May 2024

Issue Brief

Affirmative "Re-Action": How Major American and New York Bar Associations Are Responding to *Students for Fair Admissions*

Renu Mukherjee

Paulson Policy Analyst
Manhattan Institute

Introduction

For years, influential gatekeepers of the legal profession have been concerned about the low number of black and Hispanic attorneys within its ranks. Some argue that because the share of black and Hispanic attorneys in the U.S. does not reflect the share of those racial groups in the general population, the legal profession lacks diversity and cannot represent adequately the legal interests of black and Hispanic Americans.

To increase the number of racial minorities in the legal profession, bar associations at the national, state, and local levels have advised law schools and law firms to give preference to applicants from underrepresented groups in admissions and hiring, a practice commonly known as "affirmative action." For example, the American Bar Association (ABA) describes itself as the "national voice of the legal profession" and is an important accrediting agency for law schools in the United States.[1] Of ABA's four goals, one is to "eliminate bias and enhance diversity in the legal profession," seemingly through affirmative action programs.[2] In this case, diversity is defined specifically as "race/ethnicity, gender, LGBTQ+ status and disability status."[3]

However, in June 2023, the U.S. Supreme Court decided *Students for Fair Admissions v. President and Fellows of Harvard College* and held that such programs, at least in the context of university admissions, are unconstitutional. "Eliminating racial discrimination means eliminating all of it.... For 'the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color,' "[4] wrote Chief Justice John Roberts in his majority opinion. "A benefit applied to some applicants but not to others necessarily advantages the former group at the expense of the latter."[5]

About Us

The Manhattan Institute is a think tank whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

In the months since, bar associations across the nation have issued guidance on how law schools, law firms, and lower courts should respond to the justices' ruling against affirmative action. This paper examines recommendations made by ABA, the New York State Bar Association (NYSBA), and the New York City Bar Association (NYCBA), in particular.

On the one hand, ABA, NYSBA, and NYCBA appear to encourage law schools and law firms to ignore the Court's holding. Law schools, for instance, are advised to continue granting admissions preferences to black and Hispanic applicants using methods that are race-neutral in theory but race-conscious in practice. These methods, which are elaborated on below, include applicants writing about their race or ethnicity in application essays and eliminating standardized testing requirements. Meanwhile, law firms are advised to simply continue their use of affirmative action; the bar associations suggest that because *Students for Fair Admissions* considered this policy only within the context of university admissions, the decision is inapplicable to employment.[6] That argument is less and less plausible, however, as advocates of merit-based hiring file lawsuits against major U.S. law firms and companies that use racial preferences in hiring and promotion.[7]

On the other hand, ABA, NYSBA, and NYCBA also advise law schools and law firms to pursue "pipeline programs," initiatives that provide low- and middle-income high school and college students, regardless of racial or ethnic background, with free academic tutoring, standardized test preparation, mentoring, and other resources to help them enter the legal profession. Such a race-neutral and merit-based approach, while seemingly at odds with the bar associations' race-conscious recommendations, is in line with the Court's holding.

For this reason—and for the fact that pipeline programs teach students to take responsibility for their futures in a way that affirmative action does not—law schools and law firms would be wise to disregard racial preferences and to focus instead on pipeline programs.

Students for Fair Admissions and ABA

Last term, the Supreme Court held that affirmative action through the use of racial preferences for underrepresented minorities (URMs) in college and university admissions violated the Constitution's Equal Protection Clause. The decision, *Students for Fair Admissions* (*SFFA*), signified an end to 45 years of legalized discrimination against Asian Americans (considered overrepresented minorities, i.e., ORMs) and white students in higher education.[8]

ABA is the largest voluntary association of attorneys and legal professionals in the world. The organization filed an amicus ("friend of the Court") brief in *SFFA* on behalf of respondents Harvard and the University of North Carolina (UNC). In its brief, ABA urged the Court to uphold these schools' race-conscious admissions policies, arguing:

