which Harvard fields a team.

The comparison shows that, while white players make up a smaller percentage of Ivy League teams than the national average in some of the sports in which Harvard competes, African American and Hispanic representation on their teams is generally lower than the national average, especially in big-ticket sports like

154. See Weintraub & Anderson, *supra* note 16.

155. Liam O'Connor, *Ivy League Athletics Are the New "Moneyball,"* DAILY PRINCETONIAN (Oct. 10, 2019, 12:18 AM), <http://www.dailyprincetonian.com/article/2019/10/ivy-league-athletics-are-the-new-money-ball>.

156. *Youth Sports Facts: Sports Participation and Physical Activity Rates*, ASPEN INST. (2019), <https://www.aspenprojectplay.org/youth-sports-facts/participation-rates>.

157. *Id.*

158. O'Connor, *supra* note 155 ("The Noble and Greenough Schools (annual cost: \$58,100 for boarding students) had 50 alumni as varsity athletes. Deerfield Academy (\$60,680) came in second with 36 students; Phillips Exeter Academy (\$55,402), third, with 32; and the Lawrenceville School (\$66,360), fourth, with 30.").

159. Saahil Desai, *College Sports Are Affirmative Action for Rich White Students*, ATLANTIC (Oct. 23, 2018), <https://www.theatlantic.com/education/archive/2018/10/college-sports-benefits-white-students/573688/>.

160. *Id.*

161. Both tables are made using data from *NCAA Demographics Database*, NCAA, <http://www.ncaa.org/about/resources/research/ncaa-demographics-database> (last visited Sept. 17, 2020).

football and basketball. The lower proportion of white players in the Ivy League is balanced out not by a greater proportion of Hispanic and African American athletes, but by an increased proportion of Asian athletes and individuals who list their race as “Other,” which is something of a mystery category.¹⁶² Furthermore, even if the Ivy League has slightly better representation in some “country club sports” like squash and water polo, those sports are already predominantly white sports.¹⁶³

At Harvard specifically, nearly 70% of recruited athletes are white,¹⁶⁴ even though less than half of the overall student body is white.¹⁶⁵ In their statistical model, Arcidiacono et al. predicted that removing athlete preferences would cause the number of admitted white applicants to decrease by 6%; the number of admitted Hispanic applicants to increase by 7%; the number of admitted Asian American applicants to increase by 9%; and the number of admitted African American applicants to stay constant.¹⁶⁶

Despite the resources Harvard invests in its athletics, few pay attention to their programs. Average attendance at Harvard football games is about a third of the national average for college football.¹⁶⁷ Harvard rarely plays teams outside of the Ivy League, and any interest in its athletics programs tends to tie back to its

162. See Sowmiya Ashok, *The Rise of the American ‘Others’*, ATLANTIC (Aug. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/08/the-rise-of-the-others/497690/>. Individuals who write “Other” on census forms tend to be racially mixed or confused by differences in racial and ethnic classifications. Here it could include Middle Eastern or Indian athletes who do not associate with the other categories given as options. See Chloe A. Shawah, *White (Not Including Middle Eastern Origin)*, HARV. CRIMSON (Mar. 4, 2019), <https://www.thecrimson.com/article/2019/3/4/shawah-white-not-including-middle-eastern/>. It could also include individuals who preferred not to disclose their race, for whatever reason.

163. See O’Connor, *supra* note 155.

164. Arcidiacono et al., *supra* note 16, at 42.

165. *Meet the Class of 2023*, HARV. CRIMSON, <https://features.thecrimson.com/2019/freshman-survey/makeup/> (last visited Sept. 16, 2020).

166. Arcidiacono et al., *supra* note 16, at 32. These effects are generally greater than the effect of removing legacy preferences, which Arcidiacono predicts would lower white admissions by 4% and increase African American, Hispanic, and Asian American admissions by 4%, 5%, and 4%, respectively. *Id.* at 31–32.

