The Supreme Court’s Assault on History in SFFA

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INTRODUCTION

For nearly sixty years, many American public and private colleges and universities considered race in a limited way when making admissions decisions. They did so to increase enrollments from historically disadvantaged groups, especially Black students, and make campuses more diverse and the United States more inclusive, not out of antipathy towards any racial or ethnic group. The Supreme Court supported the constitutionality of such affirmative action, even while limiting it, in controlling or majority opinions authored by conservative Justices Lewis F. Powell, Jr., Sandra Day O’Connor, and Anthony M. Kennedy over four decades.

That era is over. It is history. On June 29, 2023, the Supreme Court, in a 6–3 decision, sounded the death knell of race-conscious decision-making in college admissions in Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA).1 The Court struck down the admissions programs at Harvard and the University of North Carolina (UNC) as irreconcilable with the Equal Protection Clause because, it said, they “lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.”2 The six conservative justices3 reinterpreted constitutional law

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2 Id.

3 Chief Justice Roberts wrote the majority opinion, which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Id. at 2153. Justice Thomas wrote a lengthy
regarding race-conscious admissions and tightly circumscribed the extent to which universities can consider race in admissions. Although the Court left, at least for now, some limited openings to pursue some of the objectives of such programs, its decision impedes the effort that began in the 1960s to open higher education to previously excluded communities.

It is impossible to predict the SFFA decision’s full impact. The history to come is inherently uncertain and subject to unknowns, including the path the Supreme Court’s current majority will pursue and the possibility that other decision-makers will change course or find new ways to address remaining challenges. Race-conscious college and university admissions programs were limited. They did not directly target many problems of disadvantaged populations. For instance, they did not address needs of precollege populations, those whose formal education did not extend beyond high school or those who did not apply to selective schools. Moreover, race-conscious admissions were imperfect and entailed risks and costs that had to be minimized. Still, they were a valuable method to achieve limited goals.

Although race-conscious admissions received repeated Supreme Court blessings, those decisions were divided, with most justices on both sides unhappy with aspects of the resolutions ultimately dependent on one justice’s views.

concurring opinion, Justice Gorsuch wrote a concurring opinion, joined by Justice Thomas, arguing that the admissions programs violated Title VI, and Justice Kavanaugh also wrote a concurring opinion. See id. at 2176 (Thomas, J., concurring); id. at 2208 (Gorsuch, J., concurring); id. at 2221 (Kavanaugh, J., concurring).

4 Id. at 2166 n.4 (majority opinion) (stating that the Court’s opinion does not presently govern race-based admissions programs at military academies since no military academy was a party to SFFA, nor did any lower court address the issue and “in light of the potentially distinct interests” those academies “may present”); id. at 2176 (stating that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her own life, be it through discrimination, inspiration, or otherwise” but cautioning that “universities may not simply establish through application essays or other means the regime SFFA struck down and that “the student must be treated based on his or her experiences as an individual—not on the basis of race” (citations omitted))); id. at 2225 (Kavanaugh, J., concurring) (“[G]overnments and universities [may seek] ‘to undo the effects of past discrimination in many permissible ways that do not involve classification by race.’” (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring))).

Yet SFFA is a deeply troubling decision. It undermines basic constitutional ideals, particularly the Fourteenth Amendment’s project to build a more just and inclusive United States, since the majority’s vision of the Equal Protection Clause exalts prohibiting racial classifications over providing equal protection to Black people and other historically marginalized groups. The majority’s course primarily helps certain demographic groups the law has long privileged and cements the benefits of those past preferences into the architecture of the present and future. Although SFFA will affect the United States’ racial future, the majority ignored America’s longstanding abuse of Black people and the continuing consequences of that unique mistreatment, largely brushing aside the dissenters’ efforts to consider that inconvenient topic. Whereas prior decisions regarding race-conscious college admissions had made wrong turns, they nonetheless allowed progress toward the Constitution’s inclusive ideals. SFFA simply made wrong turns, often by distorting precedent, thereby frustrating the effort to remedy past abuses and build a more inclusive society. The majority opinion systematically misused earlier Supreme Court cases that were distinguishable because they involved prejudice-driven discrimination by a White majority against Black people or other historically marginalized groups. Rather than acknowledging the discrepancy between such cases and modern-day affirmative action programs, the Court misapplied statements and doctrine from these earlier cases in a very different context and disregarded or omitted language from the cases that undermined its theory. The majority ignored or abused history in multiple ways. Ultimately, SFFA reflects the impact of the Court’s changed composition as a new right-wing, ideological majority disregards precedents and adopts what were fringe positions.

