12-2024

The Right to Inequality: Conservative Politics and Precedent Collide

Jonathan Feingold
Boston University School of Law

CONNECTICUT LAW REVIEW

VOLUME 57 DECEMBER 2024 NUMBER 1

Article

The Right to Inequality: Conservative Politics and Precedent Collide

JONATHAN P. FEINGOLD

The "end of affirmative action" is the beginning of this story. In Students for Fair Admissions v. Harvard *(SFFA), the Supreme Court struck a near fatal blow to race-consciousness. Many institutions have since pivoted to "race neutral alternatives." This is a natural turn. But one that faces immediate headwinds.*

The same entities that demanded Harvard pursue racial diversity through colorblind means have sued public high schools for doing just that. These litigants assert a "right to inequality"—a theory that would pit the equal protection clause against equality itself. Even if normatively jarring, a right to inequality might seem a natural extension of SFFA and decades of conservative caselaw hostile to remedial reform.

That sentiment is understandable. But it misreads the caselaw and overlooks a striking irony. The Supreme Court's fifty-year war on affirmative action culminated in SFFA. But the same caselaw that precipitated affirmative action's premature demise condones colorblind remedies—the precise conduct a right to inequality would preclude. To enshrine such a right, sitting conservative Justices would have to abandon their own principles and precedent. This includes longstanding disregard for theories of equality that center groups and outcomes—both of which animate the right to inequality lawsuits. This means that conservative litigants, should they prevail, would benefit from concerns long associated with progressive causes. One question, therefore, is whether a right to inequality—because it attends to disparate impacts—could re-empower racial justice advocates to challenge colorblind policies that conservative Justices have long shielded from legal scrutiny.

ARTICLE CONTENTS

The Right to Inequality: Conservative Politics and Precedent Collide

JONATHAN P. FEINGOLD [*]

INTRODUCTION

In *SFFA v. Harvard* (*SFFA*),[1] the Supreme Court struck down Harvard University and the University of North Carolina's *race-conscious*[2] admissions policies. Media outlets and legal commentators immediately declared the "end of affirmative action."[3] This common headline is misleading. Beyond overstating *SFFA*'s formal scope,[4] the message miscasts the beginning of the fight for the end.

At most, *SFFA* deprives institutions of a critical tool to redress racial inequality—that tool being *racial classifications*.[5] But the battle over equality law's doctrinal and normative soul has never been limited to means. The ultimate fight concerns the ends—or more precisely, whether the Fourteenth Amendment and statutory analogues prohibit equality-oriented goals like racial diversity, racial inclusion, and racial integration.

This fight is far from academic. Well before *SFFA* had concluded, the

---

[*] Associate Professor of Law, Boston University School of Law. J.D., University of California, Los Angeles School of Law; B.A., Vassar College. Many thanks to Devon Carbado, Jonathan Glater, Vinay Harpalani, Deborah Hellman, Jerry Kang, Gary Lawson, Nancy Moore, Jed Shugerman, Jessica Silbey, participants at the Boston University School of Law Faculty Workshop, the University of New Mexico Law School Faculty Colloquium, and Professor Alexander Tsesis' Constitutional Law Seminar. Many thanks as well to Michael Coleman, Julian Burlando-Salazar, Nana Boateng, Adam Caplan-Bricker, and Olga Obolenets for their research support. Finally, I want to express my appreciation for the editors from the *Connecticut Law Review* who provided exceptional feedback on prior drafts.

[1] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) [hereinafter *SFFA v. Harvard*].

[2] I employ the terms *race-conscious, race-based*, and *racial classifications* interchangeably to describe policies that permit decisionmakers to differentiate between individual applicants based on an applicant's racial identity. This definition tracks the Supreme Court's use of such terms in cases like *SFFA v. Harvard*.

[3] *See, e.g.*, Jelani Cobb, *The End of Affirmative Action*, The New Yorker (June 29, 2023), https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action (declaring an "obituary for affirmative action").

[4] *See generally* Jonathan Feingold, *Affirmative Action After* SFFA, 48 J. COLL. U. L. 239 (2023) (explaining that *SFFA* preserved multiple paths to constitutionally defend race-conscious admissions policies).

[5] *See supra* note 2 (defining "racial classifications"). I use the term *racial inequality* to capture any context where a racially identifiable group achieves materially worse outcomes than other groups. I recognize that any claim of over- or under-representation assumes an appropriate baseline—which itself implicates empirical and normative questions. *See* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.–C.L. L. REV. 1 (1996).

rightwing Pacific Legal Foundation (PLF) had already shifted the target from means to ends.[6] Since 2020, PLF has sued some of the nation's most coveted public high schools for adopting *colorblind*[7] policies to enhance student body diversity.[8] I term these lawsuits the "right to inequality" cases.

In a recent Supreme Court brief, PLF described colorblind efforts to increase racial diversity as "a new species of racial discrimination [that] has been spreading through some of our largest public school systems."[9] This rhetoric anchors a rather radical legal theory: the Equal Protection Clause outlaws any policy designed to alter an institution's racial composition.[10]

The theory's implications are difficult to overstate.[11] Racial inequality remains a defining feature of American society. PLF's theory of harm would stamp that status quo with a badge of legitimacy and deem suspect any effort to alter it. The legal upshot is a right to racial inequality.[12] Moving well-beyond established doctrine, such a regime would legally conflate race-*blind* efforts to *include* (e.g., reducing preferences for the children of alumni) with race-*based* efforts to *exclude* (e.g., Jim Crow segregation). The result would be an equal protection clause at war with equality itself.[13]

Albeit normatively jarring, some might expect PLF to reach a sympathetic Supreme Court.[14] Some might even view a right to inequality

---

[6] *See infra* Part III.

[7] I employ the terms *colorblind*, *race-blind* and *facially neutral* interchangeably to describe policies that do not permit decisionmakers to differentiate between individual applicants based on an applicant's racial identity.

[8] *See infra* note 265 (listing lawsuits).

[9] *See* Petition for Writ of Certiorari at 13, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170 (U.S. 2024).

[10] *See* Memorandum in Support of Motion for Preliminary Injunction at 20, Coalition 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."). *See also infra* Part III.B (noting that PLF concedes that the mere intent to increase Black and Latine enrollment raises no constitutional concern).

[11] *See* Sonja Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 169 (2024) (describing PLF's lawsuits as "an alarming effort to profoundly transform [equal protection doctrine]").

[12] *See* Jonathan D. Glater, *Reflections on Selectivity*, 49 FORDHAM URB. L.J. 1121, 1131 (2022). In a formalistic sense, PLF only challenges *intentional* efforts to reduce racial disparities. But in practice, the theory of harm would expose to legal attack any policy that reduces racial disparities—particularly so if the defendant communicates any equality-oriented commitments. *See infra* Part III.B.2.

[13] To date, all governing opinions in a right to inequality case as rejected PLF's theory of harm. *See, e.g.*, Boston Parent Coal. for Acad. Excellence Corp. v. School Comm. of Bos., No. CV 21-10330-WGY, 2021 WL 1422827, at *11 (D. Mass. Apr. 15, 2021) ("Furthermore, the Supreme Court has explained that the motive of increasing minority participation and access is not suspect.").

[14] On February 20, 2024, the Supreme Court denied certiorari in *TJ v. Fairfax*. *See* Coal. for TJ, 23-170 (U.S. 2024). Albeit a loss for PLF, it remains premature to conclude that the right-wing Justices will be unreceptive to all future petitions. PLF continues to pursue at least three other right to inequality cases—one of which is currently seeking Supreme Court review. *See* Petition for Writ of Certiorari, Boston Parent Coal. for Acad. Excellence Corp. v. School Comm. for the City of Bos., 996 F.3d 37(1st Cir. 2021) (No. 23-1137), (U.S. filed Dec. 19, 2023). Multiple Justices have signaled sympathy for PLF.

as a natural extension of *SFFA*. On the surface, this view makes sense. *SFFA* showcased the current majority's fidelity to colorblindness and hostility to inclusionary efforts. Justice Roberts' majority opinion also rehearsed rhetoric central to PLF's briefing.[15] One could even say a right to inequality appears preordained.

It might be. But that is a question of politics, not precedent. Over the past half century, conservative[16] majorities erected an equal protection framework that draws sharp distinctions between racial classifications (presumptively unlawful) and colorblind conduct (presumptively lawful).[17] That framework facilitated affirmative action's premature demise in *SFFA*. But that same regime condones the target of PLF's attacks: "colorblind remedies"—a term I use for facially neutral policies designed to further remedial[18] goals like racial diversity, racial inclusion, and racial integration.

SFFA reinforced this dynamic. Even as *SFFA* imperils remedial race-based *tools*, Chief Justice Roberts—and the three conservative concurrences—fortified the doctrinal case for remedial racial *motives*.[19]

I am not suggesting that unfriendly precedent will prevent the Supreme Court from enshrining a right to inequality.[20] Nor am I defending that

---

Justices Alito and Thomas dissented from the recent cert denial. *See* Coal. for TJ, 23-170 (Alito, J., dissenting, joined by Thomas, J.) (U.S. 2024). Those two Justices, plus Justice Gorsuch, dissented from an earlier Supreme Court decision not to hear PLF's appeal when the Fourth Circuit denied a preliminary injunction. *See* Coal. for TJ, 142 S. Ct. at 2672.

[15] *See infra* Part II.C & III.B.

[16] I use the term "conservative" as loose shorthand for Justices hostile to remedial racial projects. In the admissions context, this hostility has translated to a "colorblind" jurisprudence skeptical of all racial classifications. I recognize that the conservative label is imprecise and collapses at-times meaningful distinctions—e.g., between what Reva Siegel has termed "race conservatives" and "race moderates." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1345 (2011).

[17] *See infra* Part I.

[18] For purposes of this Article, I employ the terms "remedial" and "equality-oriented" interchangeably to capture policies designed to redress the contemporary vestiges of America's white supremacist legacies of conquest, slavery and racial apartheid. I am not using the term "remedial" in the more technical sense to describe policies an institution adopts to remedy the institution's own cognizable discrimination. In the context of individual institutions, remedial policies often entail identifying and then eliminating or mitigating practices that disproportionately exclude (or legitimize the exclusion of) historically excluded groups.

[19] *See infra* Part II.

[20] In multiple contexts, the current rightwing majority has disregarded precedent or facts that would impede broader ideological objectives. *See, e.g.*, Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente over Religion and Education*, 136 HARV. L. REV. 208, 209 (2022). Moreover, as scholars like Deborah Hellman note, the Supreme Court has not yet ruled on a lawsuit that challenges facially neutral efforts to promote remedial ends like racial diversity. *See* Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. (forthcoming 2024). One might argue that the lack of such precedent renders the constitutionality of colorblind remedies an open question. In a narrow technical sense, that might be correct. But as a substantive matter, a ruling for PLF would clash with decades of conservative caselaw that condone colorblind efforts to promote racial diversity and other remedial racial goals. *See infra* Part I-II.

precedent,[21] nor even suggesting that colorblind strategies can necessarily serve anti-racist ends.[22] My primary goal is to surface an irony that many continue to overlook: conservative caselaw presents a real barrier to the next front of conservative litigation.[23]

To side with PLF, Chief Justice Roberts and his conservative colleagues would have to disregard their own opinions and the dominant conception of equality espoused therein.[24] As one example, conservative Justices often assert that the Fourteenth Amendment protects individuals against intentional disparate treatment, but does not protect groups against unintended disparate outcomes.[25] This vision of constitutional equality clashes with PLF's claimed right to inequality, which centers group rights and unequal outcomes—the precise concerns conservative Justices banished to the margins of equality law.[26]

Ironically, then, rightwing activists now advance a racially regressive agenda by harnessing concepts long championed by racial progressives.[27] But antidiscrimination law is a doubled-edged sword.[28] If the Court bites, disparate impact will be back on the table—at least in part. One question, therefore, is whether a right to inequality could offer progressives a new avenue to challenge the myriad colorblind policies conservatives have long shielded from legal scrutiny.[29]

To date, few scholars have analyzed the right to inequality cases.[30] This

---

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

[22] Jerome Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 179 (1994).

[23] *See infra* Part I, II.A-B.

[24] *Id.*

[25] *See* Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91–97 (1986); *see also* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 558–59 (2015) (Alito, J., Roberts, CJ., Scalia, J., & Thomas, J., dissenting) ("Treating someone 'less favorably than others because of a protected trait' is 'the most easily understood type of discrimination.' Indeed, this classic form of discrimination—called disparate treatment—is the only one prohibited by the Constitution itself.") (internal citations and quotation marks omitted).

[26] *See infra* Part I.A (describing *Davis-Arlington Heights-Feeney* trio of Supreme Court cases that established intent doctrine and deemed a policy's disparate impact insufficient to state a cognizable equal protection claim).

[27] *Cf.* Osamudia James, *White Injury and Innocence: On the Legal Future of Antiracism Education*, 108 VA. L. REV. 1689, 1734 (2022).

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

[29] *See infra* Part III.B (explaining how a right to inequality would transform *Feeney*'s intent requirement into a knowledge requirement, and thereby revive disparate impact claims against inequality-reinforcing practices like legacy preferences and stop-and-frisk policing).

[30] Sonja Starr has offered the most significant treatment. Starr, *supra* note 11; Deborah Hellman, *Diversity by Facially Neutral Means*, 110 VA. L. REV. (forthcoming 2024*)*; Deborah Hellman & Ben Eidelson, *Unreflective Disequilibrium: Race-Conscious Admissions After* SFFA, AM. J. L. & EQUALITY (forthcoming 2024); Glater, *Reflections on Selectivity*, *supra* note 11; Janel George, *The Myth of Merit*, 49 FORDHAM URB. L.J. 1091 (2022); Vinay Harpalani, *Testing the Limits: Asian Americans and the*

article makes three primary contributions to that nascent body of work. First, I build on past scholarship that highlights how prevailing conservative precedent fortifies the doctrinal case for colorblind remedies.[31] Second, I surface how a right to inequality would collapse equal protection doctrine's prevailing two-track framework by reviving concerns about group rights and unequal outcomes. Third, I examine *SFFA*'s duality. Even as the decision buffers colorblind remedies against legal attacks, Justice Roberts' majority opinion might contain "dicta mines"[32] that portend the end of antiracism itself.

The remainder of this Article proceeds as follows. In Part I, I review the rigid two-track framework that governs most equal protection claims.[33] This framework offers several lessons—each of which reveal hurdles for PLF's assault on colorblind remedies.

In Part II, I explore *SFFA*'s duality. Across four opinions, the conservatives double down on prevailing doctrine in ways that reinforce Part I's lessons. At the same time, Chief Justice Roberts plants seeds that could foreshadow a jurisprudential turn that—ironically—would entrench inequality by diminishing colorblindness's grip on equality law.

In Part III, I unpack PLF's lawsuit against Thomas Jefferson High School (TJ) in Fairfax, Virginia.[34] In 2020, following public outcry regarding the near absence of Black and Latine students, TJ altered its admissions policy.[35] Every change—such as eliminating an application fee, eliminating standardized tests, and ensuring fairer representation from feeder schools—was colorblind.[36] PLF argued that the new scheme nonetheless violates the equal protection clause because the school board intended to alter the racial composition of TJ's student body.[37] In a 2-1 decision, TJ prevailed before the Fourth Circuit (a decision that reversed the

---

Debate over Standardized Entrance Exams, 73 S.C.L. REV. 3 (2022); Kim Forde-Mazrui, *Alternative Action After SFFA*, 76 STAN. L. REV. ONLINE 149 (May 2024).

[31] *See, e.g.*, Peter Salib and Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123 (2023); *see also* Starr, *supra* note 10 (citing scholarship).

[32] Frank Rudy Cooper, *Dicta, Pretext, and Excessive Force: Toward Criminal Procedure Futurism*, 112 CALIF. L. REV. 101 (2024).

[33] I say "generally" because there are isolated contexts in which the Supreme Court has departed from this two-track framework. The most obvious being redistricting cases such as *Shaw v. Reno*, 509 U.S. 630 (1993). But even in *Reno*, the conservative majority identified individual-level disparate treatment as the equal protection clause's primary concern. *See id.* at 642 ("[The Equal Protection Clause's] central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race.").

[34] *See infra* Part III.A.

[35] *See id*.

[36] *See* George, *The Myth of Merit*, *supra* note 30.

[37] *See infra* Part II.B.

district court's ruling for PLF).[38] The Supreme Court denied certiorari.[39]

In so doing, the Roberts Court proved unwilling to entertain PLF's claimed right to inequality. It would be naïve to read a single cert denial as the end of this story. Still, the decision reflects how conservative attacks on racial diversity are outpacing the appetite of conservative Justices.

I. EQUAL PROTECTION BASICS: A CONSERVATIVE SAFE HARBOR FOR COLORBLIND REMEDIES

It is difficult to understand how "profoundly" a right to inequality would "transform" antidiscrimination law without reviewing some equal protection basics.[40] To do so, I highlight three "lessons" that emerge across the past half-century of Supreme Court's equal protection caselaw:[41] (1) prevailing doctrine favors inequality over equality; (2) racial classifications present a unique constitutional concern that demands heightened scrutiny; (3) remedial[42] racial motives are not constitutionally suspect.

A brief note before proceeding. In certain respects, my portrayal of two tracks privileges form over substance.[43] This formalism as a feature of the analysis. As noted, my goal is to surface how a conservative political project (the right to inequality cases) collides with conservative caselaw. That endeavor requires taking seriously the principles conservative Justices offer to rationalize their holdings—even if one has reason to doubt the principles will hold in future cases. To the extent PLF ultimately prevails, my analysis—because it takes the Justices at their word—bolsters scholarship that admonishes the Roberts Court for privileging an ideological agenda

---

[38] On December 19, 2023 the First Circuit ruled against PLF in a separate right to inequality case. PLF has since sought Supreme Court review. *See supra* note 14.

[39] *TJ*'s robust record renders the litigation a useful case study through which to analyze the right to inequality cases.

[40] Starr, *supra* note 11.

[41] By "race cases," I refer specifically to litigation involving race discrimination claims arising under the equal protection clause. This is admittedly a limited slice of all Supreme Court cases dealing with "race."

[42] As detailed in note **Error! Bookmark not defined.**, I use "remedial" not as a legal term of art, but rather to broadly capture policies designed to ameliorate historical inequalities.

[43] One can conceptualize this distinction between form and substance at multiple levels. To begin, there are areas of the Supreme Court's race jurisprudence that stray from the two-track framework I outline here. *See generally* Aziz Z. Huq, *What Is Discriminatory Intent*?, 103 CORNELL L. REV. 1211, 1230 (2018) ("Hence, the doctrinal framework for the evaluation of discriminatory intent seems to vary depending on whether a formal classification, a stereotype, or an unexplained hostility is perceived to be at work."). This includes *Shaw v. Reno*, 509 U.S. 630 (1993), in which Justice O'Connor applied strict scrutiny to a redistricting plan that constitute a formal racial classification. Shaw v. Reno, 509 U.S. 630 (1993). *See also supra* note 31. Even where the Supreme Court remains tethered to this two-track framework, inconsistent fidelity to stated standards or concerns belies a principled commitment to those stated standards or concerns. One paradigmatic example includes the near-evaporation of standard standing and causation requirements in "reverse racism" or "white rights" cases. *See* Jonathan D. Glater, *The Elision of Causation in the 2023 Affirmative Action Cases*, 48 J. COLL. & U. L. 395 (2023).

over democratic norms and prudential concerns.[44]

A. *Lesson 1: A Two-Track Framework Favors Inequality Over Equality*

Between 1969 and 1972, President Nixon appointed four conservative Justices who flipped the Supreme Court's ideological balance and ushered in a new era of conservative jurisprudence.[45] This included the rise of a two-track equal protection framework hostile to race-conscious efforts to promote racial equality and comfortable with colorblind policies that entrench or exacerbate racial inequality. As a practical matter, this framework impedes public and private efforts to remedy the racial disparities that continue to define American society. Put simply, equal protection doctrine favors inequality over equality.[46]

This two-track framework does not neatly capture all plausible race discrimination claims.[47] Nonetheless, it remains a primary mode of analysis and—as PLF agrees—governs the right to inequality cases.

1. *The Defendant-Friendly "Default Track" Governs Lawsuits Challenging Facially Neutral Conduct*

The "Default Track", often termed *intent doctrine*, applies to litigation challenging facially neutral conduct.[48] Under the Default Track, the challenged policy is presumptively lawful and the defendant enjoys

---

[44] *See, e.g.*, Driver, *supra* note 16; Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. FORUM 97, 97 (2022) ("Armed with a new, nearly bulletproof majority, conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines.").

[45] David Simson, *Whiteness As Innocence*, 96 DENV. L. REV. 635, 695 (2019). This includes Justices openly hostile to the 1960s Civil Rights Movement. Charles Fried, ORDER AND LAW 1991.

[46] This two-track framework is specific to race discrimination claims. *See generally* Ian Haney-López, Intentional Blindness, 87 N.Y.U. L. REV. 1779, 1831 (2012) ("[*Feeney*] recast intent doctrine as the inverse of Powell's automatic hostility to express uses of race. Now, absent a reference to race, even government action that disproportionately harmed non-Whites would be presumptively constitutional.").

[47] The two-track framework I describe governs two paradigmatic race discrimination claims: (1) those challenging *facially neutral conduct* that does not involve allegations of individual-level disparate treatment (the traditional "disparate impact" claim) and (2) those challenging *racial classifications*. This framework is often applied to, albeit with some awkwardness, other theories of racial discrimination—e.g., claims of covert intentional disparate treatment, *see Yick Wo*, and systemic yet unintentional disparate treatment, *see McCleskey v. Kemp*. Scholars such as Leah Litman have observed that the Supreme Court engages with disparate impact differently when the claim is race-discrimination or religious-discrimination. *See* Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 20 (2022).