167. See Krissy Kowalski, *As College Football Attendance Drops Nationwide, Penn Gets Creative to Keep Fans Coming*, DAILY PENN. (Sept. 11, 2019, 11:49 PM), <https://www.thedp.com/article/2019/09/penn-football-attendance-history-decline-college-clemson-princeton-franklin-field; 2018 Football Cumulative Statistics>, GO CRIMSON, <https://gocrimson.com/sports/football/stats/2018> (last visited Sept. 16, 2020).

long-running history rather than what it has done recently.¹⁶⁸ Furthermore, though Harvard does not make its athletic spending and revenue public, it is unlikely to be profitable: only a small percentage of powerhouse universities boast revenues from their athletic programs that exceed their expenses.¹⁶⁹ Indeed, Stanford recently cut many of its niche athletic programs—including country club sports like squash, rowing, and sailing—citing funding concerns exacerbated by COVID-19.¹⁷⁰

Nevertheless, Ivy League schools continue to develop their athletics programs. There are several possible reasons for this: perhaps they believe strong athletic programs will increase alumni donations or the university's outreach.¹⁷¹ Some studies have connected a university's athletic success with an increased number of applicants with high test scores.¹⁷² However, Ivy League schools—especially Harvard¹⁷³—work with huge endowments and, given their already rigorous admissions rates, would likely be unaffected by a drop in applicants with high test scores discouraged from attendance because of a weak athletics program.¹⁷⁴ The value of dedicating so many admissions spots and so much money to athletics is therefore suspect.

168. See John Powers, *Why Harvard Football Still Matters*, HARV. GAZETTE (Sept. 24, 2019), <https://news.harvard.edu/gazette/story/2019/09/why-harvard-football-still-matters/>.

169. Brian Burnsed, *Growth in Division I Athletics Expenses Outpaces Revenue Increases*, NCAA (Aug. 20, 2014, 11:04 AM), <http://www.ncaa.org/about/resources/media-center/news/growth-division-i-athletics-expenses-outpaces-revenue-increases>.

170. Alex Scarborough, *Stanford to Cut 11 Varsity Sports, Cites Pandemic as Breaking Point*, ESPN (July 8, 2020), https://www.espn.com/college-sports/story/_/id/29429478/stanford-cut-11-varsity-sports-cites-pandemic-breaking-point.

171. See Desai, *supra* note 159.

172. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables* (Nat'l. Bureau of Econ. Rsch., Working Paper No. 18196, 2012), <https://www.nber.org/papers/w18196.pdf>.

173. Harvard's endowment is valued at over \$40 billion. Ellen M. Burstein & Camille G. Caldera, *Who Does Harvard's Endowment Serve?*, HARV. CRIMSON (May 27, 2020), <https://www.thecrimson.com/article/2020/5/27/commencement-2020-endowment/>.

174. *Id.*

C. Challenging Athlete Admissions Under Title VI

To successfully challenge Harvard's athlete preferences,¹⁷⁵ potential plaintiffs must first establish a prima facie case by showing that the preferences have a disparate impact on the basis of race that is sufficiently substantial to raise an inference of causation.¹⁷⁶ Here, the inference of causation is strong: 69% of athletic tips go to white students, even though only 40% of Harvard applicants are white.¹⁷⁷ This data, coupled with Arcidiacono et al.'s finding that removing athlete preferences would increase Asian American and Hispanic admissions by a significant amount,¹⁷⁸ would show a strong inference of causation and likely establish a prima facie case of disparate impact.

However, Harvard is likely to succeed in its educational necessity defense. To rebut the established prima facie case, Harvard need only point to institutional goals that its athlete preferences help it achieve. The court recognized in *SFFA v. Harvard* that eliminating tips for athletes at Harvard would make it "far less competitive in Ivy League intercollegiate sports, which would adversely impact Harvard and the student experience."¹⁷⁹ Alumni donations and involvement could decline.¹⁸⁰ Harvard could argue it has historical interests in maintaining high-quality athletic programs. Because of the deference that courts give defendants in this stage of analysis, any one of these individual claims would likely establish educational necessity.

