

The Biden Administration's Opportunity to Diversify the Supreme Court's Liberal Wing

Supreme Court Justice Stephen Breyer, appointed to the Court by President Bill Clinton in 1994, recently announced his plan to retire. Breyer's announcement provides President Biden an opportunity to make good on his campaign promise to nominate a Black woman to join the high court. A historical moment awaits should his nominee be confirmed; however, she will not tip the political balance of the Court or significantly change its dynamic. Justice Breyer, 83, is one of three liberals on the court, and his replacement will simply reinforce the court's liberal wing and the six-member conservative supermajority will remain. This is important given the court's work on cases involving voting rights, reproductive rights, maternal health, environmental protection, and affirmative action.

"I've made no decision except the one person I will nominate will be someone with extraordinary qualifications, character, experience and integrity... And that person will be the first Black woman ever nominated to the United States Supreme Court. It's long overdue."

- President Biden

With his nomination, President Biden can also ensure that the court is more representative of the American people, if only slightly. All nine justices currently on the court received their undergraduate and law degrees from private schools, primarily Ivy League institutions, which is typical of those who make it to the court. There are at least 11 Black women being considered for the job, the three front runners being Judge Ketanji Brown

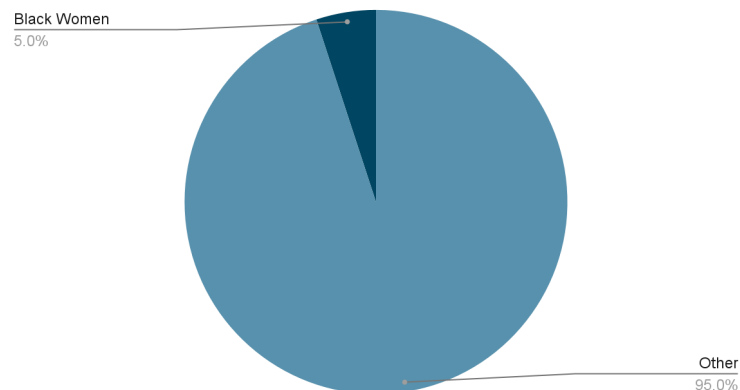
Jackson of the U.S. Court of Appeals for the DC Circuit, California Supreme Court Justice Leondra Kruger, and US District Judge J. Michelle Childs. Judge Childs stands out from her peers as she attended public schools – the University of South Florida and the University of South Carolina School of Law. Her nomination could be a win for principles of egalitarianism, proving that you do not need a degree from a prestigious school to earn a seat on the court, or in other high-profile positions.

"Why is it a top school only if it's private and Ivy League? All nine of them went to private schools. There is nobody on the Supreme Court that has as diverse a background educationally as (Childs) has."

- Representative Jim Clyburn (House Majority Whip)

In April of 2021, President Biden issued [an Executive Order](#) that formed The Presidential Commission on the Supreme Court. The Commission is tasked with examining the Court's role in the Constitutional system; the length of service and turnover of justices on the Court; the membership and size of the Court; and the Court's case selection, rules, and practices (read draft final report detailing the Commission's findings [here](#)). As the report emphasizes, "the Court's composition and jurisprudence" have long been "subjects of public controversy and debate in the nation's civic life," particularly as it relates to the court's ideological balance. The report considers whether the Court's makeup should align with the political demographics of the country? And if so, how can the court be protected from partisanship and politicization?

40 of 793 "active," or full-time federal judges are Black women



Source: Administrative Office of the U.S. Courts

Profiles of Biden's Potential Nominees

D.C. Circuit Judge Ketanji Brown Jackson



Judge Jackson is a graduate of Harvard University and Harvard Law School. She clerked for Justice Stephen G. Breyer. The Senate confirmed her to the appeals court in June by a vote of 53-to-44. All 50 Democratic caucus members voted for her, as did three Republicans: Susan Collins of Maine, Lindsey Graham of South Carolina and Lisa Murkowski of Alaska.