The discussion proceeds as follows. Part I traces the Court’s prior decisions addressing race-conscious admissions and contests some of the judgments. It addresses SFFA and, in doing so, demonstrates that the majority opinion, written by Chief Justice John G. Roberts, Jr., distorted the Court’s prior affirmative action decisions to apply new tests. The Court dramatically shifted course due to its changed composition. Yet SFFA was striking not only for its discussion and decision regarding race-conscious admissions programs but also for its attitude toward the United States’ racial history, which was evident throughout. Part II discusses the majority opinion’s indifference to the United States’ racial history, sketches some history the Court should have considered, and suggests how ignoring the United States’ past and its consequences served the majority’s doctrinal agenda. In
addition to ignoring American racial history, the Court distorted constitutional history as reflected in Supreme Court precedents. Part III shows how the majority opinion systemically misstates equal protection precedents by removing language from historical context to present a misleading impression of Supreme Court doctrine and omits important language from prior cases to distort meaning. A brief conclusion summarizes the discussion.

I. THE ROAD TO SFFA: BAKKE, GRUTTER-GRATZ, AND FISHER

A. Introduction

The aftermath of the great judicial and legislative accomplishments of the civil rights movement through the mid-1960s\(^6\) made clear that simply banning legal and administrative discrimination against Black people was necessary but insufficient to redeem the Fourteenth Amendment’s purpose of allowing that historically marginalized group to achieve equality. The past shapes the present in obvious and subtle ways, but its impact is easy to overlook, especially for those who benefit from resulting arrangements. White supremacy was so long-standing, so deeply entrenched, and so pervasive that it is no surprise, certainly not in retrospect, that its pernicious consequences survived the civil rights movement.

In his 1965 Howard University Commencement Address, President Lyndon B. Johnson declared:

> [F]reedom is not enough. . . . You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.\(^7\)

Affirmative action was a diffuse remedy that included race-conscious admissions programs in higher education, partly in response to a “growing conviction that there was a fundamental contradiction between an asserted opposition to racism and the maintenance, by

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\(^7\) Commencement Address at Howard University: “To Fulfill These Rights,” 2 PUB. PAPERS 635, 636 (June 4, 1965).
whatever process of selection, of essentially all-white colleges and professional schools.”

The advent of preferences for Black people and other disadvantaged groups presented controversies as many considered resulting moral and constitutional questions from a new angle. Were preferences for Black people that were introduced to redress past discrimination or expand opportunity comparable to familiar practices that discriminated against Black people and favored White people due to prejudice? If racial discrimination against Black people was morally wrong or illegal, could “reverse discrimination” be acceptable? Or was that term a misnomer, falsely implying a relationship between quite different activities? Does the Constitution’s Equal Protection Clause treat all racial classifications identically regardless of their objective or should it treat differently those designed to include rather than exclude traditionally disadvantaged groups? Some anticlassificationists thought all racial classifications were suspect, whereas other antishobordinationists thought only those that oppressed politically powerless groups due to prejudice were problematic—Black people, of course, presenting the paradigmatic model of such a disadvantaged American group.

Affirmative action programs could quite easily be distinguished from traditional discrimination against Black people in several respects. Their objectives were entirely different. Conventional discrimination against Black people or other disadvantaged groups reflected prejudice against them, whereas affirmative action pursued appropriate government purposes, like remedying past harm, promoting inclusivity and pluralism, fostering better understanding and relations between people of different racial and ethnic groups, engaging society’s full talent bank, and enhancing perceptions of institutional legitimacy, among others. Moreover, traditional discrimination against Black people involved a political majority mistreating a relatively powerless marginalized community. By contrast, majority groups created affirmative action programs to aid

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9 U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

Black people and certain other disadvantaged groups. As John Hart Ely observed, White people were “not going to discriminate against all [W]hite[ ] [people] for reasons of racial prejudice[,]” nor would they “underestimate the needs and deserts of [W]hite[ ] [people]” relative to Black people or “overestimate the costs of devising a more finely tuned classification system that would extend to certain [W]hite[ ] [people] the advantages they are extending to [B]lack[ ] [people].”

It is entirely different when older siblings share one of their toys with the youngest child than when they take his or her favorite one away. Finally, whereas traditional discrimination totally excluded Black people, affirmative action programs disadvantaged very few White people.

