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# AFFIRMATIVE ACTION AFTER *SFFA*

JONATHAN P. FEINGOLD\*

## *Abstract*

*In SFFA v. Harvard (SFFA), the Supreme Court further restricted a university's right to consider the racial identity of individual applicants during admissions. The ruling has spawned considerable confusion regarding a university's ongoing ability to pursue racial diversity, racial inclusion, and other equality-oriented goals—whether through “race-conscious” or “race-neutral” means. To assist institutions attempting to navigate the ruling, this article outlines a set of key legal rights and responsibilities that universities continue to possess following SFFA.*

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# TABLE OF CONTENTS

<b>INTRODUCTION</b>	<b>241</b>
<b>I. SITUATING SFFA IN THE FIGHT FOR RACIAL EQUALITY</b>	<b>242</b>
A. LOOKING BACK: SFFA ADVANCES A DECADES-LONG CAMPAIGN TO LIMIT CIVIL RIGHTS REMEDIES	243
B. LOOKING AHEAD: SFFA BUTTRESSES A RESURGENT CAMPAIGN TO LOCK IN RACIAL INEQUALITY	246
<b>II. LEGAL RIGHTS: WHAT UNIVERSITIES MAY DO TO PROMOTE RACIAL DIVERSITY AND INCLUSION</b>	<b>249</b>
A. POLICIES THAT EMPLOY RACIAL CLASSIFICATIONS	249
1. <i>The “Distinct Interests” in Diversity Rationale</i>	249
2. <i>The “Remedial” Rationale</i>	252
3. <i>The “More Quantifiable Diversity” Rationale</i>	256
4. <i>The “Fair Appraisal” Rationale</i>	261
B. POLICIES THAT EMPLOY COLORBLIND CRITERIA	266
1. <i>Universities May Consider a Student’s Personal Experiences with             Race and Racism</i>	266
2. <i>University’s May Employ Colorblind Criteria to Promote             Racial Diversity</i>	270
3. <i>Universities May Know and Learn the Racial Identity of             Individual Applicants and May Model and Analyze Their             Practices’ Racial Impact</i>	274
4. <i>Universities May Proudly Proclaim Their Equality-oriented Values</i>	276
5. <i>SFFA Applies to Admissions Decisions Only</i>	278
<b>III. LEGAL OBLIGATIONS: WHAT UNIVERSITIES MUST DO TO PROMOTE RACIAL DIVERSITY AND INCLUSION</b>	<b>279</b>
A. TITLE VI’S IMPLEMENTING REGULATIONS PROHIBIT DISPARATE IMPACTS	279
B. TITLE VI MANDATES EQUAL LEARNING ENVIRONMENTS	280
<b>IV. CONCLUSION</b>	<b>282</b>

## INTRODUCTION

In *SFFA v. Harvard* (*SFFA*), the Supreme Court further restricted a university's ability to consider the racial identity of individual applicants during the admissions process.<sup>1</sup> The immediate consequences are clear. *SFFA* makes it more difficult for colleges and universities<sup>2</sup> to employ "racial classifications"<sup>3</sup> to pursue equality-oriented goals like a racially diverse student body, a racially inclusive campus, and the "fair appraisal" of each applicant's academic talent and potential.<sup>4</sup>

But contrary to headlines, *SFFA* did not "end affirmative action."<sup>5</sup> I do not mean to understate *SFFA*'s practical or doctrinal impact. Many universities have already jettisoned or modified a range of preexisting policies—including some untouched by the decision itself.<sup>6</sup> Still, popular opinion has entrenched a narrative that overstates what is, as a formal matter, a surprisingly narrow opinion.

Universities possess a robust set of tools to create more racially diverse and inclusive campus communities. *SFFA* changed that, but less so than common headlines suggest.<sup>7</sup> One danger is that if scholars, university counsel, and institutional leaders acquiesce to this dominant narrative, even well-meaning universities will eliminate or narrow still-lawful conduct.<sup>8</sup> To guard against overcorrection and

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1 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023) [hereinafter *SFFA v. Harvard*].

2 For brevity, I use the singular term "universities" to capture the broad and diverse set of educational entities that comprise higher education.

3 I employ the terms *race-conscious*, *race-based* and *racial classifications* interchangeably to describe admissions policies that permit decision-makers to differentiate between individual students based on their respective racial identities.

4 See generally Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference*, 53 U.C. DAVIS L. REV. 1117, 1146–69 (2019) (explaining why facially neutral criteria tend to understate the actual qualifications and potential of students from negatively stereotyped racial groups).

5 See, e.g., Jelani Cobb, *The End of Affirmative Action*, NEW YORKER (June 29, 2023), <https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action>.

6 This includes new institutional mandates that prohibit admissions officers from seeing each applicant's self-reported racial identity. See Anemona Hartcollis, *Colleges Will Be Able to Hide Student's Race on Admissions Applications*, NEW YORK TIMES (May 23, 2023), <https://www.nytimes.com/2023/05/26/us/college-admissions-race-common-app.html>. *SFFA* did not require this form of racial cloaking—which the plaintiff had requested in its Complaint against Harvard. See Complaint at 119, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-14176 (D. Mass. Nov. 14, 2014) (seeking a "permanent injunction prohibiting Harvard from using race as a factor in future undergraduate admissions decisions ... permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission").

7 See *infra* Part II.

8 See Jonathan Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 142 (2023) (describing similar phenomenon after California voters passed Proposition 209, which prohibits the state from "discriminating against" or "granting preferential treatment to" individuals based on several categories including race). On September 7, 2023, Yale University settled a lawsuit in which the same entity that had sued Harvard and

self-censorship, this article makes three discrete contributions.

Part I situates *SFFA* in a broader campaign to morally stigmatize and legally outlaw equality-oriented efforts in the United States. I start here because a purely legal analysis cannot capture the rising threat to racial equality in higher education and beyond. Moreover, the ideological alignment between rightwing litigants and the Supreme Court's conservative supermajority means that what is lawful today could be unlawful tomorrow.

Part II outlines a university's right to realize a more racially just admissions process and campus environment. For purposes of precision, I break this part into two subsections. The first focuses on policies that employ *racial classifications*<sup>9</sup> to further equality-oriented objectives like racial diversity and racial inclusion. The second focuses on policies that employ *colorblind criteria*<sup>10</sup> to promote those same equality-oriented ends. Whereas *SFFA* rendered racial classifications more difficult to defend, the decision fortified the legal case for colorblind criteria.<sup>11</sup>

Part III identifies two legal obligations that universities must continue to satisfy after *SFFA*. Specifically, Title VI and its implementing regulations require covered universities to avoid practices that produce an unjustifiable disparate impact and to remedy racially hostile environments.<sup>12</sup> This part is meant to remind stakeholders that whatever *SFFA*'s reach, the opinion did not eliminate independent legal duties arising under federal civil rights law.

## I. SITUATING *SFFA* IN THE FIGHT FOR RACIAL EQUALITY

Racial equality and multiracial democracy have always been contested propositions in America.<sup>13</sup> *SFFA* is part of this story. The litigation targeted modest *affirmative action*<sup>14</sup> policies at elite institutions with their own histories of racial

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UNC challenged Yale's race-conscious admissions policy. Yale voluntarily agreed to cease engaging in equality-oriented practices that remain lawful after *SFFA*. Liam Knox, *Yale Reaches Agreement on Affirmative Action Case*, INSIDE HIGHER ED (Sept. 7, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/09/07/yale-affirmative-action-case-dropped-stipulations>.

9 Drawing on Supreme Court caselaw, I employ the term *racial classification* to describe policies that permit decision-makers to consider the racial identity of individual applicants in a competitive selection process. See *supra* note 3. The Supreme Court often employs terms like "race based," "racial preference," and "racial discrimination" to describe policies that employ "racial classifications." See e.g., *SFFA v. Harvard*, 600 U.S. 181, 208 (2023) ("Our acceptance of race-based state action has been rare for a reason. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'").

10 I employ the terms *colorblind*, *race-neutral* and *facially neutral* interchangeably to describe admissions policies that do not permit decision-makers to differentiate between individual students based on their respective racial identities. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

11 See *infra* Part II.

12 See *infra* Part III.

13 See Randall Kennedy, *The Truth Is, Many Americans Just Don't Want Black People to Get Ahead*, N.Y. TIMES (June 7, 2023), <https://www.nytimes.com/2023/06/07/opinion/resistance-black-advancement-affirmative-action.html>.

14 In this article, I use the term *affirmative action* to capture equality-oriented policies that employ racial classifications. See *supra* note 3 (defining "racial classifications").

exclusion.<sup>15</sup> By ruling against Harvard University and the University of North Carolina (UNC), Chief Justice Roberts made it more difficult for the defendants—among other universities—to reckon with and remedy institutional legacies of racial exclusion.<sup>16</sup> Aspects of Chief Justice Roberts’s opinion also legitimized the contemporary consequences of those legacies by treating the defendants’ race-conscious policies as the constitutional equivalent of Jim Crow segregation.<sup>17</sup>

#### A. *Looking Back: SFFA Advances a Decades-long Campaign to Limit Civil Rights Remedies*

In *SFFA*, the Supreme Court made it harder for universities to consider an applicant’s racial identity during admissions. The opinion was predictable in certain respects, surprising in others.<sup>18</sup> One surprise was *SFFA*’s *formally* narrow scope. As I detail below, Chief Justice Roberts limited his holding to Harvard and UNC’s respective admissions policies and did not overturn established precedent.<sup>19</sup>

That said, many foresaw that colorblindness would animate a ruling that struck down equality-oriented policies.<sup>20</sup> The Chief Justice marshalled the rhetoric

15 See, e.g., David W. Bishop, *The Consent Decree Between the University of North Carolina System and the U.S. Department of Education, 1981–82*, 52 J. NEGRO EDUC. 350, 353 (1983) (“Toward the end of 1969, [the Department of Education’s Office of Civil Rights] decided that ten states [including North Carolina] were operating segregated systems of higher education in violation of Title VI.”); see also Letter from Patricia Parker and James Leloudis, Commission on History, Race, and a Way Forward, to Kevin Guskiewicz, Chancellor, Univ. of N.C. at Chapel Hill (June 29, 2021), <https://historyandrace.unc.edu/wp-content/uploads/sites/1091/2021/07/Second-name-removal-recommendation-package-5.pdf>.

16 This builds on prior Supreme Court precedent, including the holding that remedying “societal discrimination” does not constitute a compelling interest. See *SFFA v. Harvard*, 600 U.S. 181, 209 (2023) (“Justice Powell next observed that the goal of remedying the effects of societal discrimination was also insufficient because it was an amorphous concept of injury that may be ageless in its reach into the past.”) (internal quotation marks and ellipsis omitted).

17 See generally, Jonathan Feingold, *Reclaiming CRT: How Regressive Laws Can Advance Progressive Ends*, 73 S.C. L. REV. 1 (2022).

18 Many predicted that the Supreme Court would rule against Harvard and UNC. See, e.g., Ian Millhiser, *The Supreme Court Case That Could End Affirmative Action*, VOX (Mar. 2, 2023), <https://www.vox.com/22301135/supreme-court-affirmative-action-harvard-college-race-students-for-fair-admission-ed-blum>. This tracked past predictions (then incorrect) that the Supreme Court would invalidate race-conscious admissions policies in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Fisher v. Texas*, 136 S. Ct. 2198 (2016). See, e.g., Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 283–84 (2015) (“Based on the Court’s opinion in [Fisher I] . . . we may not have to wait until 2028 for a new determination on the efficacy of affirmative action.”); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CALIF. L. REV. 1055, 1120 (2001) (“[T]he diversity rationale for affirmative action may soon be rejected or curtailed by the Supreme Court.”).

19 See *infra* Part II; see also Reginald Oh, *What the Supreme Court Really Did to Affirmative Action*, WASH. MONTHLY (July 20, 2023) (highlighting that Chief Justice Roberts did not formally overturn *Grutter v. Bollinger* or the specific holding that racial diversity constitutes a compelling interest in university admissions).

20 See, e.g., Cara McClellan, *Evading a Race-Conscious Constitution*, 25 U. PA. J. CONST. L. ONLINE 1, 2 (2023) (“The idea of a ‘colorblind’ Constitution is front and center in cases before the Supreme Court this term.”); Vinay Harpalani, *“With All Deliberate Speed”: The Ironic Demise of (and Hope for)*

of “colorblindness” to refashion the Fourteenth Amendment and *Brown v. Board of Education*<sup>21</sup>—two of our nation’s most racially progressive precedents—as impediments to building more racially diverse and inclusive universities.<sup>22</sup> At the same time, Chief Justice Roberts failed to engage the only actual evidence of discrimination presented in the litigation—evidence that Harvard’s admissions process harmed Asian Americans to the benefit of similarly situated White applicants.<sup>23</sup>

At bottom, *SFFA* invalidated the modest consideration of race within two holistic admissions processes. Such limited interventions within elite university admissions have never been a panacea to racism—nor should we expect them to be. Still, the sorts of policies Harvard and UNC employed better position universities to advance a range of democratic and equality-oriented values—for example, desegregating historically White campuses<sup>24</sup>; promoting a more individualized, equitable, and “meritocratic” selection process<sup>25</sup>; and cultivating racially inclusive campuses where all students can enjoy the full benefits of university membership.<sup>26</sup>

The ongoing need for race-conscious policies should be clear. Racism remains one of the most powerful forces in American society—a phenomenon that shapes all corners of our public and private lives.<sup>27</sup> Chief Justice Roberts’s opinion, in contrast, reads as if race is irrelevant to admissions until the moment affirmative action arrives.<sup>28</sup>

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*Affirmative Action*, 76 SMU L. REV. 91 (2023).

21 347 U.S. 483 (1954).

22 See, e.g., *SFFA v. Harvard*, 600 U.S. 181, 202 (2023) (“The Constitution, [the post-Civil War Congress] w[as] determined, ‘should not permit any distinctions of law based on race or color,’ because any ‘law which operates upon one man [should] operate equally upon all’ (quoting Supp. Brief for United States on Reargument in *Brown v. Board of Education*, O. T. 1953, No. 1 etc., p. 41 & CONG. GLOBE 2459 (statement of Rep. Stevens)). The decision and reasoning tracked a Supreme Court legacy of obstructing democratic efforts to deliver meaningful equality for Black Americans. See Kennedy, *supra* note 13.

23 See Jerry Kang, *Ending Affirmative Action Does Nothing to End Discrimination Against Asian Americans*, THE CONVERSATION (Aug. 3, 2023), <https://theconversation.com/ending-affirmative-action-does-nothing-to-end-discrimination-against-asian-americans-209647>; Jonathan Feingold & Vinay Harpalani, *Brief of Legal Scholars Defending Race-Conscious Admissions as Amici Curiae in Support of Respondents, SFFA v. Harvard (20-1199) and SFFA v. University of North Carolina at Chapel Hill (21-707) (2022)* [hereinafter Feingold & Harpalani, *Amicus Brief*].

24 See, e.g., Feingold, *Ambivalent Advocates*, *supra* note 8,.

25 See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1064 (2006).

26 See, e.g., Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, 60 (2019).

27 See, e.g., George Lipsitz, *The Racialization of Space and the Spatialization of Race*, 26 LANDSCAPE J. 10 (2007). Justice Kavanaugh appears to concede this point in his *SFFA* concurrence. SEE *SFFA v. Harvard*, 600 U.S. 181, 317 (Kavanaugh, J., concurring) (“To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist.”).

