Winter 2024

Students for Fair Admissions Sends Us Bakke to the Drawing Board for Race- Conscious Affiffirmative Action in Higher Education

Monica Teixeira de Sousa

Roger Williams University Law Review

Volume 29
Issue 2 *Vol. 29, No. 2: Winter 2024*

Article 5

Winter 2024

Students for Fair Admissions Sends Us Bakke to the Drawing Board for Race- Conscious Affirmative Action in Higher Education

Monica Teixeira de Sousa
Roger Williams University School of Law

Students for Fair Admissions Sends Us *Bakke* to the Drawing Board for Race-Conscious Affirmative Action in Higher Education

Monica Teixeira de Sousa*

INTRODUCTION

In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*[1] (*SFFA v. Harvard*), the Roberts Court rejected long-standing legal precedents that previously recognized student body diversity as a compelling state interest. This marks a dramatic retreat from the Supreme Court's earlier endorsement of race-conscious affirmative action in higher education. With its full embrace of color-blind constitutionalism[2] and repeated invocations

* Professor of Law at Roger Williams University School of Law. I wish to thank the entire editorial board of the RWU Law Review and my research assistant, Pia Piscitelli, who patiently and competently assisted me with this project. I am always and especially grateful to Patrick, Henry, and Freddie for their love and support.

1. 143 S. Ct. 2141 (2023).

2. Neil Gotanda in his foundational article writes that "[a]dvocates of the color-blind model argue that nonrecognition by government is a decision-making technique that is clearly superior to any race-conscious process" because it "facilitates meritocratic decisionmaking by preventing the corrupting consideration of race." Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 16, 17 (1991). In the context of affirmative action then, color-blind constitutionalism prohibits "[c]onsideration of past segregation… indeed, any consideration of this country's history of oppression at all…" *Id.* at 42. Professor Mari Matsuda provides a succinct explanation of the Court's color-blind constitutionalism as a view that "[i]t is racist to see race." Mari J. Matsuda, *Only We Can Free Ourselves*, 18 ASIAN PAC. AM. L.J. 5, 11 (2013). Professor Matsuda powerfully describes the perspective of those espousing color-blind constitutionalism: "[w]e won't notice any of the dehumanizing culture, violent repression, historical disenfranchisement that surrounds your

of Justice Harlan's lone dissent in *Plessy v. Ferguson*[3], the Chief Justice's prosaic statement that "[e]liminating racial discrimination means eliminating all of it"[4] evokes questions about the viability of existing efforts to increase racial diversity across colleges and universities or, more precisely, efforts to ensure meaningful representation from historically subordinated racial groups. Adopting a posture both dismissive of the specific concerns of the Asian American students on whose behalf *SFFA v. Harvard* was ostensibly brought and the centuries of racial exclusion and discrimination directed especially against Black and Indigenous Americans,[5] the Chief Justice's opinion highlights the growing rift between those who would forget our Nation's history, discounting the experiences of racially minoritized communities and those who would accept the

race, or your gender, or your sexuality, because equality is about not seeing differences, and liberty is about government retreat." *Id.*

3. 163 U.S. 537 (1896).

4. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2161. In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person . . . the equal protection of the laws." *Id.* at 2159 (quoting U.S. CONST. amend. XIV, § 1). In his concurrence, Justice Thomas stated: "In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves." *Id*. at 2176 (Thomas, J., concurring). "It is this principle that the Framers of the Fourteenth Amendment adopted in the wake of the Civil War to fulfill the promise of equality under the law." *Id.* at 2203. Thomas continued: "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." *Id.* at 2206. "The Civil Rights Act of 1875 sought to counteract the systems of racial segregation that had arisen in the wake of the Reconstruction era." *Id.* at 2183. Justice Kavanaugh concurring: "Ratified in 1868 in the wake of the Civil War, the Equal Protection Clause of the Fourteenth Amendment provides: 'No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.'" *Id.* at 2221 (Kavanaugh, J., concurring) (quoting U.S. CONST. amend. XIV, §1). Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting: "Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War." *Id.* at 2228 (Sotomayor, J., joined by Kagan & Jackson, J J., dissenting).

5. This Article makes a conscious choice to capitalize Black, Brown, Indigenous, White, Latina, and other racial and ethnic descriptors. The reader may consult the following resource for additional information: Kristen Mack & John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MACARTHUR FOUND. (Aug. 26, 2020), https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity [https://perma.cc/EW6U-WV78].

past's centrality to building a more equitable and inclusive future. In a faint silver lining, the majority's opinion forces the dissenters on the Court and those of us dissenting in the larger society to provide a rich counter-narrative in which centuries of racial oppression are not relegated to a few short paragraphs. The robust historical record can provide a springboard for a long overdue reorientation of the ongoing struggle for racial equality—one in which race-conscious affirmative action is returned to its original purpose of redressing past racial harms.

In a decision that will define the Roberts Court as much as *Brown v. Board of Education*[6] became synonymous with the Warren Court, the Chief Justice's longstanding opposition to race-consciousness finds its moment.[7] For Chief Justice Roberts, who in 2007 had written that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[8] the Court's decision in *SFFA v. Harvard* represents the vindication of his long-held commitment to an ahistorical, color-blind interpretation of the United States Constitution.[9] But now, five of his colleagues—

6. 347 U.S. 483 (1954).

7. Professor Randall Kennedy described Chief Justice Roberts as a color-blindness "immediatist," rather than one disposed to gradually decreasing the use of race in decision-making, pointing to Roberts' decision in 2007 "to strike down [as unconstitutional] a racially selected student assignment plan instituted to retain racial balance." Randall Kennedy, *The Robert L. Levine Distinguished Lecture Series: Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 2 (2013) (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)). Professor Kennedy also analogized the Chief Justice's position to that of another colorblindness immediatist, William Van Allstyne, providing one of his quotes as an example: "[O]ne gets beyond racism by getting beyond it *now*: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practice of one's government—the differential treatment of other human beings by race." *Id.* at 2 (alteration in original) (emphasis added to "now") (quoting William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979)).

8. *Parents Involved in Cmty. Schs.*, 551 U.S. at 748.

9. In a 2016 concurring opinion defending the Court's color-blind approach against Justice Sotomayor's critical dissenting opinion, Chief Justice Roberts wrote that "it is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt [described in Justice Sotomayor's dissent as the thought that 'I do not belong here'], and—if so—that the preferences do more harm than good." Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291, 315 (2014) (Roberts, C.J., concurring).

Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett—agreed with him that race-conscious admissions practices by colleges and universities are unconstitutional violations of the Equal Protection Clause. In their view, these practices lack precise and measurable objectives, use race in a negative manner to evaluate certain applicants, rely on racial stereotyping to assess others, and lack a meaningful termination date.