> Admissions policies that consider race as one of many factors are an important tool to help eliminate racial biases and stereotypes from the legal profession and our judicial system. As this Court has long recognized, diverse educational environments help break down racial biases and stereotypes by exposing all students to people with varied backgrounds and experiences. In doing so, they help train budding lawyers at a formative stage to be influenced less by biases and stereotypes and to be more open to different perspectives. Diverse educational student bodies improve the capacity of all future lawyers they produce to fulfill their critical role in the fair implementation of justice, without the distorting influence of racial bias.[9]

Notably, the Court struck down Harvard and UNC's race-conscious admissions policies largely because it found these policies to encourage, rather than "break down," racial biases and stereotypes. Chief Justice Roberts explained: "We have long held that universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'... That requirement is found throughout our Equal Protection Clause jurisprudence."[10]

Yet "by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone," Roberts wrote, Harvard and UNC's admissions programs "tolerate the very thing" that previous precedents had "foreswor[n]: stereotyping." He continues: "The point of respondents' admissions programs is that there is an inherent benefit in race qua race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that 'a black student can usually bring something that a white student cannot offer.'... UNC is much the same. It argues that race in itself 'says [something] about who you are.' "

In practice, Harvard and UNC's stereotyping took the form of systemic racial classifications.

More specifically, these institutions of higher education sought to measure the racial composition of their incoming classes by assigning students to the following categories: Asian, Native Hawaiian or Pacific Islander, Hispanic, white, African American, and Native American. Harvard, UNC, and their amici, including ABA, argued that assigning students to a designated racial or ethnic group furthered amorphous "educational benefits of diversity" and also ensured that there were no drop-offs in representation of URMs from year to year (an illegal practice known as "racial balancing"). However, as Roberts observed in his majority opinion, crass racial and ethnic categories of this sort do not further the notion of diversity, but rather, make a mockery of it:

> For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether South Asian or East Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile, other racial categories, such as "Hispanic," are arbitrary or undefined.... And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question."

ABA's contention that racial preferences for URMs in higher education and beyond contribute to the elimination of racial bias and stereotyping in law schools and the legal profession, as well as further the "fair administration of justice,"[11] would, given *SFFA*'s holding, likely be rejected by the Roberts Court.

Neither NYSBA nor NYCBA filed an amicus brief in *SFFA*. However, both organizations did respond in the weeks and months following the decision, elaborated below. Their responses suggest that, like ABA, NYSBA and NYCBA believe that racial preferences for URMs in higher education and employment are needed to eliminate racial bias and stereotyping from the legal profession.

Recommendations of ABA, NYSBA, and NYCBA

On the day the Court released its decision, ABA president Deborah Enix-Ross released the following statement, doubling down on the intentions of affirmative action:

> The ABA has a long history of supporting affirmative action and the consideration of race as one of many factors in law school admissions. We believe it is imperative that colleges, universities, and state legislatures find alternative ways to create a diverse and talented

> student body. Law schools are training grounds for lawyers and play an important role to ensure a diverse bench and bar, which are critical to minimizing implicit bias and inspiring greater public faith in the rule of law.[12]

To that end, on October 27, 2023, ABA launched a series of online workshops called "The Path Forward: Discussions and Strategies in Ensuring Diversity, Equity and Inclusion post-*SFFA v. Harvard* Webinar Series." The series includes four 90-minute videos on how higher education, the private sector, and the government and courts can continue "to share information, facilitate discussion, and to provide concrete recommendations to sustain the ongoing quest toward a more equitable society for all." Three of the four videos are available to the public for viewing. The fourth, "Empowering Diversity: Navigating Admissions After *SFFA v. Harvard*," is password-protected.[13]

Like ABA, NYCBA hosted a four-part series on the question of how the Court's holding in *SFFA* might affect law schools, law firms, and the legal profession more broadly. The first two meetings in this summer 2023 series were held virtually, and the latter two meetings were held in person. I attended the final meeting, an all-day conference at the city bar dedicated to brainstorming ways in which law schools and law firms can foster racial and ethnic diversity in the absence of affirmative action.[14]