28 See, e.g., *SFFA v. Harvard*, 600 U.S. at 231 (“[U]niversities [that employ race-conscious admissions] have for too long done just the opposite. And in doing so, they have concluded, wrongly,

This narrative follows a centuries-long discourse that reframes civil rights remedies as a threat to civil rights.<sup>29</sup> The Supreme Court has condemned equality-oriented projects since the wake of the Civil War. In 1883, two decades after the Emancipation Proclamation, the Supreme Court struck down Congress's first attempt to prohibit racial discrimination in places of public accommodation.<sup>30</sup> Invoking a narrative that now shapes affirmative action debates, Justice Bradley characterized the nation's first federal antidiscrimination law as "preferential treatment" for Black Americans.<sup>31</sup>

This discursive and legal assault on civil rights remedies did not end in the nineteenth century. Over the past fifty years, the Supreme Court has erected an equal protection framework that deems remedial race-conscious policies no less suspect than the apartheid regime they are meant to remedy.<sup>32</sup> This legal symmetry trades on rhetoric that discredits affirmative action as "preferential treatment" that harms "innocent victims."<sup>33</sup> As I and others have detailed, framing affirmative action as a "racial preference" relies on a highly contestable empirical claim; it is not a statement of objective fact.<sup>34</sup> Nonetheless, centuries of targeted rhetoric now shape (and, arguably, overdetermine) public perceptions of affirmative action and related race-conscious projects.<sup>35</sup>

Even affirmative action advocates often defend such policies as a justifiable "preference"—that is, a defensible departure from a baseline of race neutrality.<sup>36</sup> This dynamic, which can transform affirmative action's formal champions into ambivalent advocates, defined *SFFA*.<sup>37</sup> As I previously observed, neither Harvard nor UNC zealously championed its own policy.<sup>38</sup> And by omitting key facts and theories, both fed the same narrative the Chief Justice offered: that race was irrelevant to their respective admissions processes until the moment affirmative

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that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.").

29 See generally Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988).

30 See *The Civil Rights Cases*, 109 U.S. 3 (1883).

31 *Id.* at 25 ("When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.").

32 See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

33 See *SFFA v. Harvard*, 600 U.S. at 271–72 (Thomas, J., concurring).

34 See generally Carbado, *Footnote 43, supra* note 4.

35 This helps to explain why majorities of Americans recognize that racism is structural and yet remain ambivalent about "affirmative action." See, e.g., Pew Rsch. Ctr., *More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity in Admissions Decisions* (June 8, 2023), <https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions/>.

36 See Feingold, *Ambivalent Advocates, supra* note 8.

37 See *id.*

38 See *id.*

action arrived.<sup>39</sup>

Among other omissions, neither defendant highlighted the myriad ways that race matters before, during, and after admissions.<sup>40</sup> The defendants said little about their own unremedied legacies of racial exclusion,<sup>41</sup> the unearned racial preferences that colorblind criteria extend to White applicants,<sup>42</sup> nor the relationship between racial demographics and racial harassment on campus.<sup>43</sup> Harvard and UNC know better than anyone that White racial advantages infiltrate their respective admissions practices. Even SFFA, the organization that sued Harvard, conceded this point when its expert highlighted that Harvard's personal rating and legacy preferences harm innocent Asian Americans (and other students of color) to the benefit of less qualified White applicants.<sup>44</sup> And yet, by eliminating Harvard's affirmative action program, the Supreme Court made it more difficult for the university to remedy the actual sources of anti-Asian bias.<sup>45</sup>

### ***B. Looking Ahead: SFFA Buttresses a Resurgent Campaign to Lock in Racial Inequality***

In *SFFA*, rightwing think tanks and foundations targeted Harvard and UNC's race-conscious admissions policies.<sup>46</sup> The ruling is a victory for Edward Blum (a well-known affirmative action opponent who engineered *SFFA*) and his well-resourced benefactors.<sup>47</sup> But it does not end the assault on racial equality

39 See *id.*

40 See Jonathan Feingold & Arnie Arnesen, #RaceClass Affirmative Action Mini-Series, #RaceClass, [https://soundcloud.com/user-808872105/sets/raceclass-affirmative-action?utm\\_source=clipboard&utm\\_medium=text&utm\\_campaign=social\\_sharing](https://soundcloud.com/user-808872105/sets/raceclass-affirmative-action?utm_source=clipboard&utm_medium=text&utm_campaign=social_sharing) (last visited Nov. 15, 2023).

41 See Evan Mandery, *How White People Stole Affirmative Action and Ensured Its Demise*, POLITICO (June 16, 2023), <https://www.politico.com/news/magazine/2023/06/16/supreme-court-affirmative-action-college-00101963>.

42 See Carbado, Footnote 43, *supra* note 4.

43 See Feingold, *Hidden in Plain Sight*, *supra* note 26.

44 See Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. & ECON. 133, 147 (2020); see also Jonathan Feingold & Vinay Harpalani, *The Party Attacking Affirmative Action Just Made the Case for It*, BOS. GLOBE (Oct. 25, 2022), <https://www.bostonglobe.com/2022/10/25/opinion/party-attacking-affirmative-action-just-made-case-it/>; Uma Mazyck Jayakumar et al., *Race and Privilege Misunderstood: Athletics and Selective College Admissions in (and Beyond) the Supreme Court Affirmative Action Cases*, 70 UCLA L. REV. DISCOURSE 230, 234 (2023).

45 See Kang, *supra* note 23.

46 As one measure, the following nonexhaustive list of rightwing groups submitted amici briefs on behalf of SFFA: Pacific Legal Foundation, Speech First, Judicial Watch, Liberty Justice Center. See *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, SCOTUSBlog, <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-president-fellows-of-harvard-college/> (last visited Nov. 06, 2023).

47 Jeannie Park and Kristin Penner have emphasized that Edward Blum's anti-affirmative action litigation is supported by an extensive network of rightwing donors and think tanks. See Jeannie Park & Kristin Penner, *The Absurd, Enduring Myth of the "Ont-Man" Campaign to Abolish Affirmative Action*, SLATE (Oct. 25, 2022), <https://slate.com/news-and-politics/2022/10/supreme-court-edward-blum-unc-harvard-myth.html>; see also M. Pollock, M. et al., *Supported, Silenced, Subdued, or Speaking Up? Educators' Experiences with the Conflict Campaign, 2021–2022*, 9 J. LEADERSHIP, EQUITY,

in higher education and beyond. It marks a new beginning. Much of the fight now shifts to *SFFA*'s fallout. Blum and his supporters have already turned their sights on equality-oriented efforts untouched by the decision itself.<sup>48</sup> This includes recruitment and retention practices, tracking and analyzing racial outcomes, and any program under the banner of "diversity, equity and inclusion" (DEI).<sup>49</sup> If these attacks succeed, they could usher in a new era of equal protection law that renders the very goal of racial diversity legally suspect.<sup>50</sup>

This future could arrive sooner than many realize. In *SFFA*, affirmative action opponents argued that if Harvard and UNC wanted racial diversity, they should employ "race-neutral alternatives."<sup>51</sup> Yet before *SFFA* had even concluded, Pacific Legal Foundation (which supported *SFFA*'s lawsuits against Harvard and UNC) sued several of the nation's most competitive public high schools for adopting facially neutral processes to increase racial diversity on campus.<sup>52</sup> One prominent example includes Thomas Jefferson High School (TJ) in Fairfax, Virginia, which reduced reliance on standardized tests, dropped an application fee, and ensured

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& RSCH. (July 16, 2023) ("These efforts are part of a nationally networked effort to restrict diversity- and inequality-related discussion, learning, and student support in educational settings—while inflaming Americans to battle public schools and one another.").

48 See, e.g., Tatyana Monnay, *The Lawyer Who Sued Harvard on Affirmative Action Is Going After Law Firms*, BNNBLOOMBERG (Aug. 22, 2023), <https://www.bnnbloomberg.ca/the-lawyer-who-sued-harvard-on-affirmative-action-is-going-after-law-firms-1.1962268>; see also Scott Jaschik, *The Demands of Students for Fair Admissions*, BLOOMBERG (Aug. 22, 2023), <https://www.bloomberg.com/news/articles/2023-08-22/affirmative-action-foe-sues-law-firms-over-dei-hiring-programs>; INSIDE HIGHER ED (July 13, 2023), <https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions>.

49 Recent legal and political attacks targeting equality-oriented practices extend beyond higher education. See, e.g., Taylor Telford, *They Invest in Black Women. A Lawsuit Claims It's Discrimination*, WASH. POST (Aug. 26, 2023), <https://www.washingtonpost.com/business/2023/08/26/dei-lawsuit-black-businesses-fearless-fund-edward-blum/>; Jessica Guynn, *Affirmative Action Wars Hit the Workplace: Conservatives Target "Woke" DEI Programs*, USA TODAY (Sept. 8, 2023), <https://www.usatoday.com/story/money/2023/09/08/affirmative-action-republicans-target-diversity-programs/70740724007/>.

50 See *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos.*, 996 F.3d 37, 48 (1st Cir. 2021) ("Under plaintiff's purported 'rule,' a selection process based solely on facially neutral criteria that results in an increase in the percentage representation of an underrepresented group is subject to strict scrutiny if those designing the program sought to achieve that result. Such a rule would pretty much mean that any attempt to use neutral criteria to enhance diversity—not just measures aimed at achieving a particular racial balance—would be subject to strict scrutiny. And that is just what plaintiff says.").

51 See Brief for Petitioner at 86, *SFFA v. Harvard*, 143 S. Ct. 2141 (2023) (No. 20-1199), 2022 WL 2918946 at \*86 ("There is no reason why UNC cannot do the same [and remain diverse]. In fact, the myriad race-neutral alternatives available to universities led the United States to conclude in *Grutter* that racial preferences are never necessary."); see also *SFFA v. Harvard*, 600 U.S. 181, 317 (2023) (Kavanaugh, J., concurring) ("[G]overnments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.") (internal quotation marks omitted).

52 See Sonja Starr, *The Magnet School Wars*, STAN. L. REV. (forthcoming 2024); Janel George, *The Myth of Merit: The Fight of the Fairfax County School Board and the New Front of Massive Resistance*, 49 FORDHAM UR. L.J. 1091 (2022).

representation from each feeder school.<sup>53</sup>

In a case that now appears destined for the Supreme Court,<sup>54</sup> Pacific Legal deems these practices a “new species of discrimination.”<sup>55</sup> As a legal matter, the organization argues that any effort to alter an institution’s racial composition violates the equal protection clause.<sup>56</sup> Law Professor Jonathan Glater has explained that were this theory accepted, it would render racial inequality “the [legally] relevant and normatively desirable baseline against which all changes to student selection must be measured.”<sup>57</sup>

In line with the First Circuit (which rejected a related lawsuit targeting the Boston Exam Schools), the Fourth Circuit rejected Pacific Legal’s lawsuit against TJ.<sup>58</sup> This was an appropriate ruling consistent with decades of precedent that insulates facially neutral policies from legal scrutiny.<sup>59</sup> But as with *SFFA*, the challenges to race-neutral alternatives will reach a more sympathetic Supreme Court.<sup>60</sup>

One cannot know how the *TJ* litigation will end. Prevailing doctrine is not on Pacific Legal’s side. But given this Supreme Court’s hostility to equality-oriented efforts, a ruling for Pacific Legal remains plausible—even though it would require the conservative Justices to abandon their own principles and precedents.<sup>61</sup> Universities should be mindful of this possibility, which would severely curtail the availability of nearly any effort to promote racial diversity, racial inclusion, or other equality-oriented ends. But that is not the world we currently inhabit.

To clarify *SFFA*’s impact on admissions, I now identify several arguments universities can still employ to legally defend racial classifications.<sup>62</sup> I then highlight how *SFFA* fortified the legal case for facially neutral practices—including those expressly adopted to promote racial diversity and other equality-oriented goals.

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53 See George, *supra* note 52.

54 Pacific Legal filed a petition for Supreme Court review on August 21, 2023. See Pac. Legal Found., *Fighting Race-Based Discrimination at Nation’s Top-Ranked High Schools*, [https://pacificlegal.org/case/coalition\\_for\\_tj/](https://pacificlegal.org/case/coalition_for_tj/) (last visited Nov. 15, 2023).

55 Cert Brief, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 854 (4th Cir. 2023).

56 See Memorandum in Support of Motion for Preliminary Injunction at 3, 20, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685 (“[E]verybody knows [TJ’s admissions] policy is ... designed to affect the racial composition of the school ... [t]hat is all that is necessary to prove discriminatory intent.”).

57 Jonathan D. Glater, *Reflections on Selectivity*, 49 FORDHAM URB. L.J. 5 (2022).

58 See Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 871 (4th Cir. 2023).

59 See Starr, *The Magnet School Wars*, *supra* note 52.

60 Every federal court that considered *SFFA*’s challenges against Harvard or UNC had ruled that the defendants’ respective policies satisfied existing precedent.

61 See Jonathan Feingold, *The Right to Inequality and Illusions of Colorblind Continuity* (manuscript on file with author).

62 See *infra* Part II.A.

## II. LEGAL RIGHTS: WHAT UNIVERSITIES MAY DO TO PROMOTE RACIAL DIVERSITY AND INCLUSION

### A. Policies That Employ Racial Classifications

One aim of this article is to trouble the narrative that *SFFA* ended affirmative action. Chief Justice Roberts narrowed a university's right to consider the racial identity of students during admissions.<sup>63</sup> But he did not rule that universities may never employ racial classifications to achieve racial diversity or other equality-oriented goals. When located within the Supreme Court's broader affirmative action jurisprudence, *SFFA* reveals multiple paths to legally defend race-based admissions.<sup>64</sup> I explore four below: (1) the "distinct interests" in diversity rationale, (2) the "remedial" rationale, (3) the "more quantifiable diversity" rationale, and (4) the "fair appraisal" rationale.

One preliminary note. It is possible that no set of facts could lead today's Supreme Court to uphold a race-conscious admissions policy. Even if one accepts that premise, it need not follow that universities should abandon all such practices. Before *SFFA* reached the Supreme Court, many commentators predicted that Harvard's and UNC's policies would not survive the litigation. That widespread (and accurate) sentiment did not spark a wholesale retreat from race-consciousness in admissions or beyond. For institutions electing now to retreat, they should at minimum consider the legal defenses that remain viable even after *SFFA*.

#### 1. The "Distinct Interests" in Diversity Rationale

In footnote 4, Chief Justice Roberts explicitly exempted military academies from his holding because of their "potentially distinct interests" in racial diversity.<sup>65</sup> The Chief Justice explained that "[n]o military academy is party to these cases," and "none of the courts below addressed the propriety of race-based admissions systems in that context."<sup>66</sup>

The relevant footnote offered little additional reasoning. Nor did the Chief Justice identify the precise contours of this "distinct interests" exemption.<sup>67</sup> This silence

63 See *SFFA v. Harvard*, 600 U.S. 181.

64 It is beyond the scope of this article to provide a comprehensive analysis of each rationale. My more modest goal is to clarify that even after *SFFA*, several arguments remain available to legally justify race-conscious admissions policies.

65 See *SFFA v. Harvard*, 600 U.S. at 213 n.4.

66 The full footnote follows:

The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

*Id.*

67 Less than two months after the Supreme Court decided *SFFA*, *SFFA* founder Edward Blum sued West Point for its ongoing race-conscious admissions practices. See Bianca Quilantan, *Anti-*

invites at least two interpretations. On the one hand, the express exemption for military academies could imply that the exemption applies *only* to military academies.<sup>68</sup> A separate interpretation would view military academies as one example of an educational institution with “potentially distinct interests” in diversity whose interests were not addressed in the litigation. Nothing in the opinion rules out this broader interpretation, which recognizes that other types of educational institutions might value racial diversity in ways meaningfully distinct from undergraduate research universities like Harvard and UNC.