California Supreme Court Justice Leondra Kruger



Justice Kruger is a graduate of Harvard University and Yale's law school. She clerked for U.S. Supreme Court Justice John Paul Stevens and served in the Office of Solicitor General.

U.S. District Judge J. Michelle Childs



Judge Childs attended the University of South Florida and the University of South Carolina School of Law. In 1992, she became the first female law partner at a prominent firm in South Carolina. She later served as a state judge before President Barack Obama nominated her in 2010 to be a district court judge.

The names of other women being floated for consideration include NAACP Legal Defense and Educational Fund President Sherrilyn Ifill, 7th Circuit Judge Candace Rae Jackson-Akiwumi, and Delaware Supreme Court Justice Tamika Montgomery-Reeves.

The Road to the Supreme Court

When a seat on the Supreme Court becomes available, the President submits a nomination to [the Senate Judiciary Committee](#) (Chairman, [Dick Durbin](#) of Illinois). The Committee collects records and performs background checks on the nominee to prepare for confirmation hearings. Confirmation hearings feature the nominee as well as witnesses who support and oppose the nominee who testify about the nominee's judicial record and character. At the conclusion of the hearings, the committee members vote to recommend the nominee to the Senate for a full Senate floor vote or to reject the nominee. If the nominee is recommended, the full Senate will debate the nomination and proceed with a vote. In order to be confirmed, the nominee needs 51 votes (a majority). Currently, Democrats cling to narrow control over the Senate.

U.S. Education Secretary Pushes Promotes Tutoring as Effective Way to Address Learning Loss During Pandemic

The overwhelming majority of schools across the country have returned to an in-person learning format amid the COVID-19 pandemic, a hopeful nod to normalcy. However, lost instructional time during closures remains a grave concern. In a recent address, U.S. Department of Education Secretary Miguel Cardona [offered strategies](#) to assist in the recovery from the pandemic and address the systemic inequities that have long tainted America's education system. Cardona noted that stopgap measures such as intensive tutoring and extended learning time could make all the difference. A concept called ["high dosage" tutoring has proven extremely effective](#) for districts that use it, and perhaps other

districts can follow suit by funneling COVID-19 relief funding to similar partnerships and programs.

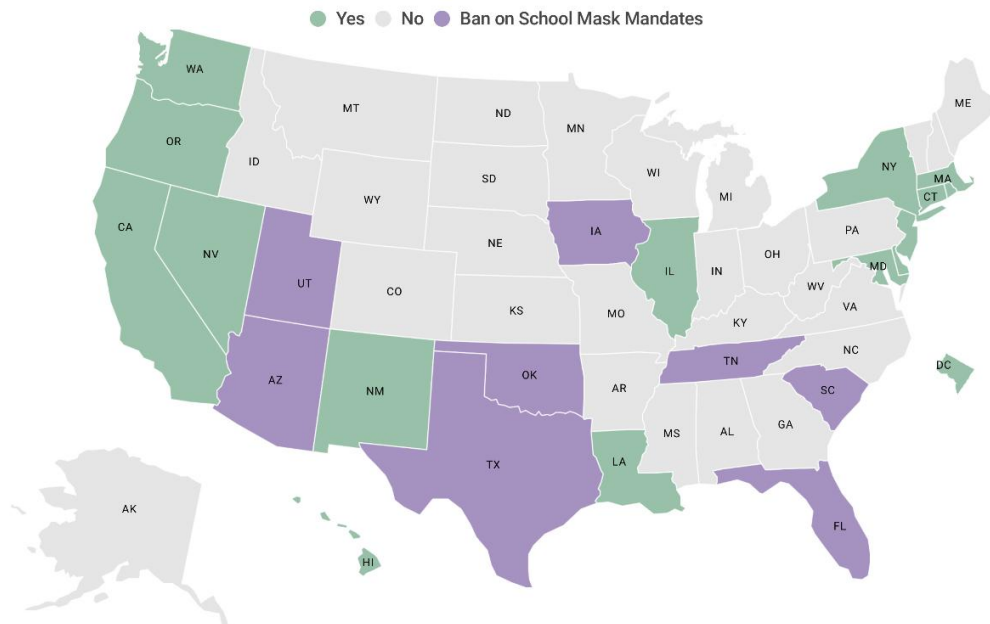
“We must make up for lost time,” Cardona said. “Our hardest and most important work lies ahead. It’ll be what we’re judged against. As educators and leaders, we’re either closing educational opportunity gaps, or making them worse with the decisions we’re going to make in the next coming months and years.” Read the full transcript of Cardona’s address [here](#).