[48] I accordingly term this the "Default Track" or "Facially Neutral Track"—which all parties agree governs the right to inequality cases. The Default Track framework traces to a trio of 1970's cases. *See* Washington v. Davis, 426 U.S. 229 (1976) (5th Amendment race discrimination claim); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (14th Amendment race discrimination claim); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979) (14th Amendment gender-discrimination claim).

substantial deference.[49]

To prevail, the plaintiff must prove that the defendant adopted the challenged policy with an "impermissible racial purpose."[50] This standard demands proof of intent to harm a disfavored racial group; knowledge of group-based harm is insufficient: "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. . . [T]he decisionmaker [must have] . . . selected or reaffirmed a particular course of action at least in part *'because of,'* not merely 'in spite of,' its adverse effects upon an identifiable group."[51]

Default Track challenges often target colorblind policies that disparately harm an identifiable group.[52] A policy's disparate impact can constitute evidence of unlawful intent.[53] But disparate impact, alone, is insufficient to state a claim.[54] The Supreme Court has further explained that the party alleging an equal protection violation must prove that the "purposeful discrimination" "had a discriminatory effect."[55] The causal burden is steep; plaintiffs have lost even when they identify biased statements and statistical evidence of discrimination.[56]

---

[49] *See* McCleskey v. Kemp, 481 U.S. 279, 296–97 (1987) ("[A]bsent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty."). *See also* Haney-López, *Intentional Blindness*, *supra* note 46 at 1832 (explaining that under *Feeney* and *Arlington Heights*, "facially race-neutral laws merit almost complete constitutional deference").

[50] Arlington Heights, 429 U.S. at 266. *See also* McCleskey, 481 U.S. at 292 ("Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'"). Prior to *Washington v. Davis*, the Supreme Court rejected an intent-based test when Black plaintiffs argued that a municipality's invidious motive or purpose could invalidate a facially neutral law. *See* Haney-Lopez, *supra* note 46 (citing Palmer v. Thompson, 403 U.S. 217, 225 (1971) ("[T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.").

[51] *Feeney*, 442 U.S. at 279; *See also McCleskey*, 481 U.S. at 298 ("McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute because of an anticipated racially discriminatory effect.").

[52] *See*, *e.g.*, *Davis*, 426 U.S. at 248; *McCleskey*, 481 U.S. at 298.

[53] *Arlington Heights*, 429 U.S. at 279

[54] Washington v. Davis, 426 U.S. 229, 248 (1976). Arlington Heights also suggests that a plaintiff need not prove disparate impact to successfully challenge a facially neutral policy. *Arlington Heights*, 429 U.S. at 279.

[55] *McCleskey*, 481 U.S. at 293.

[56] *See id.* at 298-99. This steep causal requirement in litigation challenging a policy that harms a plaintiff of color diverges sharply from the absence of any causation requirement in litigation challenging racial affirmative action that does not harm a white plaintiff. Glater, *Causation's Elision*, *supra* note 41; Raj Shah, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the U.S. Supreme Court's Standing Jurisprudence*, 61 UCLA L. REV. 196, 198 (2013) ("When racial minorities brought equal protection claims to challenge racially discriminatory policies in the 1970s and 1980s, the Court applied standing requirements strictly. Since the 1990s, however, the Court has relaxed these requirements when white plaintiffs have brought equal protection challenges to governmental racial remediation efforts.").

In the rare instance that a plaintiff satisfies the 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."[57] If the defendant satisfies that burden, the challenged policy survives.[58]

This framework resembles other antidiscrimination regimes where (absent a facial classification) proof of unlawful intent shifts the burden to the defendant—and may limit the deference the defendant otherwise enjoys.[59] At least per the Supreme Court in *Arlington Heights*, this burden shifting framework appears distinct from the contemporary "strict scrutiny" standard that governs "Racial Classification" challenges.[60]

2. *The Plaintiff-Friendly "Alternative Track" Governs Lawsuits Challenging Racial Classifications*

The alternative track, often termed *anti-classification* or *colorblindness* doctrine, applies to *racial classifications*.[61] I accordingly call this the "Alternative Track" or "Racial Classifications Track." The Supreme Court has never precisely defined what constitutes a racial classification.[62] Still, the Justices tend to equate "racial classifications" with any selection process that facially classifies and distinguishes between individuals on the basis of

---

[57] *Arlington Heights*, 429 U.S. at 270 n.21 ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.).

[58] *See id*. ("If this [showing] were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision.").

[59] *Arlington Heights*, 429 U.S. at 266 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [that generally attaches to facially neutral policies] is no longer justified.").

[60] *Arlington Heights* states that a defendant need not identify a compelling interest to save a facially neutral policy—even after the plaintiff offers proof of impermissible intent. *See* 429 U.S. at 270 n.21. Litigants and courts seem to conflate distinct standards when they suggest that proof of impermissible intent, in litigation challenging facially neutral conduct, triggers strict scrutiny. *See, e.g.*, Complaint, TJ v. Fairfax, 2021 WL 918497 (E.D.Va.) ("The new TJ admissions process is subject to strict scrutiny because, although facially race-neutral, it was enacted with discriminatory intent."); Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 894 (4th Cir. 2023) (Rushing, J. dissenting) (citing *Arlington Heights* fn.21 but then stating that an impermissible motive triggers strict scrutiny). One could trace some of this confusion to *Feeney*, which arguably articulated a different standard just two years' later. *See* Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.")

[61] *See supra* note 2 (defining "racial classifications").

[62] *See generally* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 509 (2003) (surfacing ambiguity surrounding what constitutes a "racial classification").

their respective racial identities.[63]

Under the Alternative Track, all racial classifications are presumptively unconstitutional and defendants enjoy minimal, if any, deference.[64] To prevail, the defendant must satisfy strict scrutiny—a high bar that requires proving that the challenged policy was (a) narrowly tailored (b) to promote a compelling interest.[65] Contrary to the Default Track's high causal requirement,[66] the mere existence of a racial classification constitutes a cognizable harm.[67] This is true even if the plaintiff concedes that she would not have obtained the desired benefit absent the challenged policy.[68]

3. *The Two-Track Framework Entrenches & Legitimizes Racial Inequality*

The above reveals what one could term two equal protection "sins": (1) action taken with *intent to harm* an identifiable group (the Default Track's concern); and (2) expressly *classifying* and *distinguishing* between individuals based their racial identity (the Racial Classification Track's concern).[69] These sins are not, however, symmetrically situated within the doctrine. The Racial Classifications or Alternative Track renders all racial classifications vulnerable to legal attack—even those designed to reduce

---

[63] Sonja Starr employs the term "means-colorblindness" to describe prevailing equal protection doctrine, which she contrasts with the "ends-colorblindness" that grounds PLF's theory of harm. *See* Starr, *supra* note 11 ("[Prevailing law is] focused on a particular type of suspect means, namely the use of racial classifications (or, similarly, racial discrimination in individual-level application of laws). But the position of the Coalition for TJ plaintiffs and district court goes much farther. It demands what I'll call "ends-colorblindness": the position that even absent classifications or individual-level disparate treatment, any race-related objective itself renders a policy suspect, and almost surely will invalidate it—no matter whether that objective is to reduce racial inequality or increase it, to integrate or segregate, to include or exclude. This is novel, and dangerous.").

[64] Justice Thomas' comfort with racial classifications "in prisons" belies any principled fidelity to colorblindness. *See* Johnson v. California, 543 U.S. 499, 506 n.1 (2005) ("Justice Thomas takes a hands-off approach to racial classifications in prisons, suggesting that a 'compelling showing [is] needed to overcome the deference we owe to prison administrators.' But such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.").

[65] *See* SFFA v. Harvard, 143 S. Ct. 2141, 2218 (2023). Racial classifications in the domain of criminal justice are not always subject to strict scrutiny. See Brown v. City of Oneonta, 235 F.3d 769 (2d Cir. 2000) (holding that police use of racial classifications is not subject to strict scrutiny). For an extended history of strict scrutiny, see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798 (2006).

[66] *See supra* note 46 and corresponding body text.

[67] *See* Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.").

[68] *See id*. ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). *See generally* Glater, *Causation Elisions*, *supra* note 43.

[69] Other equal protection "sins" cited by conservative Justices includes acts that "balkanize us" or "reinforce[s] racial stereotypes." Shaw v. Reno, 509 U.S. 630, 650 (1993).

racial inequality.[70] In contrast, the Default Track shields facially neutral conduct—even when some evidence of impermissible intent exists. Scholars have long observed that this dynamic favors inequality over equality.[71]

SFFA is instructive.[72] The organizational plaintiff, SFFA, levied two distinct claims against Harvard: (1) a claim alleging intentional discrimination against Asian Americans and (2) a generic affirmative action challenge.[73] The intentional discrimination claim targeted facially neutral aspects of Harvard's admissions process and triggered the Default Track.[74] The affirmative action claim targeted Harvard's race-conscious admissions policy and triggered the Racial Classifications track.[75]

As for the first claim, one source of alleged anti-Asian discrimination was Harvard's legacy preferences.[76] This policy, which benefits the children of alumni, functions as a powerful racial preference for white (and often wealthy) applicants.[77] But legacy status is colorblind; the policy formally distinguishes between students based on their familial connection to the university, not race *per se*. For this reason, legacy status does not constitute a racial classification—even though Harvard knows the policy will harm innocent students of color and favor less qualified white applicants.[78] To successfully challenge Harvard's legacy bonus,[79] the plaintiff had to prove that Harvard employs the policy *because* it adversely affects Asian Americans. SFFA did not even attempt to do so.[80]

Under prevailing doctrine, the claim fails even if Harvard knows it cannot implement its legacy preferences without negatively impacting Asian

---

[70] Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016).

[71] *See* Mario L. Barnes, *"The More Things Change . . .": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043, 2096 (2016).

[72] *See* SFFA v. Harvard, 143 S. Ct. 2141 (2023).

[73] *See generally* Feingold, *SFFA v. Harvard*, *supra* note 21.

[74] *See id*.

[75] *See id*.

[76] *See id*. Legacy status generally refers to applicants with a family member who attended the institution. *See* Jonathan Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949 (2022). Harvard's athlete bonuses also functioned as a powerful racial preference for white (and often wealthy) applicants. *See* Uma 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. DISC. 230 (2023).

[77] *See Id.* at 1975 ("[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, Josh Kinsler & Tyler Ransom, Legacy and Athlete Preferences at Harvard, 40 J. LAB. & ECON. 133, 147 (2020)).

[78] *See id*.

[79] Harvard is a private university and therefore governed by Title VI, not the Constitution. I nonetheless use Harvard for this example because the Supreme Court equated Title VI's race-discrimination prohibition with that of equal protection clause for purposes of adjudicating *SFFA*. There are compelling reasons not to assume that Title VI and the equal protection clause are coterminous in this regard. *See* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PENN. L. REV. 1075 (2009).

[80] SFFA did not specifically challenge Harvard's legacy preferences—even though SFFA's own expert exposed that this colorblind policy was a source of anti-Asian bias. *See* Feingold, *supra* note 21.

Americans. Nor would it constitute a racial classification if Harvard abandoned its legacy preference to increase racial diversity on campus. That motive might be *racial*, but the policy's means (eliminating legacy preferences) do not differentiate between individuals based on their respective racial identity. The policy, therefore, does not constitute a racial classification as traditionally understood.[81] Thus, the defendant-friendly Default Track applies.

SFFA also challenged Harvard's affirmative action policy, which permitted admissions officers to consider the racial identity of individual applicants.[82] This is a paradigmatic racial classification and explains why the Court described the challenged policy as "race-based."[83] The plaintiff-friendly Racial Classifications Track applied—even though Harvard's motives were "commendable."[84]

To summarize the foregoing, Table 1 captures key elements that distinguish these two tracks.

Table 1[85]

	Presumption	**Standard**	**Deference to Defendant**
Facially Neutral	lawful	intent	high
Racial Classification	unlawful	strict scrutiny	low

As noted, this two-track framework flattens some of the complexity within the Supreme Court's equal protection caselaw.[86] Still, this remains the predominant mode for adjudicating race discrimination claims. PLF explicitly locates the right to inequality cases within the Default Track. This means PLF should have to overcome intent doctrine's defendant-friendly posture. But as I detail in Part III, the judges who sided with PLF applied a plaintiff-friendly standard that resembled strict scrutiny, a hallmark of the

[81] *See supra* note 56 and accompany text. Limited to its facts, *Ricci v. DeStefano* is consistent with the foregoing—although it signals how the Supreme Court might rationalize a ruling that reframes colorblind remedies as a racial classification. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1374 (2010) (explaining *Ricci* as a case involving "visible victims"); Samuel Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1151 (2016) ("A fair reading of [*Ricci* is] that, by refusing to certify the test after learning which firefighters would be affected, because of the race of those firefighters, the city classified those firefighters on the basis of their race.").

[82] SFFA v. Harvard, 143 S. Ct. 2141 (2023).

[83] *See infra* Part II.A.

[84] *Id*.

[85] FN = Facially Neutral Track. RC = Racial Classifications Track. SS = strict scrutiny.

[86] *See supra* note 41.

Racial Classifications Track.

B. *Lesson 2: Racial Classifications Pose a Special Constitutional Concern*

Racial classifications trigger the Alternative Track, which views all racial classifications with suspicion—whether designed to *exclude* (e.g., Jim Crow) or *include* (e.g., affirmative action).[87] To justify a framework that legally equates Jim Crow with affirmative action, conservative Justices often argue that the act of classifying and differentiating between individuals on the basis of their racial identity (i.e., racial classifications) presents unique constitutional concerns.[88]

To begin, conservative Justices contend that racial classifications contravene the Fourteenth Amendment's command for "colorblindness." This interpretative approach, which emerged after race-based policies became tools of inclusion, reads the Constitution to forbid—absent exceeding justification—all race-based differential treatment.[89]

Conservative Justices have also embraced a conception of constitutional equality chiefly concerned with protecting individuals against intentional disparate treatment.[90] One sees this in the common refrain that the equal protection clause guarantees equal treatment, but not equal outcomes.[91] In the admissions context, conservative Justices employ the term "equal treatment" as shorthand for a colorblind decisionmaking process in which the decisionmaker does not consider the racial identity of individual applicants. From the perspective of conservative Justices, any deviation from absolute colorblindness denies each applicant their personal right to "compet[e] on equal footing."[92]

Conservative Justices also often argue that racial classifications threaten constitutionally inflected values.[93] Justice O'Connor embodies this sentiment in *Grutter*. Even as she upholds the challenged admissions policy, O'Connor argues that "racial classifications, however compelling their goals, are potentially *so dangerous* that they may be employed no more

---

[87] *See* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny,* 77 N.Y.U. L. REV. 1195, 1231 (2002) ("On this view, racial preferences inherently inflict a colossal constitutional injury on the parties being treated unequally, regardless of their purpose. The injury is so serious that only a compelling state interest could outweigh it.").

[88] Scholars, advocates, and Justices have long criticized this equivalence. *See, e.g.*, Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 387 (1978) (Marshall, J., separate opinion).

[89] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490–91 (1989) ("[T]he Framers of the Fourteenth Amendment . . . desired to place clear limits on the States' *use of race as a criterion* for legislative action, and to have the federal courts enforce those limitations.") (emphasis added).

[90] *See Croson*, 488 U.S. at 493; *see also* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282–83 (2011).

[91] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[92] Adarand Constructors Inv. v. Pena, 515 U.S. at 211 (1995).

[93] SFFA v. Harvard, 143 S. Ct. 2141, 2165 (2023) ("[A]ll 'racial classifications, however compelling their goals,' [are] dangerous.'").

broadly than the interest demands."[94] More specifically, O'Connor and other conservative Justices often assert that racial classifications, *inter alia*, (a) constitute preferential treatment[95]; (b) stigmatize their beneficiaries[96]; (c) communicate racial antipathy[97]; (d) "promote notions of racial inferiority"[98]; (e) stoke racial division[99]; (f) "mismatch" their beneficiaries with overly competitive institutions;[100] and (g) "demean[] us all."[101]

One could challenge each of the foregoing rationales.[102] For present purposes, three key observations warrant note. First, conservative Justices invoke these concerns to justify an Alternative Track (and strict scrutiny) for racial classifications.[103] Second, the same conservative Justices often argue that colorblind remedies do not implicate the foregoing concerns (even when adopted for the same reason).[104] Third, the foregoing reinforces Professor Starr's observation that a policy's means (i.e., whether the policy employs racial classifications or whether it is colorblind) determines the appropriate track. Many policies have racial goals. But only policies that employ racial classifications implicate the foregoing concerns that, per the conservative

---

[94] *Grutter*, 539 U.S. 306, 326 (2003).

[95] *Id.* at 342.

[96] *Id.*

[97] *See* Johnson v. California, 543 U.S. 499, 505 (2005); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

[98] *Grutter*, 539 U.S. at 326.

[99] *See* Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. By Any Means Necessary (BAMN), 572 U.S. 291, 308 (2014) (*"*Government action that classifies individuals on the basis of race is inherently suspect and carries the danger of perpetuating the very racial divisions the polity seeks to transcend."); *See also* Siegal, *From Colorblindness to Antibalkanization*, *supra* note 90.

[100] *See* SFFA v. Harvard, 143 S. Ct. 2141, 2197 (Thomas, J., concurring).

[101] *See id*. at 2190 (Thomas, J., concurring).

[102] Many have done so persuasively. For a thoughtful critique of this common affirmative action-as-preference framing, see Angela Onwuachi-Will, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 210-22 (2023); Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1149 (2019). *See also, e.g.*, Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 489 (2010) (refuting that facially neutral decisionmaking ensures racial neutrality); Brief for Empirical Scholars as Amici Curiae in Support of Respondents, https://gking.harvard.edu/publications/brief-empirical-scholars-amici-curiae-support-respondents (debunking "mismatch" hypothesis); Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299 (2008) (challenging stigma theory).

[103] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989).

[104] Albeit writing for himself, Justice Kennedy's *Parents Involved* opinion captures this logic. *See* 551 U.S. at 797 ("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. . . ."). One could contest this as well. But here, my goal is to take equal protection doctrine on the conservative Justices' own terms. As noted, the limited purpose of this Article is to surface how decades of conservative caselaw—if taken seriously by the current conservative majority—should imperil the right to inequality cases.

Justices, warrant strict scrutiny.[105]

Albeit bad news for racial classifications, this is good news for colorblind remedies. In Part III, I highlight how PLF tries to overcome this hurdle by importing Alternative Track standards and concerns into Default Track litigation. For now, I highlight one final equal protection lesson that undercuts PLF's desired right to inequality: conservative caselaw from both Tracks condones *remedial*[106] racial motives.[107]

C. *Lesson 3: Remedial Racial Motives Are Permissible Under Both Tracks*

1. *Foundational Racial Classifications Precedent Condones Remedial Racial Motives*

Recall PLF's core argument: any policy designed to alter an institution's racial composition constitutes an impermissible motive.[108] Because the right to inequality cases contest colorblind policies, PLF concedes that the Default Track applies.[109] The Default Track's defendant-friendly posture creates a significant challenge for PLF. But right to inequality advocates face a distinct hurdle: conservative Justices have repeatedly endorsed the precise racial motive PLF now targets.[110]

a. Strict Scrutiny's Compelling Interest Prong Endorses Remedial Racial Motives

One sees this in the doctrinal regime conservative Justices erected to adjudicate affirmative action challenges. More precisely, strict scrutiny's

---

[105] A common reaction is: "What about a colorblind policy adopted with the specific purpose to harm Asian Americans or African Americans? Surely that policy would trigger strict scrutiny because it entails an impermissible racial purpose." This sentiment is intuitive and tracks how first-year Constitutional Law classes tend to present equal protection doctrine. But as noted, language in *Arlington Heights* raises uncertainty regarding whether the "strict scrutiny" standard that governs contemporary racial classifications (and requires defendants to show that the challenged policy was narrowly tailored to advance a compelling interest) would apply to this hypothetical. *See supra* notes 57 and accompanying text.

[106] As noted above, I employ the terms "equality-oriented" and "remedial" interchangeably to capture policies designed to redress the contemporary vestiges of America's openly white supremacist legacies of conquest, slavery and racial apartheid. In the context of individual institutions, remedial policies often entail identifying and then eliminating or mitigating practices that disproportionately exclude (or legitimize the exclusion of) historically excluded groups.

[107] The term "motive" is amenable to multiple meanings. *See* Primus, *Equal Protection and Disparate Impact*, *supra* note 62 *at* 516. For purposes of this article, I employ "motive" to broadly capture one reason why a defendant adopted a challenged policy. Albeit vulnerable to slippage, the Supreme Court has employed "motive" in a similar way. *See Croson*, 488 U.S. at 493 ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a *goal* important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the *motive* for the classification was illegitimate racial prejudice or stereotype.") (emphasis added).

[108] *Infra* Part III.B.

[109] *Id.*

[110] Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 841 (2011).

internal structure endorses—at least implicitly—remedial racial motives.[111] Consider strict scrutiny's compelling interest prong, which asks whether the defendant is "pursuing a goal important enough to warrant use of a highly suspect tool."[112] Often, the asserted motive is racial. An obvious example is the "diversity rationale," which entails the specific intent to achieve racial outcomes different than what a facially neutral policy would yield.