For institutions of higher education, footnote 4 should invite the following question: *Do we possess potentially distinct interests in diversity that SFFA did not address?* If the answer is yes, that suggests a plausible path to defend a race-based admissions process. To survive legal attack, the institution would have to identify its distinct interests and persuade a court that those interests are constitutionally compelling. Among other possibilities, professional schools appear a natural fit to raise such an argument.<sup>69</sup>

This includes medical schools and law schools, both of which belong to professional organizations with stated missions—and, many would argue, the moral obligation—to serve all communities in the United States.<sup>70</sup>

To imagine what such an argument might entail for medical schools, the Association of American Medical Colleges’s (AAMC) SFFA amicus brief offers a

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*Affirmative Action Group Sues West Point over Race-conscious Admissions*, POLITICO (Sept. 19, 2023), <https://www.politico.com/news/2023/09/19/anti-affirmative-action-west-point-lawsuit-race-admissions-00116791>. If both parties elect to litigate this case to a final decision on the merits, the Supreme Court should have an opportunity to elaborate on footnote 4. Until then, the “distinct interests” rationale remains highly indeterminate.

68 Justice Sotomayor’s reaction to footnote 4 reflects this narrow interpretation. See *SFFA v. Harvard*, 600 U.S. at 355 (Sotomayor, J., dissenting) (“In a footnote, the Court exempts military academies from its ruling in light of ‘the potentially distinct interests’ they may present. To the extent the Court suggests national security interests are ‘distinct,’ those interests cannot explain the Court’s narrow exemption, as national security interests are also implicated at civilian universities. The Court also attempts to justify its carveout based on the fact that ‘[n]o military academy is a party to these cases.’ Yet the same can be said of many other institutions that are not parties here, including the religious universities supporting respondents, which the Court does not similarly exempt from its sweeping opinion.”).

69 Other educational institutions that potentially possess distinct interests in racial diversity include religious institutions (as Justice Sotomayor referenced) and, *inter alia*, those that train police, first responders, and firefighters—among other entities that train individuals who interact with and safeguard various communities. See *id.* It is worth noting that absent a normative anchor that privileges inclusion over exclusion, a diversity rationale that trades on each institution’s specific mission could invite perverse outcomes—e.g., were the Supreme Court to accept a “distinct interests” logic to justify institutional practices that exclude or discriminate against students of color or LGBTQ+ people. Cf. Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 770–71 (1997) (“[Grounding the diversity rationale in the First Amendment] constitutionalizes the power of a privileged educational establishment to determine what learning shall be valued and who shall be taught.”).

70 See ABA Statement on Diversity, Equity, and Inclusion Center, <https://www.americanbar.org/groups/diversity/> (last visited Nov. 3, 2023) (“Provides guidance, spearheads projects, and enhances collaboration and communication to advance ABA Goal III—to eliminate bias and enhance diversity in our Association, legal profession, and justice system. Goal III entities within the Center advance different but interrelated areas of diversity, equity, and inclusion.”).

starting point.<sup>71</sup> That brief identified a diversity interest arguably distinct from those proffered by Harvard and UNC.<sup>72</sup> The AAMC brief explains that “an overwhelming body of scientific research compiled over decades confirms, diversity literally saves lives by ensuring that the Nation’s increasingly diverse population will be served by healthcare professionals competent to meet its needs.”<sup>73</sup> To concretize this point, the AAMC cites now robust empirical evidence that, for example, Black patients receive better health outcomes when treated by Black physicians.<sup>74</sup> In short, the AAMC brief marshals a growing field of empirical scholarship that documents the need for medical schools to train a racially diverse medical workforce.<sup>75</sup>

An array of data points ground this proposition.<sup>76</sup> One recent experimental study found that “black male patients who had the opportunity to meet with a (randomly assigned) black male doctor ha[d] a consistent, large, and robust positive effect on the demand for preventives.”<sup>77</sup> A separate 2023 study found that the increase of Black primary care physicians “was associated with higher life expectancy and was inversely associated with all-case Black mortality and mortality rate disparities between Black and White individuals.”<sup>78</sup>

For present purposes, my goal is not to produce, in comprehensive and granular detail, the “*medical school* distinct interests” in diversity rationale. My more modest goal is to highlight that footnote 4 provides a potential defense for any institution that possesses distinct interests in racial diversity—whether it be a military academy, a medical school, or otherwise.<sup>79</sup>

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71 See AAMC Amicus Brief, *SFFA v. Harvard*, 2022 WL 3036400 (U.S.), 3–4.

72 See *id.*

73 See *id.*

74 See Dallon F. Flake, *Lifesaving Discrimination*, 72 AM. U.L. REV. 403, 409 (2022) (“It is becoming increasingly apparent that reducing racial disparities in healthcare not only requires improving minorities’ access to health services but also their access to physicians of their same race. Mounting empirical evidence indicates that for Black people in particular, patient-physician racial concordance can result in better medical care.”); Monica E. Peek, *Increasing Representation of Black Primary Physicians—A Critical Strategy to Advance Racial Health Equity*, JAMA NETWORK (Apr. 14, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803903>.

75 See Flake, *supra* note note 74 (reviewing studies).

76 See, e.g., *id.*

77 Marcella Alsan et al., *Does Diversity Matter for Health? Experimental Evidence from Oakland* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24787, 2018), [https://www.nber.org/system/files/working\\_papers/w24787/w24787.pdf](https://www.nber.org/system/files/working_papers/w24787/w24787.pdf).

78 John E. Snyder et al., *Black Representation in the Primary Care Physician Workforce and Its Association with Population Life Expectancy and Mortality Rates in the US*, JAMA NETWORK (Apr. 14, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803898>.

79 In *Bakke*, the UC Davis Medical school defended its race-conscious admissions policy, in part, on the need to “improv[e] the delivery of health-care services to communities currently underserved.” *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 310 (1978). This argument tracks the diversity interests contained in the AAMC brief. Notably, Justice Powell rejected UC Davis’s argument because the defendant failed to ground its theory in evidence, not because the theory failed as a matter of law:

It may be assumed that in some situations a State’s interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner’s special

## 2. The “Remedial” Rationale

In *SFFA*, Justice Roberts expressly identified “two compelling interests [that] permit resort to race-based government action.”<sup>80</sup> The second interest, specific to prisons, is inapposite to university admissions.<sup>81</sup> But the first offers universities another legal rationale for race-conscious admissions. The Chief Justice explained that “remediating specific, identified instances of past discrimination that violated the Constitution or a statute” constitutes a compelling interest.<sup>82</sup> In plain language, universities can employ racial classifications when necessary to remedy their own past or present acts of racial discrimination.<sup>83</sup>

This “remedial” rationale is admittedly limited.<sup>84</sup> As Chief Justice Roberts notes, the defense only applies to specific instances of legally cognizable discrimination attributable to the university itself.<sup>85</sup> One hurdle is that the Supreme Court has steadily narrowed what constitutes legally cognizable discrimination,<sup>86</sup> while

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admissions program is either needed or geared to promote that goal.

*Id.* To summarize, Justice Powell found the argument theoretically plausible but lacking an evidentiary basis. *See id.* at n.46 (“The only evidence in the record with respect to such underservice is a newspaper article.”). To the extent evidence was lacking in 1978, it is considerable today.

80 *SFFA v. Harvard*, 600 U.S. 181, 207 (2023).

81 *See id.* (“The second [compelling interest] is avoiding imminent and serious risks to human safety in prisons, such as a race riot.”)

82 *See id.*

83 *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, 323 n.221 (1999) (“[Crosby and Adarand] reaffirmed ... that ‘government bodies ... may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.’” (quoting *United States v. Paradise*, 480 U.S. 149, 166 (1987))).

84 As a doctrinal matter, the remedial rationale is legally relevant as a defense to satisfy strict scrutiny’s compelling interest requirement. Strict scrutiny, in turn, is only triggered when a university employs a race-conscious policy. If a university employed colorblind criteria to remedy past discrimination—or realize any other racial equality-oriented goal—that racial motive would not, in itself, trigger strict scrutiny. For example, a university might elect to view an applicant’s status as the descendant of an enslaved person as a positive factor in admissions. Because this criteria is facially neutral (it does not distinguish between applicants based on their respective racial identities), it would not trigger strict scrutiny—even if adopted for the express purpose of increasing the number of Black students on campus. Pacific Legal Foundation, which has sued multiple public high schools for adopting colorblind criteria to promote racial diversity, concedes this point. *See* Petitioner’s Reply in Support of Petition of Certiorari, *Coal. for TJ v. Fairfax* (No. 23-170) (Nov. 1, 2023) (“The Board says that the Coalition ‘reaffirmed’ at argument below ‘that an intent to increase Black and Hispanic representation would not itself render a race-neutral admissions policy unconstitutional.’ This is true, but it does not hurt the Coalition. The mere intent to increase black and Hispanic enrollment only violates the Equal Protection Clause if the means chosen are designed to treat applicants differently based on race.”).

85 *See SFFA v. Harvard*, 600 U.S. at 207 (“Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute.”).

86 In the university context, this often requires proof that the relevant university adopted policies or practices with the specific intent to exclude students of color. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

expanding the evidence required to prevail under such a defense.<sup>87</sup> The current contours of this rationale trace largely to *City of Richmond v. J.A. Croson Co.*, a 1989 case involving Richmond, Virginia's race-conscious set-aside.<sup>88</sup> In *Croson*, the Supreme Court held that a defendant asserting the remedial rationale must provide a "strong basis in evidence for its conclusion that remedial action was necessary."<sup>89</sup>

This rule creates a substantial evidentiary hurdle for any institution raising the remedial rationale.<sup>90</sup>

This burden need not, however, dissuade a university from pursuing this legal strategy.<sup>91</sup> This is particularly true for universities with well-documented histories of unlawful discrimination—for example, universities that openly defied federal desegregation decrees following histories of de jure racial exclusion.<sup>92</sup>

This includes institutions like UNC, one of the *SFFA* defendants.<sup>93</sup> UNC presents itself as the nation's "oldest public university."<sup>94</sup> This title obscures the fact that UNC formally excluded Black students for most of its history.<sup>95</sup> Even after

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87 See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In affirmative lawsuits claiming unlawful discrimination, plaintiffs often fail to establish unlawful intent even in cases involving substantial evidence of animus or bias. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); see also Khiara Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 110 (2022) ("Differently stated, the Court has embraced an exceedingly narrow definition of racism. By its own constrained definition, the Court should have recognized the travel ban at issue in *Trump v. Hawaii* and the techniques of voter disenfranchisement that Shelby County permitted to develop as racism. Nevertheless, the Court refused to recognize as much.").

88 See *Croson*, 488 U.S. 469.

89 *Id.* at 500; see also *Fisher v. Univ. of Tex.*, 570 U.S. 297, 317 (2013) (Thomas, J., concurring in part and dissenting in part) (citation omitted) ("[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.'").

90 Aside from introducing the "strong basis in evidence" standard to the equal protection context, the *Croson* court rejected the remedial rationale notwithstanding Richmond's exisitive history of overt racial discrimination. See *Croson*, 488 U.S. 469.

91 See generally Jonathan Feingold, *Colorblind Capture*, 102 BOSTON U. L. REV. 1949, 1983-93 (2022) (discussing how the remedial rationale offers legal and discursive benefits).

92 See *id.* (outlining how the University of North Carolina could build a remedial rationale to justify ongoing race-conscious admissions practices).

93 For records detailing UNC's desegregation resistance, see *Desegregation of the University of North Carolina at Chapel Hill: Archival Resources*, UNC UNIV. LIBRARIES, <https://guides.lib.unc.edu/desegregation-unc/archival> (last visited Nov. 20, 2023) (noting how in 1970, the federal government informed UNC that it was "in violation of the 1964 Civil Rights Act for maintaining a racially dual system of public higher education").

94 See UNC HISTORY AND TRADITION, <https://www.unc.edu/about/history-and-traditions/> (last visited Nov. 3, 2023) ("The University of North Carolina was the first public university in the nation. In 1789, William Richardson Davie wrote the act that established the University. In 1793, he and fellow trustees laid the cornerstone of the first building, Old East. Students arrived in 1795, and UNC became the only public university to award degrees in the 18th century.").

95 See GEETA N. KAPUR, *TO DRINK FROM THE WELL: THE STRUGGLE FOR RACIAL EQUALITY AT THE NATION'S OLDEST PUBLIC UNIVERSITY* (2020).

*Brown v. Board of Education*,<sup>96</sup> UNC continued to formally bar Black students until federal courts expressly prohibited the practice in 1955.<sup>97</sup> That ruling did not alter UNC's commitment to racial exclusion.<sup>98</sup> Rather than commit to desegregation, UNC fought federal integration orders for three decades.<sup>99</sup>

That contest included a decade of litigation between UNC and the federal government—litigation that endured until President Reagan's Department of Education brokered a settlement to govern desegregation across the UNC system.<sup>100</sup> The consent decree terminated the litigation, but local civil rights leaders remained skeptical that UNC would desegregate its campuses.<sup>101</sup> Elliott C. Lichtman, who had supported NAACP efforts to desegregate UNC over the preceding decade, termed the agreement "'a triple end run' around federal courts in Washington, civil rights laws and the Constitution."<sup>102</sup>

In the decades' since, UNC has exhibited increasing commitment to remedy the vestiges of this legacy.<sup>103</sup> This includes the modest race-conscious policy that the Supreme Court overturned in *SFFA*. Yet even under that policy, students of color documented the hallmarks of a racially hostile environment.<sup>104</sup> Moreover,

96 347 U.S. 483 (1954).

97 *Frasier v. Bd. of Trs. of the Univ. of N.C.*, 134 F. Supp. 589, 592 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam).

98 See Feingold, *Ambivalent Advocates*, *supra* note 8.

99 See Feingold, *Colorblind Capture*, *supra* note 91.

100 See Bishop, *The Consent Decree*, *supra* note 15 at 353 ("Toward the end of 1969, [the Department of Education's Office of Civil Rights] decided that ten states were operating segregated systems of higher education in violation of Title VI. HEW finally sent letters to those ten states requesting that they devise statewide plans to desegregate and integrate their dual systems of higher education.").

101 David S. Tatel, then a senior official involved in the litigation with the Carter Administration, described the settlement as follows: "This settlement doesn't read like a desegregation plan. It reads like a joint U.S.–North Carolina defense of everything the system did." 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/>.

102 See *id.*

103 Evidence present in the UNC litigation suggests that this work remains unfinished. See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 590 n.5 (M.D.N.C. 2021) ("[The intervenor's] expert report—which details UNC's reckoning with race over the full course of its history and illuminates the history of racial discrimination in North Carolina's K-12 public schools—is an important contribution to the Court's understanding of the context of this case. Dr. Cecelski provides considerable administrative and legislative findings that illuminate the extent of the educational disparities historically sanctioned by the State, and he concludes that, *though recently 'the University's faculty, administrators and trustees have made important strides to reform the institution's racial outlook and policies, ... those efforts have fallen short of repairing a deep-seated legacy of racial hostility and disrespect for people of color.'*") (emphasis added).