The majority's rupture from long-standing precedent that had elevated student body diversity to a compelling state interest[10] exposed the Court's profound shift on affirmative action since deciding *Regents of the University of California v. Bakke* more than four decades ago.[11] Beyond upending long overdue efforts to increase racial diversity in higher education, the *SFFA v. Harvard* ruling showcases a Supreme Court that is fundamentally opposed to *any* consideration of race. The practical impact of the decision is to restrict opportunities only recently unlocked by affirmative action for groups that were historically excluded and remain persistently underrepresented in higher education. However, this Court's rejection of student body diversity (as a distinct aim for colleges and universities) may provide an opening to refocus affirmative action efforts toward their original purpose: to repair past harms.[12] The dissenting opinions provide a deeper examination of the Reconstruction Amendments' history and intent. As Justice Thurgood Marshall originally recognized, "[i]t is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America."[13]

10. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–15 (1978) (Marshall, J., concurring in part and dissenting in part).

11. *See generally id.*

12. *See id.* at 362–69 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

13. *Id.* at 401 (Marshall, J., separate opinion); *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2262–63 (2023) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (quoting *Bakke*, 438 U.S. at 401 (Marshall, J., concurring in part and dissenting in part)).

I. ANALYSIS

The Justices' disagreement about history and its ongoing impact may actually provide a way forward; here, we find a possible blueprint for reframing the civil rights community's litigation strategy. At its core, the historical disagreement at the heart of this case centers on whether the Framers intended for the Fourteenth Amendment to have a race-conscious remedial role or whether their intent was to be race-neutral and color-blind.[14] The distinction among the Justices' competing views of history provides a fascinating starting point; unlike the Chief Justice's focus on the Civil War and Reconstruction, Justices Sotomayor and Jackson provide, in their respective dissents, a complete account of our Nation's laws in relation to Black Americans by refusing to erase the "[m]ore than two centuries after the first African enslaved persons were forcibly brought to our shores."[15] For Justice Jackson, the constitutional analysis remains incomplete without taking stock of the full context in which the Fourteenth Amendment was proposed by Congress.[16] Justice Sotomayor also begins by recognizing that, at its founding, "American society was structured around the profitable institution that was slavery, which the original Constitution protected."[17]

In sharp contrast, the Chief Justice studiously avoids discussing our Nation's full history and instead encapsulates three centuries of history in four short paragraphs before arriving at the Supreme Court's 1954 decision in *Brown v. Board of Education*.[18] In his recitation, we read a highly edited and self-congratulatory account of the Supreme Court's role in desegregation; the Chief Justice takes care to explain "*we* overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government."[19] The Court's stalling and then immediate backtracking on progress made to desegregate our Nation's public schools is omitted from this version of events,

14. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2147 (majority opinion).

15. *Id.* at 2226 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting); *see id.* at 2264–65 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting).

16. *Id.* at 2264–65 (Jackson, J., dissenting).

17. *Id.* at 2226 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

18. *Id.* at 2159–60 (majority opinion).

19. *Id.* at 2160 (emphasis added to "we").

however.[20] Justices Sotomayor and Jackson highlight the Court's complicity in helping to create and perpetuate "the problem of the color-line,"[21] as reflected in the voluminous data they present on current racial disparities in "the health, wealth, and well-being of American citizens."[22] Despite this, the Chief Justice dismisses these past and present-day realities by commenting "[t]he time for making distinctions based on race had passed."[23] If only that was true in all facets of life, the staggering racial disparities that permeate every facet of American society would no longer persist.

Ultimately, the Chief Justice exposes his cabined understanding of history in relation to the role that a white supremacist legal system has played in subordinating and elevating various groups of Americans solely because of race, and more specifically, their proximity to *whiteness*. When Chief Justice Roberts cites congressional testimony on the Fourteenth Amendment, he handpicks statements that make no reference to the anti-Black reality of the violence, discrimination, exclusion, or subordination the Amendment was designed to remedy; instead, his ahistorical retelling might lead the uninformed reader to believe that the Founders had gathered with nothing in mind other than to draft a few helpful precepts for governance. Only by taking the affirmative step to excise all mention of the on-the-ground terror experienced daily by Black citizens at the Nation's Second Founding can Chief Justice Roberts point to Congress' intent that the Constitution "should not permit any distinctions of law based on race or color" and conclude its intent was to curb racial discrimination directed at Whites as well as Blacks.[24] But, as pointed out in the dissenting opinions, this was not the aim of the Amendment, and our Founders were not

20. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 753 (1974) (noting that a remedy to eliminate segregation in Detroit public schools was "delayed since 1970").

21. W. E. B. DU BOIS, THE SOULS OF BLACK FOLK: ESSAYS AND SKETCHES, at v (Univ. of Mass. Press 2018) (1903).

22. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2263 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting); *see id.* at 2234–37 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

23. *Id.* at 2160 (majority opinion).

24. *Id.* at 2159 (quoting Supplemental Brief for United States on Reargument at 41, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1, 2, 4, 8, 10)).

gathered to respond to acts of racial violence, legal exclusion, and discrimination directed at the White citizens of this country.[25]

With a lengthy and detailed decision featuring three concurring opinions written by Justices Thomas, Gorsuch, and Kavanaugh, respectively, and two separate dissents, one by Justice Sotomayor and the other by Justice Jackson, *SFFA v. Harvard* offers keen insight into how the Justices' interpretations of law and American history vary significantly.[26] In our current moment in which parents' groups and elected officials are fighting over what version of American history should be taught in our schools, this case highlights the importance of historical accuracy. It cements the obvious: A frank account of our Nation's history must be featured prominently in required curricula throughout the land. Perhaps, then, more people might recognize the truth of Justice Jackson's words in her illuminating dissent: "[o]ur country has never been colorblind[,]" and "to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented 'intergenerational transmission of inequality' that still plagues our citizenry."[27] Despite the Court's clear reluctance to address or recognize systemic racism, its ruling may have the unintended effect of refocusing the civil rights community's efforts on affirmative action as a reparative tool. The rejection of student body diversity as a compelling interest creates space to reconsider the original purpose of affirmative action: taking the "necessary [steps] to remedy the effects of past discrimination."[28] Alternatively, if race-conscious affirmative action "programs like [University North Carolina's] [and Harvard's] carry with them the seeds of their own

25. *Id.* at 2227–28 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

26. *See generally id.*

27. *Id.* at 2264 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting) (quoting MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 128 (1997)). Compare Justice Jackson's statements with Chief Justice Roberts' false sense of accomplishment: "[t]he culmination of this approach came finally in *Brown v. Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all de jure racial discrimination by the States and Federal Government." *Id.* at 2160 (majority opinion).

28. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 363 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

destruction,"[29] Justice Jackson is correct that the Court's ruling in *SFFA v. Harvard* "will undoubtedly extend the duration of our country's need for such race consciousness, because the justification for admissions programs that account for race is inseparable from the race-linked disparities in health, wealth, and well-being that still exist in our society (the closure of which today's decision will forestall)."[30]

The familiar premise that the consideration of race—unlike other factors that might be used to favor one college applicant over another—triggers "a daunting two-step examination known . . . as 'strict scrutiny'" under the Equal Protection Clause was central to the Court's constitutional analysis.[31] A long line of constitutional case law affirms "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[32] The Chief Justice explains that the standard of strict scrutiny asks "first, whether the racial classification is used to 'further compelling governmental interests,'" and "[s]econd, if so, . . . whether the government's use of race is 'narrowly tailored'—meaning 'necessary'—to achieve that interest."[33] Yet, the Chief Justice devotes only one footnote to a discussion of the Title VI legal theory used in the separate legal challenge brought against the private Harvard College, a non-state actor for purposes of the Fourteenth Amendment.[34] Instead, Chief Justice Roberts points to the Court's earlier explanation in *Gratz v. Bollinger* that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also

29. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2275 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting).

30. *Id.* at 2274.

31. *Id.* at 2162 (majority opinion).

32. *See, e.g.*, *Bakke*, 438 U.S. at 291 (plurality opinion).

33. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2162 (first quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003); and then quoting Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 311–12 (2013)).

34. "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI." Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) (O'Connor, J., concurring). "Although Justice Gorsuch questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself." *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2156 n.2.

constitutes a violation of Title VI."[35] As such, the Court's consolidated analysis of both the Harvard and UNC cases involves only consideration of whether the admissions practices utilized violate the Equal Protection Clause.[36]

A. *The Court Determines the Attainment of Student Body Diversity Is Not a Compelling State Interest Because It Requires Admissions Officers To Use Race as a Negative Factor for Some Applicants*

In deciding that "obtaining the educational benefits that flow from a racially diverse student body"[37] is not a "compelling state interest that can justify the use of race in university admissions[,]"[38] the Chief Justice relies on several factors. First, the majority opinion concludes the weighing of race as a plus factor for some candidates necessarily means it is being used as a negative factor for other applicants in the zero-sum world of admissions at selective colleges and universities.[39] The Chief Justice articulates that the result of the race-conscious admissions systems greenlit by *Bakke* many decades ago has been "to discriminate against those racial groups that were not the beneficiaries of the race-based preference."[40] Citing *Grutter*, the majority opinion explains that the consideration of race by UNC and Harvard has unconstitutionally and "unduly harm[ed] nonminority applicants."[41]

Using only the First Circuit's opinion as support, the Chief Justice points to data that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted.[42] The dissent raises questions about the validity of the Court's reliance on this one data point, adding that this metric was provided

35. *Id.*
36. *Id.* at 2156–57.
37. *Id.* at 2163.
38. *Id.* at 2164.
39. *Id.* at 2169 ("College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.").
40. *Id.* at 2165 (emphasis omitted).
41. *Id.* at 2165 (alteration in original) (quoting Grutter v. Bollinger, 539 U.S. 306, 341 (2003)).
42. *See id.* at 2168 (citing Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard II*), 980 F.3d 157, 191 n.29 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

by "the United States, at the time represented by a different administration, argu[ing] that 'absent the consideration of race, [Asian American] representation would increase from 24% to 27%,' an 11% increase."[43] The majority opinion also relies on the lower District Court's opinion for the proposition that the admissions policy employed by Harvard resulted in "fewer . . . white students being admitted."[44] The dissenting Justices point to the weakness of this evidence, and Justice Sotomayor explains the majority's position that already overrepresented groups are harmed by selective colleges' use of race is a "myth."[45]

The majority's consideration of the race-conscious admissions process utilized by UNC and Harvard also elicits a great deal of criticism from Justice Sotomayor in her dissent that was joined by Justices Kagan and Jackson. The subtext of Justice Sotomayor's critique is that of Derrick Bell's interest convergence theory.[46] Justice Sotomayor points out that the Chief Justice has shifted the baseline back to its default favoring White Americans. Derrick Bell, considered the father of Critical Race Theory,[47] predicted such an outcome decades ago, writing: "[e]ven when interest convergence results in a potentially effective racial remedy, that remedy will be abrogated as soon as it threatens the superior societal status of whites, particularly those in the middle and upper classes."[48] The

43. *Id.* at 2243 n.28 (second alteration in original) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (quoting *Harvard II*, 980 F.3d at 191 n.29).

44. *Id.* at 2167–69 (majority opinion) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard I*), 397 F. Supp. 3d 126, 178 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

45. *Id.* at 2250 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

46. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980) [hereinafter *Interest-Convergence Dilemma*]; *see also* Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.U. REV. 1053, 1058 (2005) [hereinafter *Unintended Lessons*] ("[T]he interest of [B]lacks in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of blacks converges with the political and economic interests of [W]hites.").

47. Alexis Hoag, *Derrick Bell's Interest Convergence and the Permanence of Racism: A Reflection on Resistance*, HARV. L. REV.: BLOG (Aug. 24, 2020), https://harvardlawreview.org/blog/2020/08/derrick-bells-interest-convergence-and-the-permanence-of-racism-a-reflection-on-resistance/ [https://perma.cc/8L3H-K75M].

48. Bell, *Unintended Lessons*, *supra* note 46, at 1059.

data surrounding admissions at selective colleges and universities such as Harvard and UNC emphasizes the elite socioeconomic status and the predominantly White composition of the applicant and admitted student pools.[49] Justice Sotomayor's dissent includes data on UNC's student body, highlighting that "approximately 72% of UNC students identify as [W]hite, while only 8% identify as Black."[50] The disparity is made starker in a state where "Black North Carolinians . . . make up 22% of the population."[51]

Justice Sotomayor's dissent as well as Justice Jackson's—which was focused exclusively on UNC—picked up on the dissonance between the Chief Justice's concern over "unduly harm[ed] nonminority applicants"[52] and the demographic reality of these elite schools' student bodies, even with race-conscious admissions policies in place:

> Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit."[53]

The Chief Justice asks "[h]ow 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?"[54] Justice Sotomayor and Justice Jackson's separate dissents, explaining that the "otherwise" in the Chief Justice's understanding reflects only the baseline developed through centuries of Equal Protection Clause violations directed at Black Americans,

---

49. *See Students for Fair Admissions, Inc.*, 143 S. Ct. at 2236 (Sotomayor, J., dissenting).

50. *Id.* at 2237.

51. *Id.*

52. *Id.* at 2165 (majority opinion) (alteration in original) (quoting Grutter v. Bollinger, 539 U.S. 306, 341 (2003)).

53. *Id.* at 2250 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (alteration in original) (quoting *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2175 (majority opinion)).