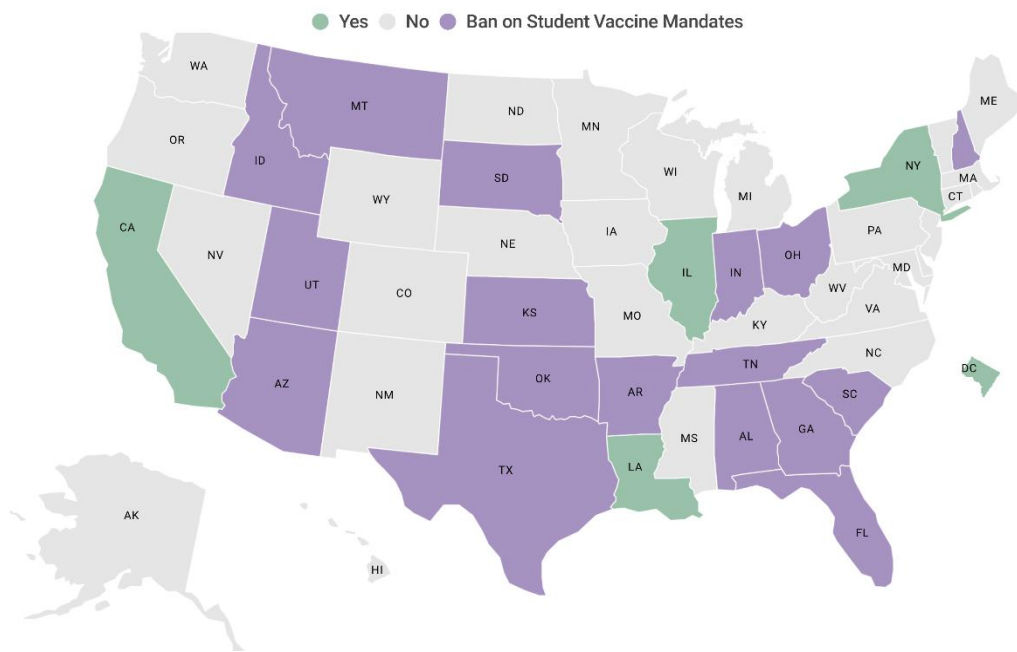
The State of Mask and Vaccine Mandates

[States continue to implement or revise](#) policies related to mask and vaccine mandates for students and employees. See the National Academy for State Health Policy’s latest infographic on the matter [here](#) and select static images below.

States with Mask Mandates



States with Vaccine Mandates



The Fate of Affirmative Action

The Supreme Court [has agreed](#) to hear two cases challenging the decades-long practice of affirmative action at the collegiate level: *Students for Fair Admissions v. Harvard University*