104 See Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-00954) ("[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 collective efforts to counter the lingering

Black students have never comprised more than 9.2% of the undergraduate campus population.<sup>105</sup> This figure marks a significant improvement from the total exclusion of Black students during UNC's apartheid era. Still, in a state that is over 20% Black, one could reasonably argue that this peak reflects UNC's failure to fully rectify its own legacy of racial exclusion.<sup>106</sup>

The foregoing only begins to outline how UNC could proffer a "remedial" rationale.<sup>107</sup> We lack a more fulsome account, in part, because UNC expressly disclaimed this argument before the Supreme Court. It is possible that UNC would have lost even had it advanced a remedial rationale and marshaled a robust record to ground the defense. Given the conservative Justices' open hostility to racial classifications, arguments available in theory might be unavailable in practice.

But even if facts seem not to matter in the court of law, they remain critical in the court of public opinion.<sup>108</sup> The prospect of a hostile Supreme Court should not overdetermine the arguments universities raise when defending race-conscious practices. Few, if any, universities will be able to escape the fallout of a resurgent movement to ban equality-oriented principles and policies nationwide.<sup>109</sup> Against this backdrop, winning the legal battle matters. But so does winning the narrative battle.

On this point, I have elsewhere offered the following observation:

[B]ridging past to present enables universities to tell a fuller story about why race still matters. This act of truth-telling comprises an important intervention in itself—particularly against the backdrop of a growing campaign to erase the past through book bans and educational gag orders. When elite schools deny or diminish the past's imprint on the present they sacrifice more than an opportunity to defend affirmative action. Such narratives also feed regressive talking points that seek to legitimize existing inequality by

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effects of racial discrimination on campus.").

105 See Nicholas Graham, *Historic African American Enrollment at UNC*, UNC UNIV. LIBRARIES (Apr. 21, 2016), <https://blogs.lib.unc.edu/hill/2016/04/21/historic-african-american-enrollment-at-unc/> ("African American students joined the undergraduate population in 1955.").

106 See Analytic Reports: Student Characteristics, UNIV. OF N.C. AT CHAPEL HILL OFF. OF INSTITUTIONAL RSCH. & ASSESSMENT, <https://oira.unc.edu/reports/> (last visited Nov. 20, 2023). UNC's Black student population declined to a recent low of 7.6% in 2018. *Id.* In 2014, the year SFFA sued UNC, that number was 7.9%. See *id.*

107 For a more comprehensive overview of this argument, see Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, *Students for Fair Admissions v. Univ. of N.C.*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-00954) ("This [unfavorable] outcome could result if the Court does not consider or weigh ... 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.").

108 Others have noted that Chief Justice Roberts dismissed or ignored significant portions of the evidence that anchored the lower court opinions in favor of Harvard and UNC. See Kang, *supra* note 23. This apparent disregard for two well-developed records supports the theory that no set of facts could have saved Harvard and UNC.

109 See Jack Stripling, *Behind the Lines of Texas A&M's Diversity War*, WASH. POST (Sept. 6, 2023), <https://www.washingtonpost.com/education/2023/09/05/texas-am-university-diversity-sb17/>.

locating racism in an ignoble past.<sup>110</sup>

### 3. The “More Quantifiable Diversity” Rationale

The “diversity” rationale refers to the proposition that universities “ha[ve] a compelling interest in a diverse student body” that can justify a narrowly tailored race-conscious admissions process.<sup>111</sup> A majority of the Supreme Court first embraced the diversity rationale in *Grutter v. Bollinger*, a 2003 case that upheld the University of Michigan Law School’s race-based admissions policy.<sup>112</sup> After *Grutter*, the diversity rationale became the primary—if not exclusive—legal argument universities employed to justify race-conscious admissions.

In *SFFA*, the plaintiff asked the Supreme Court to overturn *Grutter* and reject the diversity rationale. Chief Justice Roberts did neither—at least not formally.<sup>113</sup> Rather than overturn *Grutter* or reject the diversity rationale, Roberts concluded that Harvard’s and UNC’s specific policies failed to satisfy existing precedent—including *Grutter*.<sup>114</sup> According to the Chief Justice, the defendants’ proffered goals were “commendable” but insufficiently “coherent for purposes of strict scrutiny” and insufficiently measurable to “be subjected to meaningful judicial review.”<sup>115</sup>

110 See Feingold, *Colorblind Capture*, *supra* note 91, at 1985.

111 See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

112 *Id.*

113 Even though *SFFA* did not formally reject the diversity rationale, Chief Justice Roberts arguably narrowed the rationale’s scope by rejecting Harvard and UNC’s proffered interests—many of which tracked diversity-related interests the Supreme Court had accepted in *Grutter*. Compare *SFFA v. Harvard*, 600 U.S. 181, 214 (2023) (concluding that the following interests do not satisfy scrutiny’s compelling interest prong: “training future leaders in the public and private sectors”; preparing graduates to “adapt to an increasingly pluralistic society”; “better educating its students through diversity”; and “producing new knowledge stemming from diverse outlooks” ... “promoting the robust exchange of ideas”; “broadening and refining understanding”; fostering innovation and problem-solving”; “preparing engaged and productive citizens and leaders; enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”) with *Grutter*, 539 U.S. at 330 (“As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.”) (internal brackets omitted).

114 *SFFA v. Harvard*, 600 U.S. at 230 (“For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.”). Rather than overturn *Grutter*, Chief Justice Roberts suggested that his analysis applies *Grutter*. See *id.* (concluding that Harvard and UNC failed to comply with requirements *Grutter* imposed on racial classifications); see also *id.* at 316 (Kavanaugh, J., concurring) (“In light of the Constitution’s text, history, and precedent, the Court’s decision today appropriately respects and abides by *Grutter*’s explicit temporal limit on the use of race-based affirmative action in higher education.”).

115 *Id.* at 230 (“Both programs lack sufficiently focused and measurable objectives warranting the use of race ...”). Roberts added the following:

Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient “innovation and problem-solving,” or students who are appropriately “engaged and productive.” Finally, the question in this context is not one of no diversity or of some: it is a question of degree. How many fewer leaders Harvard would create without racial preferences,

He further condemned the defendants' policies for violating limits *Grutter* had allegedly placed on racial classifications—specifically, that universities may never “use race as a stereotype or negative, and—at some point—they must end.”<sup>116</sup>

Some have suggested that formalities aside, *SFFA* killed the diversity rationale and *Grutter*.<sup>117</sup> As a practical matter, this might be true—that is, for this Supreme Court, no set of facts could save a race-based admissions policy designed to promote racial diversity. But if one takes Chief Justice Roberts at his word, a different conclusion is warranted: the diversity rationale remains available; Harvard and UNC just missed the mark.<sup>118</sup>

A key question, therefore, is how could a university employ racial classifications in pursuit of racial diversity without meeting the same fate? One can start with Chief Justice Roberts's claim that race-conscious policies may not operate as a “negative” or a “stereotype.”<sup>119</sup>

As for the “negative” limitation, Chief Justice Roberts concluded that Harvard's process operated as a “negative” because it “result[ed] in fewer Asian American

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or how much poorer the education at Harvard would be, are inquiries no court could resolve.

*Id.*

116 *Id.* at 213. I employ the modifier “allegedly” because *Grutter* does not stand for the unqualified proposition that a racial classification may never operate as a “negative.” Even Chief Justice Roberts recognizes this when he invokes *Grutter* for the proposition that racial classifications should not “unduly harm[ ] nonminority applicants.” See *id.* at 212 (quoting *Grutter*, 539 U.S. at 341). But he then refashions this passage as a prohibition on any racial classification that functions as a “negative”—which lacks the “unduly” modifier he previously quoted. This subtle shift would appear to render unlawful any race-conscious policy that yields different racial outcomes than would arise under a facially neutral policy. If this is Chief Justice Roberts' intended rule, he cited *Grutter* for a proposition that conflicts with *Grutter* (and *Fisher v. Texas*); *Grutter* upheld a racial classification that, by design, altered the racial composition of the student body that would have existed *but for* the challenged policy.

117 See *SFFA v. Harvard*, 600 U.S. at 287 (Thomas, J., concurring) (“The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”); *id.* at 342 (Sotomayor, J., dissenting) (“As Justice Thomas puts it, ‘*Grutter* is, for all intents and purposes, overruled.’ It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.”) (internal citations omitted).

118 See Oh, *What the Supreme Court Really Did to Affirmative Action*, *supra* note 19 (“A better reading leads to the conclusion that *Grutter v. Bollinger*, a 2003 case upholding race in admissions, is still good law, diversity remains a compelling interest, and the narrow use of race, albeit in limited circumstances, continues to be permissible. Undoubtedly, universities must rethink and change their admissions policies after Harvard. But affirmative action is not dead.”).

119 *SFFA v. Harvard*, 600 U.S. at 218. (“The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”)

and white students being admitted.”<sup>120</sup> On its face, the pronouncement that racial classifications may not operate as a “negative” is indeterminate. One could read it as a requirement that racial classifications not yield a racial composition different than what would have arisen absent the racial classification. Alternatively, one could read the requirement to prohibit only those racial classifications that reduce the absolute number of any racial group.<sup>121</sup> Note that the above interpretations implicitly presume that the racial composition that would arise absent the race-based policy is legitimate—morally and legally. If one questions this presumption, it invites a third interpretation: A race-based admissions policy operates as a “negative” only if the racial group that experiences less absolute or relative representation (under that policy) enjoys a legal entitlement to the racial demographics that would arise absent the policy.

At first glance, Chief Justice Roberts appears to be embracing the first reading; his reference to Asian Americans referenced the group’s relative representation—not absolute numbers. By extension, one might ask whether this effectively outlaws all racial classifications—which, often, are designed to produce a racial composition different than what would arise under colorblind conditions.

But if one parses *SFFA*, it becomes difficult to sustain this rigid negative requirement. To begin, the Chief Justice notes that his opinion does not extend to military academies—because those institutions have “potentially distinct interests” in diversity.<sup>122</sup> If a rigid negative requirement outlawed all racial classifications, an institution’s potentially “distinct interests” in diversity would be legally irrelevant. The Chief Justice also notes that a university can employ affirmative action to remedy its own discrimination.<sup>123</sup> As with the diversity rationale, the

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120 *Id.* Chief Justice Roberts bases this empirical claim on a footnote from the First Circuit’s opinion, which upheld Harvard’s admissions process. I reproduce that footnote below because it reflects how Chief Justice Roberts cites *Grutter* for a proposition that actually departs from *Grutter*. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 191 n.29 (1st Cir. 2020), rev’d, 600 U.S. 181 (2023) (“The United States attempts to make the impact of Harvard’s use of race appear more significant than it is. It argues that Harvard ‘inflicts an 11.1% penalty’ on Asian Americans because, absent the consideration of race, their representation would increase from 24% to 27%. It then claims that Harvard provides a 133% bonus to African Americans because their representation increases from 6% to 14%. While these calculations are correct, similar calculations show that race was used about as extensively in the program approved in *Grutter*. That program, using the government’s language and calculations, inflicted a penalty of 10.9% on applicants who were not underrepresented minorities (because their representation would increase from 85.5% to 96% absent the consideration of race) while simultaneously giving a 263% bonus to underrepresented minority applicants (because their representation increased from 4% to 14.5% with the consideration of race).”).

121 To the extent one presumes that admissions processes are inevitably zero-sum, these first two readings might diverge in form but converge in practice. But as Reginald Oh has noted, not all aspects of an admissions process are necessarily zero-sum. See Oh, *What the Supreme Court Really Did to Affirmative Action*, *supra* note 19 (“One way for schools to avoid a negative impact is to expand the size of their admitting class to ensure that students are not negatively affected by the use of race. Towards the end of the admissions cycle, Harvard could assess the incoming class’s racial composition. If it appears that the use of race for underrepresented students resulted in fewer white students being admitted, then Harvard could simply eliminate the adverse racial impact by admitting more students.”).

122 *SFFA v. Harvard*, 600 U.S. at 213 n.4.

123 See *id.* at 207.

remedial rationale contemplates racial classifications that, by design, reduce the representation certain racial groups would enjoy absent affirmative action.

One might argue that the remedial rationale is materially distinct (from the diversity rationale) because it treats the pre-existing racial baseline as constitutionally suspect—that is, the student body’s racial composition would be different but for prior discrimination. This logic folds the third interpretation into the “negative” analysis—if even implicit.

Even if one accepts this argument, it is unclear why similar logic could not extend to a racial distribution that is morally suspect—even if lawful. Consider Harvard’s use of legacy preferences, which shaped the racial composition of Harvard’s student body by heavily favoring less qualified White applicants.<sup>124</sup> Under prevailing equal protection doctrine, legacy preferences raise no independent legal concern because they are facially neutral.<sup>125</sup> But as a normative matter, the racial preference they extend to White applicants renders the resulting racial composition suspect. Put differently, the question is whether the “negative” analysis leaves space to consider whether the racial composition that flows from colorblind criteria is itself legitimate. Assuming it does, a race-based policy that reduces one group’s (illegitimate) overrepresentation would not operate as a “negative” even though it reduces that group’s racial representation (relative to a process that lacked the racial classification).

There is one final reason to question whether Chief Justice Roberts introduced a rigid “negative” requirement. If Chief Justice Roberts is saying that no racial classification can reduce a group’s representation (relative to what it would have enjoyed under colorblind conditions), one would have to ask whether any racial classification could ever survive. Such a rule would render the compelling interest requirement superfluous and would appear to preclude all race-based practices—even if the asserted goal implicated interests that the Supreme Court tends to privilege such as national security.<sup>126</sup>

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124 See Feingold, *Colorblind Capture*, *supra* note 91 (“[W]ere Harvard to eliminate all Legacy+ preferences, “[t]he admit rate for all white ALDC applicants would fall from 43.6% to 11.4%, a drop of more than thirty percentage points.”) (quoting Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. & ECON. 133, 147 (2020)).

125 See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). One could argue that Harvard’s legacy preferences violate the disparate impact provision in Title VI’s implementing regulations. See *infra* Part III.A.

126 The Supreme Court often privileges perceived national security interests over the civil rights of communities of color. See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1, 35 (2010) (“The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”); Eric K. Yamamoto & Rachel Oyama, *Masquerading Behind a Facade of National Security*, 128 YALE L.J. F. 688, 701 (2019) (“The courts, too, entered the fray [following 9/11]—at times fully deferring to the executive branch and its largely unsubstantiated claims of national security, and at other times citing *Korematsu* as a reason for more closely reviewing the government’s factual claims.”). Were it true that racial classifications may never operate as a “stereotype” or “negative,” it is difficult to see how the government could ever justify a policy that targets a racial, ethnic, or religious group—even in the heat of wartime. Cf. Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678, 1686 (2022) (“At its core, racial profiling is pernicious precisely because it legitimizes the idea that one racial group’s privacy, dignity, and security may be

The requirement that racial classifications not operate as a stereotype appears more easily addressed.<sup>127</sup> According to the Chief Justice, Harvard and UNC traded on the forbidden “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”<sup>128</sup> Chief Justice Roberts further admonished the defendants for considering “race *qua* race”—that is, “race for race’s sake.”<sup>129</sup>

This characterization appears to rest on Chief Justice Roberts’s view that Harvard and UNC valued diversity for its “discourse benefits”—that is, to foster a robust marketplace of ideas. Under this conception of diversity, racial categories can function as proxies for information about an applicant’s personal experiences and perspective.<sup>130</sup> According to Chief Justice Roberts, when racial identity functions as a proxy for perspective, that constitutes “illegitimate stereotyping.”<sup>131</sup>

This stereotyping concern should disappear if the racial category is important in itself—not as a proxy to discern something else about a student. In separate work, I invite universities to embrace an equality-centered conception of racial diversity that invites this shift.<sup>132</sup> Specifically, I highlight the relationship between racial demographics and each student’s right to enjoy the full benefits of university membership.<sup>133</sup> Extensive empirical research reveals that when students from negatively stereotyped groups are severely underrepresented, they are likely to confront unique identity-contingent burdens.<sup>134</sup> These burdens, in turn, can compromise a student’s ability to learn, engage, and perform—all essential

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sacrificed for the “greater good”—a sacrifice that others are never asked, nor expected, to bear. That sacrifice can only be considered the “greater” good if you do not account for those experiencing the harm.”).