In September 2023, Tanya Martinez-Gallinucci, executive director of NYCBA's Office for Diversity, Equity, Inclusion, and Belonging (ODEIB), released a four-page statement on behalf of the city bar, lamenting the Court's ruling against Harvard and UNC. "The end to 'race-based' affirmative action will cause irreparable harm to the accessibility of higher education and beyond for people from marginalized identities, with ripple effects that touch every sector and space in our society," Martinez-Gallinucci wrote. She called on the city bar to "redouble our efforts to emphasize through speech and action that diversity, equity, inclusion, and belonging (DEIB) are core values of our profession and our society."[15]

For their part, at the end of August, NYSBA's Task Force on Advancing Diversity released a 93-page report detailing how law schools, law firms, and courts in the Empire State should respond to *SFFA*.[16] On November 4, 2023, NYSBA's House of Delegates accepted the recommendations put forth in the task force's report.[17]

Of all three bar associations' responses, the most comprehensive is that of NYSBA. For this reason (and also that the analyses and recommendations made by ABA and NYCBA in their aforementioned responses are covered by NYSBA's report), many key recommendations found in NYSBA's report are summarized below. Cumulatively, they reveal that NYSBA views *SFFA* as a "setback to efforts to achieve diversity" and offers guidance for entities to consider race while still—they claim—following the law.[18]

*NYSBA Recommendations Post-*SFFA*: New York State Law Schools*

NYSBA recommends that law schools in the state continue to consider applicants' racial identities and experiences in the admissions process by tying those features to "a non-racial goal or value being pursued by the university." [19] This way, if the school faces a legal challenge, administrators can argue that any preference granted to URMs is not based on race itself but instead on their "lived experiences," which align with institutional diversity and equity goals. Law schools are instructed to collect data on applicants' race and ethnicity for "research and evaluation purposes" during this process, which "will need to conform to the Court's guidance on the permissible role of race in the admissions process."[20]

NYSBA also advises law schools to develop admissions policies that, while race-neutral on their face, intend to increase the number of URMs in effect.[21] Examples include preferences based on low socioeconomic status, first-generation status, geographic location, as well as percentage plans.[22]

A law school's "broader institutional diversity and equity goals" can be further advanced, the report states, by ending early-decision-based admissions because, like legacy- and donor-based admissions preferences, such preferences "tend to favor applicants from high socioeconomic backgrounds."[23]

In a similar vein, NYSBA asks law schools to reconsider the LSAT as a criterion for assessing merit and academic preparedness in the admissions process, given that "standardized admission tests have been criticized as inherently racially biased."[24] (In the last few months, universities that eliminated a standardized testing requirement for admissions following Covid-19 have started to require them again.)[25]

Concerning how law schools should conduct themselves, NYSBA recommends "fostering inclusive learning environments" and "creating a sense of belonging and support" for URMs. This can be achieved through campus-wide trainings "address[ing] cultural competence"; "identifying, eliminating, and disrupting bias"; increasing faculty hiring from "diverse backgrounds"; providing "educational opportunities and coursework grounded in racial justice"; and providing mental-health support for URMs.[26]

*NYSBA Recommendations Post-*SFFA*: New York State Law Firms*

NYSBA recommends that law firms in New York reaffirm their commitment to the principles of diversity, equity, and inclusion (DEI). More specifically, NYSBA advises firms to collect, track, manage, and utilize DEI-related data, as doing so will allow them to measure the efficacy of their DEI programs. Firms should also require senior leadership to show support for DEI initiatives. [27]