Not only is this racial motive permissible, the Supreme Court has deemed it compelling. In *SFFA*, Chief Justice Roberts invalidated the challenged admissions policies. But he neither overturned *Grutter* nor rejected Justice O'Connor's conclusion that "obtaining the educational benefits that flow from a diverse student body" constitutes a compelling interest.[113] As a practical matter, the diversity rationale's formal survival might mean little for race-conscious policies. At the same time, the diversity rationale's formal survival creates a legitimate obstacle for Justices who otherwise sympathize with PLF's political aims.[114] PLF is asking the Supreme Court to create a legal regime that deems the goal of racial diversity constitutionally compelling and constitutionally suspect.

Even had Chief Justice Roberts formally overturned *Grutter* and rejected the diversity rationale, *SFFA* would still hinder PLF's core argument.[115] One reason is that Chief Justice Roberts explicitly endorsed two compelling interests—remedying identifiable discrimination and maintaining security in prisons. Only the first of these interests applies specifically to the admissions context.[116] The key, however, is that both compelling interests entail the racial motive PLF attacks: the desire to achieve particular racial outcomes.

Against this backdrop, one can view any racial motive as falling into one of three categories. The first category contains "compelling" racial motives, which can justify racial classifications. The second category contains impermissible racial motives, which would invalidate a policy even absent

---

[111] One might say differentiating between "good" and "bad" racial motives is the entire point of strict scrutiny. *See* David Schraub, *(The Limits of) Judicial Resegregation*, 58 HARV. C.R.-C.L. L. REV. 311, 314–15 (2023) ("[T]reating race-conscious desegregation as permissible and race-conscious resegregation as forbidden tacitly concedes a recognizable difference between benign and hostile racial classifications—a distinction the Supreme Court has labored hard to deny exists.").

[112] Johnson v. California, 543 U.S. 499, 506 (2005).

[113] Grutter v. Bollinger, 539 U.S. 306, 297 (2003). *See also* Kimberly West-Faulcon, *The* SFFA v. Harvard *Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355, 1412-13 (2024) ("[C]ontray to SFFA's request for a new legal rule, the Supreme Court applie[d] the pre-existing strict scrutiny legal test to Harvard and UNC's diversity-justified consideration of race in admissions."); *infra* Part III.A.

[114] In part because they would have to justify a legal regime that deems racial diversity constitutionally compelling and constitutionally suspect.

[115] I explore *SFFA* in greater detail in Part III.

[116] SFFA v. Harvard, 143 S. Ct. 2141, 2162 (2023) ("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. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.").

a racial classification.[117] The third category contains permissible racial motives.[118] Albeit insufficient to satisfy strict scrutiny, permissible motives raise no independent constitutional concern. In *SFFA*, Roberts held that Harvard and UNC's racial diversity-related failed strict scrutiny. But critically, he termed those same goals "commendable"—thus locating the universities' racial motives in the permissible category.[119] Thus, even the Chief Justice endorsed (as raising no constitutional concern) the racial motive a right to inequality would prohibit.[120]

b. Strict Scrutiny Distinguishes Between Impermissible Racial Means and Permissible Racial Motives

Richmond v. Croson[121] and *Grutter v. Bollinger*,[122] two foundational Alternative Track cases, reinforce the above. Both cases reflect how conservative Justices distinguish between racial means and racial motives. In both cases, the Justices *condemn* remedial racial classifications and yet *condone* remedial racial motives. Justice O'Connor, who authored both opinions, stressed that "[w]e apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a *highly suspect tool*."[123]

Justice O'Connor locates the use of race as the constitutional concern that necessitates heightened review. At the same time, she identifies multiple racial motives as compelling or permissive. According to O'Connor, remedying identifiable discrimination and pursuing racial diversity constitutes compelling interests sufficient to satisfy strict scrutiny.[124] And

---

[117] This would include facially neutral laws designed to maintain whites-only schools after the Supreme Court struck down *de jure* segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954).

[118] This is how Justice Roberts characterized Harvard and UNC's proffered interests, which included Harvard's interest in "better educating its students through diversity." *See id*. at 2166-67 ("Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny.").

[119] Multiple colleagues have cautioned against reading Chief Justice Roberts' "commendable" characterization as an earnest assessment that previews a stable endorsement of facially neutral policies designed to achieve the same ends. I do not mean to fetishize Roberts' words. It would be naïve to presume that precedent—even a Justice's own words—predetermines how they will rule in a future case. But as noted, one goal of this article is to surface how the opinions of conservative Justices create a legitimate obstacle to contemporary conservative litigation. I am taking seriously Chief Justice Roberts' words—and those of his conservative colleagues—not because I believe they will rigidly adhere to their own words in future cases. But rather because I think it more likely they will not.

[120] *See supra* note 85-89and accompanying text. This third category would also cover policies designed to promote the racially-inflected concerns conservative Justices tend to mobilize against racial classifications.

[121] *Croson* implicated Richmond, Virginia's set-aside for minority-owned contractors. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477–78 (1989).

[122] *Grutter* implicated the University of Michigan Law School's race-conscious admissions policy. *See Grutter*, 539 U.S. 311-15.

[123] *Grutter*, 539 U.S. at 326 (quoting *Croson*, 488 U.S. at 493) (emphasis added).

[124] *Croson*, 488 U.S. at 511; *Grutter*, 539 U.S. at 343.

while *Croson* and *Grutter* reject remedying societal discrimination as a compelling interest,[125] neither O'Connor nor her conservative colleagues suggest that the desire to remedy societal discrimination is suspect.[126] To the contrary, they appear to condone it.

In *Croson*, for example, the City of Richmond had to defend its race-based set-aside. Justice O'Connor explained that even absent evidence of past racial discrimination (which could have saved the challenged policy), Richmond had "at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races."[127] When read in context, the reference to "all races" does not appear to be a command to disregard patterns of racial exclusion. To the contrary, O'Connor notes that such policies can counter the "formal barriers" that "may have a disproportionate effect on the opportunities open to new minority firms."[128] In other words, colorblind "devices" would enable Richmond to avoid constitutional scrutiny—even if the City employed those devices to increase opportunities for "minority firms." This passage reinforces that O'Connor's concern traced to the "highly suspect tool" Richmond employed, not the City's desire to increase the participation of people of color in its contracting industry.

Justice Scalia's *Croson* concurrence tracks this distinction. Even as Scalia emphasizes his hostility to all racial classifications,[129] he invites Richmond to employ colorblind tools to achieve their underlying racial objective.[130]

Richard Primus elevated this observation in a foundational 2000 article:

> 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

---

[125] *Id.*

[126] *See also* Regents of Univ. of California v. Bakke, 438 U.S. 265, 307 (1978) (holding that "remedying the effect of 'societal discrimination'" cannot satisfy strict scrutiny but an interest in racial diversity could).

[127] *Id*. at 509–10.

[128] *Id*.

[129] *See id*. at 520 (Scalia, J., concurring).

[130] *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*.") (emphasis added). This passage suggests that Scalia characterizes "race neutral alternatives" as not "based on race" because they do not "classif[y] by race."

> contractors otherwise likely to be excluded . . . .[131]

Primus is correct. Conservative Justices have condoned the racial motive PLF now attacks.

c. Strict Scrutiny's Narrow Tailoring Prong Endorses Remedial Racial Motives

Primus also surfaced how strict scrutiny's narrow tailoring requirement also internalizes the distinction between racial classifications (all suspect) and racial motives (many permissible). Narrow tailoring functions as a "fit test" that asks the court to determine whether the challenged racial classification is necessary to realize the stated compelling interest.[132] Most relevant to the right to inequality cases, narrow tailoring requites the defendant to show that their goal could not be achieved through "race-neutral alternatives."[133]

In the context of *SFFA*, narrow tailoring obligated Harvard and UNC the burden to prove that racial classifications were necessary to yield a racially diverse student body (their articulated compelling interest). The search for race-neutral alternatives reinforces Justice O'Connor's statement that the constitutional concern flows from the means (i.e., the "highly suspect tool") the universities employed, not the racial motives they possessed. Were the defendants' motives independently suspect, the lack of a "race-neutral alternative" should not save the underlying policy.[134]

Imagine if a party challenged UNC's former policy of *de jure* segregation.[135] UNC could not save this policy by proving that race-neutral alternatives were unavailable. Nor could UNC constitutionally pursue the same ends through colorblind means. No court would suggest as much. The

---

[131] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 541 (2003) ("*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"). *See also* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1791 (1996).

[132] *See* Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 312 (2013) ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity.").

[133] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 311 (2023) (Kavanaugh, J., concurring) ("Narrow tailoring requires courts to examine, among other things, whether a racial classification is "necessary"—in other words, whether race-neutral alternatives could adequately achieve the governmental interest."). *See also* Ayres, *supra* note 131 at 1792–93. In this context, the term "race-neutral" does not mean a policy that lacks a racial motive. Rather, "race-neutral" refers to a policy that lacks a racial classification. *Cf.* Issa Kohler-Hausman, *What Did* SFFA *Ban? Acting on the Basis of Race and Treating People as Equals*, 66 AZ. L. REV. 1 (2024).

[134] Parents Involved in Cmty. Schs. V. Seatle Sch. Dist. No. 1, 551 U.S.701,735 (2007) (quoting *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in judgment) (racial classifications permitted only "as a last resort").

[135] *See* Jonathan Feingold, *Ambivalent Advocates*, 58 HARV. CR-CL L. REV. 143 (2023) (discussing UNC's history of formal racial exclusion).

reason is that in the context of Jim Crow *de jure* segregation, the constitutional infirmity lies in the racial mechanism *and* the racial motive—the latter of which is infected by racial animus and exclusionary aims.

Juxtapose this with *SFFA*, in which multiple conservative Justices admonished the defendants for failing to adopt "race-neutral alternatives."[136] Even if implicit, this criticism implies that both universities could lawfully pursue the same racial ends so long as they employed colorblind means to get there.

The foregoing highlights a substantive hurdle for PLF: past conservative majorities have blessed the racial motive that a right to inequality would preclude. PLF also faces procedural hurdles.

When plaintiffs challenge racial classifications, strict scrutiny inverts the substantial deference defendants enjoy under the Default Track.[137] In affirmative action litigation, for example, conservative Justices often invoke the concept of "judicial skepticism" to reject the defendant's proffered interest and justify invalidating the challenged policy.[138]

Croson is instructive. Richmond, the Confederacy's capital, argued that its race-based set-aside was necessary to remedy the City's legacy of racial discrimination.[139] According to Justice O'Connor, Richmond's policy failed strict scrutiny because Richmond failed to provide a "strong basis in evidence" that remedial action was necessary.[140] O'Connor admonished the lower courts for improperly deferring to the City's judgment that the policy was "necessary" and "remedial."[141] That deference was improper, O'Connor emphasized, because Richmond had employed a racial classification.[142]

Situated within O'Connor's full opinion, this reasoning supports two conclusions. First, Richmond's desire to alter the racial composition of its contracting industry (a goal that requires reducing the relative percentage of white contractors) is permissible. Were it otherwise, there would have been no need to ask the evidentiary question concerning past discrimination; the

---

[136] *Infra* Part II.A-B.

[137] *See Croson*, 488 U.S. at 500 ("The factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.").

[138] *See, e.g.*, Fisher v. Univ. of Texas At Austin, 579 U.S. 365, 403–04, 136 S. Ct. 2198, 2223, 195 L. Ed. 2d 511 (2016) (Alito, J., dissenting) (quoting *Miller*, at 922 ("Our presumptive skepticism of all racial classifications prohibits us ... from accepting on its face the Justice Department's conclusion"); Croson, 488 U.S., at 500 ("[T]he mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight"); *id*., ("The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis")).

[139] *Croson*, 488 U.S. at 500.

[140] *Id.*

[141] *See id.* ("The District Court accorded great weight to the fact that the city council designated the Plan as 'remedial.' But the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.").

[142] *Id.* ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.").

impermissible racial motive should be sufficient to invalidate the policy.[143] Second, judicial deference would have been proper had Richmond employed a "race-neutral device[]" to achieve the same ends. In other words, had Richmond employed a colorblind policy to achieve the same racial outcome, the City should have prevailed on an otherwise identical factual record—both because the court would defer to Richmond's judgment and because Richmond's racial motive was permissible. As I detail in Part III, key aspects of the factual record from *Croson* bears a striking resemblance to the right to inequality cases.

To summarize the foregoing, foundational Racial Classifications Track create a hurdle for rightwing advocates who challenge colorblind remedies. Cases like *Croson*, *Grutter*, and *SFFA* entrenched a doctrinal regime hostile to all policies that employ racial classifications—whether invidious or benign. But that same precedent bolsters the constitutional case for remedial racial motives and colorblind policies that pursue them. As I now explain below, foundational Default Track cases offer the same lesson.

2. *The Default Track*

The same lesson flows from Default Track precedent: remedial racial motives raise no constitutional concern. Consider *Arlington Heights*,[144] in which the Supreme Court confronted a colorblind land use decision that disparately impacted a Black community. Building on *Washington v. Davis,* the majority reiterated that facially neutral policies are presumptively lawful.[145] To overcome this presumption, the plaintiff must offer "proof that a *discriminatory purpose* has been a motivating factor in the decision."[146]

The term "discriminatory purpose" is itself indeterminate. If interpreted broadly, it could encompass any policy adopted with a racial motive. The Supreme Court has never endorsed such a broad interpretation, which would clash with the fact that all Supreme Court Justices endorse certain racial

---

[143] One might argue the evidentiary question concerning past discrimination would remain legally relevant even had Richmond employed a colorblind policy. This alternative characterization (which tracks PLF's arguments) presumes that the desire to alter an entity's racial composition is constitutionally suspect and, therefore, the defendant must establish a compelling interest. There are at least three problems with this argument. First, it collapses equal protection doctrine's two-track framework by importing the Racial Classification Track's strict scrutiny requirement into a Default Track challenge. *See supra* Part I.A (distinguishing the Default Track's burden shifting standard from the Racial Classification Track's strict scrutiny standard). Second, it miscasts Justice O'Connor's skepticism toward the racial means Richmond employed with the racial ends Richmond sought. Third, it overlooks how O'Connor and her conservative colleagues repeatedly invite affirmative action defendants to implement colorblind remedies.

[144] Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[145] *Id.*

[146] *Id.* at 265–66.

motives.[147] A slightly narrower interpretation would read "discriminatory purpose" to capture any policy designed to alter an institution's racial composition. Such a definition would deny any legal distinction between efforts to *include* (i.e. reduce inequality) and efforts to *exclude* (i.e., perpetuate inequality). All would be impermissible. This equivalence move tracks prevailing doctrine's hostility to all racial classifications.[148] But it has never extended to racial motives.[149]

One sees this, for example, when the Supreme Court uses the term "invidious" to modify "discriminatory purpose."[150] In cases like *Arlington* Heights, the "invidious" modifier inflects "discriminatory purpose" with a normative dimension; only *invidious* discriminatory purposes create constitutional concerns.[151] One natural way to distinguish between invidious and non-invidious purposes is to ask whether a policy is designed to exclude or include a historically excluded group.

Two years after *Arlington Heights*, the Supreme Court seemed to endorse this straightforward understanding of "invidious" in *Personnel Administrator v. Feeney*. The challenged hiring preference was facially neutral but overwhelmingly favored men.[152] Citing *Arlington Heights* and *Davis*, the majority cemented the Default Track's intent standard: "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. . . [T]he decisionmaker [must have] . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its *adverse* effects upon an identifiable group." [153]

Scholars tend to focus on the "because of" language, which banished disparate impact to the margins of equality law.[154] For present purposes, the

---

[147] The conservative Justices, for example, routinely claim that the certain racial motives animate the equal protection clause: for example, the desire to increase racial harmony, reduce racial stereotypes, and promote equal treatment. *See supra* notes 89-97 and accompanying text.

[148] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742 (2007) ("This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed [and rejected] in the past.").

[149] *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332, 2348 (2000) ("Taken to its logical end, [this vision of] the Equal Protection Clause [would] require[] government to ignore the stark racial disparities that persist in our society."). Ricci v. DeStefano, 557 U.S. 557 (2009), a Title VII case, arguably comes closest.

[150] *Arlington Heights*, 429 U.S. at 266 ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry . . ."). The term "invidious" is also indeterminate and subject to competing definitions. Still, the exclude-include distinction appears consistent with the Court's broader analysis in *Davis, Arlington Heights* and *Feeney*. The invidious modifier would likely also capture motives laden with racial animus. *See* Robert L. Tsai, *Abandoning Animus*, 74 ALA. L. REV. 755 (2023). Though even terms like "animus" are susceptible to manipulation and distortion. *See* Joy Milligan, *Animus and Its Distortion of the Past*, 74 ALA. L. REV. 725 (2023).

[151] *Arlington Heights* built on the Court's use of the term "invidious" in *Washington v. Davis*, 426 U.S. 229, 236 (1976) (framing the question as whether the challenged employment test "invidiously discriminated against Negroes").

[152] *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 256 (1979).

[153] *Id.* at 279; *Id*. at 272.

[154] *See, e.g.*, Haney-Lopez, *supra* note 46.

"adverse" language is key. As with the "invidious" modifier in *Arlington Heights*, "adverse" suggests that normative and contextual considerations inform the divide between permissible and impermissible motives.

The majority notes the lack of evidence that the hiring policy "was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service."[155] This passage tethers the impermissible motive analysis to histories of gender-based exclusion. Read in context, *Feeney*'s "adverse" language seems to contemplate a policy adopted because it *harms* women (by denying them access to Massachusetts Civil Service and trading on gendered stereotypes).[156] But no constitutional concern would presumably attach to a policy adopted because it *benefits* women, by increasing their access to Massachusetts Civil Service and combating gendered stereotypes. Note that this latter scenario parallels the conduct PLF attacks in the right to inequality cases.[157]

Feeney's normative anchor prevents the *adverse* v. *beneficial* distinction from collapsing on itself and inviting perverse results. Consider the following three scenarios.

In Scenario A, a school eliminates a legacy requirement[158] *because of* its *beneficial effects* on Black and Asian American students (who belong to groups that have faced a legacy of formal exclusion). We can call this the "inclusionary policy."

In Scenario B, a school adopts a legacy requirement *because of* its *adverse effects* on Black and Asian American students (who belong to groups that have faced a legacy of formal exclusion). We can call this the naked "exclusionary policy."

In Scenario C, a school adopts the same legacy requirement *because of* its *beneficial effects* on white candidates (who belong to a group that has benefited from a legacy of formal exclusion). We can call this the "veiled exclusionary policy."

Under an acontextual and formalistic analysis, Scenarios A and C survive (because they are framed as benefitting a group), but Scenario B fails (because it is framed as harming a group). The normative concerns should be obvious. The formalistic approach enables an entity to save an exclusionary policy by framing it as a benefit.[159] Even recognizing the

---

[155] *Feeney*, 442 U.S. at 279.

[156] The Fourth Circuit judges who rejected a right to inequality applied similar reasoning. *See* Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 883 (4th Cir. 2023) ("[T]hat a given law or policy may foreseeably have some adverse impact on a particular racial or ethnic group is not sufficient to demonstrate *invidious* discriminatory intent—the 'decisionmaker' must set out with that very purpose in mind.") (emphasis added).

[157] *Infra* Part III.

[158] That is: only the children of alumni are considered for admission.

[159] *See* Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. REV. 199 (2022).

criticism that *Davis, Arlington Heights*, and *Feeney* deserve, they counsel against this approach. The contextual awareness in *Feeney*, for example, suggests that the Court would have invalidated a veteran preference had it been designed to entrench gender disparities in the Civil Service—even if framed as a "benefit" to men rather than a "harm" to women.[160] Stated more plainly, *Feeney* reads as a case that considers context to distinguish between inclusionary motives (permissible) and exclusionary motives (impermissible).

One final note before turning to *SFFA*. Many will note that *Ricci v. DeStefano*[161] strayed from the two-track framework I outline herein.[162] In *Ricci*, a group of firefighters alleged that New Haven violated Title VII by decertifying an employment test that had produced a racially disparate impact.[163] The plaintiffs did not allege that New Haven employed a racial classification or engaged in individual-level disparate treatment.[164] Nonetheless, the conservative majority characterized the action as intentional race discrimination.

There are multiple ways to read *Ricci*'s facial inconsistency with the conservatives' broader equal protection jurisprudence. On the one hand, one can read *Ricci* in ways that minimizes any perceived inconsistency. This sort of explanation might highlight that *Ricci* is a Title VII case (not an Equal Protection case) or that the case involved "visible victims."[165] As a formal matter, these details do distinguish *Ricci* from the right to inequality cases, which neither implicate Title VII nor involve "visible victims."

On the other hand, one can argue that *Ricci* cannot be squared with the conservatives' preexisting skepticism of race discrimination claims that lacked a formal racial classification. This inconsistency story centers the doctrinal rules that conservative Justices previously endorsed. But if one zooms out a bit, that same departure from doctrine could be read as a moment of judicial consistency. Under this reading, the throughline is not a principled commitment to "individual rights," but rather enduring hostility

---

[160] *See* Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) ("The cases of *Washington v. Davis*, and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, recognize that when a neutral law has a disparate impact upon a group *that has historically been the victim of discrimination*, an unconstitutional purpose may still be at work.") (emphasis added). Kim Mazrui-Forde has suggested that one could read *Feeney* for the proposition that any policy adopted to benefit a racial group is suspect. *See* Forde-Mazrui, *supra* note 138 at 2348. Forde-Mazrui presciently previewed the right to inequality lawsuits. *See id*. at 2349. But as explained herein, it is hard to square that reading with the Court's attention to context in cases like *Feeney*.