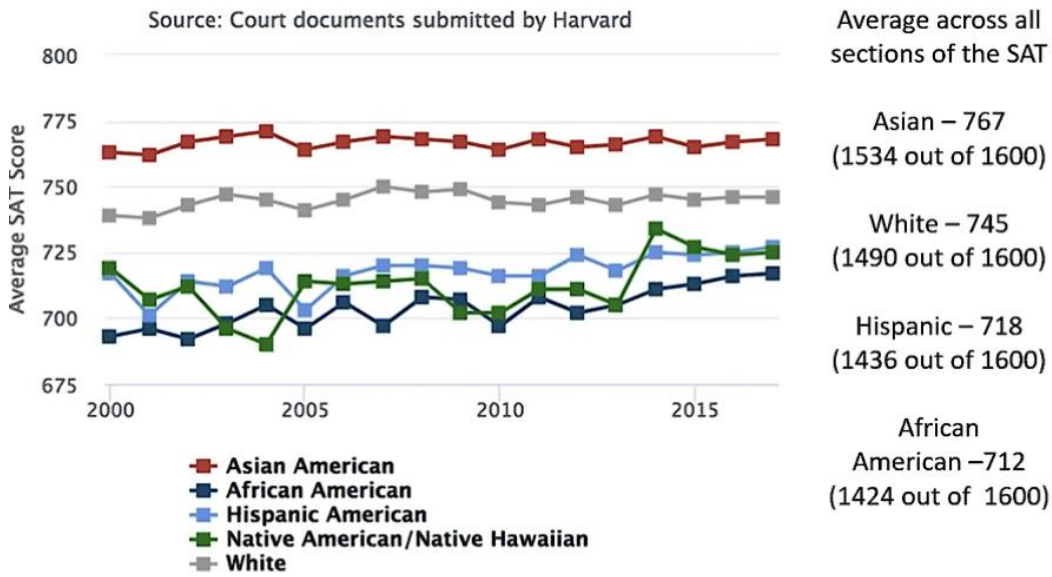
and *Students for Fair Admissions v. University of North Carolina*. The Court will reconsider how colleges should evaluate race when making admissions determinations.

Most colleges in the U.S. approach admissions decisions holistically — they not only consider standardized test scores and grades, but also the student-crafted narrative that describes personal experiences and extracurricular activities. Colleges take into account the type of high school the student attended and its course offerings, familial circumstances, and demographic information including race and socioeconomic status, among other more human elements. The plaintiffs suing Harvard make the following claims: (1) affirmative action policies as practiced by Harvard and other highly selective colleges, namely their consideration of race, are unconstitutional; and (2) Harvard's admissions process unlawfully discriminates against Asian-Americans are discriminated.

On its face, Harvard's admission process complies with Supreme Court precedent and if the Supreme Court rules in its upcoming term that Harvard's process is unconstitutional, it will be overruling decades of jurisprudence. This outcome is not out of the realm of possibility given that the Court's composition has changed since its prior rulings on affirmative action; there is currently a 6 to 3 conservative supermajority.