Since corporate DEI practices may face legal challenges in the wake of SFFA, NYSBA also advises law firms to hire counsel "to conduct legally privileged audits of their DEI programs in order to identify potential legal risks and seek advice on risk mitigation strategies."[28] It is important, the report argues, that a firm's messaging on DEI be "reviewed by in-house legal teams to ensure alignment with commitments and previous messaging, as well as compliance with state and local laws, including discriminatory advertising." In a further effort to protect themselves as they pursue DEI goals, firms hosting "diversity, anti-discrimination, anti-harassment and implicit bias trainings" should nevertheless inform hiring managers and human resource professionals that "all employment decisions should be made based on candidate qualifications, not protected characteristics."[29]

NYSBA also recommends that law firms improve outreach and recruitment of diverse talent. Examples of this include inclusive job postings, recruiting from law schools that have high URM enrollment, outreach to diverse student organizations and at diverse career fairs, recruiting candidates who have taken alternative paths in school or their careers, structural behavior interviews, and "student pipeline" programs. (Student pipeline programs, run largely by nonprofit organizations, recruit and prepare students in middle school, high school, and college for entering the legal profession. These programs will be discussed later in this brief.)

Lastly, NYSBA advises law firms to promote a more inclusive work environment for URMs. It recommends affinity groups, mentorship programs for URMs, additional job training for URMs, allocating work opportunities equitably, diverse networking opportunities, and Mansfield Certification.[30]

NYSBA Recommendations Post-SFFA: New York State Courts

The task force advises state courts to communicate a commitment to DEI from the top leadership. It recommends that court leadership ensure that procedures for seeking judicial nomination or appointment are transparent, well-publicized, and attractive to a wide array of candidates. Courts should facilitate mandatory educational programming that promotes DEI;[31] update mission statements to “specifically acknowledge the effects of bias and discrimination, and the court’s responsibility to minimize such effects in the judicial process”;[32] enlist “subject matter experts to guide and assist in the development of mandatory bias education programs that focus on understanding and identifying explicit and implicit bias”;[33] and hold those who show bias against litigants, colleagues, or other stakeholders accountable.

Internally, NYSBA encourages state courts to set clear and inclusive HR policies that seek to promote transparency and accessibility in application procedures, promote a diverse applicant pool, develop inclusive civil service exams and other written evaluation tools, and ensure that interview panels are diverse. It also recommends that state courts increase their outreach to communities with a high percentage of URMs.

In terms of data collection, NYSBA recommends that state courts collect data on the racial and ethnic makeup of judges, court personnel, and applicants for positions in the court system. Courts should also collect data on “the effectiveness of existing programs for addressing grievances involving violations of HR practices and policies.”[34]

ABA’s, NYSBA’s, and NYCBA’s responses to *SFFA* reflect the belief—also held by many institutions of higher education—that while the Court struck down Harvard’s and UNC’s affirmative action programs, it did not foreclose the consideration of race in admissions altogether. Such a reading of the decision is seemingly the result of the following passage from Roberts’s majority opinion: “At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”[35]

The next line in Roberts’s opinion warns:

> But, despite the dissent’s assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.)

NYSBA’s task force report admits that law schools have “a delicate task” when reviewing essays. It states that using an admission essay “to glean a candidate’s race for the purpose of granting or denying admission solely because of race would be ... impermissible.”[36] Nevertheless, the report argues, an admissions office “does not need to blind itself to an applicant’s race.”

Pipeline Programs

Most recommendations made by NYSBA’s Task Force on Advancing Diversity are race-conscious. They reflect the belief—popularized by racialists such as Ibram X. Kendi, Nikole Hannah-Jones, and Robin DiAngelo—that in a “systemically racist” country like the U.S., URMs can gain access to elite institutions of higher education and employment only through racial preferences, in the form of admissions and hiring “tips,” or through the elimination of merit (i.e., standardized

testing and grades) in the application process. This belief also suggests that URM students and employees will feel at ease only if their non-URM peers are subjected to DEI training and pledge their fidelity to DEI's divisive principles.