127 To be fair, there is little evidence that Harvard and UNC were relying on or reproducing stereotypical views about students of color. This did not stop the Supreme Court from declaring otherwise. See *SFFA v. Harvard*, 600 U.S. 220 (“Respondents admit as much. Harvard’s admissions process rests on the pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer.’”).

128 *Id.* at 219 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

129 *Id.* at 220.

130 *Id.* at 212 (“The first is the risk that the use of race will devolve into ‘illegitimate ... stereotyp[ing].’ Universities were thus not permitted to operate their admissions programs on the ‘belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’”). Charles Lawrence III foreshadowed how a First Amendment-centric diversity rationale would invite such arguments. See Lawrence, *Each Other’s Harvest*, *supra* note 68, at 774 (“[W]hen the First Amendment justification for diversity—academic conversation—is separated from the substantive content of that conversation—learning about the social reality of racism—it is not apparent why race should be a factor in deciding who should participate in that conversation. ‘What does the color of an individual’s skin matter in a discussion of quantum physics?’ is the paradigm rhetorical question posed by affirmative action’s opponents.”).

131 *SFFA v. Harvard*, 600 U.S. at 212.

132 See generally Feingold, *Hidden in Plain Sight*, *supra* note 26.

133 See *id.*

134 See *id.* (summarizing empirical scholarship on social identity threat and implicit biases).

components of university membership.<sup>135</sup> This scholarship situates racial diversity as a prerequisite to racial equality—or more precisely, the present and personal equality interests of actual university students.<sup>136</sup>

This equality-centered diversity rationale also avoids concerns about stereotyping. In fact, the social science on which it rests identifies affirmative action as a tool to reduce the racial stereotypes students of color often confront when numerically isolated in predominately White spaces.<sup>137</sup> The same research on stereotype threat and social identity threat helps to concretize and quantify the harm students from negatively stereotyped racial groups experience when severely underrepresented on campus.<sup>138</sup> This evidence responds to Chief Justice Roberts's concern that Harvard and UNC's respective policies "lack[ed] sufficiently focused and measurable objectives."<sup>139</sup>

As with the other rationales I identify, I am not claiming that a more quantifiable diversity rationale—that avoids the "negative" and "stereotyping" limitations—would survive before the present Supreme Court. Even if one doubts that a fortified diversity rationale would have saved Harvard and UNC's respective policies, defending racial diversity as a key to racial equality performs an important discursive intervention. Specifically, it positions universities to intervene in public debates about the relationship between institutional environments, individual opportunity, and structural racism. Universities enjoy significant platforms to uplift the contested reality that race matters, in part, because racial demographics shape a university's ability to ensure that every student, regardless of their racial identity, can enjoy the full benefits of university membership.

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135     *See id.*

136     Beyond its empirical foundation, this vision of diversity should appeal to conservative Justices because it is animated by a vision of constitutional equality that confers upon every individual an equal "right to compete" irrespective of their racial identity. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville (Northeastern Florida)*, 508 U.S. 656, 666 (1993) (holding that in the presence of a racial classification, a cognizable claim exists even if the plaintiff would not have received the benefit absent the racial classification).

137     *See, e.g.,* Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of A Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1198 (2010).

138     *See generally* Thomas Dee & Joshua Aronson, *Stereotype Threat in the Real World*, in *STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION* (Michael Inzlicht and Toni Schmader eds., 2011).

139     *SFFA v. Harvard*, 600 U.S. 181, 230 (2023). A different question concerns the amount of diversity necessary to buffer students against these equality harms. The Supreme Court has previously employed the term "critical mass" to identify the general threshold at which racial diversity yields its various benefits. *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Neither Harvard nor UNC defended their respective policy as necessary to enroll a critical mass of students from otherwise underrepresented racial groups. *See SFFA v. Harvard*, 600 U.S. at 228 ("The principal dissent's reliance on *Fisher II* is similarly mistaken. There, by a 4-to-3 vote, the Court upheld a 'sui generis' race-based admissions program used by the University of Texas, whose 'goal' it was to enroll a 'critical mass' of certain minority students. But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means."). Chief Justice Roberts seemed to suggest that *SFFA* was not intended to upset precedent that condoned "critical mass" as an legitimate objective. Specifically, he framed his opinion as consistent with *Fisher II*, in which a 4-3 plurality reaffirmed *Grutter* and upheld a race-based admissions policy designed to "enroll a 'critical mass' of certain minority students." *Id.*

#### 4. The “Fair Appraisal” Rationale

I now identify one final rationale that a university could employ to justify a race-conscious admissions policy. This “fair appraisal” approach is straightforward: unless a university considers applicant race, it will systematically undervalue the existing academic talent and potential of students of color—and thereby inflate the relative academic credentials of White applicants.<sup>140</sup> This rationale trades on decades of empirical scholarship that show how standard measures of merit often understate the academic abilities of students from negatively stereotyped groups.<sup>141</sup> Accordingly, considering applicant race positions universities to realize a more “meritocratic,” equitable, and individualized process that reduces the degree to which race shapes admissions outcomes.<sup>142</sup>

The fair appraisal rationale can be conceived at various levels of abstraction. A “broad” conception might account for the ways that an applicant’s racial identity shaped their access to resources necessary to develop the skills and competencies standard metrics measure.<sup>143</sup> This version assumes that even if a portion of group-based performance gaps reflect real differences in existing abilities, those differences should not dictate admissions outcomes because they (1) reflect access to training, not innate academic talent or potential and (2) internalize unearned racial advantage and disadvantage (themselves the vestiges of a formerly apartheid society).<sup>144</sup>

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140 I use the terms “measures of merit” and “standard metrics” interchangeably to capture metrics that universities tend to privilege in admissions processes—for example, standardized test scores, grade point average, letters of recommendation.

141 See generally Kang & Banaji, *Fair Measures*, *supra* note 25 (reviewing scholarship on implicit biases and stereotype threat).

142 See Devon Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 180–81 (2016) (“We identify a number of obstacles African American students across class likely encounter—up to and including the moment of admission—that potentially negatively impact their formal academic performance and the overall competitiveness of their admissions files. These obstacles create what we call an ‘admissions imbalance’ that affirmative action helps to offset.”).

143 One danger with this “broad” theory is that it often assumes that racial performance gaps (in, e.g., test performance or admissions) accurately reflect real differences in ability and preparation across groups. See, e.g., CHARLES FRIED, ORDER AND LAW 100 (1991) (“It seemed that we were ready to cheat on standards of excellence or even competence in order to avoid facing the fact that centuries of deprivation had left many blacks less qualified than whites.”). See also Carbado et al., *Privileged or Mismatched*, *supra* note 142 at 179 (“The failure of proponents of affirmative action to robustly defend the policy for middle-class African Americans strengthens the perception of affirmative action as a racial preference. Put another way, the perception of affirmative action as a racial preference has particular traction when its beneficiaries are black but not class-disadvantaged.”).

144 Some might argue that if the policy is designed to provide a more individualized review by accounting for a student’s relative advantage or disadvantage, the policy should focus on a student’s socioeconomic status (or familial wealth), not their racial identity. The underlying logic is that wealth is a better proxy for advantage/disadvantage than racial identity. This logic is not without some merit. If the goal is only to identify and account for each student’s relative financial resources, familial wealth could be a better (that is, less under- and overinclusive) proxy than racial identity. But as I and others have detailed, policies that attend to wealth but not race have at least three significant shortcomings: (1) they obscure the degree to which race matters (and racism operates) irrespective of an individual’s class status; (2) they deprive class-advantaged but racially disadvantaged students an individualized review; and (3) they function as a racial preference for students with the most inherited racial advantage. See Jonathan P. Feingold, “All (Poor) Lives Matter”: How Class-Not-Race

A “narrower” version might instead account for the common failure of standard metrics to accurately capture the existing talent and competencies of students from negatively stereotyped groups.<sup>145</sup> This “fair appraisals” story attends specifically to illusory portions of group-based performance gaps—portions that reflect measurement errors, not real differences in individual or group-based qualifications.<sup>146</sup> If left unaddressed, these “racial mismeasures” operate as a racial preference for White applicants.<sup>147</sup>

For present purposes, I focus on this narrower “fair appraisals” rationale because it enjoys the most direct doctrinal support. I refer specifically to Justice Powell’s opinion in *Regents of the Univ. of Calif. v. Bakke*.<sup>148</sup> Many know *Bakke* as the case in which Powell introduced the diversity rationale. Far fewer are familiar with a separate piece of Powell’s opinion—his observation that affirmative action could produce a more objective and meritocratic admissions process:

[The] *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

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*Logic Reinscribes Race and Class Privilege*, U. CHI. L. REV. ONLINE 47 (2020); Cheryl I. Harris, *Fisher’s Foibles: From Race and Class to Class Not Race*, UCLA L. REV. DISCOURSE (2017) (“In casting race-conscious affirmative action as a fight for access to privilege, the class over race discourse erases the history of working class struggle for such programs, the ameliorative effect of race conscious affirmative action in alleviating inequality, and racism’s ongoing negative impact on middle class Blacks.”).

145 See generally Feingold, *Colorblind Capture*, *supra* note 91 at 1994–95 (“This is not a ‘pipeline story that attributes the underrepresentation of Black and Latinx students to past discrimination (e.g., racially disparate access to well-resourced K-12 schools). Rather, this is a story about universities privileging fraught measures of ‘merit’ that, in practice, subject students of color to unequal treatment by understating their true academic qualifications. When universities fail to correct for fraught metrics, they confer racial advantages to wealthy white students. Affirmative action, by countering those racial advantages, promotes a more objective, individualized, and race-neutral process.”).

146 The “fair appraisal” rationale I identify herein is distinct from arguments that challenge the notion of merit itself; contend that standard metrics do not measure the traits that universities should care about; or challenge standard metrics’ lack of predictive validity. See Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1455 (1997) (arguing that “merit” in the law school admissions context was, as initially constructed, tied “to the profession’s desire to bar entry to immigrants and people of color”); See Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1270, 1314 (1995) (“In the best scenario, employment tests provide only limited predictive information so that it is difficult to make confident distinctions among individuals based solely on their test scores” and that “[t]est scores, at best, are imprecise measures of ability, however if used properly they can provide some information to employers”); Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1241 (2011) (“Research demonstrates that the predictive inadequacies of, and scientifically unjustified racial differences in, scores on conventional factorist tests like the SAT may be legally cognizable ‘test deficiencies.’”).

147 Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. 513, 529 (2019) (“[D]ecades of research on implicit bias and stereotype threat reveals that common measures of merit, although facially neutral, fail to produce racially neutral results. Rather, they produce what I term ‘racial mismeasures,’ a concept I use to describe facially neutral tools that predictably and systematically mismeasure merit because of an individual’s race.”).

148 438 U.S. 265 (1978).

argued that there is *no* “preference” at all.<sup>149</sup>

Justice Powell recognized that standard metrics might understate the academic promise and potential of students from negatively stereotyped groups. In a detailed analysis of the above passage, Professor Devon Carbado has outlined how Powell’s “fair appraisal” framing alters standard conceptualizations of affirmative action:

[Affirmative action] counteract[s] race-based disadvantages that students of color face as they prepare for college, as they put together their admissions file, and as that file is reviewed by admissions officers. At each of these steps, systematic biases introduce inaccuracies that understate the academic accomplishments and promise of those students. Affirmative action helps offset the disadvantages those biases create.<sup>150</sup>

Carbado surfaces how the fair appraisal rationale—and its substantial empirical support—troubles the near ubiquitous assumption that race-conscious admissions policies constitute “preferential treatment” that harm “innocent” third parties. This matters, in part, because the presumption that affirmative action comprises a “racial preference” anchors the Supreme Court’s longstanding hostility to such practices.<sup>151</sup> Yet even Justice Powell recognized that this characterization relies on the assumption that standard metrics accurately capture the existing abilities of all students.<sup>152</sup>

Chief Justice Roberts employs this common conflation. On at least eighteen separate occasions in *SFFA*, the Chief Justice uses the term “preference” to characterize and de-legitimize the defendants’ race-based admissions practices.<sup>153</sup> This framing internalizes the assumption that racial advantages and disadvantages do not infiltrate admissions processes until the moment affirmative action arrives. But as Carbado highlights, this assumption comprises a “highly contestable claim, not an empirical fact.”<sup>154</sup> And as I have previously detailed, “a substantial portion of ‘achievement gaps’ reflect measurement errors that artificially inflate the relative merit of white students—not actual differences in preparation, ability, or motivation.”<sup>155</sup> To borrow Justice Powell’s words, an affirmative action policy that counters these unearned white racial advantages should constitute “no ‘preference’ at all.”<sup>156</sup>

Harvard and UNC could have employed a “fair appraisal” rationale.<sup>157</sup> Neither

149 *Id.* at 306 n.43.

150 See Carbado, *Footnote 43*, *supra* note 4 (“Instead of the misleading conceptualization of the policy as a preference, footnote forty-three provides a more appropriate understanding of affirmative action as a countermeasure.”)

151 See *supra* Part I.A.

152 See *Bakke*, 438 U.S. at 306 n.43.

153 See *SFFA v. Harvard*, 600 U.S. 181, 212–229 (2023).

154 Carbado, *Footnote 43*, *supra* note 4, at 1132.

155 Feingold, *Colorblind Capture*, *supra* note 91, at 1994.

156 *Bakke*, 438 U.S. at 306 n.43.

157 See Feingold & Harpalani, *Amicus Brief*, *supra* note 23 at 15–16 (“By considering race, Respondents counter unearned racial advantages that benefit (predominately wealthy) white applicants. Respondents’ RCAPs, in turn, constitute modest antidiscrimination measures that reduce race’s impact on admissions,

did. This was disappointing, in part, because the limited evidence SFFA presented could have anchored this precise argument.<sup>158</sup> Recall that SFFA alleged that Harvard intentionally discriminated against Asian Americans.<sup>159</sup> To support this claim, SFFA presented evidence that anti-Asian bias (1) came from colorblind components of Harvard's admissions process and (2) principally benefited wealthy White applicants.<sup>160</sup>

More specifically, SFFA targeted Harvard's personal rating, which "summarizes an applicant's personal qualities based on an 'applicant's essays, their responses to short-answer questions, teachers' and guidance counselors' qualitative observations about applicants, alumni interviewers' comments, and much other information."<sup>161</sup> According to SFFA, Asian Americans received lower scores on that metric relative to similarly situated White applicants.<sup>162</sup> Multiple theories could explain this disparity. One is that implicit biases caused evaluators—such as guidance counselors or alumni interviewers—to rate Asian Americans lower than White applicants for materially identical performance.<sup>163</sup> A separate theory is that White applicants were more likely to attend private high schools with low student-to-guidance counselor ratios.<sup>164</sup> Regardless of the theory, one thing is clear: Harvard's formal race-based policy did not cause this alleged race-based harm.

Harvard could have argued that SFFA's evidence of anti-Asian bias rendered affirmative action even more important—specifically, as a tool to counter "racial

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promote a more objective process, and protect students' of color right to compete on their individual "merit," irrespective of their race.").