[161] *See* Ricci v. DeStefano, 557 U.S. 557, 563 (2009). *Cf.* Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 96 (2010) ("For the plaintiffs, this 'diversity rationale' amounted to 'reverse discrimination.'").

[162] *Shaw v. Reno* offers another example. *See supra* note 33.

[163] *See Ricci*, 557 U.S. at 563.

[164] *Id*.

[165] *See supra* note 81 (citing Richard Primus' "visible victims" theory).

to remedial projects.[166]

However one explains *Ricci*, the decision has not figured in the right to inequality cases. In part for this reason, my treatment of *Ricci* is limited.[167] Moreover, as I explain below, even *SFFA* undermines PLF's theory that colorblind remedies pose a constitutional concern.[168] To understand how, I now surface how in *SFFA*, Chief Justice Roberts and his conservative colleagues solidify the case for remedial racial motives—even as they imperil the future of remedial racial classifications.

II. *SFFA V. HARVARD*: UNEXPECTED COVER FOR COLORBLIND REMEDIES

SFFA v. Harvard involved a paradigmatic racial classifications challenge. For this reason, *SFFA* does not directly govern the right to inequality cases, which implicate colorblind conduct. It would be a mistake, however, to disregard the political and doctrinal links that bind *SFFA* and this new line of conservative litigation.

To begin, both legal fronts buttress longstanding backlash to the 20th Century Civil Rights Movement.[169] This includes ongoing campaigns to discredit and outlaw antiracism itself.[170] As a doctrinal matter, there is a logic—even necessity—to *SFFA* preceding cases like *TJ.* PLF effectively asks the court to deem racial diversity an unlawful motive.[171] This proposition collides with *Grutter*'s core holding that racial diversity is constitutionally compelling. For any Justice weary of the Court's slipping public opinion, the obvious contradiction PLF urges could be cause for concern.

Perhaps recognizing this dynamic, SFFA and some of its amici urged

---

[166] *See* Harris & West-Faulcon, *Reading Ricci, supra* note 161 at 81 ("A close reading of *Ricci* reveals how not all claims of race discrimination are evaluated on a level playing field. Although the holding in Ricci is not unambiguous (and in some respects the unusual factual predicate may ultimately limit its reach), Ricci reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury.").

[167] *See, e.g.*, Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., No. CV 21-10330-WGY, 2021 WL 1422827, at *11 (D. Mass. Apr. 15, 2021) ("Furthermore, the Supreme Court has explained that the motive of increasing minority participation and access is not suspect.").

[168] *See supra* note 38 (regarding cert petition).

[169] Jerome M. Culp, Jr. et al., *Subject Unrest*, 55 STAN. L. REV. 2435, 2452 (2003) ("This devolution [of equal protection doctrine], and its foreseeable consequences, of course are part and parcel of the larger sociolegal backlash unleashed in recent decades via the 'culture wars' being waged in law, policy, and society.").

[170] *See* Jonathan Feingold, *Reclaiming Equality*, 73 S.C. L. REV. 1 (2022). As one example, 21 Republic Attorneys Generally recently sent a letter to the American Bar Association ("ABA") that asserted – incorrectly – that the ABA's standard on diversity and inclusion conflicted with *SFFA*. *See* Jonathan Skrmetti et al., *Letter to the ABA re Standard 206* (June 3, 2024), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr24-47-letter.pdf [hereinafter Letter to the ABA]; Jonathan Feingold, *Justice is (Color)Blind: Why DEI Isn't Likely Going Away Anytime Soon*, THE HILL (July 3, 2024), https://thehill.com/opinion/judiciary/4751805-diversity-equity-inclusion-supreme-court/.

[171] *See infra* Part III.B.

the Supreme Court to overturn *Grutter* and reject the diversity rationale.[172] This request, which was unnecessary for SFFA to prevail, reflects a doctrinally strategic (and politically savvy) attack on 21st Century integrationist efforts. By first overturning *Grutter* in *SFFA*, the conservative Justices could re-cast PLF's anti-diversity lawsuits as a modest extension of precedent—not a radical departure from well-established principles.[173]

To many's surprise, *Grutter* and the diversity rationale formally survived *SFFA*.[174] Albeit a fragment of its prior self, the diversity rationale's formal survival impedes PLF's core theory. If the Supreme Court codifies a right to inequality, it will enshrine a legal regime that deems racial diversity a constitutionally compelling and constitutionally suspect racial motive.

To repeat, I am not suggesting that existing precedent will dictate—in some over-deterministic sense—whether PLF prevails. Rather, I mean to highlight a still-underappreciated dynamic. Even as *SFFA* granted rightwing activists a long-sought victory that hobbles a range of race-conscious interventions, Chief Justice Roberts undercut the legal arguments those same entities now marshal against colorblind remedies.

At the same time, Roberts signaled sympathy for arguments that animate the right to inequality cases. Borrowing Frank Rudy Cooper's terminology, one could query whether the Chief Justice planted "dicta mines"[175] that will explode in some future case.

A. *Chief Justice Roberts' Opinion*

1. A "Worthy" Racial Motive

a. Grutter *and the Diversity Rationale Survive (Formally)*

In his majority opinion, Chief Justice Roberts held that Harvard and UNC's race-conscious admissions policies violated the equal protection

---

[172] *See* West-Faulcon*, supra* note 112.

[173] Jerry Kang has used the term judicial "segmentation" to describe how the Supreme Court achieves, through a series of piecemeal decisions, an outcome than would have been difficult to justify without those intermediary steps. *See* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 944 (2004); *see also* Woody Hartzog et al., *Privacy Nicks: How the Law Normalizes Surveillance*, 101 WASH. U. L. REV. 717 (2024) (distinguishing privacy "chops" that are easy to detect from privacy "nicks" that appear less invasive yet lead to significant cumulative harms because they are unaddressed).

[174] Justice Roberts circumscribed *Grutter* and the diversity rationale's utility as a defense for race-conscious admissions. But as a formal matter, both remain good law. *See* Reginald Oh, *What the Supreme Court Really Did to Affirmative Action*, Washington Monthly (July 20, 2023), https://washingtonmonthly.com/2023/07/20/what-the-supreme-court-really-did-to-affirmative-action/.

[175] Rudy Cooper, *Dicta, Pretext, and Excessive Force*, *supra* note 32 ("A dicta mine can thus be defined as (1) an unnecessary statement that (2) a Court later silently recharacterizes as having already resolved an issue, (3) exploding it into a significant doctrine."). The conservative Justices' past comments about "racial balancing" comprise a collage of dicta mines prone to explode in *TJ. See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 501 (1992) (Scalia, J., concurring) ("As the Court reaffirms today, if 'desegregation' (*i.e.*, racial balancing) were properly to be ordered in the present case . . .").

clause.[176] Tracking well-settled precedent,[177] both universities argued that their respective policies were narrowly tailored to achieve the compelling interest of racial diversity.[178] Against this backdrop, Roberts could have struck down the policies on one of two bases.[179]

First, he could have overturned *Grutter* and declared that racial diversity is not a compelling interest. Such a holding would have formally altered legal doctrine and dislodged the universities' central defense.

Roberts did not take this approach. Instead, he wrote that Harvard and UNC failed to satisfy existing precedent—including *Grutter*.[180] Roberts explained that racial classifications are only permitted when implemented "in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny."[181] He added that "[c]lassifying and assigning students based on their race 'requires more than . . . an amorphous end to justify it.'"[182]

Turning to the facts, Roberts concluded that the universities' diversity-related goals failed this strict scrutiny because they could not be "subjected to meaningful judicial review."[183] He also chastised the defendants for employing race in a "negative manner," reproducing stereotypes, and violating time limitations.[184]

It would be overly formalistic to suggest *Grutter* and the diversity rational survived *SFFA* unscathed.[185] In multiple respects, the Chief Justice rewrote *Grutter* and narrowed the diversity rationale's practical efficacy.[186]

---

[176] SFFA v. Harvard, 143 S. Ct. 2141 (2023).

[177] *See* Grutter v. Bollinger, 539 U.S. 306, 320 (2003); *Fisher*, 579 U.S. at 388.

[178] *See* Brief by UNC, 2022 WL 2975486 at *1 ("In choosing to pursue such diversity and its educational benefits, UNC embodies the nation's highest ideals and best traditions."); Brief by Harvard, 2022 WL 2987146 at *4 ("Harvard has repeatedly studied and continues to evaluate the importance of student-body diversity to its educational objectives and whether a race-conscious admissions process remains necessary to achieve them.").

[179] Roberts could have ruled on other grounds. The two bases I offer presume that his ruling would respond to the defendants' diversity-based arguments.

[180] *See SFFA*, 143 S. Ct. at 2162 (citing *Grutter* for the legal standard that governed the Court's analysis).

[181] *Id.* at 2166. Justice Roberts also concluded that Harvard and UNC's policies were not narrowly tailored because the defendants employed racial categories that were "imprecise" and "opaque." *Id.* at 2170. According to Roberts, these alleged deficiencies in the categories themselves "undermine[d], instead of promote[d]," the universities' goals. *Id*.

[182] *Id*. at 2166.

[183] *SFFA*, 143 S. Ct. 2166.

[184] *Id*.

[185] This a point on which Justices Thomas and Sotomayor agree. *See SFFA*, 143 S. Ct. 2207 (Thomas, J., concurring) ("The Court's opinion rightly makes clear that Grutter is, for all intents and purposes, overruled."); *id*. at 2239 (Sotomayor, J., dissenting) ("As Justice Thomas puts it, '*Grutter* is, for all intents and purposes, overruled.'").

[186] As one example, Roberts rejected several goals that animated the conception of diversity the Supreme Court had affirmed in *Grutter* and *Fisher. Compare SFFA*, 143 S. Ct. 2145 (concluding that the following interests, *inter alia*, did not satisfy scrutiny's compelling interest prong: preparing

Albeit unstated, Roberts applied a stricter "strict scrutiny" than either majority had in *Grutter* or *Fisher*. Consider, for example, how Roberts cites *Grutter* for the proposition that universities may never "use race as a stereotype or negative, and—at some point—they must end."[187] As footnote 184 details, this passage reads into *Grutter* substantive requirements that conflict with *Grutter* itself.[188]

Thus while *Grutter* remains good law in a technical sense, *SFFA* offers little protection to race-based admissions schemes like the one Justice O'Connor upheld in *Grutter*. Still, Roberts never expressly rejected the diversity rationale.[189] He also expressly carved out military academies from his ruling.[190] Albeit confined to a footnote, this "exception" reinforces the point that racial diversity remains a compelling interest—at least in certain contexts.[191]

To the extent Justice Roberts wants to be perceived as consistent and coherent, *Grutter*'s formal survival creates a legitimate hurdle to right to inequality claims. But even had Roberts rejected the diversity rationale, *SFFA* would still obstruct PLF's assault on diversity.

b. Roberts Reinforces Distinction Between Impermissible Racial Means and Permissible Racial Motives

At bottom, Chief Justice Roberts reaffirmed the two-track equal protection framework I outlined in Part I. This is unsurprising; Roberts has

---

graduates to "better educating its students through diversity"; "producing new knowledge stemming from diverse outlooks"; "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).

[187] *Grutter*, 539 U.S. at 213.

[188] It is a stretch to read Justice O'Connor's aspirational 25-year sunset as a hard deadline after which racial classifications are prohibited. Moreover, *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) (emphasis added). Yet he then refashions this passage as a ban on any racial classification that functions as a "negative"—a requirement unmodified by the "unduly" he previously quoted. Taken to the extreme, this subtle shift could render unlawful any race-conscious policy that yields different racial outcomes than would arise under a facially neutral policy. If this is Roberts' intent, it is worth nothing that he cites *Grutter* for a proposition that cannot be reconciled with *Grutter* (and *Fisher v. Texas*) reject; *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.

[189] *Grutter*, 539 U.S. at 343.

[190] *See SFFA*, 143 S. Ct. at 2166 n.4 ("The United States . . . contends that race-based admissions programs further compelling interests at our Nation's military academies. . . . This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.").

[191] Roberts also leaves open the argument that goal of enrolling a "critical mass" of students of color constitutes a compelling interest. *Id.* at 2174. The same benefactor that financed *SFFA* has since sued West Point for its race-conscious admissions policy. The outcome of that litigation could reveal the extent of this carve-out.

repeatedly endorsed this bifurcated approach to racial classifications and colorblind conduct.[192] And consistent with conservative precedent, Roberts traces this two-track framework to (a) the proposition that racial classifications pose a special constitutional concern and (b) a vision of constitutional equality chiefly concerned with the individual right to colorblind "equal treatment."[193]

The following passages are illustrative:

> The time for making distinctions based on race had passed. . . . For [t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[194]

[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.[195]

I am among many who have criticized prevailing equal protection doctrine. But if one takes Roberts at his word, *SFFA* does more than cripple the future of race-consciousness. The opinion also reinforces the conservative Justices' comfort with colorblind remedies.

To begin, consider how Chief Justice Roberts interchangeably employs terms like "racial preferences," "race-based," and "racial discrimination." Roberts directs this derisive language at the defendants' use of racial classifications—the "highly suspect tools" they employ—not their racial goals.[196]

This racial *means* verse racial *motives* distinction travels through Roberts' compelling interest analysis. For example, he states that "[e]ven if these goals could somehow be measured . . . how is a court to know when they have been reached, and when the *perilous* remedy of *racial preferences*

---

[192] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. As the Court recently reaffirmed, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest.") (internal citations and quotation marks omitted); Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1915 (2020) ("To plead animus, a plaintiff must raise a plausible inference that an 'invidious discriminatory purpose was a motivating factor' in the relevant decision.") (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)).

[193] *SFFA*, 143 S. Ct. at 2165.

[194] *Id.* at 2160.

[195] *Id*.

[196] *Id.* at 2163 ("These cases involve whether a university may make admissions decisions that turn on an applicant's race.").

may cease."[197] As in *Parents Involved*, Roberts employs the derisive term "racial preferences" to describe the "perilous" tool the defendants employ—i.e., the racial classification. He is not expressing contempt for the defendants' desire to achieve particular racial outcomes—a racial motive he elsewhere condones.[198]

This distinction between impermissible racial means and permissible racial motives also appears when Roberts recites the governing standard: "Any *exception to* the Constitution's demand for *equal protection* must survive a daunting two-step examination known in our cases as 'strict scrutiny.'"[199] For Roberts, the "exception to . . . equal protection" is not the defendants' desire to racially integrate their campuses. Rather, it is the racial classifications they employ—a practice that, per Roberts, entails the precise sort of disparate treatment the Constitution forbids.[200]

Roberts' reliance on *Bakke* and *Grutter*, two foundational Racial Classifications cases, reinforces the foregoing.[201] As for *Bakke*,[202] the Chief Justice states that U.C. Davis's challenged admissions "program . . . flatly contravened a core 'principle imbedded in the constitutional and moral understanding of the times': the prohibition against 'racial discrimination.'"[203] Tracking his own use of "racial preferences," Roberts is not employing the term "racial discrimination" to broadly capture any diversity-related goal. Rather, he is using the term to describe policies that classify and differentiate between individual applicants based on their respective racial identities.[204]

---

[197] *Id*. at 2166.

[198] *See* note 118 and corresponding text.

[199] *Id.* at 2162 (emphasis added).

[200] *See id*. at 2159–62 (faulting Harvard and UNC for "mak[ing] admissions decisions that turn on an applicant's race"). In this same portion of the opinion, the Chief Justice argues that racial classifications—because they facially distinguish between individuals based of their respective racial identities—violate the Equal Protection Clause and *Brown v. Board of Education*'s equality guarantees. *See also* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc., 576 U.S. 519, 558–59 (2015) (Alito, J., Roberts, CJ., Scalia, J., & Thomas, J., dissenting) ("Treating someone 'less favorably than others because of a protected trait' is 'the most easily understood type of discrimination.' Indeed, this classic form of discrimination—called disparate treatment—is the only one prohibited by the Constitution itself.") (internal citations and quotation marks omitted).

[201] Roberts similarly invokes *Fisher II* for the proposition that the Supreme Court had previously "recognized the 'enduring challenge' that race-based admissions systems place on 'the constitutional promise of equal treatment.'" *Id.* at 2174.

[202] The Davis program is often characterized as a "quota." This description obscures important nuance in Davis's admissions policy. *See* Joel Dreyfuss & Charles Lawrence III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 49 (1979) 41–42 (citing testimony that "white applicants were interviewed . . . [but] were not admitted because they failed to meet the economic and social qualifications applied to minority applicants or because they indicated no plans to practice in underserved or ghetto areas").

[203] *Id.*

[204] The four conservative Justices who split from Justice Powell in *Bakke* included the following legislative history to support their argument that Title VI proscribes all racial classifications. Note how this language tracks the conservatives' traditional concern with individual-level disparate treatment:

Roberts cites *Grutter* for the analogous proposition that racial classifications demand heightened scrutiny to "guard against the two dangers that all race-based government action portends."[205] Roberts adds that "[i]n achieving that goal [of racial diversity], the [*Grutter*] Court made clear—just as Justice Powell had—that the law school was limited in *the means* that it could pursue."[206] These passages embody the common conservative claim that racial classifications, but not remedial racial motives, pose a special constitutional concern.[207] Thus consistent with prior conservative Justices, Roberts admonishes Harvard and UNC's raced-based policies even as he condones their racial motives.

As noted, Roberts held that the defendants' diversity-related goals were insufficiently "coherent [or measurable] for purposes of strict scrutiny."[208] Yet he never suggests those goals are themselves suspect. To the contrary, he deems them "worthy" and "commendable."[209] This tracks Roberts' analysis and language from *Parents Involved*, when he struck down two race-based K-12 desegregation plans but deemed the school districts' underlying goals "worthy."[210]

It is worth pausing to highlight how the two tracks entail competing presumptions and burdens that often determine legal outcomes. Unlike colorblind conduct, racial classifications are presumptively unlawful. To prevail, the defendant must satisfy strict scrutiny. This explains why the *SFFA* and *Parents Involved* defendants can lose even though their policies advance "worthy" goals. Had Harvard pursued the same racial motives through colorblind means, SFFA would have carried the burden to prove

---

> Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:
>
> "[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . .
>
> "The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else."

Regents of Univ. of California v. Bakke, 438 U.S. 265, 415 (1978).

[205] *Id.* at 2165.

[206] *Id*.

[207] *See supra* note 85-89.

[208] *SFFA v. Harvard*, 143 S. Ct. 2141, 2151 (2023).

[209] *Id*. at 2167 ("The interests that respondents seek, though plainly worthy, are inescapably imponderable."); *id.* at 2151 ("Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny.").

[210] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007) ("Justice Breyer's position comes down to a familiar claim: The end justifies the means . . . Our established strict scrutiny test for racial classifications, however, insists on a 'detailed examination, both as to ends *and* 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).

that the policy was adopted with an impermissible racial purpose. As a matter of formal law, one is hard pressed to see how SFFA could have done so—after the Chief Justice condoned Harvard's motive in *SFFA*.

One final passage from Roberts' opinion warrants discussion. The Chief Justice closes by noting that "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."[211] He then cautions that "universities may not simply establish through application essays or other means the *regime we hold unlawful* today."[212]

PLF and its allies would argue that the "regime we hold unlawful today" refers to Harvard and UNC's intent to racially diversify its student body.[213] That reading tracks rightwing talking points that emerged following *SFFA* and bolster a broader assault on antiracist and inclusionary projects.[214] But this reading is wrong; it is only plausible if one divorces the above passage from Roberts' entire opinion. A more supportable reading associates that "unlawful" "regime" with the "perilous" and "highly suspect" tool the defendants employed (and Roberts condemned)—not the racial motives they possessed (and Roberts condoned).[215]

Consistent with that latter reading, Roberts closes with the following clarification: "In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."[216] The directive is to avoid individual-level disparate treatment, not to avoid racial motives or shape racial outcomes.[217]

Taken together, Roberts' closing remarks reiterate basic equal protection principles. Universities (a) *may* consider an applicant's personal experience with racism (a colorblind criterion connected to each student's "experiences as an individual"), but (b) *may not* use that information to classify and then differentiate between applicants based on their respective racial identities (a covert racial classification).[218] This latter conduct would

---

[211] *SFFA*, 143 S. Ct. at 2176.

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

[213] *See infra* Part III.B. *See also* Letter to the ABA, *supra* note 170.

[214] *See, e.g.*, Renu Mukherjee, *Affirmative 'Re-Action': How Major American and New York Bar Associations Are Responding to* Students for Fair Admissions, Manhattan Institute (May 9, 2024).

[215] *Id.* at 2170.

[216] *Id*. at 2176 ("[Many universities that employ racial classifications have] concluded, wrongly, 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.").

[217] *See id*. at 2170 ("It is far from evident, though, how *assigning students to these racial categories* and *making admissions decisions based on them* furthers the educational benefits that the universities claim to pursue.") (emphasis added).

[218] For a longer discussion of the distinction between considering a student's racial identity and considering a student's personal experience with race and racism, see Feingold, *Affirmative Action After* SFFA, *supra* note 4.

reproduce the regime *SFFA* invalidated.[219] The former, in contrast, offers a colorblind path to realize the defendants' "worthy" goals.[220]

At bottom, *SFFA* left undisturbed much of the doctrinal landscape that obstructs PLF's path. I now turn to *SFFA*'s conservative concurrences, which reinforce this dynamic. One should not confuse this analysis with the prediction that Justices who proclaim fidelity to colorblindness will reject a right to inequality. It would be naïve to think *SFFA*, or any prior opinion, predetermines how Roberts or his conservative colleagues will rule in future cases.