In this way, the task force's racialist recommendations assume that URM views are monolithic and that URMs are incapable of succeeding in education and employment by merit alone. These assumptions strip URMs of agency and reinforce—rather than eliminate—pernicious stereotypes, which, as previously noted, is one of the primary reasons the Court struck down Harvard and UNC's affirmative action programs last term.

That said, the task force did present one model for fostering diversity in the legal profession that is aligned with the Court's holding against affirmative action and does provide all prospective attorneys, URMs and non-URMs alike, with agency as they embark on their educational and career journeys: pipeline programs.

Pipeline programs, which are typically run by nonprofit organizations, colleges and universities, and law firms, help students enter the legal profession by providing them with free academic tutoring, standardized test prep (SAT/ACT, LSAT, and the bar exam), mentorship, and career development opportunities. While most of these programs are geared toward high school, college, and law school students, a few are even for middle school students, as well as working professionals interested in pursuing a new career as an attorney. The goal of these programs is to give students, particularly the marginalized, the resources and guidance needed to have a successful career in law.

ABA, NYSBA, and NYCBA all support pipeline programs as a way to foster diversity in the legal profession and to help marginalized students get on a path to greater success. In fact, ABA maintains a directory of various pipeline programs across the country, while NYCBA does so for available pipeline programs in NYC.[37]

ABA and NYCBA also include race-based scholarships from nonprofits and institutions of higher education, along with corporate "diversity fellowships" at law firms, in their pipeline directories. Race-based scholarships provide URMs in college and law school with a monetary award, while diversity fellowships grant URM law students lucrative summer associate positions in Big Law.[38] Proponents of the diversity fellowships argue that these programs are pipeline initiatives similar in nature to tutoring, test prep, mentoring, and career development because their goal, too, is to bolster the number of URMs in the legal profession.

I disagree. Race-based scholarships and corporate diversity fellowships are merely affirmative action by another name. They suggest that individuals should be accepted by law schools or be hired in Big Law on account of skin color, as opposed to merit. In contrast, pipeline programs that offer academic support, test prep, mentoring, and career development opportunities prepare marginalized students to go toe-to-toe with their better-resourced peers; they provide these students with a sense of agency and accountability over their futures.

Table 1 comprises pipeline programs found in ABA's National Pipeline Directory.[39] Race-based scholarships and corporate diversity fellowships are excluded.

Table 1

ABA Pipeline Programs

Program Organizer	Program Name	Location	Age Demographic of Participants
New Jersey LEEP	College Bound Program	Newark, New Jersey	Grades 6–10
Legal Outreach, Inc.	College Bound Program	Long Island City, New York	Grades 9–10
National Association of Women Judges	Color of Justice*	Washington, DC	Grades K–12
Justice Resource Center	MENTOR	New York, New York	Grades K–12
University of California, Davis School of Law	King Hall Outreach Program	Davis, California	Grades 11–12
Dallas Bar Association	Summer Law Intern Program	Dallas, Texas	Grades 11–12
Louisiana State Bar Association	Suit Up for the Future	New Orleans, Louisiana	Grades 11–12, First-Year College Students
University of California, Berkeley School of Law	Summer Legal Fellowship Program	Berkeley, California	High School Students
Just the Beginning	Summer Legal Institute	Chicago, Illinois	High School Students
Council on Legal Education Opportunity	Road to Law School	Largos, Maine	High School, College Students
Legal Outreach, Inc.	Summer Law Institute	Long Island City, New York	Grade 8
Georgetown University Law Center	Georgetown Law Early Outreach Initiative*	Washington, DC	High School Students
Barrier Breakers, Inc.	Barrier Breakers—Law Education for BIPOC Individuals*	Princeton, New Jersey	College Students
Kean Miller	Kean Miller Connection*	New Orleans, Louisiana	College Students