54. *Id.* at 2169 (majority opinion).

are not persuasive to the majority. The reasoning employed by the majority does not acknowledge that a return to a pre-*Bakke* admissions process—one that is facially neutral with respect to race—will operate in a manner that burdens young Black people with the effects of a history equally not of their making. Justice Sotomayor's dissent highlights that "eliminating the use of race in admissions 'would reduce African American representation . . . from 14% to 6% and Hispanic representation from 14% to 9%.'"[55] Yet, the Chief Justice describes any result that might force young White students to shoulder comparable burdens as "repugnant."[56] While Justice Thomas writes in his concurring opinion that "[t]wo discriminatory wrongs cannot make a right,"[57] the dissenting Justices question whether it is right to license a continuing wrong impacting "minority applicants."[58]

Justice Gorsuch's concurring opinion, most notable in its frank discussion of current elite school's admissions practices on poor students,[59] nonetheless writes that "[f]or many students, an acceptance letter from Harvard or the [UNC] is a ticket to a brighter future."[60] But it is difficult to reconcile this concern with the data showing that "[i]n the Ivy League, children whose parents are in the top [one] percent of the income distribution are [seventy-seven] times as likely to attend as those whose parents are in the bottom [twenty] percent of the income bracket."[61] One might ask how much brighter these students' futures could possibly become if they are *entering* college as a member of the top one percent of the income distribution; a concern for the upward mobility of this demographic appears absurd.

---

55. *Id.* at 2243 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (quoting *Harvard II*, 980 F.3d at 180, 191).

56. *Id.* at 2250.

57. *Id.* at 2176 (Thomas, J., concurring).

58. *See id.* at 2225–79 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting; Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting).

59. *Id.* at 2214 (Gorsuch, J., joined by Thomas, J., concurring) ("While Harvard professes interest in socioeconomic diversity, for example, SFFA points to trial testimony that there are '23 times as many rich kids on campus as poor kids.'").

60. *Id.* at 2208.

61. *Id.* at 2214 n.3 (quoting Emily Bazelon, *Why Is Affirmative Action in Peril? One Man's Decision.*, N.Y. TIMES MAG., Feb. 15, 2023, at 41).

Justice Jackson's analysis also engages with this question and provides a historical analogue in which to consider the majority's narrow concern over "nonminority applicants," pointing out that legislative efforts to vindicate the rights of the formerly enslaved made White Americans feel "slighted[,]" and "when the Reconstruction Congress passed a bill to secure all citizens 'the same [civil] right[s]' as 'enjoyed by white citizens,' . . . President Andrew Johnson vetoed it because it 'discriminat[ed] . . . in favor of the negro.'"[62] In highlighting this history, the majority's concerns are cast in a similar, and unfavorable, light.

B. *The Court Determines Admissions Officers' Consideration of Race Rests on Unconstitutionally Impermissible Racial Stereotypes*

The majority's second point is that the attainment of student body diversity is not a constitutionally permissible compelling state interest because it is predicated on admissions officers' attribution of a unique perspective otherwise lacking in the academic community to members of certain racial groups. In the Chief Justice's view, this attribution is based on "illegitimate . . . stereotyp[ing]" under our constitutional law.[63] Per the majority's opinion, the understanding that "a [B]lack student can usually bring something that a [W]hite person cannot offer" is unconstitutional stereotyping.[64] Framed in that light, the admissions systems in place at Harvard and UNC are thus unconstitutional because they bestow "preferences on the basis of race alone."[65] Justice Sotomayor disputes the Chief Justice's characterization of the admissions processes in place at UNC and Harvard and writes that there is no

62. *Id.* at 2265 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting) ("Even after this Second Founding—when the need to right historical wrongs should have been clear beyond cavil—opponents insisted that vindicating equality in this manner slighted White Americans. So, when the Reconstruction Congress passed a bill to secure all citizens 'the same [civil] right[s]' as 'enjoyed by white citizens,' President Andrew Johnson vetoed it because it 'discriminat[ed] . . . in favor of the negro.'" (alterations in original) (citation omitted)).

63. *Id.* at 2165 (majority opinion) (alteration in original) (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

64. *Id.* at 2170 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978)); *see also id.* ("UNC is much the same. It argues that race in itself 'says [something] about who you are.'").

65. *Id.* at 2169–70.

evidence in the record to suggest that any student has ever been selected "on the basis of race alone."[66]

Missing from the Court's analysis is a discussion of how the construct of race operates in society. The Chief Justice distinguishes "skin color" from being "from a city or from a suburb," or "play[ing] the violin poorly or well," saying the former is unconstitutional under the Equal Protection Clause but the latter is not.[67] The dissenters point out that UNC and Harvard aren't selecting applicants because of "skin color," but rather how an applicant's race as society constructs it has shaped their life experiences. In the Court's decision, "race is treated as an otherwise irrelevant biological fact or physical attribute—no different than eye color, handedness, or mayonnaise preference."[68]

Justice Sotomayor critiques the majority's inability to grasp the myriad ways race impacts the life experiences of applicants. The Court's course reflects its inability to recognize that racial identity informs some students' viewpoints and experiences in unique ways. "The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a 'stereotype.'"[69] It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters. It is here that the Chief Justice draws the most criticism from his dissenting colleagues, who accuse the Court of "not acting as a court of law applying precedent but taking on the role of college administrators to decide what is better for society."[70] In fact, the Chief Justice's dissenting colleagues were accurate in their description: Colleges and universities have already modified their applications and essay prompts to reflect the Court's opinion. Sarah Lawrence College has even "incorporate[d]

66. *Id.* at 2251 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting)*; see also id*. at 2252 ("After extensive discovery and two lengthy trials, neither SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of 'race alone.'").

67. *Id.* at 2170 (majority opinion).

68. Jonathan P. Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949, 1958 (2022).

69. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2252. (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (quoting *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2169–70 (majority opinion)).

70. *Id.* at 2252.

a quote from the official summary of Chief Justice John G. Roberts's majority decision in its prompt."[71]

Justice Sotomayor highlights personal narratives shared by students of color who testified at trial. One young person "testified that it was 'really important' that UNC see who she is 'holistically and how the color of [her] skin and the texture of [her] hair impacted [her] upbringing.'"[72] Another student "emphasized that '[t]o try to not see [her] race is to try to not see [her] simply because there is no part of [her] experience, no part of [her] journey, [or] no part of [her] life that has been untouched by [her] race.'"[73] One student "who identifie[d] as Mexican-American of Cora descent[] testified that her ethnoracial identity is a 'core piece' of who she is and has impacted 'every experience' she has had, such that she could not explain her 'potential contributions to Harvard without any reference' to it."[74] And yet another student testified that "running down the neighborhood . . . people don't see [him] as someone that is relatively affluent; they see [him] as a [B]lack man."[75]

Importantly, and contrary to the majority's portrayal of the admissions process as one that erases the unique experiences and diversity within the community of Asian American students, Justice Sotomayor's dissent provides multiple examples that point in the other direction. One "Harvard alumna who identifies as Chinese American, explained that being the child of Chinese immigrants was 'really fundamental to explaining who' she is," while another Harvard alumnus "testified that his Vietnamese identity was 'such a big part' of himself that he needed to discuss it in his application."[76] In addition, Justice Sotomayor highlights in her dissent that the admissions offices' consideration of race may tip the scales in favor of any applicant, including in favor of an applicant who is Asian American.[77] Offering additional support, Justice Jackson

71. Anemona Hartocollis & Colbi Edmonds, *Colleges Want To Know More About You and Your 'Identity'*, N.Y. TIMES, https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html [https://perma.cc/D9RJ-WF86] (Aug. 18, 2023).

72. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2251 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (alterations in original).

73. *Id.* (alterations in original).

74. *Id.*

75. *Id.* at 2252 (alterations in original).

76. *Id.*

77. *Id.* at 2258.

highlighted testimony provided by Stephen Farmer, the head of UNC's Office of Undergraduate Admissions, who explained for one "North Carolinian applicant, originally from Vietnam, who identified as 'Asian and Montagnard[,]'… it was part of [the admissions office's] understanding of her, and it played a role in [their] deciding to admit her."[78] Indeed, "UNC's admissions-policy document" stated that "the race or ethnicity of *any* student may—or may not—receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application."[79]

In sharp contrast, the Chief Justice's opinion largely ignores the specific concerns of the Asian American students on whose behalf this case was brought.[80] He could easily have been writing in response to SFFA founder Edward Blum's earlier challenge against the University of Texas on behalf of a white plaintiff.[81] For instance, SFFA's introduction at the district court providing "examples of admissions officers referring to Asian American applicants as 'quiet,' 'hard work[ing],' 'bright,' but 'bland,' 'flat,' or 'not exciting,'" was never addressed in Chief Justice Roberts' opinion.[82] Similarly, the District Court's finding that "Harvard admissions officers assign Asian American applicants personal ratings that are, on

78. *Id.* at 2272 n.83 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting).

79. *Id.* at 2272.

80. It is important to note that a majority of Asian Americans support affirmative action. JANELLE WONG, ASIAN AMERICANS AND THE ANTI-RACIST EQUITY AGENDA 9–10 (2022), https://www.epi.org/publication/asian-americans-and-the-anti-racist-equity-agenda-contradictions-and-common-ground/ [https://perma.cc/3QRY-GP5K].

81. "Petitioner, who is Caucasian, sued the University after her application was rejected. She contend[ed] that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment." Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 301–02 (2013). "[O]n behalf of SFFA, [Professor Arcidiacono] argues that the lower average overall and personal ratings for Asian American applicants who have similar levels of academic strength to non-Asian American applicants suggest that Harvard is engaged in a discriminatory admissions process." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard I*), 397 F. Supp. 3d 126, 163 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (*Harvard II*) (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023).

82. *Harvard I*, 397 F. Supp. 3d at 156. There is so much the Chief Justice could have written to highlight the racist tropes deployed against Asian Americans such as the "model minority myth" as well as the way this myth is used to perpetuate negative stereotypes about Black and Latinx students, but the Court made no mention of these facts. *See* WONG, *supra* note 76, at 4.

average, slightly weaker than those assigned to applicants from other racial groups" also failed to be featured prominently in the majority opinion in *SFFA v. Harvard*.[83]

In the District Court's decision, a much greater level of sensitivity was shown by the court, although it unfortunately also relied on stereotypes to describe Asian American students:

> It is true that Asian American applicants continue to face both positive and negative stereotypes, such as perceptions that they are timid, hard-working, and are inclined towards medicine and science. It is also true that Asian Americans have significantly higher median incomes (perhaps indicative of the strong work ethic in many Asian American communities) and are more likely to hold science, technology, engineering, and mathematics occupations than the United States population more broadly. Therefore, in reviewing applicant files and comments made by admissions officers, the Court is sensitive to the challenge of differentiating among discriminatory comments that evidence actual stereotyping, animus, or racism and comments about a particular applicant that may incidentally reference a stereotypical characteristic, like "hard working," but which may also reflect an actual strength or weakness of that particular applicant.[84]

---

83. *Harvard I*, 397 F. Supp. 3d at 162. "Admissions officers generally assess an applicant based on the applicant's admissions essays, teacher and guidance counselor recommendations, accomplishments, and alumni interview report, but almost any information in a student's application can factor into the personal rating." *Harvard II*, 980 F.3d at 168. The full picture painted in the District Court's findings was that "[a]mong Expanded Dataset applicants, 22.6% of [W]hite applicants receive a personal rating of 1 or 2, compared to 18% of Asian Americans, 19.4% of African Americans, and 19.1% of Hispanics." *Harvard I*, 397 F. Supp. 3d at 162; *see also Harvard II*, 980 F.3d at 181 ("The district court first made factual findings related to the descriptive statistics. It found that Asian Americans were admitted to Harvard at a lower rate (between 5% and 6%) than white applicants (between 7% and 8%) to the classes of 2014 through 2017. It found that Asian Americans tended to score better on Harvard's academic and extracurricular ratings than white applicants but had worse personal ratings than non-Asian American applicants." (citation omitted)).

84. *Harvard I*, 397 F. Supp. 3d at 156–57 (citations omitted). The court falls into the trap of using stereotypes to compliment Asian Americans by saying their success may be "perhaps indicative of the strong work ethic in many Asian American communities." *Id.* at 156; *see* WONG, *supra* note 80, at 4.

The majority opinion's omission of the Asian American students' perspectives and particularized complaints mirrors the Chief Justice's amnesiac retelling of our Nation's history discounting centuries of discriminatory laws and injustices.[85] Ultimately, important distinctions and nuances are absent in the majority's portrayal of the big picture in which admissions officers were making limited use of race. The dissent places the spotlight on this larger context by pointing to Harvard's practice of awarding "points to applicants who qualify as 'ALDC,' meaning 'athletes, legacy applicants, applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff.'"[86] In other words, for all the discussion in the lower courts about whether Asian American students were somehow discriminated against, the way in which White students are routinely advantaged by existing admissions practices was dismissed. The data included in Justice Sotomayor's dissenting opinion regarding ALDC applicants emphasizes this color blind spot on the part of the Court:

> ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are Black, and 12.6% are Latino. Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged

85. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2159–63.

86. *Id*. at 2249 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (alteration in original) (quoting *Harvard II*, 980 F.3d at 171).

> racial group is "disadvantaged" because of a limited use of race is a myth.[87]

Justice Jackson sums up the disconnect between the present reality facing historically excluded racial groups and the Court's concerns, writing that, "[g]iven the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented 'intergenerational transmission of inequality' that still plagues our citizenry."[88] Justice Sotomayor makes a similar point in her dissenting opinion, writing that "[i]n a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC."[89]

C. *The Court Points to Student Body Diversity as "Too Imprecise" To Rise to the Level of a Compelling Interest*

Third, the Chief Justice articulates that student body diversity is too much of an "imponderable" to warrant rising to the level of a compelling interest; it is too imprecise to be accurately measured by the courts, and the desired aim of racial diversity does not match the means used by Harvard and UNC to identify student applicants' races. In this portion of the opinion, the Court cites to the 2016 *Fisher v. University of Texas at Austin (Fisher II)*[90] precedent as requiring universities to "operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny."[91]

The first deficiency identified by Chief Justice Roberts is that these interests "cannot be subjected to meaningful judicial review."[92] First, with respect to the interests identified by Harvard—

87. *Id.* at 2249–50.

88. *Id.* at 2264 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting) (quoting OLIVER & SHAPIRO, *supra* note 27, at 128).

