2022

Colorblind Capture

Jonathan P. Feingold
Boston University School of Law

COLORBLIND CAPTURE

BOSTON UNIVERSITY LAW REVIEW (*forthcoming* 2022)

Jonathan P. Feingold[*]

ABSTRACT

We are facing two converging waves of racial retrenchment. The first, which arose following the Civil Rights Movement, is nearing a legal milestone. This term or the next, the Supreme Court will prohibit affirmative action in higher education. When it does, the Court will cement decades of conservative jurisprudence that has systematically eroded the right to remedy racial inequality.

The second wave is more recent but no less significant. Following 2020's global uprising for racial justice, rightwing forces launched a coordinated assault on antiracism itself. The campaign has enjoyed early success. As one measure, GOP officials have passed, proposed or pre-filed hundreds of bills designed to stymie antiracist discourse, activism, and organizing.

To process this moment, scholars have surfaced continuities that bind racial retrenchment past and present. This includes decades of rightwing efforts to deny the relevance of race and racism in post-Jim Crow America. These accounts are not wrong. But they obscure a key variable that has long enabled racial backlash: the Left. Specifically, privileged voices on the Left continue to rehearse colorblind conceptions of race and racism—even when defending race-conscious reform.

I term this phenomenon *colorblind capture*. To capture its ubiquity and impact, I explore decades of affirmative action litigation. This analysis reveals an underappreciated trend. Even as the Left champions affirmative action, the Right sets the terms of debate. This includes the pervasive reflex, on the Left, to defend affirmative action as a "racial preference." This framing is neither inevitable nor strategic. The Left could, for example, defend race-consciousness as essential *anti*discrimination—that is, a modest tool to mitigate existing racial (dis)advantage and, thereby, yield a more

[*] Associate Professor of Law, Boston University School of Law. Jonathan Feingold holds a B.A. from Vassar College and a J.D. from UCLA School of Law. Many thanks to . . . All mistakes are my own.

individualized, objective, and race-neutral process. But as litigation headed for the Supreme Court reveals, Harvard and UNC continue to rehearse rightwing talking points—even as they defend their own admissions policies.

This dynamic does more than compromise the legal case for race-conscious admissions. It also naturalizes within public discourse the notion that seeing race and attending to racism is wrong—the same logic that anchors resurgent efforts to brand antiracism as the new racism. Colorblindness, albeit a creature of the Right, has captured the Left. If left unaddressed, this phenomenon will continue to impede, and could imperil, the long and winding quest for racial justice in America.

INTRODUCTION

We are facing two converging waves of racial retrenchment in the United States.[1] The first, which arose following the Civil Rights Movement, is nearing a legal milestone. This term, the Supreme Court will prohibit race-conscious[2] university admissions. When this occurs, the Court will cement a decades-long campaign to defuse antidiscrimination law's liberatory promise and potential.[3]

The second wave is more recent but no less significant. In 2020, George Floyd's viral murder catalyzed a global uprising for racial justice. In its wake, we witnessed a nationwide turn toward antiracism as a framework to meet our collective racial reckoning. This antiracist turn signaled a commitment to racial justice unseen since the Civil Rights Movement. It also triggered near-immediate backlash. Then-President Trump, mired in a slumping re-election campaign, embraced antiracism—among more targets like Critical Race Theory ("CRT") and the 1619 Project—as a potent foil. From Tweet to Executive Order, the former president cast antiracism as "racist," "offensive," and "anti-American" propaganda.[4]

---

[1] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331 (1988).

[2] Within this Article, I employ the term *race-conscious* to capture policies that permit decisionmakers to consider the racial identity of individual applicants. This differs *race-attentive* policies, which are attentive to racial outcomes but prohibit decisionmakers from considering the racial identity of individual applicants. Within this Article, I refer often to *affirmative action*—a term that encompasses a range of race-conscious and race-attentive practices. Unless stated otherwise, when I use the term *affirmative action*, I am referring to race-conscious policies as defined above.

[3] *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 989 (2007).

[4] *See* Donald J. Trump, Executive Order on Combating Race and Sex Stereotyping (Sept. 22, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/; Russell Vought, Memorandum for the Heads of Executive Departments and Agencies: Training in the Federal Government (Sept. 4, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf.

At the time, Trump's broadside garnered limited national attention. That disinterest has proven misplaced. A once-isolated attack metastasized into a nationwide campaign[5] of regressive discourse, legislation, and intimidation.[6] One sees this, for example, in the rise of rhetoric that demonizes antiracism as the new (anti-white) racism.[7] Across the country, GOP officials have weaponized anti-antiracism rhetoric to justify an ever-growing host of laws designed to chill—and even criminalize—basic conversations about race and racism in schools and beyond.[8] Closer to home, local officials have invoked similar rhetoric to discipline or terminate educators for assigning Black authors;[9] proclaiming that Black Lives Matter;[10] and teaching a comprehensive and honest American history.[11]

---

[5] A well-funded and highly coordinated network of rightwing actors continues to seed the infrastructure, intellectual capital, and financing for this regressive campaign. Judd Jegum & Tesnim Zekeria, *The Obscure Foundation Funding "Critical Race Theory" Hysteria*, Popular Information (July 13, 2021), https://popular.info/p/the-obscure-foundation-funding-critical. The Heritage Foundation constitutes one of the intellectual arms of this movement. *See* Heritage Foundation, *Critical Race Theory*, https://www.heritage.org/crt (creating anti-CRT propaganda clearing house).

[6] *See* Pen America, *Educational Gag Orders*, Report (Nov. 1, 2021), https://pen.org/report/educational-gag-orders/ ("Between January and September 2021, 24 legislatures across the United States introduced 54 separate bills intended to restrict teaching and training in K-12 schools, higher education, and state agencies and institutions.").

[7] *See* ADL, *Anti-Racist is Code for Anti-White*, https://www.adl.org/education/references/hate-symbols/anti-racist-is-a-code-for-anti-white ("'Anti-Racist is a Code Word for Anti-White' is a racist slogan that became popular among white supremacists in the mid-2000s.").

[8] *See id*.

[9] *See* Hannah Natanson, *A White teacher taught White students about White privilege. It cost him his job*, WASHINGTON POST (Dec. 6, 2021), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/.

[10] Joe McLean, *Lee High Teacher who hung BLM flag outside classroom reassigned, accused of misconduct*, NEWS4JAX (Mar. 25, 2021), https://www.news4jax.com/news/local/2021/03/25/lee-high-teacher-who-hung-blm-flag-outside-classroom-reassigned-accused-of-misconduct/.

[11] Brian Lopez, *North Texas principal resigns to end fight over whether he was teaching 'critical race theory'*, THE TEXAS TRIBUNE (Nov. 10, 2021), https://www.texastribune.org/2021/11/10/colleyville-principal-critical-race-theory/.

This backlash shows little signs of abating.[12] To the contrary, we are facing a threat to civil rights and multiracial democracy unseen since the fall of Reconstruction.[13]

This Article intervenes in this moment. But rather than focus on the rightwing forces stoking racial resentment, I turn to a critical but underappreciated source of backlash: the Left.[14] My claim is not that actors and institutions on the Left are self-consciously committed to racial retrenchment. Rather, my argument is that privileged voices on the Left often defend antiracist efforts on terms that reinforce colorblind conceptions of race.[15] And, in so doing, the Left imperils the legal and moral case for race-conscious policies.

On the surface, the Right and Left embrace competing theories of race and racism in America. Albeit reductionist, one can capture this divergence as follows. The Right says race no longer matters; the Left says it does. This split can be seen as a contest between color*blindness* and color*consciousness*. Colorblindness reduces race to an otherwise arbitrary physical attribute and situates racism in an ignoble past. Colorconsciousness, in contrast, embraces

---

[12] If anything, the GOP's success weaponizing "antiracism" and "CRT" indicates the opposite. *See* Jonathan Feingold, *What the Public Doesn't Get: Anti-CRT Lawmakers are Passing Pro-CRT Laws*, THE CONVERSATION (Dec. 1, 2021).

[13] *See* Ishena Robinson, *The War on Truth*, LDF (last visited Feb. 1, 2022), https://www.naacpldf.org/critical-race-theory-banned-books/.

[14] The term *Left* is a broad political category that captures a range of distinct individuals and entities. I employ the term not to suggest that all individuals or entities on the Left share political values, commitments, or priorities. Rather, I employ it because notwithstanding this heterogeneity, the Left (as a catch-all category juxtaposed with the *Right*) is generally viewed as (more) sympathetic to racial justice and civil rights. My claim, in turn, is that this perception obscures how much of the Left has defended, and continues to defend, affirmative action on lukewarm terms that enable regressive political projects.

[15] A significant exception includes scholars and activists—many who identify with critical projects—who have critiqued, *inter alia*, how liberals tend to defend affirmative action. *See, e.g.*, Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1149 (2019); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994).

a structuralist frame that views racism as embedded within American society itself—even when laws prohibit racial discrimination.

These competing visions of race and racism invite competing prescriptions for racial inequality. Whereas colorblindness prescribes race-blind remedies, colorconsciousness identifies the need to center race. But it is in this space, when the Left defends race-consciousness, that the Left turns Right. Or more precisely, privileged voices on the Left defend race-conscious policies on terms that reify colorblind conceptions of race and racism. I term this dynamic, whereby colorblindness penetrates earnest antiracist advocacy, as *colorblind capture*.

Affirmative action[16] comprises a salient example. For decades, liberals have consistently defended race-conscious hiring and admissions practices. But when doing so, advocates tend to frame affirmative action as an acceptable "racial preference"—that is, justifiable discrimination that harms otherwise deserving whites.[17] This framing, which suggests race-consciousness corrupts a race-neutral baseline, is neither inevitable nor strategic.[18] Moreover, it contravenes the structuralist theories of race and racism that the Left otherwise endorses. Nonetheless, most voices on the Left

---

[16] *See supra* note 2 (discussing terminology).

[17] *See* Carbado, *supra* note <Footnote 43 [13]> ("[W]hereas liberals believe that the costs of affirmative action are outweighed by its benefits (including diversity), conservatives perceive the costs of the policy ('reverse discrimination') too high a price to pay regardless of its benefits."); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220 (2002) ("Yet an increasing source of frustration was the inadequacy of the liberal response that too often accepted the premise that race consciousness amounted to racism and that too often argued for race-conscious remediation as temporary, exceptional, and aberrational within an otherwise neutral legal frame.").

[18] *See infra* Part III.A.2-3 (outlining the empirical case for a countermeasure framing). *See also* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1463 (1998) ("Race-conscious, nonpreferential affirmative action programs ensure enhanced and vigorous competition for benefits . . . and seek to even what has historically been an extraordinarily skewed playing field. As such, these programs promote the American ideal of a truly colorblind society and are necessary to ensure equal opportunity for all its citizens.").

continue to frame affirmative action as a "racial preference"—even when doing so erodes the moral and legal case for even antiracist efforts.[19]

Litigation at Harvard and UNC, now headed for the Supreme Court, is illustrative. In both cases, the defendants, sympathetic judges, and third-party stakeholders exhibit color-conscious instincts. One might expect, in turn, that our affirmative action advocates to defend race-conscious admissions as modest interventions that renders race less relevant in the admissions process.[20] They do not. Instead, they defend the challenged admissions practices as necessary departures from an otherwise race-neutral regime. This framing treats applicant race as irrelevant until the moment it is named and accounted for. As a result, affirmative action advocates tell an admissions story that contravenes color-consciousness's core logic, insulates facially-neutral[21] processes from critique, and rationalizes any exclusionary effects they produce.[22]

---

[19] *See* Carbado, *supra* <Footnote 43 [13]>, at 1129 ("[L]iberals themselves too often defend affirmative action from the perspective that the policy is a preference. . . . [T]he [primary] difference between liberal and conservative views on affirmative action is that liberals think the 'preference' is justified because affirmative action advances diversity, while conservatives think affirmative action is never justified because it effectuates reverse discrimination."); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 202–03 (D. Mass. 2019) ("Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population.") ("*SFFA v. Harvard I*").

[20] By, for example, reducing racial advantages and disadvantages that arise before, during, and after the admissions process. To promote concision, I employ the term *racial (dis)advantage* to capture racial advantages enjoyed by white applicants and racial disadvantages that burden applicants of color. For an overview of racial (dis)advantages common to admissions regimes, see Carbado, *supra* <Footnote 43 [13]> Carbado, at 1158.

[21] For purposes of this article, I employ "facially-neutral" to capture all admissions practices that are not race-conscious as defined above. *See supra* note 2.

[22] *See* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies That We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 57-58 (2016) ("[P]ursuant to our thick understanding of racial justice, it is not enough that racial minorities merely are present at schools from which they have been excluded. Equally if not more important are the stories that we tell about *why* they are there.").

The foregoing dynamic epitomizes *colorblind capture*. When it occurs in the context of litigation, the harm transcends compromising the legal case for a given policy or practice. Affirmative action lawsuits have long functioned as proxies for public contestation over the enduring meaning of race and racism in America.[23] Litigation, in other words, is where litigants, judges, and the public debate what, if anything, is necessary to remedy our racial past. Accordingly, when privileged voices on the Left feed narratives that locate racism in the past, it does more than undermine affirmative action. It also facilitates regressive campaigns to undermine the legitimacy and moral authority of antiracism itself.

This Article proceeds as follows. In Part I, I introduce and unpack the concept of colorblind capture. In Part II, to concretize the theory, I explore manifestations of colorblind capture in historical and contemporary affirmative action litigation. This review reveals how colorblind logics, although a creature of the Right, have long "captured" the Left. In Part III, I outline how affirmative action advocates could defend race-conscious policies without reproducing colorblind conceptions of race and racism. This final section coalesces around three insights that fuse this Article: (1) colorblind capture is pervasive, but avoidable; (2) colorblind capture obscures racial (dis)advantages embedded within facially-neutral processes; and (3) colorblind capture enables racial retrenchment by eroding any meaningful legal or moral distinction between antiracism and racism.

---

[23] *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1028 (2007) ("Gotanda recognized that debates over the nature of equality and the scope of equal protection inescapably turned on competing understandings of race.").

I. COLORBLIND CAPTURE: A CONCEPTUAL MODEL

A. Competing Theories of Race and Racism

1. Colorblindness (on the Right)

Albeit somewhat reductionist, colorblindness remains the dominant racial ideology on the Right.[24] Colorblindness embodies specific conceptions about what race is and what racism entails.[25] On race, colorblindness adheres to what Neil Gotanda has termed *formal race*—a concept that reduces race to "neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin."[26] Put differently, race is treated as an otherwise irrelevant biological fact or physical attribute—no different than eye color, handedness, or mayonnaise preference.[27] In short, colorblindness contends that "race does not matter."[28]

Albeit somewhat stylized, one can capture the above in the following equation:

The Colorblind Story:

---

[24] *See Id.* at 992 ("Contemporary colorblindness arises out of both the doctrinal flow of Supreme Court cases that washed away Jim Crow and the larger flood of changing racial ideas over the twentieth century.").

[25] There are other dimensions of colorblindness, including ostensible commitments to individualism, that transcend the immediate focus of this Article. *See, e.g.*, Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1603 (2020) (evaluating "a central pillar" of "colorblindness: the claim that race-based state action wrongfully fails to treat people as individuals").

[26] Neil Gotanda, *A Critique of "Our Constitution in Color-Blind"*, 44 STAN. L. REV. 1, 4 (1991); Issa Kohler-Hausmann, *Dangers of Counterfactual Causal Thinking*, 113 NW. U. L. REV. 1163, 1170 (2019) (explaining that colorblindness reduces race to physical markers "that people just have and thereby obviously belong to a designated racial group").

[27] *See* Kohler-Hausmann, *supra* note 25 at 1170 (explaining that colorblindness reduces race "to an attribute, a genetically produced trait, or a signifier—level of melanin in skin, phenotype, distinctive names or speech—that people just have . . .").

[28] *See After CRT complaint, Huntsville Teacher Training Investigated by Alabama State Officials*, AL.com (Dec. 11, 2021), https://www.al.com/news/2021/12/after-crt-complaint-huntsville-teacher-training-investigated-by-alabama-state-officials.html (describing parent complaint that claimed "[t]he school should not be teaching anything race related because race doesn't matter.").

race = irrelevant

This foundational presumption informs colorblind conceptions of racism. Broadly, it translates to the mantra that the government should not (morally), and may not (legally), distinguish between individuals based on their race.[29] In other words, colorblindness identifies race-consciousness—that is, seeing and accounting for race—as the primary source of 21st century racism.[30] Rick Scott neatly captured this sentiment in the GOP's 11 Point Plan to Rescue America, which states: "We are all made in the image of God; to judge a person on the color of their epidermis is immoral."[31]

To concretize the foregoing, imagine it is 1956 and UNC formally excludes Black students from its campus.[32] When viewed through the lens of colorblindness, this exclusionary policy is racist (and legally suspect) because UNC distinguishes between students based on their race—an irrelevant physical attribute.[33] In other words, the racial harm is seeing and accounting for race.

The remedy, in turn, calls for "facial neutrality"—that is, a process that neither sees nor accounts for an applicant's racial identity. Under the colorblind view, race no longer operates in any material sense; candidates are no longer advantaged or disadvantaged because of their race.[34] In other words,

---

[29] *See* Andrew Kull, *The Color-Blind Constitution* 1 (1992) ("The comfortable metaphor stands for an austere proposition: that American government is, or ought to be, denied the power to distinguish between its citizens on the basis of race.").

[30] *See* Haney López, *supra* note <"A Nation of Minorities" [2]>, at 989 ("[T]he underlying premise of reactionary colorblindness is not simply that race-conscious remedies raise moral and political and even constitutional problems, but that benign and invidious discrimination are indistinguishable and equally pernicious.").