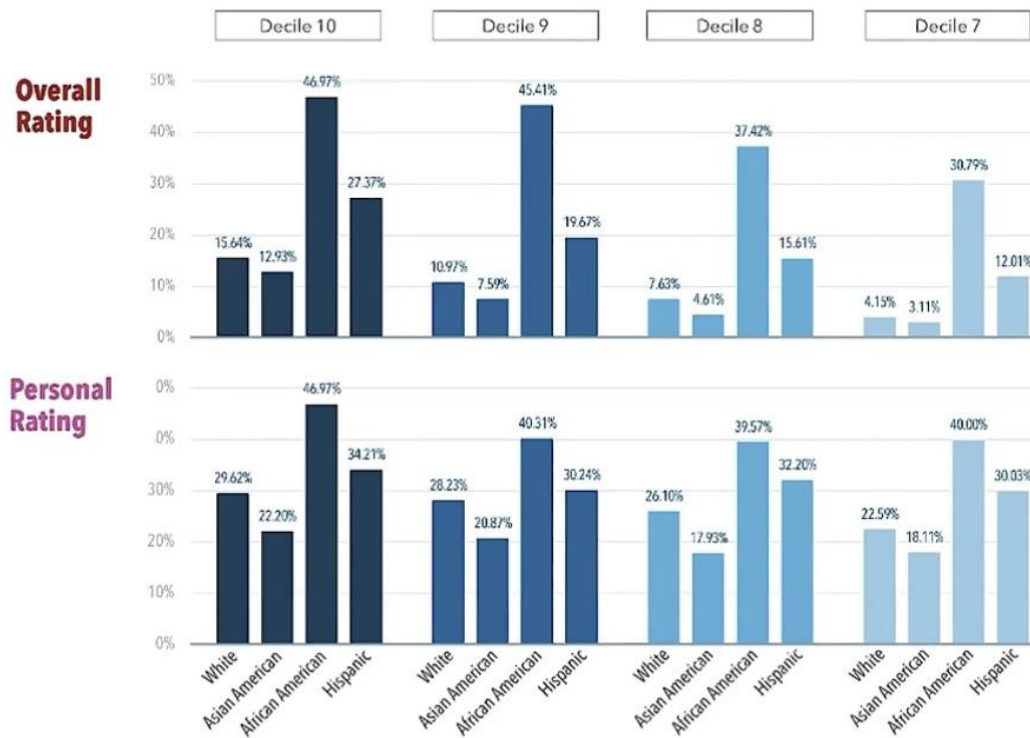
As for the second claim, economists on both sides performed regression analyses evaluating Harvard's admissions data over six years. Plaintiffs sought to show that Asian-Americans were being systematically discriminated against, and the defendants argued that the plaintiff's evaluation methods were flawed and therefore inconclusive with respect to there being an intent to discriminate. Of note, Asian-Americans are actually overrepresented at Harvard relative to their proportion of the U.S. population. The discrimination claim centers on the fact that Asian-Americans are the *least* overrepresented group.

Average SAT Score for Admitted Students by Race



Source: Plaintiff's Brief

Students for Fair Admissions argues that Harvard's supposedly race-neutral personal rating – its measure of qualities like integrity, helpfulness, kindness, fortitude, and ultimately what type of contribution the applicant would make to the Harvard community – is the problem. African-Americans and Latinx students score the highest personal ratings while Asian-Americans score the worst, just below White students.



Source: Plaintiff's Brief

Regardless of the outcome, this lawsuit has provided a dearth of transparency and has again enlivened conversations around the unique experiences of race and discrimination in America.

EdREADS

- [Smith College Replaces Student Loans With Grants, Making Access and Equity a Priority \(Higher Ed Today\)](#): Smith College announced the elimination of loans from their financial aid packages. Beginning in fall 2022, Smith will replace federal loans with institutional grants for all current and future undergraduates.
- [The SAT will be delivered digitally in the U.S. starting in 2024 \(K-12 Dive\)](#): The College Board announced that beginning in 2024, students must sit for the SAT at a school or testing center and take the test digitally.
- [In Minneapolis Schools, White Families Are Asked to Help Do the Integrating \(The New York Times\)](#): “Minneapolis, among the most segregated school districts in the country, with one of the widest racial academic gaps, is in the midst of a sweeping plan to overhaul and integrate its schools.”

- [Districts get creative to maintain special ed services as COVID drags on\(K-12 Dive\)](#): “Staff shortages predominant in special education before the public health crisis, in addition to pressures to stay compliant with the Individuals with Disabilities Education Act, are leading special education departments to be creative in providing individualized supports for students in both remote and face-to-face settings – and to prioritize parent communications.”
- [Public education is facing a crisis of epic proportions \(The Washington Post\)](#): “Public education is facing a crisis unlike anything in decades, and it reaches into almost everything that educators do: from teaching math, to counseling anxious children, to managing the building.”

Upcoming Events

- **February 8th, 8:00 PM:** Educated: An Evening with Tara Westover, in conversation with Natalie Portman; [purchase tickets here](#).
- **February 9th, 3:00 PM:** Education Now - Navigating Tensions Over Teaching Race and Racism; [register here](#).
- **February 18th, 11:30 AM:** Virtual Lunch & Learn - Changing the Paradigm of Neurodiversity: Acceptance, Inclusion, and Social Justice; [register here](#).

Get in touch with us!

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