89. *Id.* at 2250 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

90. 579 U.S. 365 (2016).

91. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2166 (majority opinion) (alteration in original) (quoting *Fisher II*, 579 U.S. at 381).

92. *Id.*

such as "'training future leaders in the public and private sectors';" "preparing graduates to 'adapt to an increasingly pluralistic society';" "'better educating its students through diversity';" and "producing new knowledge stemming from diverse outlooks"[93]—the Chief Justice concludes these interests "cannot be subjected to meaningful judicial review." As an example, the Chief Justice asks, "[h]ow is a court to know whether leaders have been adequately 'train[ed]'"?[94] Similarly, the interests put forth by UNC of "promoting the robust exchange of ideas;" "broadening and refining understanding;" "fostering innovation and problem-solving;" "preparing engaged and productive citizens and leaders;" and "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes"[95] are characterized as "not sufficiently coherent for purposes of strict scrutiny."[96] The majority opinion questions not only whether "these goals could somehow be measured,"[97] but also how a court could "know when they have been reached."[98] In presenting this argument, the Court focuses on the extent to which this interest in student body diversity compares to other interests previously found to be compelling by the Court:

> Nothing like that is possible when it comes to evaluating the interests respondents assert here. Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is

93. *Id.* (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard II*), 980 F.3d 157, 173–74 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

94. *Id.* (second alteration in original).

95. *Id.* (quoting Students for Fair Admissions, Inc. v. Univ. of N.C. (*UNC*), 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021), *cert. granted before judgment*, 142 S. Ct. 896 (2022), *rev'd sub nom.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023)).

96. *Id.* ("Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny.").

97. *Id.*

98. *Id.* ("Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?").

> standardless. The interests that respondents seek, though plainly worthy, are inescapably imponderable.[99]

Although the majority finds the task at hand incapable of objective measurement, the dissenters point to data that indeed provides useful benchmarks for the judiciary including the continued *de facto* segregation characterizing so many student applicants' lived experiences prior to enrolling in college. The dissenters' inclusion[100] of this data serves as a reference point with which to compare diversity efforts at the college and university level:

> More than a third of students (about 18.5 million) attended a predominantly same-race/ethnicity school—where 75 percent or more of the student population is of a single race/ethnicity—according to [U.S. Government Accountability Office] GAO's analysis of Department of Education data for school year 2020-21. GAO also found that 14 percent of students attended schools where 90 percent or more of the students were of a single race/ethnicity.[101]

In addition, Justice Sotomayor points to the majority's seeming recognition of "the compelling need for diversity in the military and the national security implications at stake,"[102] and presents the Court's curious decision to carve out an exception to its ruling in the case of the "Nation's military academies,"[103] as evidence of the benefits of racial diversity in higher education.[104] The brief

---

99. *Id.* at 2167. (alterations in original) (citations omitted) (first quoting *UNC*, 567 F. Supp. 3d at 656; and then quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard II*), 980 F.3d 157, 173–74 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

100. *Id.* at 2234 –35 (Sotomayor, J., dissenting).

101. U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104737, K–12 EDUCATION: STUDENT POPULATION HAS SIGNIFICANTLY DIVERSIFIED, BUT MANY SCHOOLS REMAIN DIVIDED ALONG RACIAL, ETHNIC, AND ECONOMIC LINES (2022), https://www.gao.gov/assets/gao-22-104737.pdf.

102. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2261 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

103. *Id.* at 2166 n.4 (majority opinion).

104. *Id.* ("The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that

submitted by the United States as *amici*, explains "the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse—and who have been educated in diverse environments that prepare them to lead increasingly diverse forces."[105]

Other *amici* cited by Justice Sotomayor includes state and local governments, the Association of American Medical Colleges, the American Federation of Teachers, the American Bar Association, over 300 law firms, and Major American Business Enterprises, among other key sectors, all writing in support of race-conscious college admissions.[106] Justice Sotomayor highlights state and local governments' need for "public servants educated in diverse environments who can 'identify, understand, and respond to perspectives' in 'our increasingly diverse communities.'"[107] Similarly, "increasing the number of students from underrepresented backgrounds who join 'the ranks of medical professionals' improves 'healthcare access and health outcomes in medically underserved communities[,]'" as attested to by the State of Massachusetts and echoed by the Association of American Medical Colleges.[108] Finally, in what should have figured more prominently in an opinion reached by the Nation's most accomplished jurists, the dissenting Justices call attention to the need for a "diverse pipeline of college graduates [to] ensure[] a diverse legal profession[]" and "demonstrate[] that 'the justice system serves the public in a fair and inclusive manner.'"[109] Data provided shows that, even with race-conscious admissions in place, our institutions, including the United States Supreme Court, struggle to reflect the rich diversity of our Nation; "[f]rom 2005 to

context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.").

105. *Id.* at 2260 (quoting Brief for the United States as Amicus Curiae Supporting Respondent at 12, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199)).

106. *Id.* at 2261.

107. *Id.* (quoting Brief of Southern Governors as Amici Curiae in Support of Respondents at 5–8, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199)).

108. *Id.* (quoting Brief of Massachusetts et al. as Amici Curiae in Support of Respondents at 10, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199)).

109. *Id.* (quoting Brief for the American Bar Association as Amicus Curiae in Support of Respondents at 18, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199)).

2017, 85% of Supreme Court law clerks were [W]hite, 9% were Asian American, 4% were Black, and 1.5% were Latino, and about half of all clerks during that period graduated from two law schools: Harvard and Yale."[110]

D. *The Court Depicts Racial Categories Used by Admissions Officers as "Arbitrary"*

Related to the question of measurable objectives, the Chief Justice then turns the Court's attention to a consideration of whether "respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue."[111] Here, the Court focuses its attention on the familiar categories ubiquitous in the collection of demographic data: Asian; Native Hawaiian or Pacific Islander; Hispanic; White; African American; and Native American. The majority examines these racial categories utilized by universities and questions how they can be used to "measure the racial composition of their classes[,]" finding some categories "overbroad" in the case of Asian students,[112] "arbitrary or undefined" in the case of Hispanic or Latino students,[113] as well as "underinclusive" regarding Middle Eastern students.[114]

In one of the few passages in which Asian American Pacific Islander students were directly discussed in the majority opinion—unusual in a case brought ostensibly to vindicate the rights of this demographic—Chief Justice Roberts critiques universities for being "apparently uninterested in whether South Asian or East Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other."[115] The Chief Justice ignores the point made by Justice Sotomayor that the Asian American category arose out of activism on the part of Asian American

110. *Id.* at 2262 n.42. (citing Jeremy D. Fogel, Mary S. Hoopes, & Goodwin Liu, *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals*, 137 HARV. L. REV. (forthcoming 2023)).

111. *Id.* at 2167 (majority opinion).

112. *Id.*

113. *Id.*

114. *Id.* at 2168.