[31] Rick Scott, An 11 Point Plan to Rescue America, https://rescueamerica.com/11-point-plan/. Similar sentiment animates Justice Roberts claim that "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race." Parents Involved (2007).

[32] Notwithstanding *Brown v. Board of Education*, UNC continued to formally bar Black students until the Supreme Court intervened in 1956. *See Bd. of Trustees of Univ. of N.C. v. Frasier*, 350 U.S. 979 (1956).

[33] This is, of course, the same logic that anchors the claim that antiracism—because it sees race—is racist.

[34] *See* Carbado, *supra* note <Footnote 43 [13]> (explaining that colorblindness equates facial neutrality with racial neutrality—in the sense that neither white nor black applicants are favored or disadvantaged).

facial neutrality returns the admissions process to a race-neutral neutral baseline.[35] The following equation, building on the first, advances this Colorblind Story:

The Colorblind Story:
race = irrelevant
facially race-neutral = race-neutral

So it's 1956, and UNC no longer considers applicant race. Colorblindness suggests facial neutrality equals racial neutrality. By extension, race will remain irrelevant unless UNC makes it so. How could this occur? One possibility is that UNC recognizes that it cannot overcome the vestiges of racial exclusion without adopting a race-conscious admissions process. But under the veil of colorblindness, the new policy—whatever its purpose or effect—commits the same sin of the prior practice: it renders race relevant. And by departing from an ostensibly race-neutral baseline, considering race confers a racial "preference" that "injures" white applicants.

One can capture this logic in the following equation, which builds on the Colorblind Story:

The Colorblind Story:
race = irrelevant
facially race-neutral = race-neutral
race-conscious = racial preference

It is worth noting that the empirical assertion that affirmative action is a "racial preference" flows from the two preceding presumptions: (1) race is irrelevant and (2) facial neutrality equals racial neutrality. The "affirmative action-as-racial preference" framing dominates public debates about affirmative action. Rarely, however, do we treat this preference framing as a

[35] By "race neutrality," I mean a system in which applicants neither enjoy racial advantages or suffer racial disadvantages. One could define racial neutrality more broadly. I employ the above definition because adherents of colorblindness tend to equate facial neutrality with the absence of racial (dis)advantage. As I explore below, that empirical claim is inaccurate. *See infra* Part III (outlining racial (dis)advantages within facially neutral processes).

contestable empirical claim that relies on multiple faulty assumptions about race and facial neutrality.[36]

One final piece of the Colorblind Story deserves mention. By decoupling race from racism and conflating facial neutrality with racial neutrality, colorblindness rationalizes and legitimizes exclusionary systems. Specifically, the Colorblind Story suggests that racism is not the cause of enduring racial disparities. Some other cause, perhaps cultural inferiority or inadequate preparation, is to blame.[37] We can capture this final step with one more equation.

The Colorblind Story:
race = irrelevant
facially race-neutral = race-neutral
race-conscious = racial preference
racial hierarchy = natural & legitimate

If you are writing the anti-affirmative action playbook, this is where you want to land: a narrative that (a) rationalizes existing inequality; (b) caricatures affirmative action as a racial "preference" that contravenes egalitarian norms; and (c) is so laden in public discourse that it appears natural, thereby evading critique. In large part, this narrative shapes affirmative action discourse in this country. Scholars, pundits, and the public tend to treat affirmative action as a deviation from racial neutrality that discriminates innocent white (and, at times, Asian) students. The primary disagreement is whether that discrimination is acceptable—not whether it is discrimination at all.

Colorblind capture helps explain why this narrative dominates our public discourse. But before turning to this phenomenon, I first outline competing theories of race and racism that, at least on the surface, prevail on the Left.

---

[36] *See* Carbado, *supra* note <Footnote 43 [13]>, at 1132 (arguing that advocates should treat "the claim that affirmative action is a racial preference for what it is--a highly contestable claim, not an empirical fact").

[37] *See* Carbado, *supra* note <Footnote 43>, at 1139 (describing culture arguments that insist "black parents, community leaders, and political figures should change the cultural habits of black teenagers, encourage them to study hard and stay in school, and persuade them to jettison the thinking that associates the pursuit of academics with 'acting white'"); *id*. ("That structural reality necessarily means that black students will be at a competitive disadvantage relative to white students. The solution for such disadvantage, however, should not be diversity-oriented tinkering with admissions processes in ways that undermine merit and equality.").

2. Color-Consciousness (on the Left)

For decades, liberal justices and advocates have criticized colorblind conceptions of race and racism. As for race, many on the Left reject the conception of formal race that anchors colorblindness.[38] In its place, liberals and progressive tend to emphasize that race is a "social construct" forged over "hundreds of years of historical practices starting within chattel slavery and colonization."[39] We might call this "structural race" because it recognizes the myriad ways that race matters even when unnamed, unseen or accounted for. We can visualize this conception of race by making one tweak to our initial equation:

The Colorconscious Story:
race ≠ irrelevant

Structural theories of race suggest that facial neutrality does not guarantee racial neutrality. Rather, race's persistent and pervasive force means that racial (dis)advantages often ensnare standard institutional arrangements—a concept captured in terms such as "structural racism" or "institutional racism." We can update our Colorconscious Story accordingly:

The Colorconscious Story:
race ≠ irrelevant
facially race-neutral ≠ race-neutral

Returning to our UNC example, the above account would presume that race remains relevant to UNC's admissions process *even after* the university eliminates its policy of racial exclusion. Why? Because race is more than some irrelevant personal trait. It is a socially constructed phenomenon that exerts force myriad ways.[40] In other words, UNC's shift from *de jure*

---

[38] Whereas formalists reduce race to irrelevant physical trait, structuralists view race as "a central organizing theme of American society." john a. powell, *Structural Racism: Building Upon The Insights of John Calmore*, 86 N.C. L. REV. 791 (2008).

[39] Kohler-Hausmann, *supra* note <Dangers of Counterfactual>, at 1169.

[40] To suggest that race is relevant is not to identify how, precisely, race shapes an admissions regime nor how, precisely, an institution might reduce race's relevance. Race could, for example, (a) shape which credentials a university values; (b) the respective weight afforded a given credential; and (c) students' relative access to a

segregation to formal equality is insufficient to eradicate the racial (dis)advantages embedded within its admissions process. Accordingly, when UNC adopts an affirmative action measure, that race-consciousness does not depart from a fair, balanced, and race-neutral baseline. Rather, it intervenes against a baseline that remains defined by race. One might say that affirmative action, by rendering race less relevant, is "no preference at all."

We can integrate the above account into our Colorconscious Story as follows:

The Colorconscious Story:
race ≠ irrelevant
facially race-neutral ≠ race-neutral
race-conscious ≠ racial preference

To complete our Colorconscious Story, the preceding presumptions invite a competing theory about contemporary inequality. Contrary to colorblindness, which locates racism beyond causal accounts, the Colorconscious Story center's racism enduring role. Even if the precise mechanisms remain underdefined, the lesson is clear: existing racial disparities are neither natural nor legitimate. Rather, they are the product of racial (dis)advantages that continue to shape American society. We can capture this final proposition in our last equation:

The Colorconscious Claim:
race ≠ irrelevant
facially race-neutral ≠ race-neutral
facially race-conscious ≠ racial preference
racial hierarchy ≠ legitimate & natural

given credential. Race-blind admissions regimes also privilege students for whom race has not been a salient feature of their lived experience. *See* Harvard Intervenors Post-Trial Brief at 8-9 (quoting student intervenor Sarah Cole ("Race-blind admissions is active erasure. To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race. And because of that, it would be nearly impossible for me to try to explain my academic journey, to try to explain my triumphs without implicating my race.").

B. The Colorblind Turn

The above accounts are not meant to capture the full complexity and variance of racial ideologies that span the political spectrum. But even if crude, this portrayal captures competing visions of race and racism in America. And for present purposes, the foregoing helps to illuminate the phenomenon of colorblind capture.

The Colorconscious Story reflects, in theory, how the Left *should* defend affirmative action. One might expect, for example, an unapologetic defense that frames affirmative action as essential antidiscrimination that *reduces* the relevance of race. Advocates could borrow from Professors Jerry Kang and Mazharin Banaji, who have championed affirmative action as a more "fair measure" of student talent and potential.[41] Or they could draw on Luke Harris and Uma Narayan, who decades ago championed affirmative action as a countermeasure that promotes racial neutrality.[42] At a minimum, one would expect advocates to treat with skepticism the claim that race-consciousness constitutes a racial preference and deviates from a race-neutral baseline.

In practice, this rarely occurs. Rather than maintain a clear and coherent alternative to colorblindness, affirmative action defenders often trade on colorblind conceptions of race and racism—even when simultaneously resisting formalist visions of race. This includes the overwhelming tendency to characterize affirmative action as a "racial preference."[43]

Due to its prevalence and importance, I term this (often unmindful) acquiescence to the logic of colorblindness as *colorblind capture*. Colorblind capture does not manifest in precisely the same manner at all times. Nonetheless, as I detail below, this phenomenon often entails some combination of four discrete but interacting components. More concretely, affirmative action champions tend to: (1) *misdescribe* affirmative action (by, e.g., characterizing it as "preferential" treatment); (2) *extract* race from facially-neutral criteria (like, e.g., standardized test scores); (3) *downplay*

---

[41] *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CAL. L. REV. 1063, 1067–68 (2006) ("'Fair' connotes the moral intuition that being fair involves an absence of unwarranted discrimination, by which we mean unjustified social category-contingent behavior. The term also connotes accuracy in assessment. 'Measure' has the double meaning as well: measurement and an intervention intentionally taken to solve a problem.").

[42] *See* Harris & Narayan, *supra* note <Preferential Treatment [13]>.

[43] *See* Carbado, *supra* note <Footnote 43 [13]>, at 1137 ("Indeed, even Justices Brennan and Marshall describe affirmative action as a racial preference in their *Bakke* opinions.").

race's general relevance in facially-neutral policies; and (4) *invert* any racial advantage from white applicants to Black applicants.

Affirmative action advocates should take care to avoid these common pitfalls. First, advocates risk internal contradiction. By reverting to formalist conceptions of race and racism, advocates erode, if not abandon, the structural stories they otherwise endorse. Second, advocates concede contestable claims concerning the relationship between formal equality and racial neutrality. In so doing, advocates reify the contestable claim that affirmative action constitutes a racial preference. Third, advocates effectively concede that affirmative action comprises discrimination—as opposed to essential antidiscrimination. In effect, affirmative action defenders risk compromising the legal and moral case for anti-racism writ large.

II. COLORBLIND CAPTURE: THEN & NOW

A. Colorblind Capture Then: Defending First Wave Affirmative Action

In a 2019 Article, Devon Carbado observed that even heralded liberal Justices characterized affirmative action as a "racial preference."[44] This includes Justice Brennan, who displayed an early manifestation of colorblind capture in *Bakke v. Regents*,[45] the Supreme Court's first substantive engagement with race-conscious admissions. Justice Brennan's preference framing is notable, in part, because he simultaneously emphasized race's enduring relevance. This included the assessment that U.C. Davis's Medical School,[46] by accounting for race, "compensate[d] applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination."[47]

Justice Brennan articulated a structuralist story; otherwise qualified students of color, because of "state-fostered [racial] discrimination," lacked an equal opportunity to attain academic credentials valued by the university.

---

[44] *See* Carbado, *supra* note <Footnote 43 [13]>.

[45] *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 375 (1978).

[46] Throughout this Article, I refer to UC Davis's Medical School as "Davis" and "Medical School."

[47] *Bakke*, 438 U.S. at 375–76 ("The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination.").

This was not a matter of qualifications or talent, but structural barriers that impeded certain students' ability to compile an admissions file. Davis's standard admissions policy, in turn, was facially neutral but far from racially neutral.

Justice Brennan also chastised colorblindness and its rising grip on the Supreme Court's race jurisprudence. Consider the following language:

> [C]laims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. . . . [R]eality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[48]

From this backdrop, one might expect Justice Brennan to characterize Davis's race-conscious policy as a countermeasure that mitigated pre-existing racial (dis)advantages. At a minimum, Justice Brennan would reject attempts to describe the school's modest intervention with a racial preference—let alone the legacy of Jim Crow policies that structured access to academic credentials. And yet, Justice Brennan acquiesced to certain colorblind frames:

> [T]here is absolutely no basis for concluding that Bakke's *rejection as a result of* Davis' use of *racial preference* will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of *racial preferences* for remedial purposes does not inflict a pervasive injury upon individual whites . . .[49]
>
> In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the *degree of preference* to be given is unavoidable, and *any given preference* that *results in the exclusion of a white candidate* is no more or less constitutionally acceptable than a program such as that at Davis.[50]
>
> This distinction does not mean that the *exclusion of a white* resulting from the *preferential use of race* is not sufficiently serious to require justification.[51]

---

[48] *Bakke*, 438 U.S. at 327.

[49] *Id.* at 375 (emphasis added).

[50] *Id.* (emphasis added).

[51] *Id.* (emphasis added).

Justice Brennan does not equate affirmative action with Jim Crow. Still, he contradicts the structuralist story that anchors his distrust of colorblindness. To begin, Brennan adopted a preference framing. Whatever his intent, his language implied that Davis gave an unfair race-based advantage to students of color. Or translated to components common to colorblind capture, Justice Brennan (a) misdescribed Davis's policy (as preferential); (b) downplayed race's relevance in facially neutral criteria; and (c) inverted racial advantage (by suggesting that race injured white students).

Justice Brennan's liberal colleagues displayed similar antipathy for colorblindness. Justice Blackman, for example, declared: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[52] And Justice Marshall, perhaps the most colorconscious Justice ever, described Reconstruction Era antiracist remedies as "special treatment" for Blacks.[53] This language arises within Justice Marshall's robust historically-laden defense of race-conscious remedies. Nonetheless, the rhetoric of "special treatment" sounds in the same register as "racial preference," both of which track rhetoric designed to malign antiracist efforts since the 19th Century.[54]

In *Bakke*, colorblind capture extended beyond the Supreme Court's liberal Justices. Davis, the formal defendant, did so too. To begin, Davis recognized that racial subordination rendered their facially-neutral process was unfair to students of color.[55] This was not some tangential observation. To appreciate how Davis offered a structuralist story, consider this (very long) heading from the first section of its brief:

> The Legacy of Pervasive Racial Discrimination in Education, Medicine and Beyond Burdens Discrete and Insular Minorities, as Well as the Larger Society. The Effects of Such Discrimination Can Not Be Undone by Mere Reliance on Formulas of Formal Equality. Having Witnessed the Failure of Such Formulas, Responsible Educational and Professional Authorities Have Recognized the Necessity of Employing

---

[52] *Id.* at 407.

[53] *See id*. at 397.

[54] *See Civil Rights Cases*, 109 U.S. 3, 23 (1883) ("When a man has emerged from slavery ... there must be some stage in progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.").

[55] Regents Brief at 69, 1977 WL 187977 (U.S.), 69 ("They are necessary guideposts on the long and as yet unfinished road to the end of subordination of historically subjugated and alienated minorities.").

> Racially-Conscious Means to Achieve True Educational Opportunity and the Benefits of a Racially Diverse Student Body and Profession.[56]

Simply put, Davis admitted that to get beyond race and racism, it needed to attend to race and racism.[57] In its briefing, Davis outlined how racial (dis)advantages compromised the goal of racial neutrality in standard medical school admissions processes. Davis rejected the proposition that facial neutrality could equal racial neutrality. Its race-conscious policy, in turn, was designed to promote fairness by "alleviating, in a modest but important way, . . . the suppression of racial minorities."[58] In short, Davis, framed its policy as a counter-preference that mitigated racial (dis)advantages that benefitted undeserving white applicants over more talented applicants of color.[59] It would be difficult to imagine a more cogent Colorconscious Story.

And yet, in the next sentence, colorblind capture crept it. Prior to *Bakke*, the Supreme Court had not determined whether strict scrutiny should apply to remedial racial classifications. To buttress its argument that strict scrutiny was inappropriate, Davis argued that "those who bear the *burdens* of such a program are neither members of *groups* especially susceptible to race-related injuries nor in need of protection from the results of normal political processes."[60] For present purposes, the key is Davis's suggestion that it "burden[ed]" certain "groups."

---

[56] *Id*.

[57] *See id.* at 9-10 ("Yet toward the end of the last decade, many governmental and private institutions, including this Court, came concurrently to the realization that a real effort to deal with many of the facets of the legacy of past racial discrimination unavoidably requires remedies that are attentive to race, that color is relevant today if it is to be irrelevant tomorrow.").

[58] *Id*. at 70; *see also id.* at 71 ("In this country such groups have been subjected to a network of restrictions and prejudices, to a matrix of repeated subjection to discrimination depicting them as inferior.").

[59] *See id.* at 56 n.62 (noting the argument that individuals like Bakke are "correct[ly] characterize[ed]" as the "incidental beneficiaries of past discrimination" against racialized groups). To appreciate the powerful pull of preference framing, one need only look to the source UC Davis cited for this proposition. *Id*. ("If they are excluded because of preferential policies, they may be put in the position they would have been in if the discrimination had never occurred.").

[60] *Id*. at 70. *See id.* at 68-73.

This framing, which arose elsewhere,[61] implies that Davis unfairly harmed students who did not benefit from the "Special-Admissions Program." This is the standard affirmative action critique. But as noted above, Davis explained that its program was necessary to "alleviat[e]" pervasive forces that "suppress[ed]" minority enrollment. Here and elsewhere, Davis distinguished between the social position of "groups" included within, and those excluded from, its "Special-Admissions Program." In essence, Davis created a foundation to argue that its policy countered social realities that differentially situated certain students—because of race- and class-based (dis)advantages—at the moment of admissions.[62] Any corresponding "burden," in turn, resides in the loss of that privilege.[63]

Beyond blunting this Colorconscious story, Davis's use of language reinforced the claim that racial affirmative action discriminates against whites. In other words, Davis reinforced a narrative of anti-white "reverse racism" that compromised the moral and legal force of its own policy.