Having successfully rebutted the prima facie claim, Harvard would then shift the burden to the plaintiffs to present a less discriminatory and equally effective alternative.¹⁸¹ Though there are many possible less discriminatory alternatives to Harvard's current scheme of athletic recruitment, they would likely require

175. This challenger would likely need to be the Department of Education. *Alexander v. Sandoval*, 532 U.S. 275, 282–83 (2001).

176. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 (1988).

177. Arcidiacono et al., *supra* note 16, at 42. See *supra* note 109 for a discussion of possible variances in the proportion of Harvard applicants who are white. Even going with the higher number provided by Harvard—56%—there would still likely be a strong inference of causation.

178. Arcidiacono et al., *supra* note 16, at 32.

179. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019), No. 19-2005 (1st Cir. argued Sept. 16, 2020).

180. *Id.* at 179–80; Anderson, *supra* note 172.

181. Kidder & Rosner, *supra* note 34, at 184.

Harvard to admit athletes of a lower quality or violate its agreements with the Ivy League Conference to recruit athletes within its Academic Index. Because the alternatives are not equally effective, plaintiffs' claim would fail.

IV. LEGISLATIVE SOLUTIONS TO DISCRIMINATORY EFFECTS OF HARVARD ATHLETICS

Despite being able to construct a strong prima facie claim of disparate impact on the basis of race, current judicial interpretations of Title VI would prevent plaintiffs from successfully litigating Harvard's athlete admissions policy. In this Part, I suggest legislation that would expand Title VI to permit applicants to challenge such policies in a reasonable manner. In the next Part, I propose different policies Harvard itself could adopt that could address racial disparities more directly.

The first and most important change that must be made to combat the discriminatory effects of admissions policies is to amend Title VI to create a private cause of action for disparate impact claims under Title VI, effectively overruling *Sandoval*. This would allow private plaintiffs to challenge disparate impact without needing to go through Department of Education investigation procedures or wait until a more sympathetic president is in office.¹⁸² Such a change would echo the development of Title VII, which was amended with the Civil Rights Act of 1991.¹⁸³

Following in step with Title VII improvements from the Civil Rights Act of 1991, the amendment to Title VI should also require defendants to better substantiate their educational necessity defense.¹⁸⁴ However, a Title VI amendment should go further than the present state of Title VII,¹⁸⁵ explicitly stating that the burden of proof lies with the defendant to establish that the

182. See *supra* notes 31–41 and accompanying text for a more detailed explanation of how the lack of a private cause of action complicates Title VI disparate impact challenges and jurisprudential development.

183. Note, *The Civil Rights Act of 1991 and Less Discriminatory Alternatives in Disparate Impact Litigation*, 106 HARV. L. REV. 1621, 1625 (1993).

184. *Id.* ("Congress rejected the Court's shift of the business-necessity burden of proof to the plaintiff. The Act is vague, however, with respect to the degree to which defendants must substantiate their business-necessity defense")

185. Title VII could also be strengthened by similar clarification.

effectively discriminatory program has a direct link to the claimed educational necessity.

To meet their burden of proof, I propose a two-step test. Defendants would have to prove: (1) that their effectively discriminatory practice improves the program in question and (2) that the success of that program is key to the institution's mission. The evidentiary standards here are not meant to be exacting, but rather looked at with a similar level of skepticism that courts use when looking at quasi-suspect classes like disability or marital status.¹⁸⁶ As such, universities will have to prove that their programs with a disparate impact are at least somewhat tailored to a legitimate academic goal.

Under this standard, judges would have to evaluate the substance of the evidence defendants provide. For example, over the course of its litigation against SFFA, Harvard formed several committees to look into the advantages of diversity on its campus and possible race-neutral methods of improving diversity.¹⁸⁷ They ultimately concluded that none of the race-neutral practices they analyzed, including removing athlete admissions, could improve diversity while still maintaining Harvard's high "standards of excellence."¹⁸⁸ In her trial court opinion, Judge Burroughs took these findings at face value, neglecting to analyze whether Harvard has legitimate interests in maintaining its current slate of athletic programs.¹⁸⁹

The first step of my proposed test would require Harvard to provide evidence of how its recruitment process would lead to greater athletic success, and that athletic success is integral to Harvard's mission as a university. Harvard could likely meet this standard by showing how its increased recruiting efforts improved its athletic standings or mentioning specific athletes that would not

186. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (using "rational basis with a bite" analysis in a disability discrimination claim); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (using "rational basis with a bite" analysis in a marital status discrimination claim); see also Nancy M. Reinger, *City of Cleburne v. Cleburne Living Center: Rational Basis with a Bite?*, 20 U.S.F. L. REV. 927 (1986).

187. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 149-53 (D. Mass. 2019), *aff'd* 980 F.3d 157 (1st Cir. 2020).

188. *Id.* at 153.

189. *Id.* at 171.

have been admitted without the recruitment tip who then helped their teams have success.¹⁹⁰

To meet the second component of this test, Harvard could show that athletic programs are an essential aspect of the student experience or provide quantitative data to show its athletics inspire enough alumni donations and generate enough prestige or community involvement to justify their continued use. However, the standard would at least require Harvard to demonstrate that its athletics programs have the benefits it claims they have, which the current standard merely takes as a given.

On its own, this standard would be unlikely to dismantle a university's entire athletics recruitment program, nor should it be able to.¹⁹¹ Giving courts the authority to strike down university admissions practices would move the court too far into the territory of educational policymaking.¹⁹² Furthermore, this statute would be limited in the same ways as Title VI. For example, the Department of Education could not use the statute to force admissions policy changes on private universities but would instead condition federal funding on compliance.

However, this test would be more successful on a program-by-program basis. Though dismantling elite athletics as a whole would constitute legislative overreach, litigants could use this statute to force universities to recalibrate programs that are played by predominantly white athletes and that generate little income or renown for the university.

Additionally, this standard could prove sufficient to strike down admissions preferences for legacy, dean's list, and children of faculty (LDC). Because the disparate impact of LDC policies admissions is clear and the financial benefits of keeping them are somewhat ambiguous, LDC preferences would be unlikely to withstand judicial scrutiny unless the defending university could

190. See Powers, *supra* note 168.

191. See *Students for Fair Admissions*, 397 F.Supp. at 180 ("The Court notes that reasonable minds can differ on the importance of college athletics, alumni relations, and admitting the children of faculty and staff, but takes no position on these issues other than to note that these are topics best left to schools to figure out for themselves.").

192. See Braceras, *supra* note 29, at 1193. For this reason, legislatures should not change the "equally effective and less discriminatory" standard currently employed by courts.

somehow demonstrate that legacy preferences are integral to the university's mission.¹⁹³

A. Addressing Counterarguments

This proposed legislation could theoretically be used by advocacy groups to try to eliminate admissions policies that have the effect of discriminating against white people, like diversity scholarships, but it is unlikely to be effective in most situations. Because the Supreme Court has recognized universities have an interest in diversity that is compelling enough to withstand strict scrutiny,¹⁹⁴ challenges to affirmative action under a statute that requires a lower level of scrutiny would be much less likely to be successful.

Similarly, challenges to race-neutral policies that universities have implemented to improve diversity, like allowing students to apply without disclosing standardized test scores,¹⁹⁵ would withstand scrutiny as long as universities can demonstrate the policy had the effect of improving diversity. Challenges to athletic admissions preferences that have the effect of discriminating against white applicants by admitting a disproportionate amount of minority athletes would also be able to withstand scrutiny as long as the university can demonstrate a legitimate academic interest in the success of the challenged athletic team and that their recruiting policies improve the team. Schools unable to meet this evidentiary standard would be required to modify their recruitment preferences to ensure white applicants are not disadvantaged without a legitimate purpose. However, this forced change could ultimately have a positive result for diversity, requiring universities to use more generally applicable means to achieve diversity than athlete preferences.¹⁹⁶

193. See *supra* Section II.B for an explanation of the discriminatory effect of legacy admissions.

194. *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2203 (2016) (“[T]he decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial defense is proper.”) (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013)).