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

159 See *id.*

160 SFFA argued, for example, that "even taking 'Harvard's scoring of applicants at face value, Harvard imposes a penalty against Asian Americans as compared to whites' that 'has a significant effect on an Asian-American applicant's probability of admission.'" Plaintiffs Memorandum of Reasons in Support of Its Motion for Summary Judgment at 10, *Students for Fair Admissions, Inc., v. President and Fellows of Harvard Coll.*, No. 1:14-cv-14176-ADB (D. Mass. June 15, 2018); see also *id.* ("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.").

161 *Students for Fair Admission, Inc., v. President and Fellows of Harvard Coll.*, 346 F. Supp. 3d 174, 183 (D. Mass. 2018). Admission officers further assign the personal rating based on their assessment of a variety of other factors, including the applicant's "humor, sensitivity, grit, leadership, integrity, helpfulness, courage, kindness and many other qualities." *Id.*

162 See *id.*

163 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 203 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023) ("Finally, SFFA argues that 'the district court recognized that one likely explanation for why Asian Americans are penalized in the admissions process is Harvard's 'implicit bias' and that calling the bias 'implicit' does not make it legal.'" (internal quotation marks omitted).

164 See Julie Park & Sooji Kim, *Harvard's Personal Rating: The Impact of Private High School Attendance*, 30 ASIAN AM. POL'Y REV. 2020 ("White Harvard applicants are considerably more likely to experience the advantages associated with private school college counseling, and that's a real advantage in the hypercompetitive world of elite college admissions. Asian Americans are not less personable, but even well-meaning public school counselors generally cannot dedicate the individualized time to their students like private school counselors."). See Mike Hoa Nguyen, et al., *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in SFFA v. Harvard*, 48 J. COL. & UNIV. L. 369, 384 (2023).

mismeasures” that inflated the qualifications of White students relative to their Asian American counterparts. Harvard never raised this argument. And in an ironic twist, by striking down Harvard’s existing affirmative action policy, Chief Justice Roberts hindered Harvard’s ability to mitigate the barriers Asian American students face while leaving untouched the practices that create those precise barriers.

### ***B. Policies That Employ Colorblind Criteria***

Above, I identified four rationales that remain available to defend race-conscious admissions policies. I also acknowledged that when it comes to race-conscious policies, even a robust factual record and sound theoretical argument might be insufficient before this Supreme Court.

A different story concerns policies that employ colorblind criteria—that is, policies that *do not* distinguish between individual applicants on the basis of their respective racial identities. Whereas racial classifications are legally suspect, facially neutral conduct is presumptively constitutional—even if the policy is adopted to promote equality-oriented goals like racial diversity or racial inclusion on campus.<sup>165</sup> Unfortunately, substantial commentary post-SFFA has generated confusion about the legality of such practices. This confusion heightens the risk well-meaning universities will jettison or otherwise avoid lawful conduct.<sup>166</sup> Doing so might reduce legal and political attacks in the short term. But it comes at great expense and forfeits tools that remain legally secure—even after SFFA. To aide against unnecessary overcorrection, I now highlight five facially neutral practices that present no constitutional concern.

#### *1. Universities May Consider a Student’s Personal Experiences with Race and Racism*

In SFFA, Chief Justice Roberts emphasized that universities remain free to consider each student’s personal experiences with race and racism:

[A]s all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.<sup>167</sup>

This passage should reassure universities that they may formally consider how race and racism affects, or has affected, their applicants—or what I term *personal race/ism* information.<sup>168</sup> In many respects, this reassurance should not have been

<sup>165</sup> See generally Starr, *The Magnet School Wars*, *supra* note 52; Feingold, *The Right to Inequality*, *supra* note 61.

<sup>166</sup> Liam Knox, *An Overabundance of Caution*, INSIDE HIGHER ED (Aug. 9, 2023), <https://www.insidehighered.com/news/admissions/traditional-age/2023/08/09/are-colleges-overcorrecting-affirmative-action>.

<sup>167</sup> SFFA v. Harvard, 600 U.S. 181, 231 (2023).

<sup>168</sup> See also U.S. DEP’T OF JUST. & U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT’S DECISION IN STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIV. OF N.C. (2023) [https://www.justice.gov/d9/2023-08/post-sffa\\_resource\\_faq\\_final\\_508.pdf](https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf) [hereinafter DOJ/DOE Guidance] (“[I]nstitutions of higher education remain free to consider any quality or characteristic of a student that bears on the institution’s admission decision, such as courage, motivation, or determination, even if the student’s application ties that characteristic to their lived experience with

necessary; it reflects basic elements of the Supreme Court's well-established equal protection jurisprudence.

Existing doctrine draws a rigid distinction between policies that employ racial classifications and policies that employ colorblind (or facially neutral) criteria. Racial classifications are presumptively unconstitutional and must satisfy strict scrutiny.<sup>169</sup> Facially neutral policies are presumptively lawful and need only satisfy rational basis review.<sup>170</sup> The Supreme Court has justified this rigid dichotomy by arguing that racial classifications pose special concerns that do not implicate facially neutral conduct.<sup>171</sup>

SFFA challenged Harvard and UNC's use of racial classifications—that is, the component of their admissions processes that permitted reviewers to consider the racial identity of individual applicants.<sup>172</sup> This explains why the defendants bore the near-insurmountable burden of satisfying strict scrutiny. Had Harvard and UNC possessed the same underlying goals but considered each student's personal race/ism information (a facially neutral criteria), strict scrutiny would not have applied. Instead, SFFA would have had to prove that the defendants adopted that specific policy with "an impermissible racial purpose." This is a near-insurmountable burden for the plaintiff, in part, because facially neutral policies enjoy substantial deference.<sup>173</sup>

To appreciate the distinction between racial classifications and facially neutral criteria, consider the following hypothetical. Imagine two applicants with materially identical paper records. They grew up in the same affluent neighborhood, attended the same high school, received the same GPA and SAT scores, and engaged in the

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race—provided that any benefit is tied to 'that student's' characteristics, and that the student is 'treated based on his or her experiences as an individual[,] and 'not on the basis of race.'").

169 See *SFFA v. Harvard*, 600 U.S. at 207.

170 See *Washington v. Davis*, 426 U.S. 229, 247 (1976). To invalidate a facially neutral policy, the plaintiff must provide evidence that the defendant adopted the challenged policy with an "impermissible racial purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). If the plaintiff makes this prima facie showing, the burden shifts to the defendant to prove that it would have adopted the policy "even had the impermissible purpose not been considered." *Id.* at 270 n.21.

171 See *SFFA v. Harvard*, 600 U.S. 212 ("[The *Grutter* court] observed that all racial classifications, however compelling their goals, were dangerous. And it cautioned that all race-based governmental action should remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.") (internal quotation marks and brackets omitted). See also *id.* at 208 ("Our acceptance of race-based state action has been rare for a reason. Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

172 The target of SFFA's legal challenges, coupled with the conservative Justices' embrace of "race-neutral alternatives," helps to clarify that when Roberts employs (with derision) terms like "racial discrimination," "race-based," or "race-qua-race," he is referencing the piece of Harvard and UNC's respective policies that permitted admissions officers to consider the racial identity of individual applicants. He is not referencing the defendants' racial diversity-related goals.

173 See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) ("[B]ecause an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."). Cf. Peter Salib and Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 1 (2023).

same extracurricular activity: the school newspaper. The students differ in two relevant respects.<sup>174</sup> First, they possess distinct racial identities. The first student, Brett, identifies as White; the second, Neal, identifies as Asian American. The students self-report this racial identity information on their application forms. Second, the students have different experiences with race and racism. The students describe those experiences in their admission essays.

Brett describes his high school experience as relatively uneventful. He notes that his high school is overwhelmingly White but that he rarely thinks about his own racial identity or broader racial dynamics. The one exception came from his time on the school newspaper. He notes that unlike the school as a whole, the newspaper's student staff is predominately Asian American. The teacher who oversees the newspaper is also Asian American. Brett shares that prior to joining the newspaper, he had never felt self-conscious about his racial identity. But he admits that in the newspaper's office, he cannot help but feel vigilant about his racial identity—at times concerned about how the other members of the newspaper will perceive him and his actions. He recalls times when he felt anxious that if he revealed ignorance about Asian American history, he might confirm stereotypes his classmates hold about people racialized as White.<sup>175</sup> He also reflects that his experience on the newspaper has heightened his appreciation for why racial representation can matter—and even affect how students feel inside the classroom.

Neal describes a different high school experience. Like Brett, Neal's parents were high-earning professionals. But unlike Brett, Neal describes a childhood in which he was constantly thinking about his racial identity. He describes navigating predominately White environments where he routinely encountered subtle and more overt cues that he and his family were not welcome. He describes the exhaustion, stress, and fear that he regularly carries with him—experiences that are most acute when he is the only Asian American person in the room. In contrast to Brett, Neal describes the newspaper as a site of temporary relief—a place where he can let down his guard and “just be himself.” He longs for a university where he can avoid the toll of severe underrepresentation—both in student groups and in the classes he must take for his planned English/ Art History double major.

To recap. The students provide two types of information: (1) their racial identity information and (2) their personal race/ism information. Nothing prohibits a university from obtaining, knowing, or otherwise learning about either type of

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174 This is a stylized example that flattens the complexities of identity, race, and racism. I nonetheless employ it to help concretize the difference between a presumptively unlawful *race-based* policy that considers “race-qua-race” and a presumptively lawful *colorblind* policy that considers personal race/ism experience.

175 The fear that negative performance on a particular task could confirm a stereotype about a group to which a person belongs is known as *stereotype threat*. See Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CALIF. L. REV. 307, 330–39 (2015). Decades of empirical scholarship suggest that stereotype threat is responsible for a considerable portion of racial and gender-based achievement gaps. See *id.* at 327 (reviewing two “meta-analyses [that] provide evidence that stereotype threat accounts for a quarter of the white-black SAT gap and a third of the white-Latino SAT gap”).

information.<sup>176</sup> The key doctrinal question is whether a university may consider either type of information when making an admissions decision. If Harvard considers Brett's or Neal's racial identity as a positive factor, that would constitute a presumptively unlawful racial classification.<sup>177</sup> Harvard would have to satisfy strict scrutiny to save the policy. In contrast, if Harvard considers either applicant's personal race/ism information, that would constitute a presumptively lawful facially neutral policy.<sup>178</sup> The plaintiff would carry the burden of proving that Harvard adopted the policy with an "impermissible racial purpose."

Two related points deserve note. First, the fact that universities can consider personal race/ism information dictates neither *what* constitutes personal race/ism information nor *why* universities should consider it.

As to the *what*, this underdefined category of information could entail, *inter alia*,<sup>179</sup> (1) whether a student attended a racially diverse high school; (2) whether the student was part of a severely underrepresented racial group in high school; (3) whether a student grew up in a formerly redlined neighborhood; (4) whether a student has relatives who physically fled racialized violence in the United States or abroad; (5) whether a student has relatives who lost property or personal liberty from racialized campaigns in the United States or abroad; (6) whether a student encounters forms of racial bias on a daily basis; (7) whether a student has formally studied race and racism; (8) whether a student has previously engaged in academic, professional, or other work that supports antiracist efforts.

As to the *why*, there are at least three obvious reasons why a university might positively weigh an applicant's personal race/ism information: (1) it is part of academic "*merit*"<sup>180</sup>; (2) it promotes a more *holistic and individualized* review; (3) it yields *discourse* and *equality* benefits.<sup>181</sup>

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176 See *infra* Part II.B.3.

177 This reflects the component of Harvard's and UNC's respective admissions processes that SFFA challenged and the Supreme Court invalidated.

178 This is the scenario Chief Justice Roberts invokes when he states that nothing in *SFFA* should be construed as "prohibiting universities from considering an applicant's discussion of how race affected his or her life." *SFFA v. Harvard*, 600 U.S. 181, 230 (2023).

179 This list is nonexhaustive. I include it to highlight the broad swath of information that could constitute personal race/ism information.

180 More precisely, a university may conceptualize merit to include a student's racial literacy—that is, their ability to talk and think about race and racism with a heightened level of sophistication. A student's personal race/ism information—either through their own experiences or formal study—might provide this sort of literacy. See Jonathan Feingold & Arnie Arnesen, *Why Ask Students About Race, #RaceClass*, <https://soundcloud.com/user-808872105/ep-21-why-ask-students-about-race?> (last visited Nov. 15, 2023).

181 As to discourse benefits, universities are better situated to promote a robust marketplace of ideas if their leaders, faculty and students bring a diverse set of experiences with race/ism. See *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 312 (1978) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"). As to equality benefits, a student body that better appreciates the tax that comes from racial underrepresentation and racial stereotyping will be better positioned to promote a racially inclusive learning environment. See generally Feingold, *Hidden in Plain Sight supra* note 26 (explaining how racial diversity furthers the

Second, the source of the information does not affect the doctrinal analysis. If a university formally considers racial identity as a plus factor, that is presumptively unconstitutional—whether the university obtains the information through a self-reported check box or infers it through an admissions essay. The same applies to personal race/ism information. Whether the information comes from an admissions essay or elsewhere, use of that information raises no independent legal concerns.<sup>182</sup> For various reasons, it might behoove a university to obtain such information through channels other than the admissions essay.<sup>183</sup> Some personal race/ism information could be gleaned through surveys that ask students to answer specific questions. Other types of information could be available through indirect means.

For present purposes, my goal is not to identify precisely what constitutes personal race/ism information, why a university would consider it, or how a university would acquire it. Those are questions each university should consider in light of their specific mission and local context. My primary goal is to (1) invite universities to think critically about the foregoing and (2) reiterate that reliance on personal race/ism information, regardless of the source, presents no independent constitutional concern.

## 2. *University's May Employ Colorblind Criteria to Promote Racial Diversity*

One can generalize the preceding section into the broader proposition that *SFFA* did nothing to limit a university's ability to utilize colorblind criteria to realize equality-oriented goals.<sup>184</sup> Federal guidance from the Departments of Justice and Education (DOJ/DOE Guidance) puts this plainly: "[N]othing in the *SFFA* decision prohibits institutions from continuing to seek the admission and graduation of diverse student bodies, including along the lines of race and ethnicity, through means that do not afford individual applicants a preference on the basis of race in admissions decisions." The DOJ/DOE Guidance appropriately distinguishes between facially neutral admissions policies (no constitutional concern) and policies that distinguish between individual students based on their racial identity (presumptively suspect).<sup>185</sup>

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goal of an equal learning environment).

182 Notwithstanding the recent emphasis on admissions essays, there is no obvious doctrinal reason why a university could not rely on information about a student's personal race/ism experience obtained through other sources.

183 There are multiple reasons why a university might want to avoid overrelying on the personal essay for personal race/ism information. One reason is that doing so could unfairly advantage students with the most access to coaching and resources. A second reason is that forcing students to produce this information can be traumatizing—another tax that will likely fall unevenly on students of color. See Vinay Harpalani, *Secret Admissions*, 48 J. COL. & UNIV. L. 325, 368 (2023). See also Atinuke Adediran, *The United States Supreme Court Puts an End to Consideration of Race in University Admissions and Potentially Increases Racial Trauma for Applicants*, OXFORD HUMAN RIGHTS HUB (July 4, 2023), <https://ohrh.law.ox.ac.uk/the-united-states-supreme-court-puts-an-end-to-the-consideration-of-race-in-university-admissions-and-potentially-increases-racial-trauma-for-applicants/>.