This internal contradiction reflects an early manifestation of colorblind capture. Davis acknowledged that facially neutral practices rewarded inherited race- and class- advantages. And yet, by suggesting that its policy burdened whites, Davis obscured its own insight and enabled conservative frame that continues to dominate public discourse.

A similar dynamic is playing out in ongoing litigation at Harvard and UNC. The university defendants (and sympathetic judges) recognize race's enduring relevance. Nonetheless, the same actors defend affirmative action on terms that reinforce colorblind conceptions of race and racism—thereby compromises the case for even modest anti-racist reform.

---

[61] *See, e.g., id* at 78 ("Likewise this is not a case of a preference for minorities that serves no purpose whatsoever.").

[62] The "burden" description also contradicts the actual mechanics of Davis's Special Admissions Program, which was open to applicants of *any* race that could establish social disadvantage. *See id.* at 44-47 (describing special admissions policy); *See also* Joel Dreyfuss & Charles Lawrence III, *The Bakke Case: The Politics of Inequality* <PINCITE> (1979).

[63] *See* Harris & Narayan, *supra* note <*Preferential Treatment* [13]>. In fact, Davis marshalled a similar critique before the Supreme Court. *See* Petitioner's Brief at 46 ("[Bakke's] position is that *any* diminution in his chances for admission brought about by any reliance on racial criteria is forbidden by the Fourteenth Amendment."). What Davis failed to do, minus a buried footnote, was discredit the status quo as the product of inherited racial advantage. *See* Harris & Narayan, at 56 n.62.

B. Colorblind Capture Now: Defending Affirmative Action at Harvard and UNC

I now turn to litigation at Harvard and UNC destined for the Supreme Court. As I unpack below, the universities employ each of the four moves common to colorblind capture. They *misdescribe* their own policies; they *extract* race from facially-neutral criteria; they *downplay* racial (dis)advantage within their standard admissions process; and they *invert* who benefits from racial (dis)advantages. Notably, these moves are not unique to Harvard and UNC. To the contrary, their approach is the convention; colorblind capture is the norm, not the exception.

1. Misdescribing Affirmative Action

For decades, many on Left have misdescribed affirmative action as a "racial preference."[64] Harvard and UNC have largely abandoned the term "racial preference,"[65] turning instead to terms such as "tip" or "plus factor." Notwithstanding this rhetorical shift, Harvard and UNC continue to convey the same message: race-conscious admissions provide unearned racial advantages to Black students and harm more deserving white (and, increasingly, Asian) students.[66]

The following examples, from the parties' briefing,[67] illustrate this shift (in terminology) but continuity (in meaning):

---

[64] *See* Harris & Narayan, *supra* <Myth of Preferential Treatment>.

[65] Harvard and UNC largely avoid the term "racial preference." Yet even in these limited instances, the defendants fail to note that term misrepresents how race operates within their respective policies.

[66] This framing misdescribes most race-conscious admissions policies because it connotes a baseline free from racial (dis)advantage. *See infra* Part III.

[67] The lower court opinions upholding the respective admissions policies, and the Biden Administration's brief objecting to certiorari, employ similar language. *See SFFA v. Harvard*, 980 F.3d 157, 170 (1st Cir. 2020) ("Harvard has used a system of '*tips*' in its application review process. Tips are *plus factors* that might *tip* an applicant into Harvard's admitted class.") (emphasis added) ("*SFFA v. Harvard II*"); Brief for United States as Amicus Curiae, No. 20-1199 https://fingfx.thomsonreuters.com/gfx/legaldocs/zjvqkyybzvx/harvard_brief.pdf ("Harvard may award a '*tip*' that improves an applicant's chances of admission. Tips are given based on various characteristics, including . . . race. Harvard also gives 'tips' to recruited athletes, legacy applicants, applicants on the Dean's Interest List, and children of faculty and staff.") (emphasis added).

- Admissions officers may consider an applicant's race or ethnicity as one factor among many; race or ethnicity may function as a *"tip"* or *"plus"* that contributes to admission.[68]
- OCR[] . . . found that . . . the *"tip"* for race or ethnicity provided an "opportunity for Asian American ethnicity to be positively weighed in the admissions process."[69]
- The court also rejected SFFA's argument that Harvard uses race as more than a "plus" factor, finding that Harvard does not consider race in a "rigid and mechanical manner," but rather permits admissions officers to consider race as a "tip" in a "holistic evaluation" of each applicant's potential contributions to its educational program.[70]
- The lower courts found that Harvard considers race flexibly, only as one factor among many, and only as a plus.[71]
- Any factor (race or any other) may be enough in an individual case to properly tip the scales toward admission.[72]

On the surface, adopting terms like "tip" and "plus factor" enjoys certain appeal. Both terms convey a more innocuous process than one characterized as a "racial preference." Moreover, the terms suggest that race is operative, but to a limited degree—thereby responding to the Supreme Court's admonition that racial classifications "be employed no more broadly than the interest demands."[73]

But the benefits are shortsighted because the terms reinforce colorblind logic. Whether a "tip" or a "preference," the message is clear: affirmative action departs from race-neutral baseline and places a "racial thumb on the scale."[74] Today's vernacular may be less charged, but it still (a) equates facial neutrality with racial neutrality; (b) "admits" that race-consciousness corrupts what had been a "racially neutral merit-based competition."[75]

---

[68] Defendants' Brief, *SFFA v. Harvard II*, 2020 WL 2521577 at 14. (emphasis added).

[69] *Id*. at 18 (emphasis added).

[70] *Id*. at 25.

[71] Defendant's Opposition to Certiorari at 23.

[72] *Id.*

[73] *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

[74] Carbado, *supra* note <Footnote 43 [13]>, at 1173.

[75] *Id.*

To be clear, the term "tip" does not necessarily connote a departure from racial neutrality. But to avoid this connotation, Harvard and UNC would need to identify race-consciousness as a tool to counter existing racial (dis)advantage. Neither did. If anything, the defendants marshalled a broader narrative that obscured race's broad relevance within facially neutral components of their respective policies.[76] This occurred, in part, through the process of racial extraction—to which I now turn.

2. Extracting Race

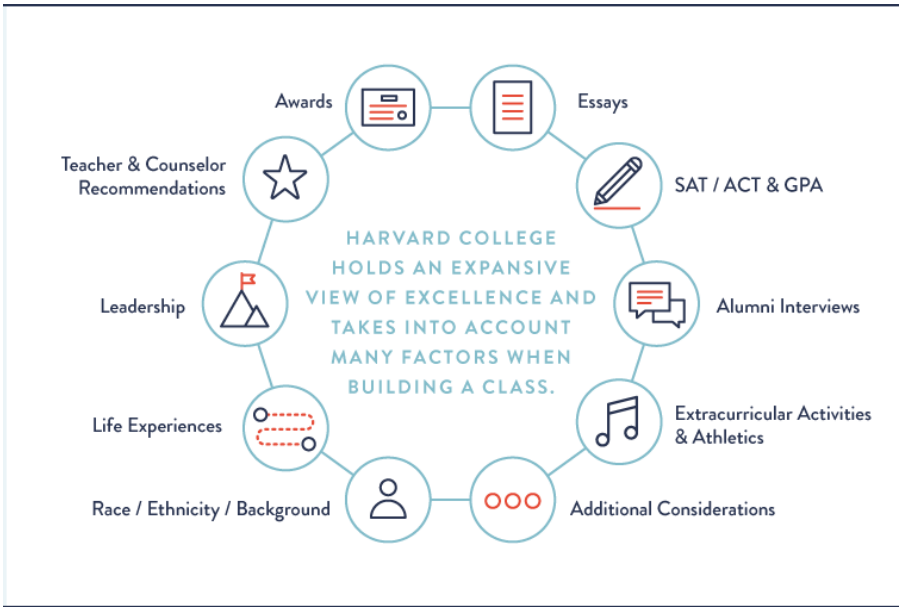
Harvard and UNC name structural racism. But they also reproduce colorblind conceptions of race and racism by extracting race from other formal criteria. In so doing, the universities (a) reduce race to racial identity, and (b) treat racial identity as a natural, independent, and isolated variable. This process of racial extraction is not unique to affirmative action advocates; rather, it reflects the prevailing conception of race across lay and academic discourse.[77]

---

[76] Moreover, Harvard positions racial diversity against academic excellence, thereby reinscribing the proposition that affirmative action benefits academically inferior applicants. Opp. to Cert. at 8 ("It concluded that there currently are no workable alternatives that would allow Harvard to achieve the educational benefits of diversity while also maintaining its demanding standards of excellence."); *id.* at 24 ("And Harvard need not choose between pursuing academic excellence and the educational benefits of diversity.").

[77] Social scientists, for example, tend to treat race as an independent variable that can explain varied outcomes. *See* Devon Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 155 (2014) ("[T]he standard approach is to treat race (assumed to be an easily identified and 'natural' demographic variable) as an independent variable—the causal agent of some dependent variable or outcome (for example, test scores)."); Laura Gomez *A tale of two genres: on the real and ideal links between law and society and critical race theory*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY (2004). As a matter of doctrine, this standard conception of race informs the diversity rationale (which views "race as one factor among many") and the command that universities explore "race-neutral alternatives." *See SFFA v. Harvard II*, 980 F.3d at 180 (1st Cir. 2020) ("The court examined six race-neutral alternatives . . . (1) eliminating Early Action; (2) eliminating ALDC tips; (3) improving recruiting efforts and financial aid; (4) admitting more transfer applicants; (5) eliminating standardized testing; and (6) instituting place-based quotas.").

The following graphic, which Harvard created to describe its admissions process, illustrates this dynamic.



On the surface, the graphic appears agnostic with respect to competing racial ideologies; it simply identifies race as one consideration among many.[78] But this portrayal is not agnostic. Rather, it employs a formalist conception of race that reduces racial identity to "an easily identified and 'natural' demographic variable"[79] that exists independent of the other admissions criteria.

To be fair, it is difficult to tell a comprehensive racial story without isolating race from other social determinants and axes of identity.[80] The danger, however, is that well-intended attempts to isolate "race" can reinforce

[78] UNC describes race in similar terms. UNC Dist. Ct. Opinion at 29-30 ("Race is one of more than forty criteria considered in every application, and the evaluation process is flexible enough to consider all of the pertinent elements of diversity that may be present for any particular applicant.").

[79] Carbado & Roithmayr, *supra* note <crt meets social science [79]>, at 155.

[80] Albeit somewhat reductionist, this describes a core insight from intersectionality theory. *See* Devon Carbado, *Critical What What*, 43 CONN. L. REV. 1593, 1613-14 (2011) ("In describing racism as an endemic social force, CRT scholars argue that it interacts with other social forces, such as patriarchy, homophobia, and classism.").

a colorblind story that treats racial identity[81] as a natural and self-realizing personal trait. This, in turn, invites the false dichotomy between race-conscious practices (where race is ostensibly operative) and facially-neutral practices (where race is ostensibly inoperative). In other words, racial extraction silos race to the act of race-consciousness.

I am not suggesting that race operates in a uniform manner across each of Harvard's admissions criteria. Even within a single criterion—e.g., standardized test scores—race often operates in multiple and distinct ways.[82] The more modest point is that racial (dis)advantages shape many, if not all, of Harvard's admissions criteria.[83] Yet by discursively and visually isolating race from other considerations, Harvard obscures this story.

Consider how Harvard locates race outside of its "academic rating," which "summarizes the applicant's academic achievement and potential based on factors including grades, standardized test scores, recommendation letters, academic work and prizes, and the strength of the applicant's academic program."[84] Harvard consistently treats these considerations as neutral, objective, and—critically—non-racial.[85] The following statement is illustrative:

---

[81] By "racial identity," I refer to the racial categories (e.g., Black and white), cultural "rules" that determine who belongs in a given racial category (e.g., the rule of hypodescent), and the meanings associated with a given category (e.g., predisposed to criminality or law abiding).

[82] *See* Jonathan Feingold, *Equal Protection Design Defects*, 91 TEMPLE L. REV. 513 (2019) (outlining how standardized test scores tend to under-measure the existing academic talent and potential of students from stigmatized groups because (a) structural forces unevenly distribute access to critical test-taking resources and (b) pervasive racial stereotypes compromise the test performance of highly motivated, academically talented, and well-prepared students from negatively stereotyped groups).

[83] *See* Feingold, "*All (Poor) Lives Matter": How Class-Not-Race Logic Reinscribes Race and Class Privilege*, U. Chi. L. Rev. Online 47 (2020); Devon W. Carbado, Kate M. Turetsky and Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. Rev. Disc. 174 (2016).

[84] Defendant's Brief.

[85] Exacerbating this tendency, Harvard and UNC objected to evidence that would have revealed how their admissions policies bestow unearned race and class privileges to wealthy white applicants. *See* Jonathan Feingold, *Ambivalent Advocates* (manuscript on file with author).

> *Comparing race to other factors* in the admissions process, SFFA relies principally on a rudimentary statistical analysis that the district court rejected because it "*over emphasize[d] grades and test scores*." As Professor Card showed and as the district court found, 'the *magnitude of race based tips* is not disproportionate to the magnitude of other tips applicants may receive."[86]

This passage, alongside the above graphic, suggests that race operates within a single site of Harvard's admissions process: the formal consideration of race. In essence, Harvard discursively and visually stripped race from its facially-neutral criteria—thereby reinforcing the colorblind claim that university admissions are race-neutral *but for* affirmative action.

Consider, also, how Harvard discusses "legacy preferences"—that is, the admissions boost Harvard extends to the children of alumni.[87] By most metrics, legacy preferences confer an unearned race (and often class) bonus to (wealthy) white applicants. One recent study concluded that 43% of Harvard's white admits benefitted from legacy or related preference.[88] This

---

[86] Harvard Appellate Brief (internal citations omitted). UNC employed near identical language. *See* Def.'s Post Trial Brief at 100 ("Professor Hoxby found that *race* and ethnicity *plays a smaller role than standardized test scores*—an analysis that Professor Arcidiacono made no effort to conduct.") (emphasis added).

[87] The First Circuit portrayed Harvard's legacy preference in similar terms. *SFFA v. Harvard II*, 980 F.3d at 171 ("At the time, Harvard reviewed applications using a process like the one challenged in this lawsuit in the sense that it used a rating system and tips for race and ALDC applicants."). Beyond legacy preferences, universities often value aspects of applicant identity unconnected to academic ability that disparately benefit white applicants. *See* Tim Wise, *Whites Swim in Racial Preference,* ALTERNET (Feb. 2, 2003), https://racism.org/articles/basic-needs/affirmative-action/1105-affirm20-1 (noting that 58 points (out of a total of 150) available points to University of Michigan applicants disparately—or exclusively—benefitted white applicants).

[88] Beyond legacy status, Harvard provides a bonus to recruited athletes, individuals on the "dean's list" (who are, by definition, wealthy and/or well-connected), and the children of faculty and staff. *See* Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LABOR & ECON. 13 (2020) http://public.econ.duke.edu/~psarcidi/legacyathlete.pdf ("[A] white typical applicant with a baseline probability of admission of 10%. If this applicant were switched to a legacy, holding all other characteristics fixed, the admission probability would rise to 49%."). According to the study, each of these "preferences primarily benefit white students." *Id*. at 19. This occurs, in part, because 70% of Harvard's ALDC applicants are white. *See id.* at 3. In contrast, white applicants comprise 40% of Harvard's non-

number drops to 16% for non-white admits.[89] Even among legacy applicants, Harvard admits white legacy applicants at a higher rate than Black legacy applicants.[90] By one estimate, were Harvard to eliminate all ALDC preferences, "[t]he admit race for all white ALDC applicants would fall from 43.6% to 11.4%, a drop of over 30 percentage points."[91] Each year, hundreds of white students would not enter Harvard *but for* inherited race- and class-advantage.

For present purposes, I provide these limited data points because they quantify the claim that legacy preferences are racial preference. Given the histories of racial exclusion at elite universities, this is not surprising. In effect, legacy preferences function as "grandfather clauses"—the facially-neutral exemption that permitted poor whites to vote when law would have otherwise prohibited it.[92]

Harvard, in turn, could identify legacy as a racial preference that invites, if not necessitates, affirmative action as a countervailing antidiscrimination measure.[93] Harvard does not take this route. If anything, it avoids its legacy policy—let alone the unearned advantages it confers.[94]

This avoidance manifests even within the above admissions graphic. That image portrays "race / ethnicity / background" as one of nine discrete admissions considerations. Legacy preferences do not appear one of the eight

---

ALDC applicant pool. *See id*. Some of these statistics entered the First Circuit's opinion. *See SFFA v. Harvard II*, 980 F.3d at 171 (noting higher admissions rates and white make-up of legacy applicants). Nonetheless, the panel treated legacy as a non-racial consideration and never conceptualized racial affirmative action as a mechanism that countered the white racial advantages legacy confers.

[89] *See id*.

[90] *See id*.

[91] *See id.* at 15.

[92] *See* Alan Greenblatt, *The Racial History of the "Grandfather Clause,"* Code Switch, NPR (Oct. 22, 2013), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause.

[93] Of course, a more direct remedy would be for Harvard to eliminate legacy preferences from its process. One step further, Harvard might stop admitting legacy students, regardless of their credentials.

[94] Harvard concedes that legacy bonuses are unrelated to a student's academic merit. *See SFFA v. Harvard II*, 980 F.3d at 178 ("Preferencing legacy applicants helps to cement strong bonds between the university and its alumni, fosters community-building, and encourages alumni to donate their time and money to support Harvard.").

other considerations. Rather, Harvard buries legacy preferences within an ellipsis that bears the name "Other Considerations."