Affirmative action also raised a second related issue, which is mentioned briefly here and discussed more fully in Part III. Before addressing the constitutionality of an affirmative action admissions program in *Regents of the University of California v. Bakke* in 1978, the Court had proclaimed that racial classification was problematic. The declarations in pre-*Bakke* cases came in contexts where a Black person, or other racial minority, challenged some oppressive governmental action reflecting racial prejudice. Did these pronouncements apply to the different circumstances of race-conscious admissions to increase the number of Black students, or did the distinct postures make them inapposite or at least require explanation? The practice of applying those old decisions to the new context was not unprecedented but was conspicuous in SFFA.


12 See, e.g., Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 Mich. L. Rev. 1045, 1046–48, 1077–78 (2002) (pointing out that race-conscious admissions programs substantially help applicants from historically marginalized groups but have a small impact on nonminorities); Bundy, supra note 8 (pointing out that in 1975 to 1976, even if one made the incorrect assumption that medical schools would not have admitted any of the 1,400 Black people admitted to medical schools without an affirmative action program, without such programs only about 7 percent of the twenty-two thousand White students who were not admitted would have received a place).

B. Bakke

In *Bakke*, the Court first reached the merits of a case involving a race-conscious admissions program to benefit racial minority applicants. Although Justice Powell’s controlling opinion allowed race-conscious decision-making to continue in higher education admissions, it erred in failing to distinguish between affirmative action and racial discrimination against Black people or other historically marginalized groups and in rejecting as an appropriate objective remedying societal discrimination. Those determinations proved central, though not entirely dispositive, in *SFFA*’s outcome and are discussed in some detail accordingly.

In *Bakke*, Allen Bakke, a White person denied admission to the University of California at Davis (“Davis”) medical school, claimed that Davis’ medical school admissions program, which set aside sixteen of one hundred seats for students from certain historically marginalized groups, violated his rights under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. After the Supreme Court of California ruled that Davis’ program violated the statute and Equal Protection Clause and ordered Davis not to consider race, the case went to the US Supreme Court. Four justices concluded that Davis’ program violated Title VI and accordingly did not reach the constitutional issue. Four others, led by Justice William J. Brennan, Jr., thought the set-aside program complied with Title VI and the Constitution. Their joint opinion concluded that “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice.”

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15 *Bakke*, 438 U.S. at 269–70, 275–78.

16 Id. at 270–71.

17 Id. at 408, 411, 421 (Stevens, J., concurring in part and dissenting in part). Chief Justice Warren Burger and Justices Potter Stewart and William H. Rehnquist joined his opinion. Id. at 408. The four justices also concluded that whether race could ever be considered in an admissions decision was not at issue. See id. at 410–11.


They regarded precedents as “in many respects inapposite” because they did not involve claims of discrimination against White people who did not resemble a traditional suspect class since they were not saddled with disabilities, subjected to past mistreatment, or without political power. Moreover, Davis’ program did not “stigmatize” any race as inferior or rest on racial prejudice or separatism. The justices thought intermediate scrutiny, recently invented for gender discrimination cases, should apply to racial classifications serving remedial purposes, so such classifications would be constitutional if they served “important governmental objectives [in a manner] substantially related to achievement of those objectives.” A state could “adopt race-conscious programs” to “remove the disparate racial impact its actions might otherwise have” if there was reason to conclude that past discrimination, even if societal, produced the disparate impact.

With the Court evenly divided, Justice Powell’s position became decisive. His civil rights credentials were somewhat suspect. As chair of the Richmond, Virginia, school board, he had not encouraged integration. No Black students attended a Richmond school with a White person during the first six years after Brown v. Board of Education—only a tiny number did in 1961. Justice Powell vocally

20 Id. at 357.
21 Id. at 357–58.
23 Bakke, 438 U.S. at 359 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Although the opinion clearly articulated and applied the intermediate scrutiny test, it later said that review must be “strict and searching.” Id. at 362. It meant this statement as a characterization of intermediate scrutiny. That statement allowed Justice O’Connor to later associate that opinion with strict scrutiny “however defined”, though to her credit, Justice O’Connor quickly associated the opinion with the intermediate scrutiny test it stated. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 285 (1986) (O’Connor, J., concurring).
criticized Dr. Martin Luther King, Jr. in the 1960s and attacked busing in a 1971 amicus brief.