195. See *Tough*, *supra* note 97.

196. See John Percy Boyd, *The Affirmative Action Athlete Dilemma*, 33 *BLACK SCHOLAR* 26, 26–28 (2003) (arguing athletics should not be the only means of creating diversity at universities and that doing so disadvantages black applicants academically).

Professor Braceras has criticized using disparate impact theory in the educational sphere because she argues it would ultimately give the judiciary too much discretion in education without promising greater “clarity or consistency.”¹⁹⁷ Though judges have employed disparate impact standards in Title VII analysis relatively effectively, Braceras argues educational needs are too subjective for courts to evaluate.¹⁹⁸

A distrust of the judiciary is natural,¹⁹⁹ but Braceras thinks too little of the courts’ ability. This proposed legislation would not require judges to become experts in education policy any more than current judiciary standards in other fields. For example, when evaluating challenges to state abortion laws, courts must balance the legitimacy of a state’s goals and its policies’ effectiveness in carrying out those goals with their adverse effects.²⁰⁰ These proposed standards are even less exacting for judges than those used in direct discrimination, where judges have been required to balance interests of similar policies but with an even greater level of scrutiny and authority.²⁰¹ If a tailoring analysis constitutes judicial policymaking, then Braceras’s problem lies not with tailoring but rather a common law judiciary.

V. INTERNAL CHANGES TO MAKE AT HARVARD

Harvard itself could make a host of policy changes to its admissions process that would lessen the disparate impact of its athlete preferences. Though each of these changes would likely decrease the competitiveness of Harvard’s athletics programs, Harvard could mitigate this issue by negotiating with the other schools in the Ivy League to adopt equivalent policies. Because Harvard rarely competes outside of the Ivy League, its strength relative to other schools in the league matters more than its overall athletic strength.

The simplest change that Harvard could make would be to combine the Extracurricular and Athletic metrics in its applicant

197. Braceras, *supra* note 29, at 1194, 1196–97.

198. *Id.* at 1192.

199. *See, e.g., Dred Scott v. Sandford*, 60 U.S. 393 (1857).

200. *See Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

201. *See Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 191–95 (D. Mass. 2019), No. 19-2005 (1st Cir. argued Sept. 16, 2020).

ratings system, as they already are for alumni interviewers.²⁰² Instead of measuring applicants solely on how effectively they use their time, Harvard's rating system gives preferences to athletic experience, even for those who are not admitted athletes. In the system's current state, an individual with strong community service credentials would likely benefit more from athletic participation—thus seeming more well-rounded in the eyes of Harvard admissions—than picking up a job or editing the school newspaper, both of which would count as extracurricular activities. This stacks the system in favor of those who are informed and privileged enough to frame their high school experience around Ivy League admission as opposed to those who merely want to be productive. Though each metric is not weighed equally, and candidates are evaluated holistically, the lower ratings Asian Americans receive for the Athletics metric in comparison to white applicants is a commonly cited reason for their low admissions rate at Harvard.²⁰³ The separation between the two metrics has little justification.

More drastically, Harvard could cut athletic recruitment entirely. Though it could still field teams, it could not grant special athlete preferences. Harvard's rating system would likely give high extracurricular ratings to applicants who would have otherwise been recruits, but, per Arcidiacono et al.'s model, cutting the added tip to athletes would significantly improve diversity at Harvard.²⁰⁴ However, Harvard's athletic competitiveness would likely drop.

Perhaps a more reasonable compromise is for Harvard to keep athletic recruitment only for sports with low barriers to participation, like football, basketball, and track and field. Because these sports are played across the country at thousands of high schools, an applicant can acquire the skills necessary to be recruited onto an Ivy League team without needing to go to an expensive private school or receive personal tutoring.²⁰⁵ This would decrease the disparate impact of Harvard's athlete preference by requiring

202. See *supra* Section III.A for an explanation of Harvard's applicant ratings system.

203. See *Students for Fair Admissions, Inc.* 397 F. Supp. 3d at 162 ("On average, Asian American applicants are . . . assigned lower athletic ratings, particularly compared to white applicants, who average especially strong athletic ratings.").