When Harvard discusses legacy, it describes the policy as just another "tip."[95] By employing the same term for affirmative action and legacy preferences, Harvard invites a false equivalence in kind and degree. As for kind, the common language suggests that both considerations confer "preferences" that depart from objective measures of merit.[96] The only distinction concerns the identity of the beneficiaries.[97] Harvard, in effect, erodes any meaningful distinction between a policy (legacy) that rewards and reproduces inherited social advantage and one (affirmative action) that counters that very privilege. In essence, Harvard reifies the same colorblind logic that denies any meaningful difference between Jim Crow and policies designed to remedy its legacy of exclusion and subordination.

But Harvard does more than obscure any qualitative distinction. By applying the imprecise term "tip," Harvard understates the outsized advantage legacy applicants enjoy.[98] Legacy "tips" exceed that of any other consideration.[99] By one account, the "typical" white applicant would see their admission probability increase from 10% to 65% if they were a double

---

[95] Harvard's Opposition to Cert. at 5 (explaining that admissions officers "may give an applicant a 'tip' for unusual intellectual ability; strong personal qualities; the capacity to contribute to racial, ethnic, socioeconomic, or geographic diversity; outstanding creative or athletic ability; or excellence in other dimensions. Readers may also give 'tips' to recruited athletes and children of alumni, donors, faculty, or staff (ALDCs).").

[96] UNC confers legacy preferences for out-of-state applicants. *See* https://admissionslawsuit.unc.edu/lawsuit/fact-check/.

[97] A claim common to public discourse is that legacy preferences constitute "affirmative action" for whites. *See, e.g.*, *College Legacy Admissions: Affirmative Action for Whites*, Letter, NEW YORK TIMES (Aug. 6, 2017), https://www.nytimes.com/2017/08/06/opinion/college-legacy-admissions-affirmative-action-for-whites.html. This common critique it reflects the recognition that legacy preferences function as white racial preferences, and incorporates the dominant presumption that affirmative action comprises "racial preferences" for people of color.

[98] A similar analysis extends to "low income students." *See SFFA v. Harvard II*, 980 F.3d at 172 ("OIR[] . . . found that 'low income students clearly receive a 'tip' in the admissions process' but that 'the tip for legacies and athletes is larger' than for low income applicants.").

[99] *See supra* note 97 (discussing magnitude of legacy preferences).

legacy.[100] In contrast, were this "typical" candidate covered by Harvard's affirmative action policy, their likelihood of admission would increase to 36%.[101]

To be clear, these statistics should be taken with a grain of salt. As with many admission rate calculations, the underlying analyses omit multiple variables that shape the actual admissions process.[102] Moreover, the counter-factual ("what if a white student were black") inaccurately assumes that one can alter race and hold all other variables constant. But even recognizing these limitations, the lesson is clear: Harvard misrepresents legacy preferences—both with respect to their qualitative substance and impact. This approach makes sense from an affirmative action critic. But not affirmative action's formal champion. Particularly at Harvard, legacy admissions call for a reframe from *whether* race operates within admissions to *how* it does.

In a recent decision upholding Harvard's admissions policy, the First Circuit seemed poised to make this turn when it foreshadowed "describ[ing] the background against which Harvard's tip tak[es] race into account."[103] But rather than identify racial (dis)advantages—such as legacy preferences—embedded across Harvard's admissions process, the Court siloed race to the moment of formal race-consciousness. One is hard-pressed to fault the court; it did little more than follow Harvard's lead.[104]

3. Downplaying Race

As noted above, many on the Left recognize that facial neutrality does not eliminate racial (dis)advantage. But even if one accepts this premise, a different question concerns the magnitude of racial (dis)advantages—are they marginal or defining features of an admissions regime. For affirmative action advocates, one might expect the stronger claim. Harvard might, for example, offer the following assessment: "Race permeates the admissions process to

---

[100] *See* Arcidiacono et al., *supra* note <legacy [92]>, at 13.

[101] *See id*.

[102] *See SFFA v. Harvard II*, 980 F.3d at 172 ("This model . . . suffered from the same problems and limitations as OIR's earlier models in that it omitted many variables that Harvard actually considered in its admissions process.").

[103] *SFFA v. Harvard II* at 172.

[104] *See supra* Part II.B.

such an extent that it must be a predominant factor as the University makes its decisions."[105]

This statement buttresses the claim that affirmative action can render race less relevant in admissions. It may be surprising, therefore, that the statement comes from neither Harvard nor UNC. To the contrary, it comes from SFFA, the plaintiff in both suits.[106]

Rather than agree with this claim (and reiterate affirmative action's counter-preference function), Harvard and UNC downplay race's relevance. The following statements are illustrative:

- SFFA asserts . . . that "[r]ace is often the reason that someone gets lopped," i.e., removed from the tentatively admitted class due to class size constraints. That too is false.[107]
- Even SFFA's expert conceded that "a large number of applicants to Harvard will be rejected without race ever becoming a factor."[108]
- As the district court found, moreover, race "never becomes 'the defining feature' of applications," consideration of race never results in the admission of unqualified applicants, race-based tips are "not disproportionate to the magnitude of other tips," and race-based tips "are not nearly as large" as those approved by the Court in Grutter.
- "Thus, no matter which preferred model is used—[Defendant's] or [Plaintiff's]—race and ethnicity is not the dominant factor in whether an applicant is admitted or rejected across the University's admissions process.'[109]

---

[105] *See* Dist. Ct. Op. at 31 ("Plaintiff contends that the consideration of race permeates the admissions process to a degree that suggests race is a predominant factor.").

[106] *See also* Jay Caspian Kang, Where Does Affirmative Action Leave Asian-Americans?, N.Y. TIMES MAG. (Aug. 28, 2019), https://www.nytimes.com/2019/08/28/magazine/affirmative-action-asian-american-harvard.html (quoting Edward Blum) ("We believe that a student's skin color or ethnic heritage should not be used to help or harm that student's prospects of being admitted to a college or university.").

[107] Harvard Opp. to Cert. at 16.

[108] Harvard Opp. to Cert. at 23.

[109] Def.'s Post-Trial Brief at 44. *See also* Dist. Ct. Opinion ("[R]ace plays a role in a very small percentage of decisions: 1.2% for in-state students and 5.1% for out-of-state students."); *see id*. ("[T]he evidence tends to show that race is not a predominate

- "Thus, taken as a whole, the record evidence establishes that race and ethnicity is not the dominant factor in the University's admissions process."[110]

One can understand why Harvard and UNC take the above approach. The Supreme Court requires universities to evaluate each applicant "as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[111] In the standard affirmative action litigation, the defendant prove that its "racial classification" is narrowly tailored to promote a "compelling interest." The preceding admonition informs the narrow tailoring prong and communicates that race may inform the admissions process, but to a limited extent. Or borrowing the Court's language, a university may consider applicant race, but may not make race a "defining feature" of an applicant's file.

But even if one accepts that race *should not* be a defining feature, that principle does not answer whether facial neutrality *or* race-consciousness gets you there. Put differently, even if the Constitution condemns selection processes in which race predominates, there is no inherent reason why the Constitution prefers facially neutral processes. That conclusion requires the empirical presumption that race and racism are inoperative until affirmative action arrives. In short, Harvard and UNC could work within existing doctrine but challenge the prevailing presumption that facial-neutrality equals racial-neutrality. Accordingly, rather than downplay race, the schools could emphasize the myriad racial (dis)advantages embedded within their standard facially-neutral process.

This discursive shift might make no difference to a hostile and ideologically motivated Supreme Court. But it matters. Identifying race as a

---

factor in the University's candidate evaluations."); *see id*. ("Plaintiff has provided no evidence that UNC . . . has allowed race to become a predominate factor in the admissions process, or has failed to adequately reflect on the role race plays in admissions decisions.").

[110] Def.'s Post-Trial Brief at 100. *See also id*. at 42-43 (comparing the relative impact of race and standardized test scores on admissions outcomes).

[111] *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003). *See also SFFA v. Harvard II*, 980 F.3d at 190 (citing Gratz & Fisher II for proposition that race not "become the decisive factor in admissions."). This doctrinal backdrop helps to explain why the student intervenors, who otherwise employ a counter-preference framing, also downplay race's overall relevance. *See* Intervenors Post-Trial Brief at 30 ("To be clear, race may have played a limited role in the admissions of Ms. Cole and Ms. Vasquez-Rodriguez, but there is absolutely nothing suspect about a university ascribing value to an applicant's ability to contribute to campus diversity based, in part, on their race.").

defining feature of standard selection processes counters the colorblind logic that invite predictable lines of legal and political attack. The alternative—where Harvard and UNC still reside—countenances a colorblind story that rationalizes the status quo and fuels a regressive assault on antiracism itself.

4. Inverting Racial Advantage

There are moments when Harvard and UNC recognize racial (dis)advantage within their respective admissions policies. But rather than surface criteria that confer white racial advantage, the defendants suggest that affirmative action confers racial advantage to students of color. This move—"inverting race"—completes the process of colorblind capture. In effect, the universities reduce the question to whether purported anti-white discrimination is permissible. Absent from discussion is whether affirmative action is sufficient to neutralize preexisting racial (dis)advantages that harm students of color.

To crystalize the concept of racial inversion, consider the following four statements:

- "The consideration of race only ever benefits students who are otherwise highly qualified, and it is not decisive even for those candidates."[112]
- "Professor Arcidiacono acknowledged that *race makes a difference only for* a 'competitive pool' of applicants that is 'defined by a variety of variables and factors' other than race."[113]
- "Simply because race and ethnicity might tip the scale for some students who are 'on the bubble' of being admitted or rejected does not mean that race and ethnicity plays a dominant role in the admissions decision and across the entire pool of applicants."[114]

---

[112] Harvard Opp. to Cert. at 6.

[113] Harvard CA1 brief at 63. Harvard conveys a similar message when it denies imposing an "undue burden on any racial group." *See id*. at 65-68 ("Addressing Harvard's consideration of Asian-American applicants under the rubric of 'undue burden,' the court acknowledged that Asian-American (and white) students make up a smaller share of Harvard's class than they might under a race-neutral system.").

[114] Def.'s Post-Trial Brief at 51; *see also id*. at 100 ("[R]ace explains, at most, a very small share of applicants' admissions outcomes.").

- "[Plaintiff's expert] admitted that race is 'not a dominant factor for white applicants.'"[115]

Even if inconsistent with a Colorconscious Story, racial inversion flows from the preceding elements of colorblind capture. When a university (a) misdescribes affirmative action, (b) extracts race, and (c) downplays race, it portrays a world in which race is inoperative but for affirmative action. From this backdrop, it only follows that racial advantage, if present at all, benefits affirmative action's beneficiaries.

Multiple aspects of racial inversion deserve attention. To begin, the universities emphasize that racial advantage—via affirmative action—only benefits "highly qualified" students of color. This framing erases the myriad race/class advantages that benefit wealthy white students.[116]

It also obscures how racial (dis)advantages shape the pool of "qualified students." By isolating racial (dis)advantage to the moment of admissions, Harvard and UNC tell a colorblind story about each student's trajectory. The universities erase how race shaped students' access to the societal resources necessary to compile a competitive admissions file. As a result, the universities suggest that something other than race and racism explain why white (and a subset of Asian students) are over-represented among "highly qualified" students.

In both lawsuits, inverting racial advantage facilitates anti-affirmative action rhetoric. To begin, this tendency fuels the narrative that race-consciousness discriminates against Asian Americans.[117] Harvard and UNC deny that they discriminate against Asian applicants. But their broader

---

[115] *Id*. at 99; *see also* Dist. Ct. Opinion at 84 ("[Plaintiff's expert testimony] suggests that, while there might be a set of students who would see a sizable "bump" in their admissions probability in the model because of their race, a typical student would see a very minimal difference in their odds of being admitted.").

[116] At Harvard, racial inversion denies the racial advantage embedded in legacy preferences—a boost without which 75% of white legacy applicants would gain admission. At UNC, racial inversion denies North Carolina's legacy of desegregation resistance—a legacy that continues to this day.

[117] This narrative is not new. *See Fisher,* 136 S. Ct. at 2227 (Alito, J., dissenting) ("The majority's assertion that UT's race-based policy does not discriminate against Asian–American students defies the laws of mathematics. UT's program is clearly designed to increase the number of African–American and Hispanic students by giving them an admissions boost vis-à-vis other applicants. . . . Given a 'limited number of spaces,' providing a boost to African–Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission. . . . But the UT plan discriminates *against* Asian–American students.").

affirmative action stories mask white racial advantage and reinforce narratives of Asian victimhood.[118] In so doing, Harvard and UNC facilitate the claim that affirmative action pits students of color against one another.[119] As a result, the plaintiffs need not construct a competing narrative; they can ride the universities' own affirmative action story.

Colorblind capture is not inevitable. But to avoid it, affirmative action advocates must adhere to a Colorconscious conceptions of race and racism. In this next section, I outline how university defendants might do so.

III. EVADING COLORBLIND CAPTURE

Above, I explored how affirmative action advocates often traffic in colorblind conceptions of race and racism. Colorblind capture is ubiquitous. But it is not inevitable. To illustrate, I now outline how Harvard and UNC could defend their respective policies. My goal is modest: outline how advocates can defend race-conscious admissions without abandoning a colorconscious admissions story. Among other benefits, doing so invites an underlying reframe: rather than ask *whether* race operates within admissions, ask *how* it operates.

To begin, I outline how affirmative action can reduce race's relevance *before*, *during*, and *after* admissions. Doing so furthers three distinct ends: (1) *fortify* standard doctrinal arguments (e.g., the diversity rationale), (2) *leverage* dormant doctrinal arguments (e.g., Justice Powell's anti-preference rationale), and (3) *challenge* existing doctrinal structures (e.g., applying strict scrutiny to remedial racial classifications).[120] From here, I identify two additional arguments that illuminate the predominance of race in standard facially-neutral policies.

Two notes before proceeding.

---

[118] *See* Jonathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus,* 107 CALIF. L. REV. 707 (2019).

[119] *See id*; Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590 (2017).

[120] Such an approach would better approximate the multi-front offensive that SFFA has leveraged against Harvard and UNC. SFFA has argued (1) that the universities violate existing law and (2) that the Supreme Court should overturn precedent in ways that render doctrine less hospitable to affirmative action. *See* Complaint, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll*., 308 F.R.D. 39 (D. Mass. 2015), aff'd., 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176) ("*SFFA v. Harvard 2015*"); Complaint, *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954) ("*SFFA v. UNC"*).

First, the following is not a one-size-fits-all recipe for defending race-conscious admissions. Advocates should tailor arguments to an institution's specific policy and local context and history. This applies to UNC (which formally excluded Black applicants and resisted desegregation) and Harvard (which was among the first elite universities to adopt race-conscious admissions). Still, most—if not all—institutions can employ the following roadmap to reinforce a colorconscious story that repositions affirmative action as essential antidiscrimination.

Second, no fact, argument, or rationale will persuade five sitting Justices to preserve race-conscious admissions.[121] But advocates should not let the Justices set the terms of engagement.[122] If ever there were a time to mobilize the most compelling case for race-conscious admissions, it is now.[123] The alternative endangers more than affirmative action in higher education.[124] Affirmative action remains the discursive site where we, as a country, debate

---

[121] Given the Supreme Court's current hostility to civil rights, advocates may be weary of marshaling novel arguments that the Court could reject—and thereby further restrict race-conscious practices. This reality invites a strategy of active avoidance—both with respect to appearing before the court and preserving arguments therein. As to the former, it is unlikely that university defendants will be able to avoid Supreme Court review without abandoning race-conscious admissions. Even if a successful buffer against creating bad law, this strategy would have the same effect: the end of affirmative action. A distinct set of questions might include the following: (1) How can university defendants rally public support around affirmative action without exposing race-conscious practices to unnecessary judicial scrutiny? (2) How might university defendants mitigate racial (dis)advantages even in the absence of affirmative action? (3) How might universities leverage high-profile litigation to defuse affirmative action myths that compromise broader anti-racist efforts?

[122] *See* Carbado, *supra* note <Footnote 43 [13]>, at 1168 ("At the very least, liberal supporters of affirmative action, on the Supreme Court and elsewhere, ought to put their best foot forward when they defend the policy, which means reconceptualizing affirmative action as a countermeasure.").

[123] Moreover, the law is not static. Arguments unsuccessful today might nonetheless bear future fruit. *See* Carbado, *supra* note <Footnote 43 [13]>, at 1130 ("Given that the Court has grown even more conservative as a result of its recent additions, and the new challenges to affirmative action in the judicial pipeline, if ever there was a time for liberal Supreme Court justices to play racial justice offense, it is now.").

[124] *See* Carbado, *supra* note <Footnote 43 [13]>, at 1173 (It would be worrisome, to say the least, if such conflations and oversimplifications became the basis for the conservative Supreme Court justices to adjudicate affirmative action as unconstitutional per se. Whether liberal supporters of affirmative action realize it, they would be implicated in that outcome.").

the enduring relevance of racism in America. In this moment of anti-antiracist backlash, defending affirmative action as a "preference"—even if justifiable—normalizes colorblindness and delegitimizes antiracism itself.

A. "Race Matters" Before, During, and After Admissions

1. Before Admission: Legacies of Racial Exclusion

In the wake of Jim Crow, federal courts recognized that the Constitution permits entities to employ race-conscious measures to remedy their own discrimination.[125] Within a generation, this "remedial justification" began to encounter "political and legal obstacles."[126] Among other hurdles, the Supreme Court has circumscribed the meaning of unlawful "discrimination"[127] and heightened the evidentiary burden affirmative action defendants must overcome.[128] These obstacles help to explain why universities have discarded remedial rationales to defend their admissions

---

[125] *See Fisher v. Texas*, 570 U.S. 297, 317 (2013) (Thomas, J., dissenting).