184 See DOJ/DOE Guidance, *supra* note 168.

185 One way to understand this distinction is to divide a policy into its means and its motive. The means determine whether or not strict scrutiny applies. Only policies that employ racial classifications (the means) trigger strict scrutiny. See *SFFA v. Harvard*, 600 U.S. 181, 214 (2023) ("Because '[r]acial discrimination [is] invidious in all contexts ... we have required that universities operate their race-based

In *SFFA*, Chief Justice Roberts reinforced this distinction. To begin, the Chief Justice reiterated that racial classifications pose special concerns that demand heightened scrutiny.<sup>186</sup> According to the Supreme Court, those concerns are specific to racial classifications; they do not extend to facially neutral conduct.<sup>187</sup>

One sees this within strict scrutiny itself. Narrow tailoring, for example, requires universities to avoid race-conscious policies if “race-neutral alternatives” could achieve the desired end.<sup>188</sup> This requirement reinforces two key points. First, race-based affirmative action is constitutionally suspect because of the racial means, not the racial motive. Were it otherwise, a “race-neutral alternative” should not save the policy.<sup>189</sup> Second, all racial classifications are suspect, but only some racial motives are impermissible.<sup>190</sup> And, critically, permissible racial motives include equality-oriented goals like racial diversity and racial inclusion.<sup>191</sup>

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admissions programs in a manner that is sufficiently measurable to permit judicial [review] under the rubric of strict scrutiny.”). Facially neutral policies, even if they are designed to promote certain racial motives like racial diversity (the motive), need only satisfy rational basis review. *See Washington v. Davis*, 426 U.S. 229, 246 (1976) (“As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue.”).

186 *See SFFA v. Harvard*, 600 U.S. at 208 (Our acceptance of race-based state action has been rare for a reason. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. That principle cannot be overridden except in the most extraordinary case.”) (internal citations and quotation marks omitted); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (“Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm.”).

187 *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in judgment) (“The argument ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.”). One point of potential confusion is Kennedy’s use of the term “race-conscious.” That term is often used to describe admissions policies that employ racial classifications. In this passage, Justice Kennedy is using the term to describe facially neutral admissions policies designed to achieve racial results.

188 *See Grutter*, 539 U.S. at 339 (“Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”).

189 *See Parents Involved*, 551 U.S. at 735 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989). (Kennedy, J., concurring in part and concurring in judgment) (racial classifications permitted only “as a last resort”); (“This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past.”).

190 *See Ian Ayres*, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1792–93 (1996) (“The *Adarand* / *Croson* preference for ‘race-neutral means to increase minority participation’ clearly contemplates legislative action ‘because of’ its effects on minority entrepreneurs. And while it is difficult to clearly specify the minimum requirement for establishing a ‘predominant’ motivating factor, it should not be difficult to conclude that subsidies fashioned to increase minority participation are predominantly motivated by race.”).

191 *See Richard A. Primus*, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV.

Imagine if SFFA had challenged UNC's former policy of de jure segregation (as opposed to its recent affirmative action policy).<sup>192</sup> UNC could not save this exclusionary and animus-laden policy by proving that race-neutral alternatives were unavailable. Nor could UNC constitutionally pursue the same ends through facially neutral means. No court would suggest as much. The reason is that in the context of de jure segregation, the constitutional infirmity lies in the racial means *and* the racial motive.

Juxtapose this with what actually transpired in SFFA.<sup>193</sup> Every conservative Justice condemned the challenged policies and racial classifications more broadly.<sup>194</sup> Many of those same opinions admonished Harvard and UNC for failing to adopt (or even invited the defendants to adopt) "race-neutral alternatives" to achieve a racially diverse student body.<sup>195</sup> This highlights that Harvard and UNC's policies were suspect because they employed racial classifications, not because they aimed to promote racial diversity or related goals.<sup>196</sup>

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493, 541 (2003) ("Instead of setting aside a certain percentage of contracting business for minority-owned contractors, the *Croson* Court wrote, the city of Richmond could have modified its municipal contracting practices in other ways that, without making race itself a factor in awarding individual contracts, would have increased contracting opportunities for minority contractors otherwise likely to be excluded. ... *Adarand* repeated this idea that "race-neutral means to increase minority business participation" can be a constitutionally appropriate substitute when race-specific affirmative action programs would violate equal protection."); Ayres, *supra* note 191, at 1791 ("The key phrase from *Croson*, which is quoted again in *Adarand*, is the admonition that policymakers must consider 'the use of race-neutral means to increase minority business participation.' The Court is still counseling legislatures to engage in race-conscious decisionmaking—to enact certain subsidies because of the race of the beneficiaries. And, of course, the Court cannot avoid this causal connection: Any race-neutral program attempting to remedy past racial discrimination would necessarily have a motive to benefit the victimized race.").

192 See Feingold, *Ambivalent Advocates*, *supra* note 8 (discussing UNC's history of formal racial exclusion).

193 Prior to SFFA, conservative Justices hostile to affirmative action invited defendants to employ colorblind policies to achieve racially motivated results. Justice Scalia's opinion in *Richmond v. Croson* is illustrative. Concurring in a judgment that struck down Richmond, Virginia's set-aside for minority contractors, Justice Scalia denied any legal distinction between Jim Crow and affirmative action; he claimed both violated the Fourteenth Amendment's colorblindness mandate. *City of Richmond*, 488 U.S. at 520 (Scalia, J., concurring) ("I do not agree ... with Justice O'Connor's dictum suggesting that ... state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination.'"). And yet, Scalia invited Richmond to employ facially neutral policies to achieve the same racially motivated ends. *See id.* at 526 ("A State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses—which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.").

194 See, e.g., *SFFA v. Harvard*, 600 U.S. 181, 284 (2023) (Thomas, J., concurring) ("To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means.").

195 See, e.g., *id.* at 317 (Kavanaugh, J., concurring) ("[G]overnments and universities still 'can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.'" (quoting *City of Richmond*, 488 U.S. at 526, 109 S. Ct. 706 (Scalia, J., concurring in judgment) (internal quotation marks omitted))).

196 Chief Justice Roberts articulated a similar position in *Parents Involved*, which invalidated

Justice Kavanaugh makes this point explicit.<sup>197</sup> In his concurrence, Kavanaugh quotes *Grutter* for the proposition that narrow tailoring “requires courts to examine ... whether a racial classification is ‘necessary’—in other words, whether race-neutral alternatives could adequately achieve the government interest.”<sup>198</sup> Kavanaugh must know that in *Grutter*, the Law School argued that racial classifications were necessary to realize a racially diverse student body.<sup>199</sup> Were there any confusion, Kavanaugh concludes with the following passage (which itself cites prior opinions from Justices O’Connor and Scalia):

[A]lthough progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. ... [G]overnments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.<sup>200</sup>

Justice Gorsuch also invokes “race-neutral alternatives” to discredit the defendants’ use of racial classifications.<sup>201</sup> The relevant passage appears to condone “universities across the country” that have sought racial diversity through facially neutral means like “reducing legacy preferences, increasing financial aid, and the like.”<sup>202</sup> Gorsuch extends this argument by noting that SFFA “submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices.”<sup>203</sup>

Even Justice Thomas, the Court’s most vocal affirmative action opponent, offered a similar take.<sup>204</sup> Also citing Scalia’s concurrence in *Croson v. Richmond*, Thomas remarked that nineteenth century laws designed to remedy racial inequality were permissible because they avoided racial classifications: “[E]ven if targeting race

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voluntary race-conscious K-12 desegregation policies but invited race-neutral alternatives. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (“The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications.”).

197 See *SFFA v. Harvard*, 600 U.S. at 311 (Kavanaugh, J., concurring).

198 See *id.*

199 See *id.* at 313–14.

200 *Id.* at 317 (citing *City of Richmond*, 488 U.S. at 526 (Scalia, J., concurring in judgment) (internal quotation marks omitted); see *id.*, at 509 (plurality opinion of O’Connor, J.)).

201 See *id.* at 299 (Gorsuch, J., concurring) (“Even beyond all this, the parties debate the availability of alternatives. SFFA contends that both Harvard and UNC could obtain significant racial diversity without resorting to race-based admissions practices. Many other universities across the country, SFFA points out, have sought to do just that by reducing legacy preferences, increasing financial aid, and the like.”).

202 See *id.*

203 *Id.* at 300.

204 See *id.* at 249–50 (Thomas, J., concurring).

as such—[ these laws] likely were also constitutionally permissible examples of Government action ‘undoing the effects of past discrimination in a way that does not involve classification by race,’ even though they had ‘a racially disproportionate impact.’<sup>205</sup> Thomas included the 1865 and 1866 Freedmen’s Bureau Acts, both of which directed assistance to “freedmen.”<sup>206</sup> Thomas reasoned that neither Act contravened the Constitution’s equality guarantees because “freedman” is a “formally race-neutral category, not blacks writ large.”<sup>207</sup>

The upshot is that under prevailing doctrine, facially neutral efforts to achieve racial diversity raise no constitutional concern.<sup>208</sup> Chief Justice Roberts’s majority opinion is in accord. The Chief Justice condemned Harvard and UNC’s means while condoning their motives. The Chief Justice concluded that neither defendant proffered a viable *compelling* interest. But he did not disparage the defendants’ diversity-related motives. To the contrary, Chief Justice Roberts deemed them “commendable.”<sup>209</sup>

Also, as noted, *SFFA* formally left *Grutter* and the diversity rationale in tact. This means that racial diversity remains a constitutionally compelling interest—at least as a formal matter. Were the Supreme Court to invalidate a facially neutral policy designed to promote racial diversity, it would effectively enshrine a constitutional framework at war with itself—one in which racial diversity is both compelling and impermissible.

### 3. *Universities May Know and Learn the Racial Identity of Individual Applicants and May Model and Analyze Their Practices’ Racial Impact*

*SFFA* does not prohibit universities from knowing or learning their applicants’ individual racial identities or collecting and analyzing that information in the aggregate.<sup>210</sup> *SFFA* requested that the Supreme Court prohibit Harvard and UNC from knowing or becoming aware of each applicant’s racial identity.<sup>211</sup> It is not surprising that the Supreme Court never seriously considered this request, which

205 *Id.* at 249 (internal brackets omitted) (citing *City of Richmond*, Scalia, J., concurring in judgment).

206 *See id.* at 247–51.

207 *Id.* at 247.

208 As referenced herein, pending litigation from the Pacific Legal Foundation seeks to upend this aspect of prevailing doctrine. *See Glater, Reflections on Selectivity*, *supra* note 57.

209 *SFFA v. Harvard*, 600 U.S. at 214. This is consistent with *Parents Involved*, in which Chief Justice Roberts condemned the use of racial classifications, but characterized the defendants’ racial motives as a “worthy goal.” *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007) (“Our established strict scrutiny test for racial classifications, however, insists on ‘detailed examination, both as to ends and as to means.’ Simply because the school districts may seek a *worthy goal* does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.”) (emphasis added).

210 *See DOJ/DOE Guidance*, *supra* note 168 (“As stated above in Question 2, admissions officers need not be prevented from learning an individual applicant’s race if, for example, the applicant discussed in an application essay how race affected their life.”).

211 *See Complaint* at 119, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 14-14176 (D. Mass. Nov. 14, 2014), *supra* note 6.

SFFA effectively abandoned during the litigation. Beyond the request's impracticability,<sup>212</sup> universities need to obtain and analyze racial demographic information to identify and avoid policies and practices that disparately impact certain groups.<sup>213</sup>

Chief Justice Roberts made clear that admissions officers may know the racial identity of individual applicants when he identified race/ism information as a permissible consideration.<sup>214</sup> In the same passage, Chief Justice Roberts emphasized that Harvard and UNC could not use that information to covertly reestablish "the regime we hold unlawful today."<sup>215</sup> As discussed above, the unlawful "regime" refers to the defendants' use of racial classifications, not their knowledge of individual racial identities nor their diversity-related goals.<sup>216</sup>

If confusion persists, consider any other context in which an entity is permitted to know individuals' racial identities but prohibited from treating those individuals differently based on that information. Racial profiling is a useful analogy. If the police choose to stop person A because person A is (or is perceived to be) Asian American, that race-based disparate treatment would raise serious Fourteenth Amendment concerns.<sup>217</sup> At the same time, nothing prohibits the police from learning the racial identity (or perceived racial identity) of the individuals they encounter on the street. If anything, collecting and analyzing demographic information about police encounters better positions law enforcement to avoid or minimize practices that disparately harm certain racial groups.

Translated to the admissions context, nothing prohibits Harvard from preemptively modeling, contemporaneously tracking, or subsequently analyzing the racial impact of its admissions process.<sup>218</sup> Nor does SFFA prohibit Harvard from adjusting its process based on analysis that reveals a colorblind criterion is disparately harming an identifiable racial group. Imagine if halfway through an admissions cycle, Harvard discovers that Asian American admits are conspicuously underrepresented. That triggers concern and a corresponding internal analysis that identifies two likely culprits: (a) Harvard's overreliance on guidance counselor

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212 See Feingold, *SFFA v. Harvard*, *supra* note 158.

213 See DOJ/DOE Guidance, *supra* note 168 ("Data containing demographic information about an institution's student applicant pool, student admissions outcomes, and student enrollment and retention provide institutions with critical information related to their programs and objectives."). See also *infra* Part III.A.

214 *SFFA v. Harvard*, 600 U.S. at 230.

215 *Id.*

216 See *supra* Part II.B.1.

217 See *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

218 DOJ/DOE Guidance, *supra* note 168 ("Similarly, institutions may investigate whether the mechanics of their admissions processes are inadvertently screening out students who would thrive and contribute greatly on campus. ... The Court's decision likewise does not prohibit admissions models and strategies that do not consider an individual's race, such as those that offer admission to students based on attendance at certain secondary or post-secondary institutions or based on other race-neutral criteria.").

letters of recommendation and (b) Harvard's legacy preferences.<sup>219</sup> Both criteria systematically advantage White applicants, who gain admission over their equally qualified, if not more qualified, Asian American counterparts.<sup>220</sup>

As noted, Harvard has only filled half its admit class. The question, therefore, is what can Harvard do (practically and legally) to correct or mitigate a process defect that favors White applicants over equally (or more) qualified Asian American applicants. Per *SFFA*, a concern would arise if Harvard rectified the problem by treating Asian American identity as a plus factor in the admissions process.<sup>221</sup> That would be "reestablish[ing]" the "regime" *SFFA* deemed "unlawful." In contrast, it should raise no legal concern if Harvard ceased considering both criteria for the remainder of its admissions cycle.<sup>222</sup> Even if done for a racial purpose, this mid-cycle shift reflects the type of "race-neutral alternative" conservative Justices have endorsed for decades.<sup>223</sup>

#### 4. Universities May Proudly Proclaim Their Equality-oriented Values

Nothing in *SFFA* limits a university's expansive right to openly and unapologetically express its commitment to equality-oriented goals like racial justice, antiracism, racial diversity, and racial inclusion.<sup>224</sup> Such public proclamations are lawful and often key to fostering a welcoming campus environment.

There is a common narrative that universities—and the government more broadly—should be neutral. The basic claim is that the government should not pick sides, particularly on controversial topics.<sup>225</sup> In certain respects, this is true. When a

219 This fact pattern reflects the evidence of anti-Asian bias *SFFA* presented in *SFFA v. Harvard*. See Feingold, *SFFA v. Harvard*, *supra* note 158.

220 See *id.*

221 Although this race-conscious response would trigger strict scrutiny, Harvard could defend the specific policy under remedial or fair appraisal rationales (especially if Harvard continued to rely on the colorblind criteria that functioned as an unfair racial preference for White applicants). See *supra* Parts II.A.2, II.A.4.