University of Texas, San Antonio Institute for Law and Public Affairs	Summer Law School Preparation Academy	San Antonio, Texas	College Students
University of Houston Law Center	Scholar I, II Programs*	Online	First- and Second-Year College Students
Colin Powell School	Honors Program in Legal Studies*	New York, New York	Grade 11
Law School Admission Council (LSAC)	LSAC Pre-Law Undergraduate Scholars*	Newtown, Pennsylvania	College Students, Prospective Law School Students One Year from Applying
LatinoJustice	LawBound*	New York, New York	College Students, Recent College Graduates
University of Arkansas Law School	Summer Pre-Law Program* (SPPARK)	Fayetteville, Arkansas	College Seniors, Recent College Graduates
Eversheds Sutherland	Eversheds Sutherland Scholars*	Atlanta, Georgia	College Seniors, Recent College Graduates
SEO Law	SEO Law Catalyst*	Online	College Juniors, Seniors, and Recent College Graduates
Black Lawyers' Association of Cincinnati, Cincinnati Bar Round Table	Summer Work Experience in Law*	Cincinnati, Ohio	Law School Students
University of Texas School of Law	Texas Law Pipeline Program (High School Outreach Pipeline Program Scholars)	Austin, Texas	Grades 11–12
Sidley Austin LLP	Sidley Pre-Law Scholars Program	Chicago, Illinois	College Students
University of Houston Law Center	Working Professional Program	Houston, Texas	College Graduates, Working Professionals
Legal Education Access Pipeline, Inc. (LEAP)	LEAP Fellowship*	Pasadena, California	Prospective Law School Students
Diversity Access Pipeline, Inc.	Scholarship and Leadership Program*	Apollo Beach, Florida	Prospective Law School Students
Minority Legal Education Resources, Inc.	Bar Process Management Program*	Chicago, Illinois	Law School Students
Wichita Bar Association	Grow Your Own Lawyer Program	Wichita, Kansas	Grades 11–12
Michigan State University College of Law (MSU)	MSU Law Pathway Scholars Program	East Lansing, Michigan	College Students, Recent College Graduates
Street Law, Inc.	Corporate Legal Diversity Pipeline Program*	Silver Spring, Maryland	High School Students

*Programs that are limited to racial minorities, women, and/or LGBT individuals; these are likely illegal.
Source: "National Pipeline Programs Directory," American Bar Association

The sheer number of pipeline programs approved by ABA shows that these initiatives are a viable alternative to affirmative action. Not only do these programs seek to increase the number of marginalized groups in the legal profession, but they also—unlike affirmative action—seek to ensure that participants have the requisite skills to succeed in law school and their professional work. ABA-approved pipeline programs that limit participants to racial minorities, women, and/or LGBT individuals likely violate antidiscrimination law and should be modified to allow all individuals, regardless of race, gender, or sexual orientation, to participate.

Case Study: Cleary Gottlieb Washington Irving Campus Program

Law firm Cleary Gottlieb's Washington Irving Campus Program, a pipeline initiative for underserved public high school students in New York City, serves as a case study for a pipeline program that, if fully race-neutral as the firm claims it is, other law firms and law schools should consider emulating.[40] For over 30 years, the goal of this pipeline program, open to Washington Irving Campus students, has been to "close the opportunity gap by equipping traditionally underrepresented students with learning experiences and tools needed to excel as students in higher education, as professionals in the workplace, and as leaders in the community."[41]

Cleary's pipeline program was founded in 1991 when the law firm partnered with what was then Washington Irving High School to offer students free SAT tutoring. Since then, the school and pipeline program have evolved: Washington Irving today comprises five independent high schools sharing the same building at 40 Irving Place in Manhattan. These include Gramercy Arts High School, High School for Language and Diplomacy, International High School, Academy for Software Engineering, and Union Square Academy for Health Sciences. Meanwhile, the Cleary Gottlieb Washington Irving Campus Program now provides students with college admissions coaching, mentoring, mock trials, book clubs, and internship opportunities.[42] The components of this program, gleaned from the firm's website, can certainly be re-created by law schools and other law firms.