[126] Kang & Banaji, *supra* note <*Fair Measures* [41]>1067–68; Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 92 (1986). Here, I use the term "remedial defense" and "remedial justification" interchangeably to capture the rationale that an entity may, consistent with the Constitution, employ race-conscious measures to remedy its own prior discrimination. This differs from remedial measures designed to ameliorate "societal discrimination," a rationale The Supreme Court has rejected. *See Bakke,* 438 U.S. at 310 ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . . That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.").

[127] Given the Supreme Court's reluctance to find cognizable discrimination in cases spanning *Richmond v. Croson*, 488 U.S. 469 (1989), *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), and *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021)—all involving strong evidence of discrimination—one might question whether Harvard or UNC could fare any better.

[128] *See* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH J. RACE & L. 263, 307 (1999), at 307 (explaining that a successful remedial defense requires a university to "demonstrate a 'strong basis in evidence for [its] conclusion that remedial action was necessary.'"); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness,* 58 UCLA L. REV. 73 (2010).

policies.[129] These hurdles do not, however, justify abandoning remedial rationales—which both Harvard and UNC have done.[130]

To begin, bridging past to present enables universities to tell a thicker story about why race still matters.[131] This act of truth telling comprises an important intervention in itself—particularly against a backdrop of growing campaign to erase the past through book bans and educational gag orders.[132]

---

[129] *See* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 322 (2017) ("Because of the legal obstacles associated with articulating and maintaining a race-conscious affirmative action program for purposes of remedying past discrimination, those seeking to utilize a race-conscious affirmative action program are more likely to prevail in court if they instead choose to articulate a desire to achieve diversity as the rationale for such a program."). A separate explanation is that remedial rationales force universities to broadcast ugly institutional stories that could invite legal liability. *See* Feingold, *supra* <*Ambivalent Advocates*>; Jenkins, *supra* note <Foxes Guarding the Chicken Coop [134], at 307 ("[T]he *Croson* standard places great weight on evidence that would raise an inference of liability against the government under the Equal Protection Clause and 1964 Civil Rights Act. . . . [T]hat same showing creates a prima facie case of unlawful discrimination against the affirmative action defendant vis-à-vis excluded minorities.").

[130] Harvard inaccurately contends that student body diversity is the only compelling interest available to defend race-conscious admissions. *See* Harvard's Response to Motion to Intervene, *SFFA v. Harvard 2015*, 308 F.R.D. at 39. Some lower federal courts have adopted this misplaced position, which appears to derive from imprecise language in Justice Kennedy's *Fisher I* opinion. *See SFFA v. Harvard 2015*, at 51 ("The Court, however, has also suggested that a university may not employ racial classifications to remediate past instances of discrimination or injustice, because a 'university's 'broad mission [of] education' is incompatible with making the 'judicial, legislative, or administrative findings of constitutional or statutory violations' necessary to justify remedial racial classification.'"). Reading Justice Kennedy's *Fisher* opinion alongside Justice Thomas' dissent, the most supportable reading is that Justice Kennedy was reiterating that "societal discrimination" does not justify affirmative action—not that a university cannot employ race-conscious admissions to remedy its own discrimination.

[131] Tom Foreman Jr., *UNC Protesters Cite Ongoing Frustration Amid Tenure Dispute*, ASSOC. PRESS (June 25, 2021).

[132] *See* Jeffrey Sachs, *Scope and Speed of Educational Gag Orders Worsening Across the Country,* PEN America (Dec. 13, 2021), https://pen.org/scope-speed-educational-gag-orders-worsening-across-country/. Kimberle Crenshaw, King was a critical race theorist before there was a name for it, LA Times (Jan. 17, 2022) ("[CRT] has become the target of coordinated efforts to stigmatize and erase generations of antiracist knowledge, advocacy and history. The objective is both to disappear antiracism's history and to deny its contemporary salience.").

When elite schools deny or diminish the past's imprint on the present, the cost transcends a missed opportunity to defend affirmative action. Such narratives also feed regressive narratives that locate racism in an ignoble past.

But even as a matter of law, the remedial justification enjoys a stronger constitutional mooring than other viable defenses—including the diversity rationale.[133] Even Justice Thomas, the Court's most vocal affirmative action opponent, recognizes the remedial defense:

> [T]he Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide a strong basis in evidence for its conclusion that remedial action [is] necessary.[134]

It is one thing for Thomas to identify a valid defense (in the abstract) and quite another for him to accept it (in actual litigation). Only a naïve reader would confuse Justice Thomas' endorsement of the remedial rational with a commitment to uphold affirmative action when a record reveals past discrimination.[135] At the same time, there is little reason to believe the diversity rationale—where Harvard and UNC place their eggs—would fare any better before the current Court.

At bottom, the remedial defense offers a doctrinal anchor to implicate histories of racial exclusion that continue to compromise racial inclusion in the present.[136] By extension, litigation grants universities an elevated platform to publicly account for their own legacies of racialized segregation and

---

[133] *See* Jenkins, *supra* note <*Foxes Guarding the Chicken Coop* [134]>, at 323 ("[*Croson* and *Adarand*] reaffirmed . . . that government bodies . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.") (quotation marks omitted).

[134] *Fisher v. Texas*, 570 U.S. 297, 317 (2013) (Thomas, J., dissenting).

[135] *Cf.* Samuel Issacharoff*, Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. L. F. 11, 12–13 (2002) ("Even then, it was clear that the defense of an ongoing legal obligation to take affirmative steps to integrate a particular university's student body was undoubtedly limited to a very small subset of the leading institutions that engage in affirmative action. Moreover, as reflected in the recent University of Georgia litigation, even the once-segregated institutions are increasingly removed from that formal discriminatory past.").

[136] The District Court, relying on one of the intervenors' expert witnesses, noted that UNC's discriminatory past might support its admissions policy. Notably, the court linked this evidence to the diversity rationale. *See* Dist. Ct. Opinion n.5.

subordination—and thereby counter regressive narratives that deny how racism imprinted our collective past and present.[137]

Neither Harvard nor UNC have embraced this opportunity. In fact, both have resisted intervenor attempts to develop a record necessary to support a remedial defense.[138] This reluctance to highlight the past is not new to affirmative action litigation; defendants have long resisted intervenor efforts to foreground the university's past racial discrimination.[139]

To concretize how invoking the past furthers a colorconscious admissions story, I turn to UNC, whose history of de jure segregation and desegregation resistance invites a remedial defense.[140]

---

[137] *How* a university talks about racism can constitute an important intervention. Adam Harris, *This is the End of Affirmative Action, What Are We Going to Do About It?*, The Atlantic (Sept. 2020) (describing introspective projects at elite universities).

[138] The UNC intervenors sought "to present evidence showing that UNC-Chapel Hill's current admissions policy is necessary in part because it helps remedy the long history of segregation and discrimination in North Carolina, including within the University itself." Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, *SFFA v. UNC*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-954). *See also id*. ("This [unfavorable] outcome could result if the Court does not consider or weigh (or cannot consider or weigh because the record is insufficiently developed) the history of discrimination at UNC-Chapel Hill, the inextricable link between that history and UNC's current compelling interest in student body diversity, and the adverse effect that elements of the current admissions process have on the diversity of the student population.").

[139] *See* William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions, and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 176 n.14 (2001); *See also Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1244 (11th Cir. 2001) ("Although UGA argues loosely that its use of race is 'supported' by the university's history of discrimination, UGA does *not* identify remediating past discrimination as the compelling interest justifying its policy; indeed, it has repeatedly disavowed that interest.").

[140] For records detailing UNC's desegregation resistance, see *Desegregation of the University of North Carolina at Chapel Hill: Archival Resources*, https://guides.lib.unc.edu/desegregation-unc/archival (last visited Dec. 13, 2021).

Prior to 1951,[141] the UNC system formally barred black students from every campus.[142] In 1951, student plaintiffs prevailed in litigation that forced UNC to admit Black students to its law school and medical school.[143] This decision was significant but limited; it neither compelled nor prompted corresponding changes across North Carolina's public university system. Even after *Brown v. Board of Education*, which prohibited de jure segregation in public schools, UNC continued to bar non-white students from its undergraduate campuses.[144] This resistance occurred even in the face of public protest and legal challenge.[145]

A 1955 statement from UNC's Board of Trustees captures the university's commitment to racial exclusion:

> The State of North Carolina having spent millions of dollars in providing adequate and equal educational facilities in the undergraduate departments of its institutions of higher learning for all races, it is hereby declared to be the policy of the Board of Trustees of the Consolidated University of North Carolina that applications of Negroes to the undergraduate schools of the three branches of the Consolidated University be not accepted.[146]

---

[141] The following overview is inexhaustive. Among other limitations, I focus on admissions policies in the years following *Brown v. Board of Education*. Excluded, in turn, are myriad manifestations of racial discrimination at UNC and the surrounding area. *See* Pollitt, *Problems in Southern Desegregation: The Chapel Hill Story*, 43 N.C. L. REV. 689, 691 (1965) (commenting that in 1963 "[t]he three motels (although not the University-owned Carolina Inn), the only bowling alley, all the barbershops except the one located in the campus student union, approximately a third of the restaurants (especially those ringing the town), two grocery stores fronting the highways leading into the community, and several service stations were segregated; some with 'White Only' signs in prominent display."). Moreover, my focus omits UNC's much longer legacy of white supremacy—including the university's entanglement with, and support for, the Confederacy and slavery. *See* Geeta Kapur*, To Drink from the Well* (2020).

[142] Donna L. Nixon, *The Integration of UNC-Chapel Hill – Law School First,* 97 N.C. L. REV. 1741 (2019).

[143] *See McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951).

[144] *Frasier v. Bd. of Trustees of Univ. of N. C.*, 134 F. Supp. 589, 590 (M.D.N.C. 1955), *aff'd sub nom. Bd. Of Trustees of Univ. of N.C. v. Frasier,* 350 U.S. 979 (1956).

[145] *Id*.

[146] *Id*.

Not until 1956, following Supreme Court intervention, did UNC formally desegregated its undergraduate campuses.[147] But abolishing de jure segregation did not translate to racial inclusion. Lacking, for example, was a commensurate commitment to remedy UNC's legacy of racial segregation.[148] In the years since *Brown*, one could argue that UNC has done more to resist desegregation than to realize integration.[149]

Throughout the 1960s, North Carolina resisted desegregation through a strategy of "moderation."[150] Breaking from other Confederate states that outright defied federal mandates, North Carolina's white elite employed a subtler approach that privileged token representation and moderated

---

[147] *Bd. of Trustees of Univ. of N.C. v. Frasier*, 350 U.S. 979 (1956).

[148] Jennifer Ayscue et al., *Segregation Again: North Carolina's Transition from Leading Desegregation Then to Accepting Segregation Now*, THE CIV. RTS. PROJECT (May 14, 2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/segregation-again-north-carolina2019s-transition-from-leading-desegregation-then-to-accepting-segregation-now/Ayscue-Woodward-Segregation-Again-2014.pdf ("Unlike other Southern states that used more overtly defiant tactics to oppose the federal government, North Carolina's state and local politicians implemented a subtle legal strategy to delay integration as long as possible.").

[149] North Carolina has a more nuanced history of desegregation at the K-12 level, in which the state saw meaningful racial integration before a period of re-segregation. *See id.* But even the period of increased racial integration is a mixed story; it often involved the closure of successful Black schools and the termination of successful Black educators. *See* Irving Joyner, *Pimping Brown v. Board of Education: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160, 194 (2013) ("From 1963 to 1970, the number of Black principals in the state's elementary schools plunged from 620 to only 170. Even more striking, 209 Black principals headed secondary schools in 1963, but less than 10 still held that crucial job in 1970. By 1973, only three had survived this wholesale displacement.") (brackets omitted).

[150] *See* Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After Brown*, 89 NW. U. L. REV. 92, 98 (1994) ("[T]he concept of 'moderation' in the post-*Brown* South, particularly in North Carolina, was a malleable concept, skillfully used to deflect widespread pupil integration. Resistance to *Brown* was far more spectacular in the defiant southern states such as Virginia and Louisiana, but equally effective in states such as North Carolina that understood the value of tokenism and appeals to moderation.").

rhetoric.[151] Moderation proved an effective strategy.[152] As late as 1969, fifteen years after *Brown* and five years after Congress passed the Civil Rights Act of 1964,[153] UNC remained—in effect if not form—an all-white institution.[154]

UNC's desegregation resistance, even if initially effective, never escaped public scrutiny. Buoyed by the Civil Rights Movement, local stakeholders and organizations pressed the federal government to enforce antidiscrimination law.[155] In 1969, the Nixon administration responded by naming North Carolina among ten states ordered to develop desegregation plans.[156] Rather than comply, UNC joined four other states that "ignored the request because they realized that Nixon did not plan to enforce consequences for failing to comply."[157] The following year, Nixon's Department of Health,

---

[151] *See* Braxton Craven, *Legal and Moral Aspects of the Lunch Counter Protests*, CHAPEL HILL WKLY., 1B (Apr. 28, 1960) ("The choice is not between segregation and integration; it is between some integration and total integration. . . . [If we resist all integration], it is a foregone conclusion that the winner will be total integration, or that the schools will be closed. . . . Token integration . . . will save the state and save the schools. . . . This is moderation."). Even before *Brown*, North Carolina's legislature had opened an all-Black law school for the express purpose of excluding Black students from its flagship schools. Nixon, *supra* note <The Integration of UNC-Chapel Hill [147]>, at 1756–57 ("The unaccredited North Carolina College School of Law was . . . specifically created . . . to avoid integrating Carolina Law, the state's flagship university."); *See* Joyner, *supra* note <pimping brown [154]>, at 169 ("Legislators established the law school to protect the University of North Carolina Law School from a *Missouri ex rel. Gaines* inspired lawsuit by the NAACP on the grounds that the state did not have a law school African-Americans could attend.").

[152] *See* Douglas, *supra* note <Rhetoric of Moderation [155]>.

[153] Title VI of the Civil Rights Act of 1964 made it unlawful for entities receiving federal funding to engage in racial discriminate. 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.")

[154] *See id*.

[155] History Department of N.C. State Univ., *Fluctuating Commitment*, N.C. STATE UNIV.: THE STATE OF HISTORY, https://soh.omeka.chass.ncsu.edu/exhibits/show/colorline-hew/hewcommitment.

[156] *Id*.

[157] *Id*.

Education and Welfare ("HEW")[158] advised UNC that failing to remedy its legacy of de jure segregation violated Title VI.[159] The agency's complaint initiated a decade of negotiation between UNC and the federal government.[160] This stalemate ended in 1979, when the Carter Administration—which revitalized federal commitments to civil rights enforcement—announced its intent to terminate roughly $90 million in federal funding to UNC.[161]

The threat was short lived. In 1981, Ronald Reagan entered the White House and brought with him an education philosophy more sympathetic to desegregation resistance than desegregation. That year, UNC and Reagan's Department of Education entered a settlement to govern desegregation across the UNC system.[162] The settlement ended the eleven-year legal dispute between UNC and the federal government. It did not, however, convince local civil rights leaders that North Carolina would, in fact, desegregate its public universities. The skepticism was warranted. Beyond lacking specific requirements, the agreement was negotiated in secret and facilitated by North Carolina Senator Jesse Helms—a stalwart segregationist.[163] David S. Tatel, who led HEW during the Carter Administration, offered a candid reaction:

---

[158] In 1979, HEW was split into the Department of Health and Human Services and the Department of Education. *See* United States Department of Health, Education and Welfare Records, John F. Kennedy Presidential Library and Museum, https://www.jfklibrary.org/asset-viewer/archives/USDHEW.

[159] *See* David W. Bishop, *The Consent Decree Between the University of North Carolina System and the U.S. Department of Education*, 1981-82, 52(3) J. NEGRO EDUC. 350 (1983).

[160] In 1973, UNC submitted a desegregation plan that called for enhanced recruitment, remedial programming, and an antidiscrimination policy, among other provisions. Nixon's Department of HEW rejected the plan for lacking specific admissions goals or plans for execution. *See id.*

[161] *See* Consent Decree, 1979-1981, N.C. STATE UNIV.: THE STATE OF HISTORY, https://soh.omeka.chass.ncsu.edu/exhibits/show/colorline-hew/hewconsentdecree.

[162] Bishop, *supra* note <Consent Decree Between [165]>, at 350.

[163] The *New York Times* portrayed the consent decree as follows:

> But the agreement does not require the state university system, which includes 16 campuses, to dismantle programs at white schools to eliminate duplication of programs, as the Carter Administration had demanded.
>
> The agreement was worked out in secret negotiations at the same time the Government was taking the state to court in a suit that could have cost North Carolina $90 million in Federal education aid.

> This is the first really major action the new administration has taken in the civil rights field, and it shows they're not interested in enforcing the civil rights laws that prohibit segregation in education[.]This settlement doesn't read like a desegregation plan. It reads like a joint U.S.-North Carolina defense of everything the system did.[164]

Elliott Lichtman, who prepared multiple NAACP briefs over the preceding decade, offered a similar take. According to Lichtman, the agreement comprised "'a triple end run' around federal courts in Washington, civil rights laws and the Constitution."[165]

To summarize, for nearly three decades after the Supreme Court prohibited de jure segregation in *Brown v. Board*, North Carolina's white political class defied federal orders to integrate its public university campuses. Federal confrontation ended in 1981, but only through a closed-door negotiation between outspoken segregationists and a sympathetic administration.