204. Arcidiacono et al., *supra* note 16, at 32.

205. See *supra* notes 153–59 and accompanying text for an explanation of the socioeconomic hurdles to compete in Harvard's "country club sports."

athletes in wealthier, whiter sports to be admitted based on other metrics. As previously mentioned, Stanford instituted an even more drastic policy, cutting many of its country club sports entirely.²⁰⁶ Though it cited budget cuts, Stanford's decision to cut programs the year after many of them were used to facilitate an admissions bribery scandal is unlikely a coincidence.²⁰⁷

Another change that Harvard could make would be to require the average AI for its athletes to be the same as the rest of the school and not one standard deviation below.²⁰⁸ Though this would likely have a similarly gutting effect to programs as cutting their recruitment tips entirely, it would still allow coaches some level of discretion in balancing the academic profiles of their recruits.

CONCLUSION

At first glance, disparities in athlete admissions may not seem like a significant problem. Indeed, the minority students crowded out of Harvard by athletes are still immensely bright and qualified students that will likely be accepted at some other prestigious institution. Nevertheless, a rejection from Harvard closes a student off from a clear path to the upper echelons of society – not only high income,²⁰⁹ but also an elite network of presidents, judges, and celebrities.²¹⁰ An Ivy League degree is not required for success, but it sure helps.

Furthermore, discriminatory admissions practices – no matter how small – add yet another obstacle to the success of already disadvantaged minorities. Minorities are crowded out of elite universities in the same way they are crowded out of business and

206. Scarborough, *supra* note 170.

207. See Weintraub & Anderson, *supra* note 16.

208. See *supra* notes 150–152 and accompanying text for an explanation of AI.

209. The median annual pay for graduates of Harvard ten years following graduation is \$129,000; the median of graduates of all Ivy League schools is \$124,600; and the median for non-Ivy League college graduates is \$81,600. Aimee Picchi, *Harvard's Admissions Trial: The Value of a Harvard Diploma*, CBSNEWS (Oct. 22, 2018, 4:28 PM), <https://www.cbsnews.com/news/harvards-admissions-trial-the-value-of-a-harvard-diploma/>.

210. *Id.*

politics²¹¹ and in the same way they are crowded into prisons.²¹² Racism in America is a tapestry; though the harm of each individual thread may appear negligible, our society has woven these threads into an oppressive canvas.

The policies—in schools, corporations, and governments—that perpetuate these outcomes may not be overtly racist, but their effects are racist all the same.²¹³ To achieve racial equity, we must tear out each thread that forms the tapestry of American racism. Universities' use of athlete preferences may be but one thread, yet it is a thread all the same.

Our current legislative framework is unable to combat the disparate racial impact of athlete preferences and similarly discriminatory admissions policies. As such, Congress must expand litigants' capabilities under Title VI. Specifically, Congress should allow private parties to bring forth disparate impact claims and require schools to meet a stricter level of scrutiny to demonstrate their discriminatory policies constitute an educational necessity.

211. Jeanne Sahadi, *After Years of Talking About Diversity, the Number of Black Leaders at US Companies Is Still Dismal*, CNN (June 2, 2020, 5:50 PM), <https://www.cnn.com/2020/06/02/success/diversity-and-black-leadership-in-corporate-america/index.html>; Daniel Weeks, *Why Are the Poor and Minorities Less Likely to Vote?* ATLANTIC (Jan. 10, 2014), <https://www.theatlantic.com/politics/archive/2014/01/why-are-the-poor-and-minorities-less-likely-to-vote/282896/>.

212. See, e.g., DJ Silton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53 (2002); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

213. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 18 (2019) (defining a racist policy as “any measure that produces or sustains racial inequity between racial groups”).