115. *Id.* at 2167 (emphasis omitted).

students in the late 1960s.[116] Instead of exploring why the term was viewed as necessary to unite various ethnic groups in their common struggle for visibility, the Court simply imposes its own narrative on the community of Asian American students. The majority portrays the decisions made by admissions officers as mechanical—blindly assigning points to applicants on the basis of race alone—as opposed to the individualized and holistic review described by UNC and Harvard and discussed by Justices Sotomayor and Jackson in their dissents.[117] Justice Thomas' concurring opinion highlights the historical experience of Asian Americans and the long list of injustices to which they have been subjected by our Nation's laws and rightly concludes that "Asian Americans can hardly be described as the beneficiaries of historical racial advantages."[118] However, the argument as to how Asian American students are being subjected to discrimination by UNC and Harvard is not as well supported. According to the record below, the admission rates of Asian Americans at institutions with race-conscious admissions policies, including at Harvard, have "been steadily increasing for decades."[119]

Data also shows that "[a]t Harvard, 'Asian American applicants are accepted at the same rate as other applicants and now make up more than 20% of Harvard's admitted classes,' even though 'only about 6% of the United States population is Asian American.'"[120] Similarly, we cannot discount the other metrics showing that while "59% of [W]hite students and 78% of Asian

116. "The term 'Asian American' was coined in the late 1960s by Asian American activists—mostly college students—to unify Asian ethnic groups that shared common experiences of race-based violence and discrimination and to advocate for civil rights and visibility." *Id.* at 2254 n.36 (quoting Brief of Amici Curiae Asian American Legal Defense and Education Fund et al. in Support of Respondents at 9, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199)).

117. *Compare id.* at 2168–70 (majority opinion), *with id.* at 2249–50 (Sotomayor, J., dissenting), *and id.* at 2271–74 (Jackson, J., dissenting).

118. *Id.* at 2199 (Thomas, J., concurring).

119. *Id.* at 2258 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard II*), 980 F.3d 157, 198 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

120. *Id.* at 2258 n.39 (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*Harvard I*), 397 F. Supp. 3d 126, 203 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)).

students have a parent with a bachelor's degree or higher, . . . the same is true for only 25% of Latino students and 33% of Black students."[121] Likewise, "[m]edian income numbers from 2019 . . . [show] $76,057 for White households, $98,174 for Asian households, $56,113 for Latino households, and $45,438 for Black households."[122] A genuine holistic and individualized review on the part of admissions officers requires that this broader socioeconomic, first- or continuing-generation context also be considered in the case of individual applicants, irrespective of their race.[123]

In addition, the fact that colleges and universities are simply using the same racial categories employed by the federal government across multiple sectors is not discussed by Chief Justice Roberts but draws extensive commentary in the dissent written by Justice Sotomayor:

> The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary." To start, the racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U.S. Census Bureau. Surely, not all "federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies" that flow from census data collection are constitutionally suspect.[124]

The majority's opinion is unclear in discussing how the official racial categories impede student applicants from sharing a full picture of their racial identity. In fact, the dissent points out that "it is up to students to choose whether to identify as one, multiple,

---

121. *Id.* at 2235 n.12 (citing DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS tbl.104.70 (2021)).

122. *Id.* at 2269 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting) (citing Brief of the National Academy of Education as Amicus Curiae in Support of Respondents at 14, *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141 (No. 20-1199)).

123. *Id.* at 2242 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

124. *Id.* at 2254 (citations omitted).

or none of these categories."[125] Students may also "select subcategories or provide more detail in their personal statements or essays."[126] Indeed, the dissenters point out that the only party confused by the process of "racial self-identification" is the Court.[127]

The Court's primary point that the "imprecise" and "arbitrary" nature of these categories prevents colleges and universities from being able to attain their stated goal of student body diversity also receives criticism from the dissenting Justices. Justice Sotomayor points out that "[a]ny increased level of precision runs the risk of violating the Court's admonition" going back to the *Grutter* decision against "specified percentage[s]" and "specific number[s] firmly in mind."[128] Justice Sotomayor concludes that "the majority's holding puts schools in an untenable position. It creates a legal framework where race-conscious plans must be measured with precision but also must not be measured with precision."[129]

E. *The Majority Opinion Identifies a Lack of End Date for the Use of Race-Conscious Admissions Practices as Constitutionally Problematic*

The final point in the Court's opinion focuses on the opinions authored by individual Justices dating back to Justice Powell's separate opinion in *Bakke* and states that those cases have warned against race-conscious admissions operating with "no end . . . in sight."[130] Whereas Justice Powell fretted over whether remedying the effects of past societal discrimination would be "ageless in its reach into the past,"[131] Chief Justice Roberts's main concern stems from whether the consideration of attaining a diverse student body would be ageless in its reach into the future. The Chief Justice—along with Justice Kavanaugh in his separate concurring opinion—draws attention to their reading of *Grutter*, depicting *Grutter* as having "imposed one final limit on race-based admissions

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 2253 (some alterations in original) (quoting Grutter v. Bollinger, 539 U.S. 306, 324, 335 (2003)).
129. *Id.* (emphasis omitted).
130. *Id.* at 2166 (majority opinion).
131. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

programs," and warning that "[a]t some point . . . they must end."[132] The majority specifically cites to *Grutter* in support of its decision in *SFFA* to select present day as that "[end] point" and to terminate the use of race-based admissions:

> It has been [twenty-five] years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that [twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[133]

But the Court's requirement for a fixed end date for race-conscious admissions ignores the lack of a comparable end date for the race-conscious *impacts* of centuries of discrimination and exclusion. Justice Jackson provides a powerful reminder of this incongruity in her beautifully written dissent: "history speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark."[134]

While the Court's holding was not surprising in light of previously[135] expressed objections to race-conscious affirmative action by many of the Justices in the majority, it was nevertheless seismic in its rejection of the Court's longstanding commitment to racial inclusion for members of groups historically excluded from selective institutions of higher education. Justice Sotomayor remarks on this decision's likely impact in the years to come, stating that "[t]he Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education."[136]

The very last component of the majority's opinion included a hastily added codicil seemingly carving out a narrow way in which colleges and admissions might continue to consider the race of applicants:

---

132. *Students for Fair Admissions, Inc.,* 143 S. Ct. at 2165 (majority opinion) (citing *Grutter*, 539 U.S. at 342).

133. *Id.* at 2165–66 (quoting *Grutter*, 539 U.S. at 343).

134. *Id.* at 2268 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting).

135. *See e.g.,* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 437 (2016) (Alito, J., dissenting and joined by Roberts, C.J., and Thomas, J.).

136. *Students for Fair Admissions, Inc.,* 143 S. Ct. at 2239 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting).

> At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today.[137]

The Chief Justice attempts to provide an explanation of what colleges may or may not do in light of this caveat, with the following statement:

> A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[138]

Justice Sotomayor presents a scathing rebuke to this last-minute attempt to minimize the harmful impact of the decision. First, Justice Sotomayer emphasizes that "the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as 'courage,' [and] 'leadership' . . . [which] only serves to perpetuate the false narrative that Harvard and UNC currently provide 'preferences on the basis of race alone,'" as opposed to "holistically . . . [and] in a limited way."[139] Second, Justice Sotomayor admonishes the disingenuousness on the part of the Chief Justice in adding this paragraph at the very end of the majority opinion:

---

137. *Id.* at 2176 (majority opinion).