A brief review of UNC's racial demographics adds texture to this partial history.[166] Before *Brown*, Black students were absent from UNC's campuses. In the four years following *Brown*, the UNC system's Black student

---

> . . . Mr. Bell credited Senator Jesse Helms, Republican of North Carolina, with helping to start the negotiations with North Carolina officials. He said Mr. Helms had told them of Mr. Bell's interest and that secret talks were conducted through Douglas Bennett, a Washington lawyer.

Carolina Settles Integration Suit, N.Y. TIMES (June 21, 1981), https://www.nytimes.com/1981/06/21/us/carolina-settles-integration-suit-on-universities.html.

[164] Charles R. Babcock, *U.S. Accepted Desegregation Plan Once Rejected for N.C. Colleges,* WASH. POST (July 11, 1981), https://www.washingtonpost.com/archive/politics/1981/07/11/us-accepted-desegregation-plan-once-rejected-for-nc-colleges/3e4c542b-40b8-405f-8cc9-a46952035b0f/

[165] *See id*. (stating also that the NAACP would challenge the consent decree); *see also* Bishop, *supra* note <The Consent Decree [165]>, at 359 ("The LDF concluded that the Decree totally lacked 'commitments to meet *specific* requirements of the desegregation 'Criteria.'").

[166] Institutional demographic statistics never tell a complete story. Still, these figures add depth UNC's legacy of racial exclusion. As a point of reference, North Carolina's population is roughly 22% Black, a baseline that the State has employed to measure racial inclusion within its universities. *See* 1981 Consent Decree (defining "underrepresented" as "those groups whose percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina").

population never exceeded 26 (or .30% percent of the entire student population). By 1974, amid federal litigation, Black enrollment nearly eclipsed 1,000 students (surpassing 5% of system's student body).

UNC Chapel Hill shares a similar story. UNC's percentage of Black-identified students peaked in 2011, at 11% of the campus population. This figure represents a significant increase from 35 years' prior, when the State settled with Reagan's Department of Education. Still, in a state that is over 20% Black, that peak reflects UNC's inability to rectify a legacy of racial exclusion. In the decade since, UNC's Black student population declined to a low of 7.8% in 2018.[167] In 2014, the year SFFA sued UNC, that number was 8.4%.[168]

The foregoing provides a partial picture of racial exclusion as UNC. Yet even this partial picture exceeds the longitudinal story UNC has told about race and racism on its campus. Fortunately, this story is not wholly absent from the litigation.[169] Notwithstanding UNC's resistance, student intervenors secured the ability to share a more comprehensive account. We can see, in turn, what a more capacious remedial defense, that ties past to present, might entail.[170] This begins with the intervenors' basic framing of the case:

> [A] "race-blind" . . . admissions process would produce a range of harms. Such harms would include: . . . lessening the diversity within each racial group, thereby entrenching racial stereotypes; exacerbating racial isolation among students who are already among the most marginalized on UNC's campus; and undermining their leadership and

---

[167] Undergraduates enrolled at UNC Chapel Hill, *Analytic Reports: Student Characteristics*, Office of Institutional Research and Assessment, https://oira.unc.edu/reports/.

[168] *Id*.

[169] UNC's only reference to the Consent Decree is for definitional purposes. *See* UNC Defendants' Proposed Findings of Fact and Conclusions of Law at 9, *SFFA v. UNC*, 319 F.R.D. 490. UNC does not, for example, explain the conditions that permitted the consent decree's adoption, the decades of desegregation resistance it followed, nor the desegregation resistance it facilitated.

[170] *See* Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law at 2, *SFFA v. UNC*, 319 F.R.D. 490 ("Unrebutted evidence demonstrates that while UNC has made strides in harnessing the benefits of diversity, Black, Latinx, and Native American students continue to experience tokenism, false stereotypes, racial isolation, and overt racial hostility on UNC's campus. These dynamics require UNC's ongoing attention to both numeric representation and contextual factors that shape the campus climate.").

> collective efforts to *counter the lingering effects of racial discrimination on campus*.[171]

To buttress the foregoing, the intervenors tie contemporary racial hostility to "North Carolina's sordid history of state sponsored racial discrimination, which includes excluding African-American and other students of color from UNC-Chapel Hill."[172] The intervenors highlight how even after court-ordered integration, "UNC's leadership turned a blind eye to the discrimination experience by those same students once admitted."[173] Against this backdrop, the intervenors relay how UNC's institutional culture continues to stymy the full participation of students of color.[174] To anchor this claim, the intervenors cite individual acts of bias, the presence of confederate relics, and visits by white nationalists.[175] From this backdrop, the intervenors contend that "[w]hile UNC publicly rejects its prior legacy of racial discrimination and has made some progress in removing and renaming confederate relics, . . . *UNC's historical context has present-day manifestations that make students of color feel unwelcome on UNC's campus*."[176]

To be clear, there is no reason to believe this conclusion, and the evidence on which it relies, will sway a hostile court. Still, this story is critical; without understanding UNC's racial past, it is impossible to understand UNC's racial present. In other words, this account provides a more honest, comprehensive, and colorconscious admissions story. The intervenors, unlike UNC, seed frame affirmative action as modest antidote to ongoing racial harms inseparable from an institutional legacy of racial exclusion.

---

[171] *Id*. at 3 (emphasis added)

[172] *Id*.

[173] *Id*. at 41-42.

[174] *See id*. *at* 64 ("UNC's past history does not stand in isolation. The record is abundantly clear that to this day, issues of race, white supremacy, and the historic legacy of slavery and Jim Crow discrimination continue to pervade UNC's campus environment, impacting the University's ability to harness the educational benefits that flow from student body diversity.").

[175] *See id*. at 42-43.

[176] *See id*. at 43 (emphasis added).

2. During Admissions: Racially Defective Measures of "Merit"

Above, I outlined how race mattered in the past (and continues to shape the present). Here, I explore how race matters in the present. Specifically, I affirmative action advocates can surface the myriad racial advantages that standard facially neutral criteria confer upon class-privileged white students. This presentist focus sharpens the claim that affirmative action comprises essential antidiscrimination by mitigating concrete and quantifiable racial (dis)advantages embedded in standard admissions regimes.

Elsewhere, I have detailed how standard measures of "merit"—from standardized tests to interviews—systematically under-state the existing abilities of individuals from negatively stereotyped groups.[177] The underlying scholarship underscores a critical observation: a portion of perceived achievement "gaps" is illusory.[178] Rather than capturing actual differences in ability, part of the gap reflects measurement defects that artificially inflate the academic talent of white students relative to students of color.[179]

This is not a "pipeline" story about past discrimination producing unequal educational opportunities.[180] Rather, this is a story about unequal

---

[177] *See* Jonathan Feingold, *Racing towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J. L. & MOD. CRITICAL RACE Persp. 231 (2011). *See also* Sam Erman & Gregory M. Walton, *Stereotype threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education,* 88 S. CAL. L. REV. 307 (2015); Carbado, *supra* note <Footnote 43 [13]>, at 1146–47 ("There is some, albeit imperfect, evidence that implicit biases [and stereotype threat] . . . impact[], to the detriment of students of color, critical admissions criteria and decisions, including: (1) the content of letters of recommendation; (2) assessment of resumes; (3) evaluation of writing samples; (4) student performance on standardized tests; (5) grading; (6) mentoring; and (7) placement decisions.").

[178] Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCH. 42 (2012) (""[A] portion of perceived group-based differences across educational settings is often illusory, a consequence of psychological harms that obscure the actual, but 'latent,' ability of negatively stereotyped students.").

[179] This story of discrimination is, in respects, narrow. It does not, for example, implicate intersecting structural (e.g., the relationship between housing segregation and educational resources) and individual (e.g., teacher expectations) forces that shape a student's educational trajectory. *See generally* Carbado, *supra* note <Footnote 43 [13]>, at 1123.

[180] Narratives that attribute racial disparities to racialized resource gaps are not, in whole, wrong. But they tend to (a) reproduce the pernicious presumption that Black

treatment in the present—disparate treatment that is most likely to harm middle- and upper-class students of color.[181] When universities rely on fraught metrics, they extend racial advantages to white students. Accounting for applicant race, in turn, can create more objective, fair, and race-neutral processes by mitigating those advantages.

Notably, this framing enjoys a doctrinal hook. In *Bakke*, Justice Powell struck down Davis's admissions policy. But he also made the following observation:

> Racial classifications in admissions conceivably could serve a fifth purpose . . . : *fair appraisal of each individual's academic promise* in the light of some *cultural bias in grading or testing procedures*. To the extent that race and ethnic background were *considered only to the extent of curing established inaccuracies* in predicting academic performance, it might be argued that there is *no "preference" at all*.[182]

This insight, buried in a footnote, enjoys empirical support.[183] This has not, however, translated to the courtroom. With limited exception, affirmative

---

students are less capable and talented than their white counterparts and (b) conflate racial (dis)advantage with class. *See* Jonathan Feingold, *Deficit Frame Dangers*, Ga. St. L. Rev. (2021). Among other consequences, "pipeline" stories can reinforce the unfounded claim that middle-class status inoculates students of color from racial disadvantage. *See generally* Jonathan Feingold, *supra* note <All Poor Lives Matter [89]>.

[181] Standard measures of merit are most likely to under-state the existing talent of students from "the academic vanguard of their group"—that is, students who are race disadvantaged but class privileged. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52(6) AM. PSYCH. 613, 617 (1997). *See also* Camille Lamar Campbell, *Getting at the Root Instead of the Branch: Extinguishing the Stereotype of Black Intellectual Inferiority in American Education, A Long-Ignored Transitional Justice Project*, 38 L. & INEQ. 1, 54 (2020) ("Paradoxically, highly-motivated students who are most invested in academics and whose academic engagement should enhance their performance are most vulnerable to stereotype threat.").

[182] *Bakke*, 438 U.S. at 306 fn. 43 (1978).

[183] Justice Powell relegated this insight to a single footnote, in part, because Davis did not invoke the counter-preference argument—an omission that reflected UC's ambivalence toward its own policy. *See* JOEL DREYFUSS & CHARLES LAWRENCE III, *supra* note <Politics of Inequality [62]>. Available evidence supporting a counterpreference frame included many of Davis's own students, who would not have been admitted based on standard metrics of academic achievement alone. *See id*. Moreover, UC never disclosed that the Medical School Dean employed a

action advocates have yet to harness this rationale—even though it dovetails with the Colorconscious Story.

Having focused on UNC above, I now turn to Harvard.[184] To begin, we might ask whether Harvard considers criteria likely to compromise a "fair appraisal" of every applicant's academic talent and potential. At least three stand out: (1) standardized test scores[185]; (2) teacher & counselor recommendations; and (3) alumni interviews.[186]

We can start with standardized tests. Decades of research confirm that racial performance gaps cannot be explained, in full, by differences in preparation, motivation, or resources.[187] A significant portion results from stereotype threat, a psychological phenomenon that depresses the

---

discretionary list—a practice through which the Dean approved the admission of roughly 5 (out of 100) wealthy and well-connected students per admissions cycle who would not have been admitted under standard criteria. *See id*.

[184] Albeit underdeveloped, the student intervenors mobilized counter-preference frames in the Harvard and UNC litigation. *See* Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law at 17, *SFFA v. UNC*, 319 F.R.D. 490 ("Race-conscious admissions allows UNC to account for inequalities and better assess a student's potential."); Harvard Intervenors Post-Trial Brief at 10 ("Traditional admissions criteria systematically undervalue the potential contributions of racial minorities. . . . The ability to consider race allows admissions officers to counterbalance the racial skew in admissions criteria and academic opportunities.").

[185] In December 2021, Harvard announced that standardized test scores would be an optional component of an applicant's file through 2026. *See* Nick Anderson, *Harvard won't require SAT or ACT through 2026 optional push grows*, Washington Post (Dec. 16, 2021). This places Harvard alongside a growing number of universities that have reduced or eliminated reliance on standardized test scores.

[186] Race arguably informs every criterion upon which Harvard relies. *See* Carbado, *supra* note <Footnote 43 [13]>, at 1145 ("Negative action can manifest itself not only in 'hard' evaluative measures, such as standardized test scores and grades, but also in 'soft' evaluative measures, such as leadership experience, awards, extracurricular opportunities, internships, and letters of recommendation."). I have focused on the identified criteria to manage scope.

[187] *See* Feingold, *supra* note <Racing Towards Color-Blindness [183]>, at 234 ("Stereotype threat may be a possible source of bias in standardized tests, a bias that arises not from item content but from group differences in the threat that societal stereotypes attach to test performance."); Erman & Walton, *supra* note <Stereotype Threat and Antidiscrimination Law>.

performance of high performing individuals in domains where their group faces a negative stereotype.[188]

Stereotype threat's impact is concrete and quantifiable. According to two meta-analyses, stereotype threat may account for roughly one fifth of a standard deviation in test performance.[189] Translated to the SAT, this equates to roughly sixty-three points on a 2,400-point test.[190] 63 points might appear trivial. But it explains significant portions of observed performance gaps.[191]

This literature betrays the perception that standardized tests—whatever their faults—provide a unform assessment of student ability.[192] Blind reliance on these tests, in turn, deprives Black and Latinx students of a "fair appraisal" of their academic talent and promise. Moreover, it confers a corresponding racial advantage upon white applicants unencumbered by negative societal stereotypes. For universities that consider standardized test scores, race-consciousness offers a direct if imprecise mechanism to promote "meritocraticracy."

Beyond standardized tests, criteria that rely on subjective judgment present similar "fair measure" concerns. This includes letters of recommendation and alumni interviews—both of which grant evaluators

---

[188] *See generally* Kim Shayo Buchanan & Phillip Atiba Goff, *Racist Stereotype Threat in Civil Rights Law*, 67 UCLA L. REV. 316, 330–31 (2020).

[189] *See* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132, 1134-37 (2009).

[190] *See* Jonathan Feingold, *Hidden in Plain Sight*, 2019 UTAH L. REV. 59, 98 (2109).

[191] See *id.*; *see also* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCH. SCI. 1132, 1137 (2009) ("The observed effect sizes suggest that the SAT Math test underestimates the math ability of women like those in the present sample by 19 to 21 points, and that the SAT Math and SAT Reading tests underestimate the intellectual ability of African and Hispanic Americans like those in the present sample by a total of 39 to 41 points for each group. Insofar as the overall gender gap on the SAT Math test is 34 points and as the overall Black-White and Hispanic-White gaps on the SAT (combining math and reading) are 199 and 148 points, respectively, these differences are substantial." (citation omitted)).

[192] Elsewhere, I have argued that stereotype threat renders standardized tests "susceptible to 'uneven conditions'" measurement errors because the tests "subject certain performers, because of their race, to materially different conditions during performance (but fail to account for this difference." Feingold, *supra* note <*Equal Protection Design Defects* [85]>, at 530.

substantial discretion. As a result, such criteria are vulnerable to measurement errors (that is, disparate treatment) that arise from implicit biases.[193]

Notably, implicit bias concerns entered the Harvard litigation as a potential source of alleged disparate treatment. But these concerns came not from Harvard—e.g., as a racial (dis)advantage against which affirmative action intervenes. Rather, SFFA invoked implicit biases to buttress its narrative of anti-Asian bias.[194] According to SFFA, Harvard's "personality rating"—which incorporates teacher and guidance counselor recommendations—invites racial stereotyping and has been the "downfall of many Asian American applicants. [195]

Harvard rejected SFFA's allegations on factual and legal grounds. On the facts, Harvard denied that implicit biases infiltrated its process or otherwise subject Asian applicants to disparate treatment. On the law, Harvard argued that disparate treatment traceable to implicit biases or third-parties (e.g., high school guidance counselors) was not legally cognizable.[196]

On the surface, the parties' respective positions make sense. SFFA, the plaintiff, alleges disparate treatment. Harvard, the defendant, objects. But if SFFA wants to deligitimize affirmative action (its apparent goal), and Harvard wants to fortify race-conscious admissions (its apparent goal), the

---

[193] The district court noted that "teacher and guidance counselor recommendations seemingly presented Asian Americans as having less favorable personal characteristics than similarly situated non-Asian American applicants." *SFFA v. Harvard I* at 170.

[194] Plaintiff's Proposed Findings of Fact and Conclusions of Law (hereinafter "SFFA Harvard Brief") at 25-26, SFFA v. Harvard, 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176) ("The United States has a long and tragic history of racial discrimination against Asian Americans. Today, Asian Americans continue to face explicit and implicit racial bias. . . . Admissions systems that rely on subjective criteria are susceptible to abuse, including racial stereotyping and other forms of racial discrimination. Harvard's personal rating is especially susceptible to abuse because of its general subjectivity and because of Harvard's failure to take steps to guard against racial stereotyping."). SFFA critiques Harvard for failing to provide implicit bias training—which SFFA suggests is necessary because implicit biases can manifest as "prejudices of which [admissions officers] are unaware" may "nonetheless play a large role in their evaluations of people and their work." *Id*. at 28.

[195] *SFFA v. Harvard I* at 170 ("Because teacher and guidance counselor recommendation letters are among the most significant inputs for the personal rating, the apparent race-related or race-correlated difference in the strength of guidance counselor and teacher recommendations is significant."); .