Moreover, as I now highlight, the Chief Justice seems to endorse concerns that animate PLF's theory of inequality. As a formal matter, these concerns should do little work in a *TJ*-like context; the relevant language is largely confined to dicta and doctrinally tethered to a Racial Classifications challenge. But as a practical matter, one might view these concerns as "dicta mines"[221] that signal a precarious future for the same colorblind remedies Roberts otherwise appears to endorse.

2. The "Dicta Mines"

Within his strict scrutiny analysis, Roberts distinguishes between racial classifications that confer a "plus" (possibly lawful) and those that operate as a "negative" (always unlawful).[222] The Chief Justice simultaneously characterizes admissions as a "zero-sum" competition.[223] This zero-sum framing erodes any meaningful distinction between plus factors and negative factors. Where one group's proportional or absolute increase (a "plus") entails another group's proportional or absolute decrease (a "negative"), "plus" factors and "negative" factors merge into one.[224]

To further evidence the universities' unlawful conduct, Roberts cites Harvard and UNC's attention to racial outcomes.[225] For example, he highlights that the racial composition of Harvard's admitted class changed little over a recent ten-year period.[226] Following this observation, Roberts

---

[219] *See also id.* at 2169–70 ("Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping.").

[220] For a deeper discussion of this passage from *SFFA*, see Feingold, *Affirmative Action After* SFFA, *supra* note 4.

[221] Rudy Cooper, *Dicta, Pretext, and Excessive Force*, *supra* note 32.

[222] *See SFFA*, 143 S. Ct. at 2151 ("The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference . . . University programs must comply with strict scrutiny, they may never use race as a . . . negative.").

[223] *SFFA*, 143 S. Ct. at 2169 ("How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?").

[224] Roberts observes that Harvard admitted fewer white and Asian American students under its race-conscious policy than it would have under a facially neutral policy. *See id.* at 2172–73, 2177.

[225] *Id.*

[226] *Id.*

rehearses the common reprisal that "racial balancing . . . is patently unconstitutional."[227]

Below, I detail how similar rhetoric about negative impacts, zero-sum contexts, and racial balancing pervades PLF's theory of harm.[228] One might therefore query whether Justice Roberts' language constitutes "dicta mines" now waiting to explode.

This could occur. But if it does, the link would be rhetorical, not doctrinal or analytical. Talking points about negative impacts, zero-sum contexts, and racial balancing might enjoy rhetorical purchase in the sphere of public discourse. But as a matter of law, they provide no obvious benefit to PLF. When Roberts recites concerns about zero-sums, impacts, and racial balancing, each concern appears legally relevant because racial classifications are present and strict scrutiny already governs the analysis. None of the concerns neatly translate to a Default Track challenge targeting colorblind remedies.

B. *The Conservative Concurrences: Condoning Colorblind Remedies*

Justices Kavanaugh, Gorsuch, and Thomas authored concurring opinions in *SFFA*. Each concurrence endorsed the following two propositions: (1) strict scrutiny was proper because Harvard and UNC employed racial classifications; (2) racial diversity is not an impermissible motive. This should not be a surprise. Each concurrence reflects the common conservative claim that race-based policies violate the "norm of equal treatment"[229] but remedial motives do not.[230]

The concurrences diverge with respect to each Justice's interpretive approach. Justice Kavanaugh draws principally on Supreme Court precedent;[231] Justice Gorsuch focuses on statutory text;[232] and Justice Thomas offers his own "originalist" perspective.[233]

One other point of divergence warrants note. The concurring Justices signaled differing degrees of sympathy to PLF's claims. When the Supreme Court denied *TJ*'s certiorari petition in early 2024, Thomas joined Alito's dissent.[234] Two years' prior, when the Supreme Court denied an earlier

---

[227] *Id*.

[228] *See infra* Part III.B.

[229] *SFFA*, 143 S. Ct. 2141, 2221 (2023) (Kavanaugh, J., concurring).

[230] *See supra* Part I.

[231] *See id.* at 2221 (Kavanaugh, J. concurring) ("[T]he Court has long held that racial classifications by the government, including race-based affirmative action programs, are subject to strict judicial scrutiny.").

[232] *See infra* Part II.B.2.

[233] *See SFFA,* 143 S. Ct. at 2206 ("In the wake of the Civil War, the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements.").

[234] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 218 L. Ed. 2d 71 (2024) (Alito, J. & Thomas, J., dissenting).

request for review, Justice Gorsuch dissented with Thomas and Alito.[235] Particularly with respect to Thomas, these dissents caution against presuming past opinions will cabin the Justices' adjudication of future claims. That reality does not displace my primary observation: if you take equal protection doctrine on the conservatives' terms, even the *SFFA* concurrences undercut PLF's asserted right to inequality.

1. *The Kavanaugh Concurrence*

Kavanaugh offers the most forceful defense of colorblind remedies. To begin, Kavanaugh makes the standard distinction between racial means (all are suspect) and racial motives (many, including diversity, are permissible). One sees this when he cites *Grutter* for the proposition that "all racial classifications are constitutionally suspect."[236] Then, quoting *Grutter*, Kavanaugh explains 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."[237]

Kavanaugh's reference to "race-neutral alternatives" reinforces two points. First, in affirmative action challenges, the constitutional concern traces to the policy's racial *means*, not its *racial* motive. In *Grutter*, that motive is racial diversity and enjoying its correlate benefits. Second, a policy that employs colorblind means (*i.e.,* "race neutral alternatives") to advance that same racial motive raises no constitutional concern.

Kavanaugh further invokes *Grutter* for the proposition that "even if a *racial classification* is otherwise narrowly tailored to further a compelling governmental interest, a '*deviation* from the norm of *equal treatment* of all racial and ethnic groups' must be 'a temporary matter'—or stated otherwise, must be 'limited in time.'"[238] This passage further elucidates the prevailing conception of constitutional equality that animates conservative race law.

This "deviation from the norm of equal treatment" refers, again, to the means Harvard and UNC employed to achieve racial diversity.[239] And these suspect means—the racial classifications—constitute "[un]equal" and "preferential" treatment that offends Kavanaugh's sense of equal protection. Racial classifications must be time-limited, in turn, because "however compelling their goals, [these means] are potentially so dangerous that they may be employed no more broadly than the interest demands."[240] What is

---

[235] Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022) (Alito, J., Thomas, J., & Gorsuch, J., dissenting).

[236] *See SFFA,* 143 S. Ct. at 2206.

[237] *Id.*

[238] *Id*. This passage also reflects an attempt to frame *SFFA* as consistent with *Grutter*—and thereby justify a ruling that seems to disregard that very precedent. Kavanaugh's creative revision offers another data point to those skeptical that past cases meaningfully constrain future decisions.

[239] *Id.* at 313.

[240] *Id.* at 313 ("Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.'").

neither time-limited nor presumptively suspect is the underlying goal to produce a racially diverse campus.

Kavanaugh crystalizes this means v. motives distinction when he encourages the defendants to employ colorblind remedies to achieve the same ends. Citing Scalia and O'Connor, Kavanaugh closes with the following guidance:

> [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."[241]

2. *The Gorsuch Concurrence*

Whereas Kavanaugh draws heavily on precedent, Gorsuch employs a textualist approach. His upshot is clear: "Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin."[242] One could contest Gorsuch's interpretation of Title VI and his conclusion that this interpretation proscribes all racial classifications.[243] For present purposes, Gorsuch's analysis is informative because it appears to condone colorblind remedies.

To begin, Justice Gorsuch defines "discrimination" narrowly. He argues that Title VI prohibits intentional disparate treatment of individuals but is unconcerned with group-level outcomes.[244] Gorsuch then presents *SFFA* as a simple syllogism. Major premise: Title VI prohibits covered entities from intentionally treating some individuals differently than other individuals because of their respective racial identities. Minor premise: Harvard and UNC intentionally treated some individuals differently than other individuals because of their respective racial identities. Conclusion: Harvard and UNC violated Title VI, full stop.

To ground his reasoning, Gorsuch identifies multiple points in Harvard's admissions process where reviewers could formally consider an applicant's racial identity. He concludes that "[f]or these reasons and others still, the district court concluded that 'Harvard's admissions process is not *facially*

---

[241] *Id*. at 2225.

[242] *Id*. at 2208.

[243] *See generally* Onwuachi-Willig, *A Narratological Reading*, *supra* note 102 at 210–22.

[244] *See SFFA*, 143 S. Ct. at 2209 ("Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race . . . and without regard to any other reason or motive the recipient might assert.").

neutral' with respect to race."[245]

This *facially neutral* point is important. According to Gorsuch, Harvard and UNC violated Title VI because their policies lacked facial neutrality. By distinguishing racial classifications and facial neutrality, Gorsuch both (a) implicates racial classifications as "discrimination" that violates Title VI and (b) insulates facially neutral processes as (at least presumptively) "nondiscrimination" that complies with Title VI.

Gorsuch then explicitly distinguishes the challenged policies' racial means (unlawful) and racial motives (lawful). Like Kavanaugh, Gorsuch invokes the prospect of "race-neutral alternatives" to Harvard and UNC's race-based practices.[246] The relevant passage seems to approve of "universities across the country" that have sought racial diversity through colorblind means like "reducing legacy preferences, increasing financial aid, and the like."[247] Gorsuch notes that the plaintiff "submitted evidence that Harvard could nearly replicate the current racial composition of its student body without resorting to *race-based* practices."[248]

Tracing prior conservative caselaw, Justice Gorsuch ties the legal harm to Harvard and UNC's use of racial classifications. He faults the defendants for "intentionally treating one person worse than another . . . on the ground of race."[249] It is this intentional individual-level disparate treatment that renders the policies "race-based" and, per Gorsuch, unlawful. Gorsuch directs no similar skepticism at the universities' underlying goals. To the contrary, his reference to race neutral alternatives seems to suggest that the same racial goals would pose no statutory concern if pursued through facially neutral means.

3. *The Thomas Concurrence*

Justice Thomas is perhaps the Court's most vociferous colorblindness advocate and affirmative action opponent.[250] It seems unthinkable that he would reject a right to inequality if one such case ever reaches the Supreme Court. But that dynamic is explained by Thomas' regressive politics, not the principles espoused within his precedent—including *SFFA*.

---

[245] *Id*.; *see also id*. at 2216 ("The district court . . . found that the school's admissions policy "cannot ... be considered facially neutral from a Title VI perspective given that admissions officers provide [race-based] tips to African American and Hispanic applicants, while white and Asian American applicants are unlikely to receive a meaningful race-based tip.").

[246] *See id.* at 2215.

[247] *Id*.

[248] *Id.* (emphasis added); *accord id*. at 2176 (Thomas, J., concurring) ("[The Supreme Court] then pulled back in *Grutter v. Bollinger*, 539 U.S. 306 (2003), permitting universities to *discriminate based on race* in their admissions process (though only temporarily) in order to achieve alleged 'educational benefits of diversity'.") (emphasis added).

[249] *See supra* note 24.

[250] *See generally* Robert Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307 (2024) (offering an extended and thoughtful analysis of colorblindness and its evolution within conservative jurisprudence).

In his concurrence, Thomas indicted racial classifications and their "pernicious effects."[251]

Purchased at the price of immeasurable human suffering, the Fourteenth Amendment recognizes that classifications based on race lead to ruinous consequences for individuals and the Nation. Consequently, "all" racial classifications are "inherently suspect," and must be subjected to the searching inquiry conducted by the Court.[252]

As in past opinions, Thomas claims that race-conscious policies constitute racial preferences, stigmatize their beneficiaries,[253] perpetuate stereotypes,[254] and provoke racial resentment.[255] These concerns turn on empirical claims specific to racial classifications; they do not obviously track to colorblind conduct.[256] Thus, even Justice Thomas offers reasoning that seems to condone the colorblind remedies PLF now targets.

One could go further and argue Thomas affirmatively defended such efforts. As one example, Thomas distinguishes the challenged admissions policies from the 1865 and 1866 Freedman's Bureau Acts (FBAs).[257] Thomas deems the former constitutionally suspect because Harvard and UNC distinguished between individuals based on their respective racial identities. According to Thomas, this formal disparate treatment violates the Constitution's colorblindness mandate.

As to the FBAs, Thomas suggests these federal laws complied with the Constitution's command for colorblindness because Congress did not employ racial classifications—even though Congress possessed open racial motives.[258] Thomas notes that as a formal matter, the FBAs directed assistance to "freedmen," not "Black Americans."[259] He contends that the

---

[251] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2177 (2023) (Thomas, J., dissenting) ("I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.").

[252] *Id*. at 2150.

[253] *See, e.g.*, *id*. 2257 ("I have long believed that large racial preferences in college admissions 'stamp [blacks and Hispanics] with a badge of inferiority.'").

[254] *See, e.g.*, *id*. at 2205 ("Eschewing the complexity that comes with individuality may make for an uncomplicated narrative, but lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.").

[255] *See, e.g.*, *id.* at 2201 ("[N]o social science has disproved the notion that this discrimination engenders attitudes of superiority or, alternatively, provokes resentment among those who believe that they have been wronged by the government's use of race.").

[256] *See id.* at 2190("To survive strict scrutiny, any such benefits [from racial diversity] would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race.").

[257] *Id.* at 2185.

[258] *See id*. ("The 1866 Freedmen's Bureau Act . . . authoriz[ed] the Bureau to care for all loyal refugees and freedmen. Importantly, however, the Acts applied to freedmen (and refugees), a formally race-neutral category, not blacks writ large. [B]ecause not all blacks in the United States were former slaves, 'freedman' was a decidedly under-inclusive proxy for race. Moreover, the Freedmen's Bureau served newly freed slaves alongside white refugees.") (internal quotation marks and citations omitted).

[259] *Id.*

FBAs comport with the Constitution's command for colorblindness because "freedman" is a "formally race-neutral category, not blacks writ large."[260]

Thomas then translates this colorblind formalism to the admissions context. Invoking Justice Scalia, he states that "nothing prevents the States from according an admissions preference to identified victims of discrimination" because no one is "identified on the basis of their race"—even if the policy disproportionately benefits Black applicants.[261]

Thomas further invokes Scalia to defend 19th century laws (like the FBAs) designed to remedy racial inequality. He argues that those laws complied with the Constitution because they avoided racial classifications: "[E]ven if targeting race 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.'"[262]

One final passage from Thomas' concurrence provides support for colorblind remedies. Justice Thomas approvingly references colorblind efforts to promote racial diversity.[263] After marshaling evidence that the University of California admitted "its 'most diverse undergraduate class ever" through a colorblind admissions scheme, Thomas concludes that "[r]ace-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies."[264]

Thomas makes two notable moves in this passage. First, he endorses—at least implicitly—colorblind efforts to achieve racial diversity and its related benefits. Second, Thomas traces his concerns to Harvard and UNC's race-based means (which generate "burdens and strife"), not their underlying racial motives (which can avoid those burdens and strife when pursued through colorblind means).

Against this backdrop, I now turn to *TJ*. Although the Supreme Court rejected PLF's request for certiorari, *TJ* remains a useful case to further illuminate why this ascendant front of conservative litigation appears to collide with conservative caselaw.

III. THE RIGHT TO INEQUALITY CASES: *TJ V. FAIRFAX*

In the summer of 2020, global protests for racial justice sparked unprecedented interest in racism's structural dimensions. Institutions large

---

[260] *Id.* at 2185.

[261] *Id.* at 2186–87 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J.) ("While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on *the basis of their race*.") (emphasis in original).

[262] *Id.* (internal brackets omitted) (citing *Croson*, Scalia, J., concurring in judgment).

[263] *SFFA*, 143 S. Ct. at 2206 ("To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means.").

[264] *Id*.

and small asked how their own facially neutral policies might entrench legacies of racial exclusion and subordination. This moment prompted several of the country's most competitive public high schools to review and alter exclusionary admissions processes.[265] The relevant policies were colorblind before the changes and remained colorblind thereafter.[266]

The rightwing Pacific Legal Foundation (PLF) has since sued at least four of those schools.[267] PLF claims that the new policies violate the Equal Protection Clause because they were motived by a desire to alter the institution's racial composition.[268] All governing opinions have rejected this argument and the right to inequality it entails.[269] Multiple reviewing courts have noted that PLF's theory of equality would transform racial diversity into a suspect motive. The First Circuit put it plainly:

> 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.[270]

The First Circuit is correct. PLF would cast under a specter of suspicion any policy designed to increase racial diversity or reduce racial inequality. PLF's theory also legitimizes racial exclusion as the natural and proper state

---

[265] *See* Starr, *supra* note 11 (describing changes at four elite public high schools).

[266] *See id.*

[267] This includes lawsuits against Thomas Jefferson High School in Fairfax, Virginia, Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 872 (4th Cir. 2023); New York City Specialized Public High Schools, Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, No. 18 CIV. 11657, 2022 WL 4095906, at *1 (S.D.N.Y. Sept. 7, 2022); the Boston Exam Schools, Boston Parent Coal. for Acad. Excellence Corp. v. School Comm. of City of Bos., 996 F.3d 37, 41 (1st Cir. 2021); and magnet middle schools in Montgomery County, Maryland, Association for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 617 F. Supp. 3d 358, 366 (D. Md. 2022).

[268] *See* Memorandum in Support of Motion for Preliminary Injunction at 3, 20, Coalition 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."). PLF publicly suggests that *all* racial motives are unconstitutional. *See* Pacific Legal Foundation, *Racial Preferences in Education: FAQs*, https://pacificlegal.org/racial-preferences-faq/ (last visited July 25, 2023) ("Schools may constitutionally use a wide range of admissions criteria, as long as they are not discriminating based on race (or other forbidden characteristics) or using proxies for race to discriminate. For example, schools *may use or not use* standardized tests, essays, interviews, or auditions, *as long as their reasons* for using or not using them *are not racial*.") (emphasis added).

[269] *See id.*

[270] Boston Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., 996 F.3d 37, 48 (1st Cir. 2021).

of affairs.[271] To prevail, PLF needs the conservative Justices to abandon the principles and doctrinal rules that ground the Supreme Court's traditional two-track equality framework.

To concretize this dynamic, I now turn to PLF's lawsuit against Thomas Jefferson High School (TJ). PLF challenged the TJ School Board's (Board) colorblind effort to racially integrate its student body.[272] On February 20, 2024, the Supreme Court denied PLF's petition for certiorari. I nonetheless focus on *TJ* because (a) the underlying facts and theories are straightforward and representative of the right to inequality cases,[273] and (b) this litigation is well-developed with multiple competing opinions.[274]

A. *The Facts*[275]

Thomas Jefferson High School for Science & Technology (TJ) is located in Fairfax, Virginia. TJ is a highly coveted school with rich academic opportunities.[276] TJ has long employed a colorblind admissions process. Prior to 2020, TJ's admissions process required applicants to, *inter alia*: (a) reside in one of five school divisions; (b) be enrolled in eighth grade; (c) have a minimum 3.0 GPA; (d) be enrolled in or have completed Algebra I; and (e) pay a $100 application fee. Every student who satisfied those criteria took three standardized tests. If a student's test scores hit a particular benchmark, they took another exam and could submit teacher recommendations. TJ then engaged in a holistic review to select students who met the foregoing requirements.

In 2020, Fairfax County's "over one million residents [were] approximately 61% white, 10% Black, 16% Hispanic, and 19% Asian and

---

[271] Paul Butler has argued that the Supreme Court's criminal procedure jurisprudence already does this. Paul Butler, *The System is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR J. 75 (2020).

[272] One important note: TJ claims that the challenged policy was adopted to enhance *geographic* and *socio-economic* diversity—not *racial* diversity. This is a plausible claim, which should be sufficient to save the policy under standard applications of intent doctrine. *See supra* Part I. For purposes of this article, I assume that TJ also concedes that racial integration was a motivating factor. I do so to highlight that a right to inequality remains a doctrinal stretch even under such facts.

[273] One meaningful difference between *TJ* and PLF's lawsuit against the Boston Exam Schools is the positionality of white students. In *TJ*, white students experienced a slight increase in representation. In the Exam School case, white students experienced a modest drop in representation. *See* Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos., 996 F.3d 37, 41 (1st Cir. 2021). Albeit beyond the scope of this article, the shifting positionality of different racial groups invites further scholarly attention.

[274] *See, e.g.*, Coalition for TJ v. Fairfax Cnty. Schl. Bd., No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022) (containing three separate opinions).

[275] The following facts come principally from Judge Heyten's concurrence in Coalition for TJ v. Fairfax Cnty. Schl. Bd., No. 22-1280, 2022 WL 986994, at *1–2 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring).

[276] In 2023, U.S. News & World Report ranked TJ the nation's best public high school. *See U.S. News Best High Schools Rankings*, U.S. NEWS & WORLD REPORT, https://www.usnews.com/education/best-high-schools/rankings-overview (last visited July 25, 2023).

Pacific Islander."[277] That same year, TJ admitted so few Black students that the number was too small to be reported. In response, and alongside nationwide protests for racial justice, Virginia convened a task force to examine racial barriers that limited access to TJ and other Virginia schools. The Fairfax County School Board ("Board") considered various changes to TJ's admissions policy.

In December 2020, the Board adopted a new policy that, as before, required all applicants to: (a) reside in one of five school divisions; (b) be enrolled in eighth grade; and (c) be enrolled in or have completed Algebra I. Yet unlike the prior process, the new policy eliminated the $100 application fee and the standardized tests. The new policy also raised the minimum GPA from 3.0 to 3.5 and required students to have taken certain specified honors courses.