222 This mid-cycle shift, which would alter the admissions process for a yet-to-be-admitted cohort, distinguishes the hypothetical from *Ricci v. DeStefano*, 129 S. Ct. 9658 (2009). In *Ricci*, the Supreme Court invalidated New Haven, CT's decision to revise a promotional procedure after discovering that a component of the initial evaluation process had a severe adverse impact on African American firefighters. See *id.* Identifiable White firefighters who would have been promoted under the initial process sued. See *id.* Richard Primus has argued that the existence of these identifiable "visible victims" rendered the racially motivated decision suspect—whereas similar decisionmaking that lacks visible victims would not. See Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1369–75 (2010).

223 See *supra* Part II.B.2.

224 In pending litigation, affirmative action opponents have invoked equality-oriented statements to challenge the legality of facially neutral efforts to promote racial diversity. See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023). In a separate piece, I explain why the legal theory underlying those challenges lacks a coherent doctrinal anchor but could nonetheless find a sympathetic Supreme Court. See Feingold, *The Right to Inequality*, *supra* note 61.

225 Widespread criticism targeting university statements concerning the conflict in Israel and Gaza belies this neutrality narrative. See Emma Hurt & Eleanor Hawkins, *Universities Struggle with Responses as Israel–Hamas War reverberates*, AXIOS (Oct. 18, 2023), <https://www.axios.com/2023/10/18/israel-hamas-palestine-gaza-college-universities-statement>. Rather than demand neutrality, much of the criticism aimed at universities faults institutional statements for being *too* neutral and for not staking out a more partial position. See *id.*

public university regulates the speech of others, the First Amendment and related laws and values often demand some degree of neutrality.<sup>226</sup> But in other contexts, neither law nor values demand neutrality. This is especially true when the government is acting as a *speaker* (as opposed to when the government acts as a *regulator*).<sup>227</sup>

Education law scholar Kristine Bowman has explained that “[p]ublic universities have broad leeway under the government speech doctrine to advance their views while excluding others’ view-points.”<sup>228</sup> Bowman observes that the Supreme Court has “made clear that the government may freely express viewpoints and that it does not have (or need) First Amendment protections when doing so.”<sup>229</sup> Free speech scholar Catherine Ross has similarly noted that “[n]o constitutional hurdle restrains administrators ... from promoting chosen messages, including exhortations that encourage empathy, sensitivity, tolerance of difference, and civil norms.”<sup>230</sup>

We might not see it, but universities choose sides all the time. This includes decisions over institutional policies, values, and curriculum. Bowman highlights this reality: “When university presidents speak at convocation and graduation, and when they communicate regularly with their campuses, they often are opining and seeking to persuade rather than demanding compliance.”<sup>231</sup> In each instance, the university is not being neutral. It is taking sides and expressing values.

First Amendment scholar Steven Calabresi has likewise observed that a neutrality requirement would conflict with the university’s core mission to pursue truth and knowledge: “I would add that public colleges, universities, and secondary schools could not even function if they did not choose to praise some viewpoints and criticize others. The praising of some things and the disapproving of others is basically at the core of what education itself is all about.”<sup>232</sup>

A university’s right to speak is not diminished when a topic is controversial or divisive. In fact, such topics might increase the need for a university to share its viewpoint through intentional counterspeech. This includes situations that, if left unaddressed, could create a hostile environment for students of color. To illustrate how a university can use counterspeech to promote a racially inclusive climate, Bowman recounts how University of Florida’s President Kent Fuchs used his platform to condemn the ideas espoused by rightwing ideologue Richard Spencer.<sup>233</sup>

When Spencer came to the University of Florida in the fall of 2018, Fuchs was outspoken in his opposition to Spencer’s message. Fuchs conveyed messages to the university community via email, video, and social media; the campus

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226 See Kristine Bowman, *Universities’ Speech and the First Amendment*, 99 NEBRASKA L. REV. 896 (2020).

227 *Id.*

228 *Id.*

229 *Id.* at 912.

230 Catherine J. Ross, *Assaultive Words and Constitutional Norms*, 66 J. LEGAL EDUC. 739, 768 (2017).

231 Bowman, *Universities’ Speech and the First Amendment*, *supra* note 227 at 932–33.

232 Steven G. Calabresi, *Freedom of Expression and the Golden Mean*, 79 BROOK. L. REV. 1005, 1013 (2014).

233 Bowman, *Universities’ Speech and the First Amendment*, *supra* note 227 at 933.

newspaper; and in public settings. Bowman notes that Fuchs spoke persuasively, seeking to convince those in the university community and beyond that Spencer's views were wrong. Fuchs avoided coercive speech; he neither punished Spencer nor threatened to punish those who supported him.<sup>234</sup>

##### 5. SFFA Applies to Admissions Decisions Only

In the months since *SFFA*, many universities have questioned their ability to consider race in aspects of institutional governance that transcend admissions. Common examples include financial aid and other recruitment and retention strategies.<sup>235</sup> It is understandable that university officials view such policies as under threat.<sup>236</sup> But it is a mistake to conclude that *SFFA* directly governs these other institutional practices.

To start, Chief Justice Roberts explicitly limited his opinion to the challenged conduct: Harvard and UNC's race-conscious admissions practices. Beyond tying his analysis to the defendants' respective policies, the Chief Justice underscored that these "cases involve whether a university may make *admissions decisions* that turn on an applicant's race."<sup>237</sup> This language supports the position that *SFFA* does not determine the legality of other institutional policies that might also consider a student's racial identity.

Beyond Chief Justice Roberts's limiting language, factual distinctions between admissions processes and other equality-oriented practices highlight why *SFFA* does not necessarily translate. To begin, affirmative action opponents tend to frame admissions as a "zero-sum" context whereby admission for one student means rejection for another.<sup>238</sup> This framing does not naturally extend to recruitment and retention practices—often designed to remove barriers that exclude or undermine the educational experience of students from historically excluded groups (but have no obvious "negative" effect on other groups).<sup>239</sup>

The DOJ/DOE Guidance makes a similar point:

*SFFA* does not require institutions to ignore race when identifying prospective students for outreach and recruitment, provided that their outreach and recruitment programs do not provide targeted groups of prospective students

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234 Bowman also notes that Fuchs openly spoke in his official capacity, thus making clear that he was speaking on behalf of the university. *See id.*

235 See Devika Rao, *Is the End of Affirmative Action Also the End of Race-based Scholarships*, THE WEEK (July 8, 2023), <https://theweek.com/supreme-court/1024862/is-the-end-of-affirmative-action-also-the-end-of-race-based-scholarships>.

236 See Joseph Ax, *Anti-affirmative Action Group, Emboldened by US Supreme Court, Targets Scholarships*, REUTERS (Sept. 22, 2023), <https://www.reuters.com/world/us/anti-affirmative-action-group-emboldened-by-us-supreme-court-targets-2023-09-22/>.

237 *SFFA v. Harvard*, 600 U.S. 181, 208 (2023) (emphasis added).

238 *See id.* at 219 ("College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.").

239 *See* DOJ/DOE Guidance, *supra* note 166 ("In addition to outreach and recruitment programs, institutions may offer pathway programs that focus on increasing the pool of particular groups of college-ready applicants in high school and career and technical education programs.").

preference in the admissions process, and provided that all students—whether part of a specifically targeted group or not—enjoy the same opportunity to apply and compete for admission. Such outreach and recruitment efforts can remove barriers and promote opportunity for all, and institutions remain able to permissibly consider students’ race when engaged in those efforts.<sup>240</sup>

It is possible that this Supreme Court would deny any legal distinction between admissions practices and other institutional efforts to create racially diverse and inclusive campuses. But that does not mean universities should prematurely cede still-lawful conduct. It would be as if abortion providers closed shop when *Dobbs* was still pending because many predicted the Supreme Court would overturn *Roe v. Wade*. It is, of course, prudent for institutions to plan for possible future rulings. My more modest hope is that universities not unthinkingly extend *SFFA* beyond its formal holding by eliminating beneficial policies or practices that remain legally defensible.

### III. LEGAL OBLIGATIONS: WHAT UNIVERSITIES MUST DO TO PROMOTE RACIAL DIVERSITY AND INCLUSION

*SFFA* does not relieve universities of two important legal obligations. First, federal law mandates that universities avoid unjustifiable racial disparities.<sup>241</sup> Second, universities have a legal duty to create and maintain equal learning environments.<sup>242</sup> Both legal obligations require regular vigilance and attention to racial outcomes and racial dynamics on campus.

#### A. Title VI’s Implementing Regulations Prohibit Disparate Impacts

The United States Department of Education (DOE) issues regulations to effectuate Title VI’s various mandates. These “implementing regulations” include a provision that prohibits universities from employing admissions criteria that disproportionately and unjustifiably exclude students of color.<sup>243</sup> This disparate impact provision furthers one of Title VI’s core aims: to remove barriers that deny certain groups equal access to sites of educational opportunity.<sup>244</sup> The United States Department of Justice (DOJ) has explained that the “disparate impact regulations seek to ensure that programs accepting federal money are not administered in a way that perpetuates

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240 *Id.* (“In identifying prospective students through outreach and recruitment, institutions may, as many currently do, consider race and other factors that include, but are not limited to, geographic residency, financial means and socioeconomic status, family background, and parental education level.”).

241 *See infra* Part III.A.

242 *See infra* Part III.B.

243 For an extended analysis of Title VI’s implementing regulations, see Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PENN. L. REV. 1075, 1145–55 (2009); *see also* Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590 (2017).

244 *See* U.S. Dep’t of Justice Civil Rights Division, *Title VI Legal Manual, Section VII: Proving Discrimination—Disparate Impact* <https://www.justice.gov/crt/fcs/T6Manual7> (last visited Nov. 21, 2023).

the repercussions of past discrimination.”<sup>245</sup>

Under disparate impact theories of discrimination, the analysis focuses on the consequences of a university’s actions, not the university’s motive or intent. The basic requirement is that a university must avoid policies or practices that unjustifiably harm an identifiable racial group. When a policy is shown to have a negative disparate impact on an identifiable racial group, the university must offer a “substantial legitimate justification” to support the policy.<sup>246</sup> Even if the university offers an otherwise valid justification, the policy still violates Title VI’s implementing regulations if there was an available alternative that could have achieved the same result with a less discriminatory impact.<sup>247</sup>

Title VI’s disparate impact provision implicates university policies that disparately disadvantage students of color during the admissions process and on campus. This could include a university’s overreliance on facially neutral admissions criteria like standardized tests, guidance counselor letters of recommendation, or legacy preferences. A Boston-based civil rights organization invoked these regulations in a recent complaint submitted to the Office of Civil Rights (OCR).<sup>248</sup> The complaint alleges that Harvard’s legacy admissions preferences, which overwhelmingly favor wealthy White applicants, violate Title VI and its implementing regulations.<sup>249</sup>

### ***B. Title VI Mandates Equal Learning Environments***

SFFA did not diminish universities’ ongoing obligation to create equal learning environments for all students. Specifically, Title VI of the Civil Rights Act of 1964 mandates that universities take affirmative steps to remedy racially hostile environments.<sup>250</sup> Title IX creates parallel institutional obligations that protect students on the basis of sex.<sup>251</sup>

Congress passed Title VI as part of a sweeping federal civil rights law known as the Civil Rights Act of 1964.<sup>252</sup> Among other benefits, Title VI enabled Congress to use its Spending Power to enforce the Supreme Court’s desegregation mandate contained in *Brown v. Board of Education*.<sup>253</sup> Title VI was also designed to ensure that

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245 *Id.*

246 *Id.*

247 *See id.*

248 Complaint Under Title VI of the Civil Rights Act of 1964 at 3, Chica Project, African Cmty Econ. Dev. of New England and Greater Bos. Latino Network v. President and Fellows of Harvard College (Harvard Corporation), U.S. Dep’t of Educ. Office for Civil Rights (July 3, 2023).

249 *Id.*

250 *See* 42 U.S.C.A. § 2000d; *see also* Cara McClellan, *Discrimination as Disruption: Addressing Hostile Environments Without Violating the Constitution*, 34 YALE L. & POL’Y REV. 1 (2015).

251 *See* 20 U.S.C. § 1681; *see also* Brian Soucek, *Speech First, Equality Last*, 55 ARIZ. ST. L. REV. 683 (2023).

252 *See* Charles Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination,”* 70 GEO. L.J. 1, 3 (1981).

253 *See id.* at 22-23.

federal tax dollars would not subsidize entities that engaged in racial discrimination.<sup>254</sup> Prior to its passage, President John F. Kennedy outlined Title VI's purpose:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation.<sup>255</sup>

Congress subsequently passed Title VI, which states that "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."<sup>256</sup> Along with other federal agencies, the OCR within the United States DOE enforces Title VI and its implementing regulations.<sup>257</sup>

OCR has explained that "the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient" with actual or constructive knowledge violates Title VI.<sup>258</sup> To constitute a racially hostile environment, the underlying conduct (e.g., physical, verbal, graphic, or written) must be "sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient."<sup>259</sup> OCR further explains that "an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a nondiscriminatory educational environment."<sup>260</sup>

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254 See Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125, 137 (2014).

255 See H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963).

256 42 U.S.C. § 2000d.

257 U.S. Dep't of Educ. Office for Civil Rights, *Education and Title VI* (Apr 23, 2003) <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>.

258 See Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 47 (Mar. 10, 1994).

259 *Id.*

260 *Id.*

If OCR determines that a racially hostile environment exists, it will evaluate whether the university has taken sufficient and effective remedial action. To satisfy Title VI, a university's response "to a racially hostile environment must be tailored to redress fully the specific problems experienced at the institution as a result of the harassment ... the responsive action must be reasonably calculated to prevent recurrence and ensure that participants are not restricted in their participation or benefits as a result of a racially hostile environment."<sup>261</sup>

In short, Title VI mandates that covered universities take affirmative measures to prevent racially hostile environments. Failure to do so violates students' civil rights and exposes the university to legal liability and the potential loss of federal funding.<sup>262</sup>

These obligations implicate the many sites of institutional governance that shape a university's campus climate. That includes the university's admissions process and retention practices. When universities fail to recruit, admit, and retain critical masses of students from negatively stereotype groups, the result can amplify effects like tokenization, stigma, and isolation—thereby compromising enrolled students' right to a learning environment free from racial harassment.<sup>263</sup>

#### IV. CONCLUSION

*SFFA* made it more difficult for universities to realize a host of equality-oriented goals. Looking ahead, danger lies in both understating and overstating *SFFA*'s significance. To guard against either outcome, I have offered a roadmap to help institutional leaders navigate the post-*SFFA* legal and political landscape. This case is over. But the next fight for racial justice—with legal, political, and narrative fronts—has already begun.

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261 *Id.*

262 As a strategic matter, Title VI's concern with equal learning environments is attractive because it reflects the theory of constitutional equality that animates prevailing equal protection doctrine. Specifically, the Supreme Court views the equal protection clause as a constitutional mandate that safeguards personal rights. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Because the Fourteenth Amendment 'protect[s] persons, not groups,' all 'governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.' It follows from that principle that 'government may treat people differently because of their race only for the most compelling reasons.'"). Racially hostile environments undermine such rights because they deny actual students, because of their race, an equal opportunity to enjoy the full benefits of university membership. See Feingold, *Hidden in Plain Sight*, *supra* note 26.

263 See Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 EDUC. RESEARCHER 3, 115-24 (2014); Bowen, *Brilliant Disguise*, *supra* note 137.