Table 1: Racial Demographics of Ivy League Athletics Teams²¹⁴

	% White		%Black		%Amer. Indian		%Asian		%Hispanic		%Pacific Islander		%Two or More Races		Nonresident Alien		%Other	
	Ivy	All	Ivy	All	Ivy	All	Ivy	All	Ivy	All	Ivy	All	Ivy	All	Ivy	All	Ivy	All
Men's Baseball	72.9	77.0	1.6	6.1	0.0	0.5	3.1	0.9	2.0	7.5	0.0	0.2	7.1	3.8	0.4	0.8	12.9	3.2
Men's Basketball	40.3	23.8	32.4	56.4	0.0	0.3	1.4	0.4	2.2	2.0	0.0	0.1	8.6	5.5	2.2	8.5	12.9	3.1
Men's Cross Country	63.8	68.9	5.8	9.4	0.0	0.4	4.3	1.2	2.9	7.9	0.5	0.2	5.3	3.4	1.9	5.5	15.5	3.2
Men's Fencing	44.2	52.0	6.3	5.1	0.0	0.0	22.1	16.8	3.2	6.3	0.0	0.0	5.3	7.1	2.1	6.3	16.8	6.3
Men's Football	54.1	37.3	22.8	48.5	0.4	0.4	1.2	0.4	2.8	3.0	0.1	1.5	4.9	5.4	0.7	0.5	12.9	3.0
Men's Golf	44.3	69.0	1.4	2.1	0.0	0.2	17.1	5.5	0	3.0	0.0	0.3	10.0	2.2	10.0	13.8	17.1	3.9
Men's Ice Hockey	66.9	67.3	0.0	0.6	0.0	0.1	1.2	0.4	1.2	1.0	0.0	0.0	2.4	1.5	11.2	24.0	17.2	5.0
Men's Lacrosse	74.1	81.8	3.1	2.7	0.6	0.6	0.3	0.5	2.2	2.5	0.0	0.2	1.6	2.1	2.2	3.8	15.9	5.8
Men's Rowing ²¹⁵	62.1	71.3	0.5	1.1	0.3	0.2	3.8	2.3	3.3	4.3	0.3	0.2	3.6	3.3	8.8	7.2	17.3	10.1
Men's Sailing ²¹⁶	84.6	81.5	0.0	0.0	0.0	0.4	5.1	3.0	2.6	2.2	0.0	0.9	7.7	4.7	0.0	0.4	0.0	6.9
Men's Skiing	81.6	74.5	0.0	0.0	0.0	0.0	7.9	2.0	7.9	2.0	0.0	0.0	2.6	0.7	0.0	20.1	0.0	0.7
Men's Soccer	56.1	49.4	7.7	10	0.0	0.2	5.4	1.4	5.4	12.3	0.0	0.2	6.8	4.3	1.4	18.2	14	3.9
Men's Squash	50.8	56.2	2.3	1.9	0.8	0.5	13.1	9.5	1.5	2.4	0.0	0.0	3.1	4.3	8.6	12.4	18.5	12.9
Men's Swimming & Diving	54.6	71.8	1.2	1.9	0.0	0.2	16.3	4.2	1.2	5.2	0.0	0.1	6.4	4.5	1.8	8.5	15.5	3.6
Men's Tennis	50.5	39.4	1.0	3.5	0.0	0.1	15.5	4.9	1.0	6.3	0.0	0.3	7.8	3.1	1.2	38.2	14.6	4.2
Men's Track & Field	53.0	52.8	14.2	26.4	0.0	0.3	3.8	1.3	2.7	5.4	0.2	0.2	8.2	4.8	2.8	4.9	16	4.0
Men's Volleyball	41.9	68.8	0.0	3.2	0.0	0.0	3.2	3.0	0.0	3.2	0.0	3.5	3.2	7.2	1.4	4.6	51.6	6.5
Men's Water Polo	43.9	68.9	1.7	1.0	0.0	0.5	8.6	3.1	1.7	6.9	0.0	0.3	10.3	5.4	0.0	7.3	34.5	6.1
Men's Wrestling	62.9	73.8	4.8	6.6	1.1	0.6	2.7	1.4	2.7	7.8	0.0	0.2	5.9	4.1	0.0	0.2	19.9	5.4
Women's Basketball	57.5	31.6	15.8	46.7	0.8	0.4	0.8	0.5	1/7	2.6	0.0	0.5	5.8	6.7	1.7	7.7	15.8	3.3
Women's Cross Country	73.8	71.3	0.4	7.9	0.4	0.5	1.3	1.0	0.9	6.9	0.0	0.2	6.0	3.3	2.6	5.3	14.6	3.6
Women's Fencing	39.6	48.1	5.4	5.2	0.0	0.2	21.6	14.5	3.6	6.2	0.0	0.2	7.2	7.8	5.4	8.5	17.1	9.2
Women's Field Hockey	67.9	75.2	0.6	1.8	0.0	0.2	3.8	1.5	2.5	1.7	0.0	0.0	2.5	2.4	6.3	11.4	16.4	5.8
Women's Golf	19.3	53.4	10.0	2.8	0.0	0.2	54.4	12.2	0.0	3.4	0.0	0.7	3.5	2.8	7.0	21.7	15.8	2.8
Women's Ice Hockey	57.2	64.7	0.7	0.5	0.0	0.4	2.9	0.7	2.2	0.8	0.0	0.1	12.0	2.0	17.4	26.3	1.2	4.6
Women's Lacrosse	79.8	84.1	1.6	2.8	0.0	0.5	1.6	0.9	0.8	2.7	0.0	0.1	5.1	3.0	0.0	1.3	14.5	4.7