Under the new policy, TJ holistically evaluated all eligible students based on their GPA, essays, and experience factors (a new criterion). Experience factors considered whether the applicant (a) qualifies for free or reduced-price meals, (b) is an English language learner, (c) has an Individualized Education Plan, or (d) attends a historically underrepresented middle school.

Figure A: TJ Admissions Policy Before & After 2020

Pre-2020 Policy	New Policy
minimum 3.0 GPA	minimum 3.5 GPA + specific honors courses
pay $100 app. fee	No application fee
If meet above → tests	If meet above → no tests
Holistic review	Holistic Review + experience factors (SES; ELL; IEP; under-rep)
No feeder rules	1.5% Plan

[277] Complaint at ¶ 25, Coalition for TJ v. Fairfax Cnty. Sch. Bd., (No. 1:21-cv-296), 2021 WL 918497 (E.D.Va. Feb. 25, 2022).

The new policy also guarantees to each participating public middle school a number of seats equivalent to 1.5 percent of its eighth-grade class.[278] Slots are first awarded to the highest scoring applicants from each middle school. The remaining applicants compete for about 100 unallocated seats.

During the review process, the Board resolved that "[t]he admissions process must use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance or targets."[279] The process was, and remains, colorblind; officials who evaluate applications are not even told the race, ethnicity, gender, or names of applicants.[280] It is worth nothing that SFFA sought this precise practice (i.e. that admissions officers not learn the racial identity of individual applicants) in its lawsuits against Harvard and UNC.

TJ implemented the new policy in the spring of 2021. In its inaugural year, TJ received 3,470 applications. This represented nearly 1,000 more applicants than the prior cycle and "included markedly more low-income students, English-language learners, and girls than had prior classes at TJ."[281] As for standard academic metrics, the mean grade point average under the new plan was higher than in the five preceding years.

TJ extended 550 offers. For the first time in more than a decade, TJ enrolled students from every middle school in Fairfax County.[282] The Fourth Circuit reported the following racial breakdown for the 2021 admissions cycle:

- Asian Americans comprised 48% of applicants and received over 54% of offers;
- Black students comprised 10% of applicants and received 7.9% of offers;
- Hispanic students comprised 10.95% of applicants and received 11.27% of offers;
- white students comprised 23.86% of applicants and received 22.36% of offers.[283]

---

[278] This school-based set-aside parallels university processes that guarantee admission to the top x-percent of students from each public high school in the state. *See, e.g.*, Jeff Stensland, *USC to admit top 10% of S.C. high school class* (Aug. 1, 2023), https://sc.edu/uofsc/posts/2023/08/usc-to-admit-top-10-percent-in-state-students.php ("All South Carolina students who are ranked in the top 10 percent of their high school graduating class will be guaranteed admission to the University of South Carolina's Columbia campus starting with the Fall 2024 application cycle.").

[279] One can surmise that this pronouncement reflected the Board's desire to avoid any policy that could conflict with existing Supreme Court precedent.

[280] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 875 (4th Cir. 2023).

[281] *Id*.

[282] The prior year, eight of the county's 28 middle schools sent no students to TJ. *Id*.

[283] *See* Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 874 (4th Cir. 2023) (noting that "'multiracial/other' students received 4.91% of offers while making up 6.6% of applicants").

The Fourth Circuit also detailed more granular information about Asian American students. In the preceding five years, Asian Americans received at least 65 percent of all offers. Under the new policy, Asian Americans received 54 percent of offers. While this represented an aggregate decrease, Asian American students from historically underrepresented middle schools "saw a sixfold increase in offers, and the number of low-income Asian American admittees to TJ increased to fifty-one—from a mere one in 2020."[284]

B. *The Legal Theory*

PLF concedes that the Default Track applies because the challenged policy is facially neutral.[285] PLF furthers acknowledges that it must therefore prove that the challenged policy was adopted with an "impermissible racial purpose."[286] PLF does not argue that all racial motives are *per se* impermissible. PLF concedes, for example, that the "mere intent to increase Black and Hispanic enrollment" does not violate the equal protection clause.[287] On this point, PLF elaborates that the Board's decision to eliminate the $100 application fee raises no constitutional concern because "it is implausible that having all applicants pay $0 discriminates against anyone."[288]

One might presume the foregoing concessions end the analysis; there is no racial classification and the challenged motive is permissible. PLF nonetheless charges that TJ violated the Constitution because it adopted a policy designed to alter TJ's racial composition: "[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."[289]

---

[284] *Id*.

[285] Brief for Appellee, Coalition for TJ at 18, v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 22-1280), ("Because the challenged policy is facially race-neutral, the Court's task is to determine whether the Board overhauled TJ admissions for an impermissible racial purpose."). *See also* Appellant's Opening Brief at 26, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of Bos., No. 21-1303 (1st Cir. June 14, 2022), 2022 WL 2237632 (quoting *Feeney* for the proposition that "the dispositive question is whether the School Committee chose the ZIP Code quota at least in part 'because of,' not merely 'in spite of,' [the quota's] adverse effects upon an identifiable group.").

[286] *Id*.

[287] *See* Reply to Certiorari. PLF argues that such a motive "only violates the equal protection clause if the means chosen are designed to treat applicants differently based on race." *Id*. *See also* Memorandum in Support of Motion for Preliminary Injunction at 20, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685 ("Mere motive to increase the representation of a particular racial group does not render an action racially discriminatory under *Arlington Heights*.")

[288] *Id*.

[289] *See* Memorandum in Support of Motion for Preliminary Injunction at 20, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685. SFFA's attorney rehearsed a similar argument during Supreme Court oral argument. See Transcript of Oral Argument at 12, SFFA v. Harvard, 143 S. Ct. 2141 (2023) (No. 20-1199) ("If the only reason to adopt a particular

In essence, PLF attempted to rebrand a permissible motive as an impermissible motive. To understand how, it is helpful to center two discrete theories that permeate PLF's briefing. First, PLF contended that "racial diversity" constitutes "racial balancing," and is therefore unlawful. Second, PLF contended that "racial diversity" constitutes "racial discrimination," and is therefore unlawful.[290]

Both theories are normatively and doctrinally suspect. On the former, the theories normalize racial exclusion and delegitimize racial inclusion.[291] On the latter, both theories collide with the Default Track's defendant-friendly posture. Specifically, the theories locate harm within group-based outcomes (absent any claim of individual-level disparate treatment), require judicial skepticism (thereby denying the defendant any deference), and convert the Default Track's intent requirement into a knowledge requirement. The result is Default Track litigation in name only.

To set up the analysis, I reintroduce Table 1, which summarized key elements that differentiate our equal protection Tracks. I have starred the

---

admissions policy, if the sole exclusive reason was for racial diversity alone, we think that would probably raise problems under that precedent, but, of course, it's a fact-intensive inquiry under Arlington Heights . . ."). PLF's attack on racial diversity reflects the most recent iteration of the claim that any effort to remedy racial inequality is impermissible because it attends to race. *Cf.* Primus, *Equal Protection and Disparate Impact*, *supra* note 52 at 536-37 ("[L]egislation intended to break down inherited racial hierarchies and to integrate the workplace is at greater risk of being found to have an unconstitutional motive. Such motives are racially allocative.").

[290] These two theories interact. For example, PLF claims that TJ *discriminated* against Asian Americans in order to *racially balance* its school. *See* Appellee's Response Brief at 65, Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 22-1280), 2022 WL 2197387 ("[T]he district court correctly concluded that the Board acted with an impermissible racial purpose when it sought to decrease enrollment of 'overrepresented' Asian-American students at TJ to more closely reflect the racial composition of the surrounding community.").

[291] As a formal matter, PLF does not claim a right to preserve the racial status quo. Rather, PLF formally challenges policies *consciously designed* to reduce inequality. Judge Rushing's Fourth Circuit dissent is instructive:

> [N]one of this "turn[s] 'the previous status quo into an immutable quota.' . . . States remain free to change the status quo, and even in ways that disproportionately affect protected groups, but States may not intentionally discriminate on the basis of race. . . . If in the future the Board finds legitimate justifications counsel modification of TJ's admissions policy, the Board is free to act in its best judgment. The Constitution constrains it, however, from making decisions based on race.

Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 895 (4th Cir. 2023) (Rushing, J., dissenting).

The comment responded to the claim that PLF's theory would create a legal entitlement to the racial status quo. Rushing is correct only in the most formal sense. Given the evidence PLF marshals to support its claim—the Judge Rushing's treatment of those facts—any policy change that meaningfully reduced a baseline of racial inequality would be probative of unlawful intent. This is particularly true if the defendant publicly articulates commitments to racial diversity and inclusion or attends to the racial impact of its policies. Moreover, Judge Rushing's admonition that an institution may not make decisions "based on race" seems to invite the unsupportable conclusion that the Fourteenth Amendment outlaws all policies designed to reduce racial disparities—even if facially neutral.

Facially Neutral track because all parties agree it governs the right to inequality cases.

Table 1

	Presumption	**Standard**	**Deference to Defendant**
Facially Neutral ***governs TJ***	lawful	intent	high
Racial Classification	unlawful	strict scrutiny	low

1. *Theory A: Racial Diversity = Racial Balancing*

TJ prevailed before the Fourth Circuit. For present purposes, the most relevant opinion is that of Judge Rushing, who penned a dissent that adopted many of PLF's arguments. For that reason, I draw on PLF's briefing and Judge Rushing's dissent to surface the theories of discrimination that animate PLF's desired right to inequality.

Consistent with PLF's framing, Judge Rushing presents the Board's "racial diversity"[292] goals as an interest in "racial balancing."[293] She then condemns the challenged policy on this basis.[294] In the court of public opinion, a rhetorical strategy that conflates (and thereby discredits) inclusionary efforts with racial balancing offers obvious appeal.[295] But in a court of law (at least one constrained by existing caselaw), this conflation runs into three significant roadblocks.

First, racial balancing concerns have always arisen when strict scrutiny already applies. A careful reading of precedent suggests those concerns do

[292] As noted, I employ the term "racial diversity" as shorthand for equality-oriented goals that attend to baseline racial demographics and a policy's distributive effects. Albeit concerned with racial baselines and outcomes, these goals do not entail a desire to ensure "racial proportionality" or "demographic parity" for "its own sake"—and therefore do not constitute "racial balancing" as defined by the Supreme Court. *See* Glater, *Reflections on Selectivity*, *supra* note 12 at 1123 ("A majority of the Court has consistently rejected racial balancing, which is pursuing a particular racial mixture for its own sake.").

[293] In its Fourth Circuit brief, PLF employs the terms "racial balance" and "racial balancing" a total of 28 times. *See* TJ v. Fairfax, 2022 WL 2197387 (C.A.4).

[294] *See, e.g.*, Brief for Appellee, Coalition for TJ at 2, v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 22-1280) (quoting district court's conclusion that "the Board's process was 'infected with talk of racial balancing from its inception.'"); *id*. ("Racial balancing for its own sake is 'patently unconstitutional, and cannot be transformed into something constitutional 'simply by relabeling it 'racial diversity.'").

[295] Rightwing think tanks and officials have made similar rhetorical moves in what appears to be a coordinated effort to inflate *SFFA*'s scope and reach.

not track to Facially Neutral challenges. Second, even if racial balancing constitutes an impermissible purpose (sufficient to invalidate a facially neutral practice), even conservative Justices recognize that racial balancing and racial diversity are distinct interests.[296] Third, given that racial balancing and racial diversity comprise distinct goals, the high deference defendants enjoy in the Default Track should defuse allegations of racial balancing whenever a defendant plausibly asserts that racial diversity was the actual motivation.[297]

a. Racial Balancing Concerns Are Doctrinally Tethered to Racial Classifications Challenges

The Supreme Court has historically identified racial balancing as a concern in litigation challenging a remedial racial classification. Even more precisely, the specific concerns conservative Justices associate with racial balancing arise within the strict scrutiny analysis. As I explain below, there is no obvious reason why these concerns are legally relevant outside the confines of strict scrutiny.[298] Yet that is what PLF and Judge Rushing attempt to do—in essence transporting a concern specific to racial classifications to litigation challenging facially neutral conduct.[299]

Here is a different way to understand the move PLF and Rushing are making with respect to racial balancing. In past cases, racial balancing has been relevant because strict scrutiny applies. In *TJ*, PLF and Rushing argue that strict scrutiny should apply because there is evidence of racial

---

[296] Note the conceptual slipperiness that often follows the term "racial balancing," which could constitute a goal (e.g., the desire to achieve a specific racial composition) or a mechanism (e.g., a selection system that ensures a specific racial composition in order to further some other goal).

[297] *See generally* Salib & Krishnamurthi, *The Goose and the Gander*, *supra* note 31 (explaining that intent doctrine should insulate university defendants who adopt facially neutral policies to achieve racial diversity).

[298] It is puzzling to think that the Fourteenth Amendment was intended (or commonly understood) to prohibit state action designed to decrease racial inequality. Were that accurate, it would suggest Congress passed the Civil War Amendments to preserve—not to transform—the racial order that defined pre-Civil War America.

[299] *See* Appellee's Response Brief, Coalition for TJ v. Fairfax, 2022 WL 2197387, at *2–3 ("The district court recognized that the Board's process was 'infected with talk of racial balancing from its inception.' Racial balancing for its own sake is 'patently unconstitutional,' Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 311 (2013) (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)), and cannot be transformed into something constitutional simply by relabeling it 'racial diversity.'" *Id*. (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007) (plurality opinion) (internal citations and quotation marks omitted); Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 892–93 (4th Cir. 2023) (Rushing, J., dissenting) (citing Racial Classification Track cases for the proposition that "racial balancing offends the Equal Protection Clause" and marshaling that proposition to discredit a facially neutral policy designed to promote racial diversity). I am not claiming that it is *per se* inappropriate for courts to import concerns from one doctrinal context to another. But when it occurs, the importation should be justified and transparent. Neither condition is present here. The specific racial balancing concerns that conservative Justices invoke in Racial Classifications challenges (where strict scrutiny applies) do not obviously translate to Facially Neutral Challenges (where strict scrutiny does not apply). PLF and Judge Rushing act as if they are merely restating the law—when in fact they are remaking it.

balancing.

Judge Rushing's analysis is instructive. Consider, for example, how she quotes *Parents Involved* for the proposition that "the Supreme Court has condemned as impermissible racial balancing a school district's goal of 'attaining a level of diversity within the schools that approximates the district's overall demographics.'"[300] She is correct that Chief Justice Roberts condemned "racial balancing" in *Parents Involved*. Out of context, the quote invites the inference that all efforts to attain a racial mix that approximates the community are impermissible—whether through facially neutral or race-based means. But when read in the context of *Parents Involved*, that inference becomes suspect for two related reasons. Justice Roberts' antagonism toward racial balancing (a) is not readily disentangled from his hostility toward racial classifications and, (b) is doctrinally situated within the strict scrutiny analysis.[301]

Consider the following. To begin, Roberts draws on *Grutter*, which he cites for the rule that "using race simply to achieve racial balance would be 'patently unconstitutional.'"[302] This passage is instructive because it tracks the standard racial means versus racial motives distinction discussed above.[303] *Grutter*'s reference to "using race" implicates the defendant law school's use of racial classification, not its underlying desire to shape the racial composition of its student body.[304] This distinction suggests that it is "patently unconstitutional" to use racial classifications to achieve a specific racial mix.[305] That is different than holding that a desire for racial proportionality constitutes, in itself, an unconstitutional motive.[306]

Reinforcing strict scrutiny's relevance to the analysis, Roberts invokes racial balancing within his narrow tailoring analysis—an inquiry foreign to facially neutral challenges governed by the *Davis-Arlington Heights-Feeney*

---

[300] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 892 (4th Cir. 2023) (Rushing, J., dissenting).

[301] *See Parents Involved*, 551 U.S. at 730 ("Allowing racial balancing as a compelling end in itself would 'effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved.").

[302] *Id*.

[303] *See supra* I–II (outlining how conservative Justices erected an equal protection framework that condemns all racial classifications but condones many racial motives—including the desire to reduce racial inequality).

[304] *Id*. at 741.

[305] *Cf. See* Fisher v. University of Texas, 570 U.S. 297, 426 (2013) (Alito, J., dissenting) ("Like UT's purported interests in demographic parity, classroom diversity, and intraracial diversity, its interest in avoiding racial isolation cannot justify the use of racial preferences.").

[306] This tracks Justice Powell's aversion to racial balancing-like goals in *Regents v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). Specifically, Powell's resistance to "assur[ing] . . . some specified percentage" appears linked to the challenged race-conscious policy, which Powell viewed as a "racial preference." *See id*. ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

trilogy.[307] In this portion of the opinion, Roberts reasoned that the school districts failed strict scrutiny, in part, because their focus on racial proportionality belied their purported interest in distinct "diversity" benefits.[308] As a doctrinal matter, Justice Roberts cites the defendants' alleged interest in racial balance to anchor his conclusion that they failed strict scrutiny.

Even recognizing that *Parents Involved* concerned a racial classifications challenge, one might presume that Justice Roberts' concerns about racial balancing become no less relevant in a facially neutral challenge. After all, multiple Supreme Court majorities have described racial balancing as "patently unconstitutional."[309] On its face, this is sweeping language. But when one digs into *Parents Involved*, a far more restrained reading emerges.

Even as Justice Roberts disapproves of racial balancing, he is clear that the challenge to the desegregation policies failed because the school districts employed racial classifications—not because they desired to achieve particular racial outcomes.[310] This distinction, which emerges across *Parents Involved*, parallels Justice Roberts' reasoning in *SFFA*.

In one *Parents Involved* passage, Roberts admonishes the districts for failing to "show that they considered methods other than explicit racial classifications to achieve their stated goals."[311] This reference to race neutral alternatives implicitly endorses the defendants' openly racial goals.[312] And while Roberts employs the term "racial balancing" to describe that goal, he simultaneously praises that goal: "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." This passage locates the constitutional harm not in

---

[307] *See supra* Part I.

[308] *Id*. at 727 ("The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits . . . The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts."). The foregoing aligns with *Tuttle v. Arlington County*, a Fourth Circuit decision Judge Rushing also cites to discredit the District's purported interest in racial balancing. *See* Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 893 (4th Cir. 2023) (Rushing, J., dissenting) ("Our Court has similarly identified as racial balancing a policy that sought 'to achieve racial and ethnic diversity in . . . classes in proportions that approximate the distribution of students from racial groups in the district's overall student population.'" (quoting Tuttle v. Arlington Cnty. Sch. Bd., 195 F.3d 698, 707 (4th Cir. 1999)). As with *Parents Involved*, *Tuttle* doctrinally situates racial balancing concerns within the narrow tailoring analysis. *See Tuttle,* 195 F.3d at 705 ("Examining the race/ethnicity factor, we conclude that even under *Bakke* it was not narrowly tailored because it relies upon racial balancing. Such nonremedial racial balancing is unconstitutional.").

[309] *See, e.g.*, Fisher v. Univ. of Texas at Austin, 570 U.S. 297, 311 (2013) (quoting *Parents Involved*, 551 U.S. at 732) ("Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'").

[310] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007).

[311] *Id*.

[312] *Id*.

the goal of racial diversity or proportionality, but in the "discriminat[ion] on the basis of race"—which refers to the districts' practice of classifying and differentiating between certain students based on their respective racial identities.[313]

b. Racial Diversity Is Not Per Se Racial Balancing

As a factual and legal matter, the Supreme Court has consistently distinguished between racial diversity and racial balancing.[314] In defendant-friendly litigation like *TJ*, this distinction should hinder a plaintiff's ability to prevail on a theory of racial balancing.

This distinction is most obvious in cases like *Grutter* and *Fisher*, which deemed racial diversity constitutionally compelling and condemned racial balancing as "patently unconstitutional."[315] Justice O'Connor traces her reasoning to Justice Powell's opinion in *Bakke v. Regents*.[316] In *Bakke*, Powell endorsed the diversity rationale while condemning efforts to "assure within [a] student body some specific percentage of a particular group merely because of its race or ethnic origin."[317]

One way to read these cases is to appreciate the distinction between an interest broadly attentive to racial composition (racial diversity) and a rigid quota-like process that ensures a specific racial breakdown (racial balancing).[318] Albeit less pronounced, one sees this distinction within the

---

[313] *See id.* (emphasis added).

[314] PLF and Judge Rushing appear to accept this point. Otherwise, there would be no legal need to frame the district's interest in racial diversity as an interest in racial balancing. The stated interest in racial diversity would itself invalidate the policy.

[315] *See* Grutter v. Bollinger, 539 U.S. 306, 329-30 (2003).

[316] Courts often treat *Bakke* as the earliest citation against racial balancing. This obscures the term's longer history, as it first entered Supreme Court lexicon as a permissible tool to guide desegregation remedies in K-12 schools. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971) ("If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) ("Similarly the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems."). *Swann* noted that district courts could consider racial demographics when fashioning an affirmative remedy. Two decades later in *Freeman v. Pitts*, the Supreme Court held that "[r]acial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors." 503 U.S. 467, 494 (1992). Notably, this language arose in an opinion concerning a district court's authority to mandate remedies. At face value, the quote captures the Supreme Court's 1970's approach: there is no affirmative duty to racially balance unless existing imbalance can be traced to de jure segregation. This limited duty to desegregate does not, however, prohibit voluntary efforts to integrate.

[317] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1987) (opinion of Powell, J.).

[318] This distinction also helps to explain why the Court's liberal Justices did not dissent from Justice O'Connor's statement about racial balancing.