138. *Id.* (emphasis omitted).

139. *Id.* at 2251 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) (quoting *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2170 (majority opinion)).

> This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.[140]

Justice Sotomayor's point recalls scholarly responses to the posture taken by the Roberts Court on the matter of affirmative action. Professor Bridges explains that "the Court provides a remedy to people of color seeking relief from racially burdensome laws and policies only when the racism embedded in the challenged law or policy is so closely tied to white supremacy that it would be embarrassing for the Court to do nothing."[141] This is such a case; the Court's insistence on a color-blind application processes would act to penalize students of color in a very blatant manner as shown by Justice Jackson's brilliant hypothetical in her dissent,[142] which she also posed during the oral argument:

> The first applicant says: I'm from North Carolina. My family has been in this area for generations, since before the Civil War, and I would like you to know that I will be the fifth generation to graduate from the University of North Carolina. I now have that opportunity to do that, and given my family background, it's important to me that I get to attend this university. I want to honor my family's legacy by going to this school. The second applicant says, I'm from

140. *Id.*

141. Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25 (2022).

142. *Students for Fair Admissions, Inc.,* 143 S. Ct. at 2264 (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting) ("Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC's holistic merits-based admissions process?").

> North Carolina, my family's been in this area for generations, since before the Civil War, but they were slaves and never had a chance to attend this venerable institution. As an African American, I now have that opportunity, and given my family—family background, it's important to me to attend this university. I want to honor my family legacy by going to this school.[143]

Justice Jackson's example clarified how a White student would have been given the benefit of discussing their family's connection to the university, whereas a Black student, on account of his and his ancestors' race, would not have been able to explore his own connection to the institution. Because of this unassailable commentary, the Chief Justice felt compelled to give a very minor concession to students of color in a few brief lines at the end of the majority opinion. It must have been clear to the Chief Justice that a failure to address Justice Jackson's devastatingly effective hypothetical would have been noticed and criticized. In other words, his failure to do so would be an example where it would be "embarrassing for the Court to do nothing."[144]

Chief Justice Roberts recognizes that it would be discriminatory to allow the White student to discuss their personal history in relation to their school of choice, while preventing the Black student from doing the same. Then, Chief Justice Roberts does what he believes will address this potential disparity by allowing the hypothetical James to also discuss in the application his desire to "honor [his] family's legacy"[145] by attending UNC. The history of enslavement in James' family is an appropriate topic for consideration by the admissions counselors at UNC, but not *race qua race*.[146] Of course, it is logical that only Black applicants, *in addition to descendants of enslaved Indigenous persons*, will be able to discuss their ancestors' history of enslavement in the United States, but this distinction somehow suffices to appease the Roberts Court's

143. Transcript of Oral Argument at 65, Students for Fair Admissions, Inc. v. Univ. of N.C. (*UNC*), 142 S. Ct. 896 (2022) (No. 21-707).

144. Bridges, *supra* note 141, at 25.

145. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2264 (Jackson, J., dissenting).

146. *Id.*. at 2170 (majority opinion).

formalistic approach to the issue of justiciable racism: a benign facially race-neutral law with disparate impacts is indistinguishable from a malign facially race-neutral law with disparate impacts.[147]

CONCLUSION

Within Justice Jackson's brilliant analogy, a renewed civil rights discourse around affirmative action can be found; the key is our shared history. The Chief Justice reluctantly recognizes at the end of the majority opinion that an admissions benefit may accrue to an applicant "whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal[;]" his only caveat is that consideration of a student's heritage or culture "must be tied to that student's unique ability to contribute to the university."[148] Important and reparative work can be done within this paradigm. An Indigenous student with demonstrated leadership qualities forged by a knowledge that the local elite university sits on land stolen from his ancestors; this student can make a showing these qualities will "contribute to the university." This is one example among multitudes. It is here that the majority's opinion has the potential to further progressive goals. Consider the following call to action: "[f]ar more Black and brown people should be attending law school for free, or their tuition should be substantially reduced in order to allow more people of color to become attorneys."[149] Indeed, and there is a pathway available for those colleges and universities willing to work within the parameters of the Court's decision in *SFFA*. There is also more to be done by those willing to

147. Professor Khiara M. Bridges describes the Roberts Court's impoverished conceptualization of "what counts as racism against people of color" and concludes that "the most explicitly race-conscious efforts to disrupt the systems and processes that have made it so that people of color are at the bottom of most measures of social well-being [, such as affirmative action,] will not survive judicial review." Bridges, *supra* note 141, at 32.

148. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2176 (emphasis omitted) ("A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.").

149. BeKura W. Shabazz & Lisa Sangoi, *Black Feminist Thought Grounds and Centers Us: A Reflection by Two Activists and Legal Workers*, 34 YALE J.L. & FEMINISM 122, 127 (2023).

agitate for a different Court composition and a change in direction "*Bakke*" to Justice Thurgood Marshall's viewpoint.

Finally, this decision is clearly not the last time the Court will be confronted with a constitutional challenge to a university and/or other educational institution's admissions policy regarding its consideration of race. The next generation of legal challenges is illustrated by the group of public-school parents in Fairfax County, Virginia, who challenged the admissions policy in place at the high-performing Thomas Jefferson High School for Science & Technology (TJ) in 2021. The parents argued that the facially race-neutral admissions policies nonetheless violated the Equal Protection Clause of the Fourteenth Amendment because they sought to "enhance diversity and inclusion at TJ."[150] On appeal from a favorable district court opinion, this coalition of parents lost in front of the Fourth Circuit Court of Appeals as they were unable to demonstrate that "the policy [had any] . . . racially disparate impact on Asian American students[,]" as "those students have had greater success in securing admission to TJ under the policy than students from any other racial or ethnic group."[151] The Fourth Circuit also held that the Coalition failed to "identify any evidence suggesting that the Board adopted the policy 'at least in part because of' some calculated adverse effect on Asian American students—that is, the Coalition ma[de] no showing of discriminatory intent by the Board."[152]

This case—or a similar case—will likely reach the United States Supreme Court in the near future. In light of the *SFFA* decision and the clear super-majority opposed to affirmative steps to expand diversity and inclusion of underrepresented groups in educational settings, the possible future envisioned by Justice Marshall in his powerful separate opinion in *Bakke* many decades ago may come to be. Justice Marshall wrote he "fear[ed] that the Court's folly [would] bring[] . . . our Nation to the brink of coming 'full circle' once again."[153] The Court's decision in *SFFA* has moved us closer to the precipice feared by Justice Marshall, but a firm

150. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 874 (4th Cir. 2023).
151. *Id.* at 879.
152. *Id.*
153. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2278 n.105 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting).

grasp of history, coupled with a recognition of our individual and collective power, can help minimize the harm to our students.