College Admissions Coaching: Cleary supports students through the college application process by hosting lessons on college essay writing, financial aid, scholarship essay writing, and professional skill development. The firm also conducts information sessions with college and university admissions officers. Cleary volunteers conduct mock interviews, edit college essays, and help students draft résumés.

Mentoring: Cleary mentors are paired with a high school mentee and are required to spend at least four hours per month with the mentee. Before becoming a mentor, interested Cleary employees must apply and attend training at the start of the school year. The law firm holds monthly events for mentors and mentees to participate in together.

Mock Trial: The mock trial portion of Cleary's pipeline program is run jointly with NYSBA and Justice Resource Center. High school students from all five boroughs are brought together to compete in simulated civil and criminal cases. These students prepare to defend both sides of a given case by presenting opening and closing statements, conducting direct and cross-examinations, and acting as witnesses. At the final tournament of the season, teams compete in front of judges at the Manhattan and Brooklyn courts.

Book Club: Students and Cleary volunteers read a new book each month and meet weekly for discussion.

Internships: Exceptional juniors and seniors in Cleary's pipeline program are hired to intern at the law firm in several departments, including alumni relations, corporate resources, document support, help desk, mail/messengers, and audiovisual support.

In 2023, NYCBA's Office of Diversity, Equity, Inclusion, and Belonging presented Cleary Gottlieb with the Diversity and Inclusion Champion Award at the city bar's Power the Pipeline Conference, which I attended. The award was given for the firm's Washington Irving Campus Program. The example of that program should prove that even advocates of diversity can support programs that, unlike affirmative action, are rooted in merit.

Conclusion

Since the Court's ruling in *Students for Fair Admissions*, law schools and law firms have turned to national, state, and local bar associations for guidance on how they ought to respond. As one might expect, most of the recommendations from ABA, NYSBA, and NYCBA, in particular, have advised these institutions to continue using racial preferences, even if indirectly, for URMs in admissions, hiring, and promotion, seemingly in defiance of the ruling.

That said, all three bar associations' endorsement of pipeline programs as a viable alternative to affirmative action is a welcome surprise for advocates of colorblindness and merit in New York and beyond. These programs, if race-neutral, are in line with *SFFA* and help low- and middle-income students of all racial and ethnic backgrounds to enter the legal profession and get on a path to greater success. Pipeline programs that limit who can participate based on one's status as a racial or ethnic minority, however, are likely unconstitutional and are merely affirmative action by another name.

If law schools and law firms are to act prudently—and constitutionally—they should ignore the calls by ABA, NYSBA, and NYCBA to double down on racial preferences in admissions, hiring, and promotion. Instead, if law schools and law firms are interested in providing low- and middle-income students with greater access to the legal profession, while also teaching them a valuable lesson on how to be in control of their own futures, these institutions ought to implement race-neutral pipeline programs.

Organizations that are interested in establishing or improving their own race-neutral pipeline programs should clearly define what "success" means for participants who have completed the program. They should also keep track of how many program participants meet this definition of success annually. For example, if a law firm runs a race-neutral pipeline program intended to help law students pass the bar exam, the firm might define "success" as passing the bar on one's first try. In this example, the firm would keep a record of how many program participants meet this bar and how many program participants do not meet it, making this information available to the public.

In the wake of *SFFA*, it is possible and preferable for organizations to assist and train future lawyers from all backgrounds. Race-neutral pipeline programs are the way forward and have the benefit of relying on merit, while also targeting aspiring attorneys who come from disadvantaged backgrounds.

Endnotes

1 "New ABA Profile of the Legal Profession Highlights Changing Federal Judiciary," American Bar Association (ABA), July 18, 2022.

2 "ABA Model Diversity Survey," ABA.

3 Ibid.

4 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

5 Ibid.

6 See, e.g., Task Force on Advancing Diversity, "Report and Recommendations of the New York State Bar Association's Task Force on Advancing Diversity," New York State Bar Association (NYSBA) (Aug. 31, 2023), 5. The NYSBA task force states: "Notably, the majority opinion also stated explicitly that it was not purporting to rule on admission practices at the nation's military academies. Nor does the majority opinion purport to rule on the employment practices of private employers, governed principally by Title VII of the Civil Rights Act and 42 U.S.C. § 1981."