Chief Justice's writing.[319] As noted above, in *Parents Involved* Roberts describes racial balancing as an interest in "racial proportionality" "for its own sake."[320] Roberts further comments that "*Grutter* itself reiterated that 'outright racial balancing' is 'patently unconstitutional.'"[321] Unless one divorces that passage from *Grutter*'s facts, analysis, and holding, O'Connor cannot mean that any effort to achieve a particular racial outcome (e.g., increase racial proportionality) is patently unconstitutional.[322]

SFFA's explicit carveout for military academies tracks the foregoing.[323] Recall that Justice Roberts writes that *SFFA* "does not address [whether race-based admissions programs further compelling interests at our Nation's military academies] in light of light of the potentially distinct interests that military academies may present."[324] This carveout is unnecessary if racial diversity and racial balancing are identical—or, more precisely, identically impermissible.[325]

The modest upshot is that even Chief Justice Roberts recognizes that racial diversity and racial balancing are not factual and legal analogues. This means that when defendants enjoy deference, racial balancing arguments should offer plaintiffs limited utility. I unpack this dynamic below.

c. The Default Track's Deference to Defendants Should Defuse Racial Balancing Claims

Above, I outlined how racial balancing concerns have traditionally arisen within Racial Classification challenges. I also suggest there is reason to believe that these concerns do not track to Facially Neutral challenges. Even if they do track, PLF's claim that the Board acted with a desire to racially balance its student body should enjoy limited legal purchase.

The reason is straightforward. In Racial Classifications challenges, strict

---

[319] *See, e.g.*, Fisher v. Univ. of Texas at Austin, 570 U.S. 297311 (2013) ("A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.' 'That would amount to outright racial balancing, which is patently unconstitutional.'") (quoting *Bakke* and *Grutter*).

[320] *Parents Involved*, 551 U.S. at 729. *Cf.* Fisher v. Univ. of Tex., 579 U.S. 365, 425 (2016) (Alito, J. dissenting) ("If UT is seeking demographic parity to avoid isolation, that is impermissible racial balancing.").

[321] *Id*.

[322] Judge Rushing quotes District leaders articulating this precise goal to support her conclusion that TJ engaged in racial balancing. *See infra* Part III.1(3).

[323] *See* Feingold, *supra* note 4 at 249-51 (observing that *SFFA* does not answer whether military academies possess a potentially distinct interest in diversity that could satisfy strict scrutiny).

[324] SFFA v. Harvard, 143 S. Ct. 2166 n.4 (2023).

[325] Thus, either (a) in interest in racial diversity is not always (or never) an interest in racial balancing or (b) racial diversity is always the same as an interest in racial balancing, but racial balancing is sometimes permissible (even when coupled with a racial classification).

scrutiny strips defendants of the deference they would otherwise enjoy.[326] In such cases, it is often this notion of judicial "skepticism" that conservative Justices invoke to justify rejecting a defendant's asserted rationale.[327] Put differently, strict scrutiny enables judges to reject legally available arguments on the basis that the argument is factually unsupported.

Default Track challenges, which all parties agree govern *TJ*, flips the script. In such cases, the plaintiff carries a heavy burden and the defendant enjoys substantial deference.[328] Where the challenged policy evidences a "readily explainable" proper purpose or the defendant offers a reasonable explanation, that is generally too much for the plaintiff to overcome.[329] This is true even if the plaintiff proffers some indicia of impermissible intent.[330]

This dynamic should short circuit PLF's attempt to characterize the Board's action as an act of "racial balancing." It also reveals why Judge Rushing's open skepticism is doctrinally improper.[331]

To begin, the Board articulated multiple motivations that PLF concedes are permissible.[332] This includes the desire to increase Black and Latine

---

[326] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223 (1995) ("Despite lingering uncertainty in the details, however, the Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, *skepticism*: "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.'") (emphasis added).

[327] *See, e.g.*, Fisher v. Univ. of Texas at Austin, 579 U.S. 365, 407 (2016) (Alito, J., dissenting) ("Although UT claims an interest in the educational benefits of diversity, it appears to have paid little attention to anything other than the number of minority students on its campus and in its classrooms.").

[328] *See supra* Part I.A.

[329] *See also* Salib & Krishnamurthi, *supra* note 31 at 138–39 ("[The *Iqbal* Court] reasoned that, even at the pleading stage, Courts could not "infer" a conclusion of 'invidious discrimination' from statistical imbalances when there were 'obvious alternative explanation[s].' Universities will similarly have 'obvious alternative explanations' available for statistical evidence of racial disparities in admissions.").

[330] City of Mobile, Ala. v. Bolden, 446 U.S. 55, 70 (1980) ("[W]here the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.").

[331] *See* Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 895 (4th Cir. 2023) (Rushing, J., dissenting) ("Applying this well-established framework to the undisputed facts of this case on summary judgment compels the conclusion that the Board adopted the Policy with an impermissible purpose of racially balancing TJ to reduce Asian student enrollment."). Given *TJ*'s facts, the suggestion that "the undisputed facts" "compel[s] the conclusion" is incompatible with the Default Track's defendant-friendly framework.

[332] Reply Brief of Appellant at 25-26, Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 22-1280), 2022 WL 2713947 ("The Coalition has failed to present any evidence that the Board sought to disadvantage Asian Americans or engaged in racial balancing. At every turn, the Board focused on removing socioeconomic, geographic, and other barriers to entry for all races. The Plan's race-blind design reflects that focus. The evidence at most demonstrates that some Board members—whose individual views are distinct from those of the Board as a corporate body, hoped that alleviating these barriers would also increase Black and Hispanic representation. There is nothing unconstitutional about expressing such laudable sentiments.").

enrollment.[333] The Board also denied any interest in racial balancing.[334] Absent substantial evidence to the contrary, this should end the inquiry in the Board's favor. Of the evidence in the record, most is in the Board's favor. To begin, the actual policy increased diversity along multiple dimensions (consistent with the Board's asserted goal), yet came nowhere near replicating the district's racial proportionality.[335] The Board also prohibited admissions officers from learning the racial identity of individual applicants.[336] Moreover, on its face and in practice, the challenged policy invited a range of "obvious alternative explanations" (to the claim of racial balancing).[337]

Rushing nonetheless concluded that racial balancing was a motivating factor. It is hard to see how legal framework that extends substantial deference to the defendant could yield this result.

Rushing claims to follow precedent. Yet she affords TJ minimal, if any, deference. Rushing's analysis better approximates the skepticism that characterizes Racial Classifications challenges. Consider the evidence Judge Rushing cites to support her finding that the Board engaged in racial balancing. The judge highlights three categories of evidence: (1) antiracist statements from District leaders; (2) the Board's attention to racial outcomes; and (3) the Board's adoption of a policy likely to increase racial diversity.

Before turning to the evidence, one broader point is warranted. As noted, the Board proffers a permissible interest and denies an interest in racial balancing. Were the following facts sufficient to invalidate the challenged policy, the equal protection clause would effectively outlaw antiracism itself.

i. Antiracist Statements from District Leaders

Judge Rushing opens by noting that "[w]hen admissions statistics for

---

[333] Recall that PLF concedes the desire to increase Black and Latine representation is permissible. *See id.* at 891 ("Indeed, the Coalition's representative . . . endorsed 'increasing the diversity of Black and Hispanic students at TJ through merit-based admissions.'").

[334] *See also* Appellee's Response Brief at 65, Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 22-1280), 2022 WL 2197387 ("These school districts—including the Board in this case—openly admit their goal of admitting more Black and Hispanic students but deny any intent to discriminate against the Asian-American students who typically bear the brunt of the admissions policy manipulations.").

[335] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 884 (4th Cir. 2023) ("[I]f the Board actually sought to 'balance' the student population at TJ, it did a terrible job. . . . in the Fall of 2019, Asian American students comprised some 19.5% of Fairfax County's student population, and Hispanic students made up another 26.8%; but the Asian American students received 54.36% of TJ's offers of admission in 2021, and the Hispanic students received only 11.27% of the offers.").

[336] *Id.* at 875 ("[I]n adopting the challenged admissions policy, the Board resolved that '[t]he admission process must use only race-neutral methods that do not seek to achieve any specific racial or ethnic mix, balance or targets.").

[337] For example, the Board claimed that the policy was designed to advance a range of non-racial goal, and the Board presented evidence that the policy accomplished those ends.

TJ's class of 2024 were released in June 2020, the numbers revealed that . . . the percentage of Black students was 'too small for reporting'—meaning 10 or fewer students."[338] In response, TJ's "principal . . . stressed that the student body did 'not reflect the racial composition in FCPS [Fairfax County Public Schools],' and if it did, the school 'would enroll 180 black and 460 Hispanic students.'"[339]

Rushing then quotes the Board Chair, who "called the admissions data 'unacceptable' and vowed the Board would take 'intentful [sic] action.'"[340] She then quotes the Superintendent and another board member, respectively:

- The Superintendent said that the Board "needed to be explicit in how [it was] going to address the under-representation."[341]
- The board member called upon the Board to "recognize the unacceptable numbers . . . of African Americans that have been accepted to T.J." and take action.[342]

Following these quotes, Judge Rushing references a Board meeting in which the Superintendent presented a "a slide presentation stating that the purpose of changing TJ's admissions policy was to make TJ 'reflect the diversity of' the district."[343] District staff then shared racial demographics about TJ and the district, and recalled the Superintendent's statement that "diversity at TJ doesn't currently reflect the [District]."[344]

The Board subsequently approved a resolution directing the superintendent to submit an annual report that "shall state the goal is to have TJ's demographics represent the NOVA region."[345] Judge Rushing notes that the Board subsequently reaffirmed its "'goal of improving ethnic, racial, and socioeconomic diversity' at TJ." She then references a District staff white paper that noted TJ's failure to achieve desired levels of diversity over the prior fifteen years.[346]

Among the foregoing statements, two come closest to reflecting a desire to ensure demographic parity—those communicating (a) the "goal to have TJ's demographics represent the NOVA region" and (b) a desire for TJ to "reflect the diversity" of the District. In a Racial Classification challenge, the specter of judicial skepticism might warrant deeming those statements proof of racial balancing—even if the totality of the evidence urges otherwise. But in a Default Track challenge, such a finding would depart

---

[338] *See id.* at 895 (Rushing, J., dissenting).
[339] *Id*.
[340] *Id.*
[341] *Id.*
[342] *Id*.
[343] *Id*. at 895.
[344] *Id*.
[345] *Id*.; *see also id*. at 895-96.
[346] *Id*. at 896.

from decades of caselaw that deemed far greater proof of discrimination insufficient to meet the plaintiff's burden. This is particularly so given that only one of the above statements came from the Board itself.[347]

When considered holistically, the evidence in *TJ* reveals an earnest desire to counter TJ's legacy of exclusion—racial and otherwise. Neither PLF nor Rushing appear to contest that this is a goal. Concerns about racial exclusion animated the school principal's comments in 2020; it is the concern that local advocates had pressed for decades[348]; and it is the concern Board members and other District leaders expressly identified in the quoted comments. One way District leaders articulated this concern was by highlighting the severe numerical under-representation of Black and Latine students.

Yet as noted, PLF concedes that the desired increase in Black and Latine representation constitutes a permissible motive. Perhaps for this reason, PLF attempts to recast a permissible interest in racial diversity as an impermissible interest in racial balancing. Under strict scrutiny and the defendant's corresponding burdens, this argument holds some legal purchase. But under standard applications of intent doctrine and the substantial deference defendants enjoy, PLF's theory appears untenable.[349]

Judge Rushing nonetheless deems the foregoing statements proof of an unlawful intent. Rushing claims to adhere to *Arlington Heights* and its progeny. But as a practical matter, her analysis collapses the prevailing two-track framework into a single track that subjects all remedial projects to strict scrutiny. This doctrinal collapse occurs in at least two respects—one substantive the other procedural. On the substantive point, Rushing effectively erodes any distinction between racial diversity and racial balancing. As a procedural matter, she subjects the defendant to heightened scrutiny and skepticism. The consequence is to transform antiracist aspirations into evidence of unconstitutional conduct.

ii. Attention to Racial Impact

To further evidence the Board's motive to "achieve the desired racial

---

[347] The Supreme Court has also repeatedly discounted the probative value of statements that are not contemporaneous with the adoption of a challenged policy or made by individuals not directly responsible for that policy. *See* City of Mobile v. Bolden, 446 U.S. 55, 74 n.20 (1980) ("Among the difficulties with the District Court's view of the evidence was its failure to identify the state officials whose intent it considered relevant in assessing the invidiousness of Mobile's system of government. To the extent that the inquiry should properly focus on the state legislature the actions of unrelated governmental officials would be, of course, of questionable relevance.").

[348] *See* George, *Myth of Merit*, *supra* note 30 (cataloguing efforts to integrate TJ).

[349] A reader might argue that my analysis is too formalistic—in the sense that intent doctrine is better understood as conservative hostility to remedial projects and less about principled conservative theory of equality. I am sympathetic to that concern and do not mean to convey a naïve orientation to legal doctrine. But as noted, I am taking the conservatives on their own stated terms to surface a still under-appreciated collision between contemporary conservative litigation strategies and decades of conservative caselaw.

demographics," Judge Rushing cites the "Board's extensive use of racial data and modeling."[350] For example, Board members reviewed the prior fifteen years of admissions data broken down by race; figures that reflected TJ's inability to increase Black and Latine enrollment throughout the period.[351] Judge Rushing notes that the Board (a) utilized models to predict how different changes would affect TJ's racial composition and (b) eliminated standardized testing because it created "a barrier for historically underrepresented students."[352]

According to Judge Rushing, the above "evidence demonstrates . . . [that] the Board was keenly interested in data about the racial effect of the policy proposals and admissions variables it considered."[353] This is hardly revelatory; nor does it evidence impermissible intent. The Board openly sought to jettison unnecessary "barrier[s] for historically underrepresented students"—a goal PLF concedes is permissible.[354] It is hard to imagine how the Board could achieve that goal without attending to the racial impact of various policies. And as noted, every compelling interest the Supreme Court has identified entails a desire to affect racial outcomes. TJ's attention to racial effects does not transform a permissible goal (whether framed as racial diversity, racial integration, or racial balancing) into an impermissible one. Yet Judge Rushing's analysis does precisely that.[355]

iii. Adoption of Policy that Increases Diversity

Rushing last cites the Board's decision to adopt a policy that would foreseeably increase Black and Latine representation. She specifically identifies the decision to allocate "seats at TJ to 1.5% of each middle school's eighth grade class."[356] Judge Rushing recognizes that in the year

---

[350] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 896 (4th Cir. 2023) (Rushing, J., dissenting).

[351] *Id*. at 897. Rushing describes this period as one involving "a dramatic increase in offers to Asian students . . . while offers to White students declined and offers to students of other races remained consistently low." *Id*. This framing is not descriptively inaccurate. But it centers the rise in Asian American enrollment, not the enduring absence of Black and Latine students. There is nothing inherently wrong about centering Asian Americans' experience—in fact, Asian Americans and their experience is too often lacking from legal analysis. *See* Vinay Harpalani, *The Need for an Asian American Supreme Court Justice*, 137 HARV. L. REV. F. 23 (2023). But as a doctrinal matter, Judge Rushing's conclusion that the Board wanted to reduce Asian American over-representation is difficult to reconcile with the Board's plausible and repeated assertions to the contrary.

[352] *Id*. at 897–99.

[353] *Id*. *See also id.* ("For instance, after crunching the numbers, the white paper concluded that "while a majority of Asian students in Geometry opted to apply for admission to [TJ], a majority of Black and Hispanic (and White) students enrolled in the same course during eighth grade chose *not* to apply for admissions.") (emphasis in original).

[354] *See supra* note 175 and accompanying text.

[355] *See* Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 900 (4th Cir. 2023) (Rushing, J. dissenting) ("[T]he record is replete with evidence of the Board's concern to reform the racial diversity of TJ's student body.").

[356] *Id*.

prior, "half of the offers to [TJ] . . . came from six feeder schools" (out of twenty-six total middle-schools).[357] That process yielded class profiles with "few low-income students, English Language Learners (ELL), students receiving special education services, and students who identify as Black, Latino, or multiracial."[358]

As a matter of design, the challenged policy—including the 1.5% plan—appears intended to mitigate the prior policy's exclusionary effects. And that is what occurred. In its first year, TJ increased the diversity of its student body along multiple metrics. This included offers of admission to students from all twenty-six public middle schools—something that had not occurred for fifteen years.

According to Judge Rushing, the percentage plan—alongside the other evidence—"makes plain the Board's intent to racially balance TJ to reduce Asian Enrollment."[359] To support this conclusion, Judge Rushing leans heavily on community comments that the percentage plan would "disadvantage" feeder schools (where Asian Americans were over-represented), and the perception that the new policy would negatively impact Asian Americans.[360] Statements concerning a policy's foreseeable impact are legally relevant. But under standard Default Track analysis, such statements or impacts are far from sufficient to prove a discriminatory purpose.[361]

To reach a contrary conclusion, Judge Rushing disregards countervailing facts. This includes testimony that no Board member or district staff "ever analyzed how the 1.5% allocation would affect" the racial composition of TJ's admitted class.[362] And in all but three middle schools, Asian American students "received a far higher proportion of offers relative to their percentage of the student body."[363]

I do not mean to discount concerns that the challenged policy might

---

[357] *Id*.; *see also* Appellant's Opening Brief, TJ v. FAIRFAX COUNTY, 2022 WL 1522305 (C.A.4), 7 ("Just eight of Fairfax County's twenty-six middle schools, accounted for 87% percent of the County's share of TJ's admitted students from 2016-2020.").

[358] Appellant's Opening Brief, TJ v. FAIRFAX COUNTY, 2022 WL 1522305 (C.A.4), 7.

[359] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 901 (4th Cir. 2023) (Rushing, J., dissenting). This is an instance in which PLF's two theories of harm—racial balancing and racial discrimination—converge.

[360] *Id*.

[361] Consider legacy preferences, which stakeholders routinely criticize because of their exclusionary effects. Under prevailing doctrine, it is hard to imagine a court accepting that record (concerns about impact + actual impact) as sufficient to state a claim. For progressive critical of Judge Rushing's opinion, it is worth highlight that her analysis—if applied in a principled manner—could open the door to challenge legacy preferences and other facially neutral policies that yield predictable disparate impacts.

[362] Appellant's Opening Brief, TJ v. FAIRFAX COUNTY, 2022 WL 1522305 (C.A.4), 7.

[363] *See id*. at 13 ("For example, Asian Americans received approximately 78% of offers at Frost Middle School (one of the six "feeder" schools on which the Coalition focuses) despite being approximately 25% of the student body. The same was true for non-feeder schools: Asian Americans received 75% of offers at Lanier Middle School—where approximately 24% of the student body identifies as Asian American.").

disadvantage certain Asian American students, or that a somewhat irregular process preceded the policy's adoption.[364] One would hope that districts take such concerns seriously and employ processes that permit meaningful community participation. My more modest point is that under well-established intent doctrine, those concerns are far from sufficient to prove an unlawful motive—whether framed as racial balancing or discrimination. And as I highlight below, rendering such comments cognizable does more than enable PLF's anti-equality litigation. It also opens the door to revitalize antidiscrimination law as a tool to challenge more subtle manifestations of bias that reproduce inequality.

Judge Rushing's racial balancing analysis refactors equal protection doctrine in one final way that warrants note. She contends that evidence of racial balancing triggers strict scrutiny.[365] This analytical move transforms prevailing law in at least three respects.

First, strict scrutiny is inapplicable to *Arlington Heights*, which PLF agrees drives the analysis and employs a distinct burden-shifting framework.[366] Second, Rushing inverts the standard relationship between racial balancing and strict scrutiny. Under prevailing law, racial balancing concerns are relevant because strict scrutiny applies.[367] Here, Rushing contends that evidence of racial balancing means strict scrutiny should apply. In so doing, she misapplies the analysis in cases upon which she relies. Third, Judge Rushing disregards substantial evidence that the Board possessed a motive PLF concedes is permissible—thereby denying the Board the deference they should enjoy.

At bottom, Judge Rushing concludes that the evidence permits a single conclusion: the Board adopted its policy to racially balance its school. Even recognizing some evidence supporting this finding, it clashes with well-established caselaw that (a) demands judicial deference, (b) condones facially neutral efforts to reduce historical inequality, and (c) differentiates

---

[364] Even if unintended, selective indifference to Asian American communities and their concerns likely aggravates preexisting dynamics of civic ostracism and social alienation. *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 107 (1999); *see also* Harpalani, *Testing the Limits*, *supra* note 30 at 762.

[365] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 893 (4th Cir. 2023) ("A school board's motivation to racially balance its schools, even using the means of a facially neutral policy, must be tested under exacting judicial scrutiny."). This tracks PLF's claim that a desire to affect racial demographics triggers strict scrutiny. *See* Appellant's Opening Brief at 3-4, Bos. Parent Coalition for Acad. Excellence Corp. v. Sch. Comm. of Bos., No. 21-1303 (1st Cir. June 14, 2022), 2022 WL 2237632 ("[T]he district court found that 'the race-neutral criteria were chosen precisely because of their effect on racial demographics.' That finding alone should have triggered strict scrutiny, which applies not just when [government actions] contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object.") (internal quotation marks and citations omitted).

[366] *See supra* note 47 and accompany text (identifying *Arlington Height*'s burden shifting framework). The *Shaw v. Reno* line of cases offer the most support for this move. But as discussed above, *Shaw* (a) deviates from the prevailing two-track framework; (b) is factually anchored to the redistricting context; and (c) articulates principles that do not track to PLF's right to inequality lawsuits.