[196] Def.'s Harvard Brief.

preceding arguments appear more awkward.[197] By invoking implicit biases, SFFA is articulating a structuralist racial story that locates racial bias within facially neutral considerations. Put differently, when Harvard relies on the "personal rating" without correcting a predictable measurement error (that disadvantages Asians), Harvard harms Asian applicants to the benefit of white applicants with equal (or worse) qualifications. Absent intervention, "white students and [Asian] students are not competing on even ground."[198]

In effect, SFFA opened the door for Harvard to defend affirmative action as a countermeasure. Absent intervention, implicit biases benefit students from societal favored groups (here, white students) and disadvantage students societally disfavored groups (here, Asian students). Race-conscious admissions, in turn, could mitigate the unearned racial advantage white students otherwise enjoy. Or in Justice Powell's words, evidence of anti-Asian bias calls for a targeted, race-conscious countermeasure to "cur[e] established inaccuracies in predicting academic performance" of Asian applicants.[199] That race-conscious intervention, which de-biases existing metrics, would constitute "no 'preference' at all."[200]

Harvard could have embraced SFFA's implicit bias story. It has not. This decision, perhaps strategic on the surface, compromises the case for race-conscious. Rather than fortify its own policy's legal and moral mooring, Harvard reified colorblind critique. To begin, by discounting implicit biases, Harvard reinforced the view that facial-neutrality equals racial neutrality. This claim, in turn, naturalizes the "preference framing" that already pervades public perceptions of affirmative action. Moreover, Harvard enabled SFFA's core narrative that affirmative action is the source of anti-Asian bias.[201]

---

[197] Notably, the district court recognized multiple ways in which race infects the admissions process, yet never translated these observations into a counter-preference framing. *SFFA v. Harvard I* at 203 ("Further, the Court feels confident stating that the statistical disparities in personal ratings and admissions probabilities that have been identified are the result of some external race-correlated factors and perhaps some slight implicit biases among some admissions officers that, while regrettable, cannot be completely eliminated in a process that must rely on judgments about individuals.").

[198] Carbado, *supra* note <Footnote 43 [13]>.

[199] *Bakke*, 438 U.S. 265, [] (1978)

[200] The district court comes closest to making this point. *SFFA v. Harvard II* at 202 ("[T]o the extent that the disparities are the result of race, they are unintentional and would not be cured by a judicial dictate that Harvard abandon considerations of race in its admission process.").

[201] *See* Feingold, <sffa v. Harvard [124]>.

To be clear, Harvard might discriminate against Asian applicants, and implicit biases might be part of the story. But that story exculpates affirmative action, even if it implicates Harvard. SFFA reinforces this point when it documents anti-Asian bias that benefits white (and likely wealthy) students, not other students of color.[202] Harvard, for its part, feeds that narrative—even if it undermines the case for affirmative action.

Before proceeding, it is worth exploring how the counterpreference framing defuses the concern that affirmative action stigmatizes its beneficiaries.[203] On the merits, this claim enjoys limited empirical support.[204] For present purposes, however, I am most interested in how "stigma" concerns interact with competing theories of race and racism.

In the abstract, stigma arguments follow a basic logical progression: if an entity admits un(der)qualified members of a specific group, all group

---

[202] The lower courts identified multiple ways that race could have disadvantaged Asian American vis-à-vis similarly situated white students. Letters of recommendation were part of this story. *SFFA v. Harvard I* 170 ("[R]ace-correlated variation in teacher and guidance counselor recommendations is likely a cause of at least part of the disparity in the personal ratings."). The courts theorized multiple factors, ranging from implicit biases to the disproportionate concentration of Asian applicants in "public high schools where overloaded teacher and guidance counselors may provide more perfunctory recommendations." SFFA v. Harvard, 980 F.3d 157, 201 (1st Cir. 2020); see also SFFA v. Harvard, 397 F. Supp. 39 at 202 ("[Lower scores] might be the result of qualitative factors that are harder to quantify, such as teacher and guidance counselor recommendations, or they may reflect some implicit biases.").

[203] *See* Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (outlining concern that affirmative action stigmatizes Black students); Angela Onwuachi-Willig et. al., *Cracking the Egg: Which Came First-Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299, 1301–02 (2008) ("Proponents of this view identified both internal stigma—doubt of one's own qualifications—and external stigma—the burden of the doubts of others in one's qualifications—as reasons for dismantling affirmative action programs.").

[204] The weight of evidence identifies racial stereotypes, not affirmative action, as the source of stigma. *See* Onwuachi-Willig et. al., *supra* note <Cracking the Egg [213]>, at 1344 ("[W]ith respect to the seven law schools we surveyed, it was not affirmative action that resulted in internal and/or external stigma, but rather racial stereotypes that have attached historically to different groups, regardless of affirmative action's existed.").

members are stigmatized regardless of their individual qualifications.[205] Even if one accepts this premise, additional presumptions are required before one can conclude that affirmative action produces stigma. Specifically, affirmative action should produce stigma if: it contravenes an otherwise race-neutral, objective and meritocratic process by favoring its beneficiaries over more-qualified students. In contrast, affirmative action should not stigmatize its beneficiaries if: a university considers applicant race to reduce identifiable racial (dis)advantages within its facially neutral process.

We can concretize the above by returning to SFFA's implicit bias concerns. If Harvard knows that implicit biases are likely to produce "personal ratings" that under-state the existing merit of Asian applicants relative to white applicants with similar (or worse) qualifications, a race-conscious policy that attends to this specific racial (dis)advantage would not create a "racial preference" for Asians. To the contrary, it would reduce a "racial preference" for white applicants—one that, if unaddressed, ensures that Harvard will admit un(der)qualified white applicants over more deserving Asians.

If one endorses the stigma logic, the above account does not depict a system free from stigma. Rather, it suggests that standard stigma arguments identify the wrong victim and culprit. Asian students would not be stigmatized by an affirmative action policy that mitigates anti-Asian bias. Rather, Harvard stigmatizes its white students—even those who would have gained admissions absent the myriad of racial advantages, spanning legacy status to implicit biases, that benefit their racial peers.

To be more precise, Harvard could defend affirmative action as a countermeasure that reduces a myriad of racial (and class) (dis)advantages that pollute its standard admissions system. Doing so would defuse predictable lines of attack—including the claim that race-conscious admissions stigmatize Black students. But Harvard does the opposite. Rather than surface racial (dis)advantages across its admissions process, Harvard denies, discounts, and obscures race's enduring relevance. As a result, Harvard reproduces the very presumptions that legitimate and rationalize enduring racial disparities on its own campus. And, more broadly, Harvard breathes lift into the colorblind logic that regressive forces have long weaponized to malign antiracism itself.

---

[205] *See also* john a. powell, Post-Racialism or Targeted Universalism?, 86 DENV. U. L. REV. 785, 792 (2009) ("There is an assumption that racially targeted programs create white resentment because there is a sense that whites who are playing by the rules are having things taken from them and given to undeserving non-whites who do not play by the same rules.").

3. After Admission: Racial Headwinds in the Classroom

Above, I outlined how universities could surface racial (dis)advantages that arise before and during the admissions process. Here, I shift the frame forward and outline how affirmative action promotes race-neutrality after admissions.

Harvard and UNC identify student body diversity as the goal informing their race-conscious practices. This makes sense; as recently as 2016, the Supreme Court reaffirmed the "diversity rationale's" status as settled constitutional doctrine.[206] Even so, the diversity rationale remains far from secure—particularly given a new conservative majority open to revisiting and overturning existing precedent.[207] For this reason alone, it is worrisome that Harvard and UNC have marshalled a thin theory of diversity susceptible to predictable but avoidable critique.[208] More specifically, the university defendants understate why racial diversity matters on campus and in the classroom. As a result, Harvard and UNC reinforce a formalist vision of race and racism that compromises the case for racial diversity in higher education and beyond.

To see what a thicker diversity story might entail, we can start by reviewing standard diversity critiques from the Right and Left.

From the Right, a common claim is that racial diversity's educational benefits—to the extent they exist—are limited to subjects that directly implicate race. In short, racial diversity might matter in an ethnic studies class or Asian-American history class, but not in a physics or math class.[209] From the Left, a resonant concern is that diversity—as a concept and practice—decouples race from racism in ways that privilege the interests, comfort, and

---

[206] *See Fisher v. Texas*, 136 S. Ct. 2198 (2016). *See also* Feingold, *supra* note <hidden in plain sight [197]>.

[207] Even if the diversity rationale survives in form, the Supreme Court could render it unavailable in practice. This would follow Justice Alito's *Fisher* dissent. *See id.* at 2227 ("Neither UT nor the majority has demonstrated that any of these four [diversity-related] goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.").

[208] Moreover, elite universities have resources to buttress existing arguments by funding research that examines the benefits of student body diversity. This work continues to occur; there is no reason universities could more directly fund it. *See, e.g.,* Adam Chilton et al., *Assessing Affirmative Action's Diversity Rationale*, 122(2) COLUM. L. REV. (forthcoming 2022).

[209] *See* Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. Discourse 40, 62-63 (2016).

learning of institutional insiders (who often are white, male, and cis-gendered).[210] In other words, diversity commitments can legitimate the status quo by obscuring how race shapes institutional environments and experiences therein.

On the surface, these critiques appear divergent. They cohere, however, in two respects. First, a common conception of diversity infuses both. Advocates herald diversity for multiple reasons.[211] But the dominant vision of diversity remains a "marketplace of ideas" approach that values diversity as a tool to promote robust discourse in the classroom.[212] One can think of this as the First Amendment case for diversity: student body diversity yields more perspectives which facilitates more learning for all.

Albeit dominant, this First Amendment diversity story invites predictable critique—including that from the Right and the Left noted above.[213] One response to both concerns entails a more robust diversity story. Rather than focusing on "discourse benefits" alone, advocates can foreground diversity's equality function.[214] More specifically, racial diversity buffers students of color against a host of environmental headwinds that can

---

[210] *See* Jonathan P. Feingold, *Diversity Drift*, 9 WAKE FOREST L. REV. ONLINE 14 (2019).

[211] *Compare* Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 *Fordham L. Rev.* 2301, 2305 (2004) ("What I have called 'discourse' benefits are the core 'educational benefits' of student body diversity, and they are, unsurprisingly, grounded in 'the expansive freedoms of speech and thought associated with the university environment.'") with Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 765 (1997) ("But I believe that this distinction is misconceived. The diversity rationale is inseparable from the purpose of remedying our society's racism.").

[212] *See Elise C. Boddie, The Indignities of Color Blindness,* 64 UCLA L. REV. DISCOURSE 64, 71 n.26 (2016) ("[T]he diversity rationale in higher education admissions . . . is rooted in First Amendment freedoms.")*;* Feingold, *supra* <hidden in plain sight [197]>, at 115 ("To attain a robust marketplace of ideas, a university must admit individuals with different experiences and viewpoints.").

[213] Moreover, this dominant framing tends to value difference for difference's sake, a position that can blur any meaningful distinction "between those who would #TakeAKnee to honor Black lives and those who travel the college circuit to mock, demean, and insult." Feingold, *supra* note <*Diversity Drift* [221]>.

[214] *See* Feingold, *supra* note <hidden in plain sight [197]>.

compromise their right to an "equal university membership."[215] This discursive and analytical shift—which repositions diversity as a predicate to equality—serves two purposes. First, it leverages existing doctrine (that is, the diversity rationale) to surface additional manifestations of racial (dis)advantage ubiquitous across university settings. Second, it fortifies the case for diversity by mooring an existing rationale to a more compelling legal, empirical, and normative anchor.[216]

Diversity's equality function is not absent from doctrine. The related concept of critical mass, for example, entered the Supreme Court's lexicon in *Grutter*.[217] Invoking testimony from university administrators, Justice O'Connor embraced the notion that racial representation (or "critical mass") reduces racial isolation, tokenism and the negative effects that flow therefrom.[218] More recently, in *Fisher v. Texas*, Justice Kennedy cited similar reasoning to support the University of Texas's race-conscious admissions program.[219]

In ongoing litigation, Harvard and UNC note the link between racial representation and student experience. But consistent with their broad defenses, they understate the relevance of race and the case for affirmative action. Specifically, they fail to leverage this insight into a more fundamental point: admissions policies inattentive to race tend to produce severe racial disparities,[220] which in turn produces institutional environments in which

---

[215] For a comprehensive overview of this argument, see Feingold, *supra* note <*Hidden in Plain Sigh* [197]*t*> (reviewing the social identity threat and stereotype threat literatures); Erman & Walton, *supra* note <*Stereotype threat and Antidiscrimination Law* [183]>; *See* Anastasia M. Boles, *Valuing the "Race Card": Teaching Employment Discrimination Using Culturally Proficient Instruction*, 44 T. MARSHALL L. REV. 25, 26 n.5 (2019) (citing sources).

[216] *See id*.

[217] *Grutter v. Bollinger*, 539 U.S. 306 (2003); Feingold, *supra* note <hidden in plain sight [197]>.

[218] *Grutter v. Bollinger*, 539 U.S. 306 (2003); Feingold, *supra* note <hidden in plain sight [197]>.

[219] *Fisher v. Texas*, 136 S. Ct. 2198 (2016) (citing evidence that "minority students admitted under the [race-neutral admissions] regime experienced feelings of loneliness and isolation).

[220] In recent years, extreme examples have garnered national attention. *See* Drake Pooley, *Why Has Black Enrollment Fallen at an Elite Southern University*, New York Times (Sept. 17, 2021), https://www.nytimes.com/2021/09/17/opinion/auburn-university-black-students.html.

students of color are more likely to experience racial hostility on campus. Or phrased in the alternative, affirmative action—by mitigating severe racial disparities—fosters educational environments in which all students, regardless of race, can enjoy the full benefits of university membership.[221] In short, race-conscious admissions promote equality at the moment of admissions (by countering white racial advantage) and thereafter (by promoting more equitable educational environments).

To concretize the foregoing, consider an exchange between Chief Justice Roberts and the University of Texas's attorney in *Fisher v. Texas*.[222] During oral argument, the Chief Justice posed the following question: "What—what unique—what unique perspective does a minority student bring to a physics class?"[223] UT's counsel dodged the question.[224] This non-response did not prove fatal—at least not for UT.[225] Still, UT missed an opportunity to marshal the strongest case for diversity and affirmative action more broadly.

Harvard and UNC will no doubt receive a similar question. They should do better. They might start by invoking Professor Rachel Godsil, who argued that UT should have responded by highlighting diversity's equality function. Specifically, Godsil urged advocates to defend racial diversity as necessary, even in physics, to "create an environment in which all students can perform to their capacity through the reduction of stereotypes, racial anxiety, and racial isolation."[226] In fact, racial diversity may matter most in classes like physics—that is, "disciplines and domains in which negative stereotypes hold a stronger historical significance and contemporary salience."[227]

When they reach the Supreme Court, Harvard and UNC can draw on decades of scholarship that grounds the proposition that racial diversity

---

[221] Universities could, for example, link diversity's equality function to Title VI obligations to prevent a racially hostile environment.

[222] *Fisher v. Texas* is the most recent race-conscious admissions challenge to reach the Supreme Court.

[223] Transcript of Oral Argument at 55, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981).

[224] *Id.* at 55-56.

[225] *See Fisher v. Texas*, 136 S. Ct. 2198 (2016) (upholding constitutionality of UT's race-conscious admissions policy).

[226] Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. Discourse 40, 62-63 (2016).

[227] *Id*.

promotes racial equality.[228] But they need not look to this body of research alone. Universities enjoy access to a unique and local "data set" that can fortify this claim: their own students. Unfortunately, university defendants tend to overlook—if not minimize—the experiences of students on their campus. This dynamic has unfolded in both cases.[229] Rather than center the voices and experiences of their students, Harvard and UNC have fought to exclude that testimony from the litigation.[230] Fortunately, courts in both cases permitted student intervenors to thicken the factual record with their personal accounts of life on campus. Those stories are critical. Beyond strengthening the case for affirmative action, the testimony illuminates an unassailable yet contested reality: race continues to matter on university campuses, and affirmative action offers one tool to make that less so.

B. The Rebrand: Affirmative Action as Affirmative Obligation

Above, I explored how "race matters" before, during, and after admissions. The goal was three-fold: (1) add depth and texture to the structuralist insight that facial neutrality does not ensure racial neutrality; (2) reveal how colorblind logics (that cast affirmative action as justifiable discrimination), rather than this basic insight, animate affirmative action advocacy; (3) reinvigorate the case for advocates to defend affirmative action as essential anti-discrimination—a countermeasure that mitigates an array of racial (dis)advantages embedded in standard admissions processes.

Here, I take the argument one step further. If affirmative action comprises essential antidiscrimination, it suggests that universities do not just enjoy a *right* to consider applicant race. They might, as well, possess an *obligation* to do so. To unpack this final reframe, I turn to two final points of analysis: Title VI's disparate impact regulations and the tiers of scrutiny that govern equal protection challenges.

1. Title VI Disparate Impact Regulations

Rarely do universities argue that affirmative is required. Still, the UNC student intervenors made this precise point to justify their presence in the

---

[228] *See supra* Feingold, <hidden in plain sight>.

[229] *See* Cheryl I. Harris, *What the Supreme Court did not Hear in* Grutter *and* Gratz, 51 Drake L. Rev. 697 (2003).

[230] *See SFFA v. UNC* at 493 ("SFFA and UNC oppose intervention and argue that Proposed Intervenors should be allowed to participate as amicus curiae.").

litigation. Specifically, the intervenors argued that UNC was unlikely to develop evidence (or otherwise argue) "that the current admissions process is *necessary* to comply with minority students' rights under the Constitution and Title VI."[231]

The proposition that federal law may *require* race-conscious admissions rests on multiple sources of law.[232] One source is Title VI, which prohibits covered entities from discriminating against students on the basis of race.[233] Consistent with its broader equality jurisprudence, the Supreme Court has read a discriminatory "intent" requirement into Title VI. This judicial narrowing constrains Title VI's remedial efficacy. It does not, however, displace the disparate impact provision in Title VI's implementing regulations.[234] The regulations offer a doctrinal site the serves two related purposes. First, the regulations help surface racial (dis)advantage within facially neutral processes.[235] Second, they offer a legal hook to defend race-conscious admissions as mandatory anti-discrimination.[236]

---

[231] Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 14, *SFFA v. UNC*.