214. Data consolidated from *NCAA Demographics Database*, NCAA, <http://www.ncaa.org/about/resources/research/ncaa-demographics-database> (last visited Sept. 19, 2020).

215. Harvard fields two rowing teams for each gender: Heavyweight Crew and Lightweight Crew. NCAA data consolidates the two.

216. Harvard also fields a women's sailing team, but NCAA does not provide demographic data for it.

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Women's Rowing	61.7	73.4	2.0	2.1	0.2	0.4	3.5	3.2	2.4	4.9	0.0	0.1	2.0	4.1	4.4	4.9	14.3	7.0
Women's Rugby	47.2	56.5	14.8	16.4	0.0	0.0	9.3	5.6	7.4	6.5	0.0	1.7	4.9	6.9	5.6	3.0	20.8	3.4
Women's Skiing	100	76.9	0.0	0.0	0.0	1.4	0.0	0.0	0.0	0.7	0.9	0.0	13.9	0.0	0.0	19.6	0.9	1.4
Women's Soccer	54.9	68.7	10.7	7.0	0.0	0.3	4.2	1.3	4.7	7.3	0.0	0.4	0.0	5.4	1.4	6.6	0.0	2.9
Women's Softball	62.7	69.4	0.0	7.6	0.0	0.8	3.8	1.4	8.9	10.1	1.3	0.9	7.4	7.3	0.0	0.5	16.7	2.2
Women's Squash	56.9	58.8	0.9	0.6	0.0	0.0	11.2	9.4	1.7	1.2	0.0	0.0	11.4	3.5	8.6	12.4	12.0	14.1
Women's Swimming & Diving	57.2	75.7	0.7	1.3	0.0	0.3	16.2	3.8	2.2	3.4	0.0	0.2	4.3	3.8	1.8	7.6	16.4	3.9
Women's Tennis	41.0	38.5	3.6	4.9	0.0	0.3	33.7	5.9	1.2	4.8	0.0	0.3	6.1	3.6	1.2	37.4	15.8	4.3
Women's Track & Field	58.4	53.5	13.9	27.1	0.4	0.4	2.1	1.2	1.9	4.4	0.2	0.3	6.0	5.0	2.8	5.1	13.3	3.2
Women's Volleyball	62.7	64.6	7.0	14.8	0.0	0.4	7.0	1.1	2.1	4.5	0.7	0.9	6.0	5.9	1.4	5.1	14.3	2.8
Women's Water Polo	38.9	62.7	3.7	1.7	0.0	0.7	7.4	1.9	5.6	10.9	0.0	0.8	5.6	7.6	0.0	8.4	13.4	5.4