[367] *See supra* Part III.B.1(1).

between racial diversity and racial balancing. Judge Rushing renders the litigation a Facially Neutral challenge in name only. In practice, she employs a strict scrutiny-like standard to, first, find racial balancing. She then invokes that finding to support the conclusion that strict scrutiny governs the analysis.

Table 2, below, depicts this dynamic. Note how Judge Rushing effectively collapses the prevailing two-track framework into a single strict scrutiny track for all remedial projects.

Table 2

	Presumption	**Standard**	**Deference to Defendant**
Facially Neutral ***governs *TJ****	lawful	intent	high
Rushing Opinion	unclear	strict scrutiny	low
Racial Classification	unlawful	strict scrutiny	low

2. *Theory B: Racial Diversity = Racial Discrimination*

In addition to arguing that the Board's interest in racial diversity constitutes racial balancing, PLF argues that the same interest in diversity constitutes unlawful racial discrimination. As with PLF's racial balancing argument, this related theory of harm cannot succeed unless the court alters intent doctrine.

PLF recognizes that it must prove TJ "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." This requires proof that TJ adopted the challenged policy *because* it *adversely affected* Asian Americans—not *in spite of* this outcome.[368] Anything less might present normative concerns, but fails to state a cognizable claim under *Washington v. Davis* and its progeny.[369] Given PLF's concession that the Constitution

[368] A separate question concerns whether diminished over-representation constitutes a cognizable adverse effect. If an historically segregated law school adopts a policy because of its desire to admit fewer white students, one could argue that the loss of over-representation is not "adverse" because there was no pre-existing legal or moral entitlement to that over-representation. A different conclusion could plausibly arise if the same law school adopts a policy because of its desire to admit fewer Asian American students (who continue to face forms of racial discrimination but nonetheless are "over-represented" relative to a relevant baseline).

[369] *See supra* Part I.A.

condones the Board's desire to increase Black and Latine representation,[370] the Default Track's rigid intent requirement would seem to doom the litigation.

PLF attempts to avoid this result by arguing that in "zero-sum" contexts,[371] an interest racial diversity constitutes unlawful discrimination.[372] This claim trades on the logic that in a zero-sum context, TJ cannot realize its permissible goal without reducing (that is, *adversely affecting*) a different group's relative racial representation.[373] If accepted, this theory would transform a permissible goal into an unlawful intent. And as I detail below, it would transform *Feeney*'s intent requirement into a knowledge requirement—a doctrinal shift that progressives might welcome.

PLF's zero-sum framing enjoys rhetorical appeal—particularly for those intent on discrediting antiracism and DEI-type initiatives as anti-Asian (or antisemitic).[374] But as a doctrinal matter, it would convert intent doctrine's intent standard into an effects/knowledge test. Also of note, this theory of harm would shift the prevailing constitutional concern from individual-level

---

[370] *See supra* note 175 and accompanying text. *See also* Memorandum in Support of Motion for Preliminary Injunction at 20, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685 ("Mere motive to increase the representation of a particular racial group does not render an action racially discriminatory under *Arlington Heights*."). Were this goal impermissible, there would be no obvious need for PLF to frame TJ's interest in racial diversity as racial discrimination.

[371] Memorandum in Support of Motion for Preliminary Injunction at 3, 20, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685 at 20 ("Admission to TJ is a zero-sum game, and the evidence demonstrates that the Board did not change the rules of the game 'in spite of' its adverse impact on Asian-Americans, but instead did so because the rule change would have the desired racial effect."). Judge Rushing is not the only federal judge to accept this theory of unlawful intent. *See, e.g.*, Association for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., 560 F. Supp. 3d 929, 953 (D. Md. 2021) ("The Complaint also makes plausible that the County acted with a discriminatory motive in that it set out to increase and (by necessity) decrease the representation of certain racial groups in the middle school magnet programs to align with districtwide enrollment data.").

[372] S*ee* Glater, *Reflections on Selectivity*, *supra* note 12 at 1130 ("[T]he plaintiffs equated these efforts to promote diversity—that is, to facilitate access to at valued resource for students historically denied it—to intentional discrimination by proxy to exclude students of particular, disfavored backgrounds.").

[373] *See* Memorandum in Support of Motion for Preliminary Injunction at 20, Coalition for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Feb. 25, 2022), 2021 WL 5755685 ("That does not mean that *any* action taken for the sake of racial diversity is presumptively unconstitutional."). PLF offers the example of a state that lowers its bar cut score to increase the percentage of attorneys of color. *Cf.* Mitchel Winick et al., *Examining the California Cut Score: An Empirical Analysis of Minimum Competency, Public Protection, Disparate Impact, and National Standards*, ACCESSLEX INST. RSCH. PAPER (Nov. 11, 2020), https://ssrn.com/abstract=3707812 (examining the racially disparate effect of higher "cut scores").

[374] There is an extended history of rightwing scholars and activists employing this sort of rhetoric to delegitimize antiracist efforts. *See* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1679 (1999); Kathryn Abrams, *How to Have A Culture War*, 65 U. CHI. L. REV. 1091, 1099 (1998).

disparate treatment to group-based disparate outcomes.[375] The rhetorical power of PLF's theory is it offers the illusion of doctrinal continuity even as it ruptures a long-established conservative framework.[376] Put differently, PLF and Judge Rushing can claim fidelity to precedent while rewriting that very caselaw.

To appreciate how PLF's diversity equals discrimination argument rewrites doctrine, consider the following. To begin, as a factual matter, a school could possess the specific desire to increase access for one racial group (whether it be Black Americans or Asian Americans) without possessing any conscious desire to affect any other group. PLF concedes this factual point. Under *Feeney*, the undisputed racial motive (to increase access to an historically excluded group) is permissible. PLF concedes this legal point.[377]

PLF nonetheless contends that in "zero-sum" settings, this permissible motive transforms into an impermissible motive. As a factual matter, it is true that relative representation is relative; if one group's relative representation increases, another group's relative representation must decrease. But a policy's inevitable effect does not convert—factually or legally—the desire to include one group into the desire to exclude another.

Intent doctrine condones colorblind policies even when the defendant could not achieve its permissible goal without a racial group suffering adverse harm.[378] Knowledge that an adverse impact is likely—or even inevitable—is insufficient. As discussed above, conservative Justices moor this rule to a vision of equality principally concerned with individual-level disparate treatment and largely disinterested in group-level disparate outcomes. These principles, and the doctrinal rules they ground, sit at the heart of intent doctrine—and comprise the target of longstanding criticism from the Left.

For her part, Judge Rushing collapses any meaningful difference between knowledge and intent. As one example, Rushing states that "[t]he foreseeability of the Policy's consequences for Asian students raises a

---

[375] There are compelling reasons to soften the Default Track's intent requirement—e.g., to render antidiscrimination law more attentive to selective indifference to outgroup suffering. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349 (1987). It would be highly concerning, though perhaps predictable, if the Supreme Court jettisoned intent only when litigants challenged policies that countered historical patterns of exclusion. *Cf.* Harris and West-Faulcon, *Reading Ricci*, *supra* note 100 (recounting how the Supreme Court has made it easier for white plaintiffs to bring successful "reverse discrimination" lawsuits).

[376] The illusion of continuity benefits from *SFFA*, in which Justice Roberts adopted a zero-sum framing to suggest that race-based policies that function as a "plus" also function a "negative." As a doctrinal matter, the "negative" concern was relevant because the challenged policy was a racial classification and strict scrutiny applied. *See supra* Part II.C. But stripped from its legal context, Roberts' language offers a veneer of legitimacy and continuity to PLF's current attacks on colorblind remedies.

[377] *Id.*

[378] Again, I mean only to be descriptive. There are many compelling reasons to soften the Default Track's steep intent requirement.

reasonable inference that 'the adverse effects were desired.'"[379] This quote invokes a *Feeney* footnote, only some of which Rushing quotes. The omitted portion concludes:

> When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.[380]

The record and the plaintiff affirm TJ possessed a legitimate desire to remedy a history of racial exclusion by increasing Black and Latine enrollment. On its face and in practice, the challenged policy reflected this desire to diversify TJ along racial and other lines. As noted, conservative and liberal Justices have treated interests in racial diversity and remedying societal inequality as "legitimate"—if not "compelling."[381] When situated within Rushing's zero-sum framing, the impact on Asian American representation "is essentially an unavoidable consequence" of that legitimate goal. Under such circumstances, the "inference simply fails to ripen."

When read in full, the footnote tracks traditional understandings of *Feeney*'s intent requirement and belies the zero-sum framing's legal relevance. To accept Rushing's rationale, the conservative Justices would have to abandon this framework—which multiple of them helped to construct. This presents a multifaceted dynamic. In the right to inequality cases, a conservative Justice's disregard from conservative principles would reveal the limits of those principles. It would also open the door for more rightwing attacks on colorblind remedies. But there is a flipside to this. PLF's theory of harm should—at least in theory—also be available to progressive advocates. This would mean reviving litigation strategies that target any number of colorblind policies that cannot be achieved without adversely impacting an identifiable racial group.

PLF's effort to recast racial diversity as racial discrimination runs into a separate hurdle. PLF recognizes that under governing equal protection doctrine, individual-level disparate treatment remains the principal constitutional concern.[382] PLF does not, however, allege that TJ treated individual students differently because of their respective racial identities. The challenged policy impact groups differently. But to borrow Justice Thomas' parlance, that policy safeguards every applicant's right to

---

[379] Coalition for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 903 (4th Cir. 2023).

[380] Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 n.25 (1979).

[381] *See supra* Part I-II.

[382] *See* Reply to Cert. (arguing that the otherwise permissible desire to increase Black representation "violates the equal protection clause if the means chosen are designed to treat applicants differently based on race").

"compete on equal footing."[383]

When PLF cites an inevitable decline in representation to anchor its theory of discrimination, it is executing a subtle but significant shift. The identified equality concern is no longer individual-level equal treatment—the concern that animates each of the conservative concurrences in *SFFA*. Rather, PLF is offering a theory of equality concerned principally with group-based equal outcomes. This is the precise concern conservative Justices tend to view as constitutionally irrelevant and rightwing thinktanks denigrate as racist.[384]

3. *Antidiscrimination Law's Double-Edged Sword: A Progressive Right to Inequality?*

The foregoing sections should not be read as a defense of equal protection doctrine nor the shallow conceptions of equality that animate it. But it should reveal that PLF's theory of equality departs from conservative jurisprudence in multiple respects. First, it would transform *Feeney*'s intent standard into a knowledge requirement. Second, this doctrinal shift would trade on group-based conceptions of harm.

Even if unintended, it is predictable that a theory of inequality that centers group-based outcomes could open new sites of progressive advocacy. To appreciate this latter dynamic, consider how PLF's theory of discrimination would translate to *Washington v. Davis*, the foundational intent doctrine case that rejected disparate impact as a cognizable constitutional harm.[385]

In *Davis*, a class of Black plaintiffs sued Washington D.C. for using a hiring test that had a racially disparate impact. At least one of D.C.'s goals was to administer that employment test – a facially "legitimate" purpose (just as one of the Board's desires was to increase Black and Latine representation in *TJ*). D.C. could not employ that test without adversely affecting African Americans (just as TJ cannot increase Black and Latine representation without reducing at least one other group's relative representation). Per PLF's theory of harm, the employment test's inevitable disparate impact on Black candidates should constitute unlawful intent (and

---

[383] *See* Northeast Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993).

[384] *See, e.g.*, Christopher Rufo et al., *Abolish DEI Bureaucracies and Restore Colorblind Equality in Public Universities*, Manhattan Institute (Jan. 18, 2023), https://manhattan.institute/article/abolish-dei-bureaucracies-and-restore-colorblind-equality-in-public-universities; Mike Gonzalez, *Pushing "Equity" Under the Guise of "Unity*," The Heritage Foundation (Feb. 17, 2021), https://www.heritage.org/civil-rights/commentary/pushing-equity-under-the-guise-unity.

[385] Washington v. Davis, 426 U.S. 229 (1976). One reader suggested that *Washington v. Davis* is inapposite to *TJ* because it did not involve a racial motive. Factually, this is true. But doctrinally, it should be irrelevant. Both *Davis* and *TJ* involve (a) facially neutral policies and (b) permissible motives. The fact that the permissible motive in *TJ* happens to be racial is a factual distinction without a doctrinal difference. But it is this appearance of difference that creates the illusion that *TJ* deserves the skepticism that attaches to Racial Classification even when all parties agree *Feeney* and *Davis* apply.

thereby satisfy *Feeney* and *Davis*) because the goal cannot be achieved without inflicting the adverse effect. This is a result many progressive advocates would welcome.

But were that true, the *Davis* plaintiffs would have prevailed—and so would have the *Arlington Heights* plaintiffs and *Feeney* plaintiffs; in each instance, the challenged policy furthered a goal that could not be achieved without adversely affecting an identifiable group. The Supreme Court expressly rejected that rationale—in part out of concern that disparate impact theory would destabilize a "whole range of [facially neutral policies] . . . more burdensome to the poor and to the average black than to the more affluent white."[386]

Consider, as well, how PLF's discrimination theory seems to create a new opening to challenge legacy preferences. Like many institutions, Harvard argues that it extends an admissions preference to the children of alumni to further development goals. Legacy preferences are facially neutral and the desire to build a base of connected alumni is a "legitimate" policy. As a result, under prevailing doctrine Harvard's policy is legally sound even though Harvard knows its colorblind legacy preference will have an adverse effect on all groups of color—there is no way around it given Harvard's history of racially exclusive admissions. But under PLF's theory, this would constitute cognizable discrimination under *Feeney* because Harvard cannot do what it wants to do (that is, give legacy preferences) without having an adverse effect on Asian American students.

Before concluding, one final dimension of PLF's diversity-equals-discrimination theory warrants note. PLF and Judge Rushing contend that the disparate impact analysis should employ a before-and-after comparison. This means comparing a group's relative representation before-and-after the challenged policy is implemented. Translated to *TJ,* this comparison invites the conclusion that Asian Americans suffered a cognizable effect because their relative representation declined in the first year of the challenged policy relative to the prior year.[387]

Multiple aspects of PLF's preferred before-and-after comparison are troubling. Here, I am most interested in how this conception of harm would erect a perverted version of disparate impact that inverts the theory's traditional function.

---

[386] *See* Washington v. Davis, 426 U.S. 229, 248 (1976) ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.").

[387] *See* COALITION FOR TJ, Plaintiff - Appellee, v. FAIRFAX COUNTY SCHOOL BOARD, Defendant - Appellant., 2022 WL 2197387 (C.A.4), *20.

First, an acontextual[388] before-and-after comparison transforms permissible motives into impermissible motives by recasting inclusion as exclusion. The dynamic is straightforward. If admissions are zero-sum, increase for one group entails decrease for another. If that decrease constitutes a cognizable impact, the exclusionary status quo is marked as legitimate and the inclusionary countermeasure is marked as illegitimate.

Second, an acontextual before-and-after comparison inverts disparate impact theory's focus of concern.[389] In its traditional form, disparate impact theory views racial disparities with skepticism. Offending institutions must therefore justify policies that produce disparate outcomes.[390] This plaintiff-friendly presumption of illegitimacy contrasts with the Default Track's defendant-friendly presumption of legitimacy.[391] PLF's preferred approach would, in contrast, view with skepticism policies that had any effect on the pre-existing baseline. Beyond flipping disparate impact's traditional concern, this shift would render the Default Track unable to distinguish between inclusionary and exclusionary effects—the key normative consideration that animated cases like *Feeney*.

To concretize the dynamic, consider how a policy designed to reduce the gender disparity in *Feeney* would fare under an acontextual before-and-after approach. In *Feeney*, the challenged policy disparately favored men over women. Under traditional disparate impact theory, that policy would be presumptively unlawful; the state would carry that burden to justify it. But under PLF's approach, the inequality produced by that policy becomes the legally relevant and normatively appropriate baseline.[392] The disparate impact concern arises not from the policy, but from a subsequent that reduces the pre-existing disparity.

This is precisely how PLF seeks to wield disparate impact. Not as a tool to question and contest baseline inequality, but as a sword to discredit equality-oriented interventions. To the extent racial inequality defines the status quo, PLF's before-and-after test sanitizes that inequality as an unobjectionable artifact of life. The disparate impact concern arises only if an entity upsets the status quo by reducing inequality. Translated to *TJ*, the school's pre-2020 admissions policies (that effectively excluded Black and

---

[388] By acontextual, I mean a before-and-after comparison that unmindfully treats the status quo as the legitimate and normatively relevant baseline. *See* Glater, *Reflections on Selectivity*, *supra* note 12. Beyond stamping racial inequality with a badge of legitimacy, this measure of cognizable impact would compromise the legality of integration itself.

[389] *See generally* U.S. DEPT. OF J., CIVIL RIGHTS DIVISION, TITLE VI LEGAL MANUAL; SECTION VII: PROVING DISCRIMINATION – DISPARATE IMPACT 4 (last visited July 19, 2023), https://www.justice.gov/media/1121301/dl?inline.

[390] *See id*.

[391] If anything, this skepticism and burden resembles the Supreme Court's orientation toward racial classifications.

[392] *See* Glater, *Reflections on Selectivity*, *supra* note 12 at 1131 ("Implicit in the complaint's argument is the claim that the *status quo ante* is the relevant and normatively desirable baseline against which all changes to student selection must be measured.").

Latine students, among others) is the improper target of skepticism. Rather, the offending act is the Board's effort to counter those patterns of exclusion. And rather than obligating the Board to justify its pre-existing policy, a right to inequality would obligate the Board to justify even modest countermeasures.[393]

The foregoing reflects how acontextual before-and-after comparisons would hinder many racial justice interventions. But this is another site where it is worth asking how double-edge sword of antidiscrimination law could create unexpected openings for progressive advocacy. On the one hand, American society remains defined by vast racial inequality and stratification. At the same time, many institutions, domains and industries are now far more integrated—along race-gender lines—than they were prior to 20th century Civil Rights Movement. We are also in a moment of acute and organized retrenchment that includes escalating attacks on a range of policies and practices that have created more open and inclusive institutions.

If the Supreme Court adopts an acontextual before-and-after approach, there is no formal doctrinal reason why conservative litigants would have a monopoly on that theory. It should also be available to progressives to challenge, for example, the new breed of anti-DEI ("diversity, equity, and inclusion") laws if the relative representation of students of color drops following such laws. The theory's formal viability does not guarantee that the Supreme Court—or a lower court—will entertain it when coming from the Left, even if the even if they track parallel claims the Right. But as I noted at the outset, my goal is to take the Justices at their word.[394]

To summarize this section, Table 3 incorporates Judge Rushing's treatment of PLF's racial diversity = discrimination theory.

Table 3

	Presumption	**Standard**	**Deference to Defendant**
Facially Neutral ***governs *TJ***	lawful	intent	high
Rushing Opinion	unclear	knowledge OR	low

[393] PLF urged as much in the Boston Exam School litigation. *See* Appellant's Opening Brief at 35-36, Bos. Parent Coalition for Acad. Excellence Corp. v. Sch. Comm. of Bos., No. 21-1303 (1st Cir. June 14, 2022), 2022 WL 2237632 ("Permitting the School Committee to avoid strict scrutiny simply because the racial composition of admitted students mirrors that of the applicant pool would eviscerate this principle and create a substantial exception to the *Arlington Heights* framework.").

[394] Alternatively, one might say that this dynamic reflects the co-constitutive relationship between doctrine and politics.

		strict scrutiny	
Racial Classification	unlawful	strict scrutiny	low

CONCLUSION

After *SFFA,* universities across the country turned to "race neutral alternatives" to promote equality-oriented goals like racial diversity, inclusion and integration. These efforts range from eliminating course requirements, reducing reliance on standard measures of merit, and a burgeoning movement to eliminate legacy preferences.[395] If the Supreme Court enshrines a right to inequality, all such efforts would be suspect. The upshot should be deeply troubling. By denying any distinction between inclusion and exclusion, the Supreme Court would pit the Equal Protection Clause against equality itself.

The mere prospect of this future should concern all stakeholders committed to multiracial democracy. Many might nonetheless read *SFFA* as a prelude to this equal protection dystopia. Those predictions might be correct. But as I have detailed herein, it is premature to declare the end of equality. Two important and underappreciated dynamics complicate the right to inequality cases—dynamics that did not follow traditional affirmative action challenges like *SFFA*.

First, the same conservative caselaw that renders affirmative action presumptively suspect should shield colorblind remedies from legal attacks. This includes the formalistic conception of colorblindness that pervades equal protection doctrine. To rule for PLF, the conservative Justices would have to abandon the constitutional regime they helped construct—and the principles they espoused as recently as *SFFA*.

PLF and its rightwing allies also face a separate hurdle that affirmative action plaintiffs have never faced. Were the Supreme Court to enshrine a right to inequality, the maneuvering required would do more than destabilize equality-oriented policies. It would also rekindle disparate impact theory—and thereby threaten a range of colorblind policies conservative Justices have long shielded from legal scrutiny. This is simply to observe that antidiscrimination law is a double-edged sword. It might not be PLF's intent, but swing hard enough to the right and one might open new sites of resistance for the left.

---

[395] As one example of the latter, the non-profit organization Class Action has been spearheading efforts to ban legacy preferences in admissions across the country. *See* Ending Legacy Admissions, Class Action, https://www.joinclassaction.us/endlegacy (last visited July 16, 2024).