[232] *See, e.g.,* Luke Harris, *Reimagining* Regents v. Bakke, in CRITICAL RACE JUDGMENTS (arguing that a university's over-reliance on "untrustworthy" measures of academic potential without a countermeasure (e.g., affirmative action) discriminates—in practice if not law—against Black students).

[233] 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[234] *See* 34 C.F.R. § 100.3(b) (prohibiting "recipients of federal funds from engaging in policies with unjustified racially disparate impact"). *See also* Kidder & Rosner, *supra* note <How the SAT Creates "Built-in Headwinds [145]>, at 175 ("While the efficacy of Title VI itself is limited by the same discriminatory purpose requirement as the Equal Protection Clause, the U.S. Department of Education regulations interpreting Title VI prohibit both intentional discrimination and criteria or practices that have an unwarranted disparate impact on a protected class.").

[235] Michael G. Perez, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467, 467 (2004) ("Enforcing a prohibition on disparate impact in higher education admissions would force schools to discard or reform admissions criteria that have an unfair and unnecessary discriminatory effect on minority applicants.").

[236] The Supreme Court has barred private parties from enforcing Title VI's implementing regulations. *See Alexander v. Sandoval*, 532 U.S. 275, 293 (2001)

To establish a prima facie case under Title VI's implementing regulations, a plaintiff must present evidence that (1) a covered entity "admitted members of [a] racial group at a rate that is lower than the admission rate of the racial group admitted at the highest rate", and (2) "that the disparity between the difference in rates meets the judicially determined threshold that triggers the legal requirement that the university prove the admissions criteria causing the racial disparity in rates is an 'educational necessity."[237]

Multiple methods exist for establishing a "judicially determined threshold."[238] One method is the "four-fifths rule."[239] Professor Kimberly West-Faulcon has outlined how this rule would apply to claims of anti-Asian bias:

> Applying the four-fifths rule involves determining whether the ratio of the selection rate for the racial group alleging disparate impact—the group with the lower selection rate—is less than 80 percent of the selection rate for the racial group selected at the highest rate. If the ratio of the selection rate of Asian Americans compared to the rate of selecting whites is less than 80 percent, a rejected Asian American student would potentially have evidence of legally cognizable racial

("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602."). Private parties may still file administrative complaints with the Department of Education, which is empowered to bring such claims. *See Kidder & Rosner*, *supra* note <How the SAT [145]>, at 177.

[237] West-Faulcon, *supra* note <Obscuring Asian Penalty [125]>. Professor West-Faulcon has offered the most comprehensive analysis of how a university defendant would operationalize Title VI's disparate impact regulations to make an affirmative case for race-conscious admissions and defuse standard lines of attack. *See id*.

[238] *See id*. at 616 n.105 and body text. *See also* Jenkins, *supra* note <Foxes Guarding the Chicken Coop [134]>, at 309-10 (describing a similar framework in the constitutional context).

[239] 29 C.F.R. § 1607.4(D) (2016) (explaining the "four-fifths rule" for adverse impact):

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

adverse impact, also called racially disparate impact, under established Title VI disparate impact law.[240]

University defendants rarely mobilize Title VI's disparate impact provisions to defend race-conscious admissions.[241] This may be a mistake. Under certain facts, a university may be able to demonstrate that race-conscious admissions are necessary avoid an unjustifiable disparate impact from faulty measures of merit.[242] The argument makes multiple interventions. First, it disrupts the presumption that standard academic indicators are unassailable race-neutral measures of "merit."[243] Put differently, the implementing regulations provide an analytical framework to highlight how race matters in the baseline against which affirmative action intervenes.[244]

The implementing regulations serve an additional purpose. They also offer a path to counter claims that affirmative action discriminates against Asian Americans. Professor West-Faulcon has detailed how UT could have mobilized such an argument to defuse this narrative in *Fisher v. Texas*.[245] A short review is helpful, in part, because similar narratives now enjoy heightened salience in legal and public discourse.

---

[240] West-Faulcon, *supra* note <obscuring Asian penalty [125]> (citing 29 C.F.R. § 1607.4(D)).

[241] *See* Kidder & Rosner, *supra* note <How the SATs [145]>, at 184–85 ("There is a paucity of Title VI standardized testing cases challenging college and university admission practices. This may be a reflection of the availability of affirmative action as a counterbalance to disparate impact, and it may also reflect a recognition on the part of plaintiffs' attorneys that Title VI disparate impact cases are difficult to win and may have even less viability in the future.").

[242] *See id*.

[243] *See* Kidder & Rosner, *supra* note <How the SAT creates built in headwinds [145]>, at 193 (explaining why over-reliance on standardized tests would not constitute an educational necessity).

[244] For deeper critiques of "merit," see Harris & Narayan, *supra* note <myth of preferential treatment [13]> and Daria Roithmayr, *Deconstructing the Distinction between Bias and Merit*, 85 CALIF. L. REV. 1449 (1997).

[245] *Fisher v. Texas* featured a white plaintiff. Still, conservative Justices couched their affirmative action skepticism in a narrative of Asian victimhood. *See Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2227 (2016) (Alito, J., dissenting) ("The majority's assertion that UT's race-based policy does not discriminate against Asian–American students defies the laws of mathematics.").

UT admitted most of its students through a facially-neutral 10 Percent Plan.[246] The remainder of admits ("non-Top Ten") came through a process that permitted admissions officers to consider a range of factors.[247] One factors was an applicant's race—a consideration available to any student.[248] Even within this subset of students, UT admitted Black and Latino students at rates far lower than white and Asian applicants.[249]

As Professor West-Faulcon explains, UT could have marshaled this data to defend affirmative action on two fronts. First, UT could have argued that the rate disparities for non-Top Ten applicants exposed the university to liability under Title VI's disparate impact provisions.[250] In other words, the question should have been whether UT did enough to mitigate its over-reliance on criteria that produced an unjustifiable disparate impact—not whether the law permitted UT to consider race at all.

Separately, UT could have employed the data to counter the narrative that affirmative action harmed Asian applicants. To begin, UT admitted Asian and white non-Top Ten applicants at similar rates—data that undercuts the claims of negative action against Asians.[251] More important, white applicants applied in larger numbers and enjoyed higher admission rates than Black and Latino applicants. Accordingly, rejected Asian Americans "were far more likely to have been displaced by a white applicant than an African American

---

[246] Pursuant to the 10 Percent Plan, all Texas students who graduate in the top 10% of their high school automatically receive admission to UT. *See id*. at 2207.

[247] *See id*.

[248] *See id.* ("[T]here is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus.")

[249] *See* West-Faulcon, *supra* note <Obscuring Asian Penalty [125]>, at 615 ("Both the white and Asian American admission rates were more than double the rates for Latino and African American students, statistically favoring white and Asian American applicants over African Americans and Latinos, not vice versa.").

[250] *See id*.

[251] Statistics that aggregate the experience of all students raced as Asian are likely to obscure meaningful differences across different Asian ethnic groups. *See generally* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. Rev. 101 (2021). Accordingly, average "Asian" performance masks (a) the group-based disadvantage that certain communities continue to face and (b) why affirmative action benefits certain Asian students. *See* West-Faulcon, *supra* <obscuring Asian penalty [125]>.

or Latino applicant."[252] In other words, if UT rejected deserving Asian applicants, the beneficiaries were likely white, not another student of color.

Similar arguments could translate to ongoing litigation at Harvard and UNC.[253] SFFA has deployed a narrative of Asian victimhood to discredit affirmative action—even if its own expert identifies white students as the primary beneficiaries of anti-Asian bias.[254] Harvard could invoke Title VI's implementing regulations to highlight this dynamic—which calls for more (racially targeted) affirmative action, not less.

Harvard has not done so, even as SFFA notes instances of white racial advantage. As one sample, SFFA cited a report from Harvard's Office of Institutional Research:

> OIR found that Asian-American admit rates were lower than white admit rates every year over a ten-year period even though . . . white applicants materially outperformed Asian-American applicants only in the personal rating. Indeed, OIR found that the white applicants were admitted at a higher rate than their Asian-American counterparts at every level of academic-index level.[255]

Harvard could have cited the report to evidence the racial advantages that white students enjoy *even with* its current admissions regime. Instead, Harvard discounted the report's factual and legal relevance.[256] One might

---

[252] West-Faulcon, *supra* <Obscuring Asian Penalty [125]>, at 9.

[253] *See* West-Faulcon, *supra* note <obscuring Asian Penalty [125]>, at 625 (explaining that a Title VI analysis could dispel the narrative that "African Americans and Latinos, but not whites, as the students who are edging out Asian Americans").

[254] West-Faulcon, *supra* note <Obscuring Asian Penalty [125]>.

[255] Plaintiff's Memorandum of Reasons in Support of its Motion for Summary Judgment at 13, *SFFA v. Harvard 2015*. This statement tracks additional allegations from SFFA that Harvard prefers white applicants vis-à-vis Asian applicants with similar academic credentials. *See, e.g.*, *id*. at 10 ("An Asian-American male applicant with a 25% chance of admission would see his chance increase to 31.7% if he were white—even including the biased personal rating. Excluding the biased personal rating . . . [An] Asian-American applicant's change would increase to 34.7% if he were white. . . . If they had been treated like white applicants, an average of approximately 44 more Asian Americans per year would have been admitted to Harvard over the six-year period the experts analyzed.").

[256] I am not suggesting that the Report proves discrimination—however defined. Rather, I surface this evidence because Harvard diminished a report that, albeit provisional, could have bolstered a structuralist account of race and strengthened the case for affirmative action *for* Asian applicants.

justify Harvard's response as a rational response to potential evidence of discrimination. That explanation, however, misconstrues the report's import vis-à-vis affirmative action. The report, even if provisional, suggests that white applicants enjoy unmerited racial advantage relative to Asian applicants. If anything, the report suggests that Harvard's race-conscious practices have yet to eliminate racial (dis)advantages that benefit white applicants. It also exculpates affirmative action as the source of any anti-Asian bias.

Similar reasoning extends at UNC. SFFA's complaint contains a table of admissions rates for Black, White, and Asian American students.[257] The table divides students into nine "academic index ranges."[258] In seven of the nine ranges, white applicants enjoy a higher admission rate than Asian Americans—most of which surpass the four-fifths threshold.[259] In its post-trial brief, SFFA highlighted an academic decile where "[t]he white admit rate is 2.9 percent. The Asian American admit rate is 1.4 percent; and then you see for African Americans, it's 39.6 percent; and for Hispanics, it's almost 16 percent."[260]

SFFA deploys these misleading figures to implicate affirmative action as the source of anti-Asian discrimination.[261] UNC, however, need not hide

---

[257] *See* Complaint at 18, *SFFA v. UNC*. UNC generated the statistics in 2006. SFFA employs the table to malign affirmative action, not to target the advantage white students enjoy vis-à-vis Asian applicants).

[258] These indices correspond to the students' SAT scores and undergraduate GPA. SFFA divides students in this way to calculate the purported "boost" students receive from affirmative action. But as other have noted, this method distorts the admissions process—and overstates affirmative action's impact—by treating academic performance as the only admissions criteria. *See* West-Faulcon, *supra* note <Asian penalty [125]>.

[259] *See id*.

[260] Plaintiff's Proposed Findings of Fact and Conclusions of Law at 29, *SFFA v. UNC*. There is a risk of misconstruing disparate admissions rates for students who comprise minorities within an admissions pool.

[261] Tables like this overstate affirmative action's impact for at least two reasons. First, they employ analyses that disregard multiple admissions considerations. Second, when a university employs affirmative action to reduce over-reliance on fraught standardized test scores, Black and Latinx students are likely to enjoy higher median rates of admission when controlling for test scores. Separately, the figures reveal what universities already admit: they consider applicant race. *See* Feingold, *supra* note <SFFA v. Harvard [124]>, at 724; *see also* West-Faulcon, *supra* note <Obscuring Asian Penalty [125]>, at 627.

from the data. To the contrary, it could emphasize that white applicants enjoy higher admissions rates relative to their Asian counterparts. Doing so disrupts SFFA's causal claim that affirmative action harms Asian Americans and implicates the racial advantages that white students continue to enjoy—even under a race-conscious admissions regime. By reappropriating the data, advocates need not ignore or diminish evidence of anti-Asian biases; rather than implicating affirmative action, that evidence invites more robust and refined race-consciousness.

2. Contesting Strict Scrutiny

Last, a colorconscious story invites a final intervention: challenge existing equality law, which subjects Jim Crow and affirmative action to the same—and most rigorous—level of judicial review. On this point, Devon Carbado has offered the following observation:

> A final reason a countermeasure framing of affirmative might be important is that this framing would make the application of strict scrutiny to affirmative action normatively and doctrinally suspect. Which is to say, it is much easier for opponents of affirmative action to argue that the policy triggers strict scrutiny when affirmative action is conceptualized as a preference than it would be if affirmative action were viewed as a countermeasure.[262]

In other words, judicial skepticism toward race-conscious admissions trades on the claim that affirmative action confers a "racial preference." That skepticism appears misplaced if affirmative action mitigates racial (dis)advantage. For affirmative action advocates, evading colorblind capture leads here: an unbashful critique of doctrinal regimes that conflate segregation with desegregation, subordination with remediation, exclusion with inclusion.

This critique of exiting doctrine will not sway the current Supreme Court. But that reality renders the critique no less important.

To begin, affirmative action litigation remains a proxy for broader fights over the enduring relevance of race and racism in American—and what, if anything, remains necessary to repair a legacy of racialized subordination and oppression. Today, these larger battles could not be more acute. Given the resurgence of anti-antiracism discourse, university defendants bear a heightened responsibility to reclaim their own policies' moral and constitutional authority. Part of that work entails targeting the colorblind logic

---

[262] Carbado, *supra* note <Footnote 43 [13]> (".").

that underwrites existing doctrine and informs regressive projects that seek to re-write the past and cast antiracism as the new racism.

This is a space where the Left could learn from the Right. The current moment of racial retrenchment is facilitated by an ultra-conservative majority.[263] But it is also facilitated, if not made possible, by a decades-long project that seeded within constitutional discourse and public consciousness the colorblind conceptions of racism and racism. Affirmative action advocates have enabled this project.

At least since *Bakke*, university defendants have conceded a doctrinal framework the equates affirmative action with interment.[264] By failing to contest strict scrutiny's application to remedial race-consciousness, affirmative action advocates have weakened the case for their own policies. To appreciate why, consider if the Supreme Court included five liberal Justices. Harvard and UNC would prevail. But based on a compelling interest that satisfies strict scrutiny. Even in upholding race-conscious admissions, the Court would reify core colorblind logics that render affirmative action presumptively suspect—politically, morally, and constitutionally.[265]

This acquiescence is not inevitable, nor is it strategic. Consider SFFA, who has deployed a multi-pronged attack that works within and challenges existing law.[266] To begin, SFFA has (a) employed existing doctrine to attack Harvard and UNC's respective policies while also (b) challenging features of doctrine that render race-conscious admissions even theoretically possible.[267] As one example, SFFA urges the Court to overturn the diversity rationale. Even more radically, the plaintiff invites the Court to prohibit all race-consciousness, regardless of the rationale.[268]

---

[263] *See* Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 325 (2020) ("In this way, Chief Justice Roberts's respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not.").

[264] Prior to *Bakke*, there was no established framework for adjudicating voluntary remedial race-conscious interventions. *See* Carbado, *supra* note <Footnote 43 [13]>, at 1123 ("Justice Powell's concurring opinion in *Bakke* was written at a moment in which the race per se model of equal protection had not yet taken hold. . . . [T]here was a very real question about whether courts should subject race conscious governmental decision-making to something like a tiered approach.").

[265] See Murray, *supra* note <The Symbiosis of Abortion [275]>.

[266] *See* Feingold, *supra* note <sffa v. Harvard [124]>.

[267] *See id*.

[268] *See id*.

Even if SFFA does not prevail on every point, it has expanded the possibilities of regressive lawmaking. This contrasts with the university defendants, who acquiescence to existing doctrine circumscribes the grounds for even poignant dissents. Moreover, SFFA recognizes—or at least appears to recognize—that its audience transcends the court. This entity, part of a larger enterprise of rightwing forces, is also speaking to the public. The narrative SFFA constructs within the purview of litigation does more than further its legal claims. It also tracks, amplifies, and reinforces an ongoing campaign to sew colorblindness so deeply into our cultural consciousness that we can no longer differentiate between racism, on the one hand, and antiracism, on the other.

CONCLUSION

This Article has located contemporary affirmative action disputes within longstanding efforts to defuse the transformative potential of antiracist reform. At one level, this connection is obvious. Race-conscious admissions offer a modest antiracist practice. They are, accordingly, a natural target of regressive backlash. But the connection runs deeper. To begin, fights over affirmative action implicate far more than any given practice or set of practice. Affirmative action debates serve as a proxy for larger and more fundamental contestations over what, if anything, America must do to overcome its racial past. These fights, in other words, are where litigants, judges, and the public debate whether a racial status quo defined by searing inequalities is constitutionally acceptable and morally just.

We might, accordingly, expect affirmative action litigation to feature competing visions of race and racism in America—where, perhaps, affirmative action advocates wield a structuralist story to combat the colorblind logic that animates anti-affirmative action talking points. But this is not what we see. Instead, we encounter an adversarial space in which both sides—Left and Right; advocate and opponent—espouse thin theories of race and racism that, at best, offer "lukewarm" support for modest race-conscious interventions.

This reality reveals that the Right has never enjoyed a monopoly on colorblindness. For decades, colorblindness—and the conceptual pillars on which it rests—has infused liberal defenses of affirmative action. This trend shows no signs of abating. For those determined to withstand multiple coalescing waves of racial retrenchment, this should be a cause for concern. But it also reveals a site of opportunity—even if race-conscious admissions are lost in the court of law. This is the moment to revive affirmative action in the court of public opinion. The moment calls for nothing less.