7 Nate Raymond, "Activist Behind US Affirmative Action Cases Sues Major Law Firms," Reuters, Aug. 22, 2023.

8 *SFFA* overturns the 2003 decision in *Grutter v. Bollinger*, which ruled that affirmative action was constitutional; *Grutter v. Bollinger*, 539 U.S. 306 (2003).

9 ABA amicus brief in *Students for Fair Admissions v. President and Fellows of Harvard College (SFFA)* (Aug. 1, 2022), 5–6.

10 *SFFA*.

11 ABA amicus brief in *SFFA*, 8.

12 Deborah Enix-Ross, "Re: U.S. Supreme Court Decision on Race-Based Admissions," June 29, 2023.

13 "The Path Forward: Discussions and Strategies in Ensuring Diversity, Equity and Inclusion Post-*SFFA v. Harvard* Webinar Series," ABA, Fall/Winter 2023.

14 "City Bar Launches Four-Part Series and Conference to Mobilize Stakeholders Following Affirmative Action Ruling," New York City Bar Association (NYCBA), press release, July 6, 2023.

15 Tanya Martinez-Gallinucci, "Protecting Diversity, Equity and Inclusion Post-SFFA," NYCBA, Sept. 18, 2023.

16 Task Force on Advancing Diversity, "Report and Recommendations."

17 Susan DeSantis, "New York State Bar Association House of Delegates Approves Report in Wake of Supreme Court Decision on Affirmative Action," NYSBA News Center, Nov. 4, 2023.

[18] Task Force on Advancing Diversity, "Report and Recommendations," 4.

[19] Ibid., 26.

[20] Ibid., 28.

[21] Robert VerBruggen, "After Affirmative Action, Meritocracy?" Manhattan Institute, June 8, 2023.

[22] Task Force on Advancing Diversity, "Report and Recommendations," 27.

[23] Ibid., 32.

[24] Ibid., 29.

[25] Janet Lorin, "Why US Colleges are Reviving Standardized Tests," *Bloomberg*, Apr. 11, 2024.

[26] Task Force on Advancing Diversity, "Report and Recommendations," 36–37.

[27] Ibid., 61.

[28] Ibid., 57.

[29] Ibid., 60.

[30] The Mansfield Rule "measures whether law firms and [corporate] legal departments are considering a broad pool of talent—including historically underrepresented groups." See Julia DiPrete, "What Is Mansfield Certification and Why Is It So Important for Law Firms?" *Vault*, Dec. 9, 2022.

[31] Task Force on Advancing Diversity, "Report and Recommendations," 76.

[32] Ibid., 77.

[33] Ibid., 78.

[34] Ibid., 84.

[35] *SFFA*.

[36] Task Force on Advancing Diversity, "Report and Recommendations," 26.

[37] "About Diversity Pipeline Initiatives," NYCBA.

[38] Since August 2023, the American Alliance for Equal Rights has sued several law firms over their diversity fellowships, contending that these programs illegally bar Asian American and white students from participating; Julian Mark and Taylor Telford, "Conservatives Are Suing Law Firms over Diversity Efforts. It's Working," *Washington Post*, Dec. 9, 2023.

[39] "National Pipeline Programs Directory," ABA.

40 Some may argue that Cleary Gottlieb's Washington Irving Campus Program is not race-neutral, but rather race-conscious, because many of the students who currently attend one of the five Washington Irving Campus high schools are black or Hispanic. However, I dispute such a characterization unless the program explicitly bars white and/or Asian American students on the Washington Irving Campus from participating, which, based on the firm's website, it does not appear to do.

41 Cleary Gottlieb, "U.S. Educational Pipeline: Washington Irving Campus Program."

42 Ibid.