Justice Powell rejected the views of the Brennan et al. opinion, which distinguished the general constitutional analysis for race-conscious decision-making in university admissions from that for conventional discrimination against Black people. Consistent with Carolene Products footnote four, Justice Brennan and his three colleagues thought strict scrutiny inapplicable since Bakke was not from a racial minority group subject to historical prejudice or lacking political power. In contrast, Justice Powell rejected the Carolene Products test since the Court had not “invoked” it “as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny.” Justice Powell stated that the test might apply when deciding whether “new types of classifications” are suspect, but “[r]acial and ethnic classifications . . . are subject to stringent examination without regard to these additional characteristics.”

Justice Powell’s analysis disregarded the fact that prior racial discrimination cases purportedly applying strict scrutiny involved invidious discrimination against Black people. The history of racial discrimination in the United States made Black persons the paradigmatic suspect class, so no elaboration or justification was needed to explain close review of measures discriminating against them. The Court had never applied strict scrutiny when a White person invoked the Equal Protection Clause to challenge race-conscious decision-making intended to help historically marginalized

27 Walker, supra note 26, at 1236–42.
28 Driver, supra note 26, at 276.
29 United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (suggesting that normal judicial deference to political actors might be inappropriate when reviewing government action directed against “racial minorities,” or “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).
31 Id. at 290 (opinion of Powell, J.).
32 Id.
33 See Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. REV. 1267, 1275–78 (2007) (pointing out that many racial discrimination cases purporting to apply what is now called strict scrutiny did not since they failed to include one or more of the elements and that the modern test in such cases was largely developed in the 1960s, 1970s, and 1980s).
groups. So, Bakke’s claim really raised a “new type[] of classification[,]” and Justice Powell acknowledged that the Court had used Carolene Products criteria to determine whether strict scrutiny should apply to new classifications.\footnote{Bakke, 438 U.S. at 290.} Justice Powell read prior cases broadly as making any racial classification suspect and subject to strict scrutiny notwithstanding those cases’ entirely different facts,\footnote{Id. at 290–91 (citing cases involving wartime limitations against Japanese American citizens for proposition that racial or ancestral classifications are suspect).} and thereby avoided addressing whether classifications adverse to White people for a laudable purpose should merit more relaxed review. A case of first impression, like Bakke, by definition raises novel issues, but Justice Powell invoked historical novelty to decline to use Carolene Products criteria to consider Bakke’s situation while ignoring that Bakke sought to benefit from a novel use of strict scrutiny.\footnote{Id. at 294 (objecting that Davis “urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white ‘majority’ cannot be suspect if its purpose can be characterized as ‘benign,’” while ignoring the fact that Bakke was making a novel argument in claiming protection under the Clause).} Applying novelty against the people of the race seen as the prime beneficiary of the Equal Protection Clause seems perverse. Had Justice Powell treated race-based equal protection claims by White people as a new category, the Carolene Products criteria would have been relevant,\footnote{See, e.g., Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (applying Carolene Products criteria to age); San Antonio Indep. Sch. Dist. v. Richardson, 411 U.S. 1, 28 (1973) (applying those criteria to wealth); Graham v. Richardson, 403 U.S. 365, 372 (1971) (applying the criteria to noncitizens).} and their application might well have denied strict scrutiny to a White claimant in this case as previously done regarding claims of some other groups.\footnote{Bakke, 438 U.S. at 290.}

Justice Powell recognized that the Court initially believed the Fourteenth Amendment was designed to protect Black people from oppression,\footnote{Bakke, 438 U.S. at 291.} but curious reasoning led to his conclusion that by 1978 it applied evenly to all. He wrote that the original purpose of the Equal Protection Clause was displaced as the Clause was “[v]irtually strangled in infancy by post-civil-war judicial reactionism”\footnote{Id. (alteration in original) (quoting Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 381 (1949), https://doi.org/10.2307/3477801).} and then “relegated
to decades of relative desuetude” during the period in the late nineteenth and early twentieth centuries when the Court aggressively used the Due Process Clause of the Fourteenth Amendment to protect liberty of contract and property claims.\textsuperscript{41} The Equal Protection Clause attained a “genuine measure of vitality” around 1940 in cases unrelated to race, although the cases Justice Powell cited were strange choices,\textsuperscript{42} which actually undercut his claim that it applied more symmetrically\textsuperscript{43} since they accorded with prior understandings that the Equal Protection Clause addressed mistreatment based on prejudice.\textsuperscript{44} What revitalized the Clause in the mid-twentieth century were cases in which Black people challenged Jim Crow practices,\textsuperscript{45} thereby redeeming its historical meaning,\textsuperscript{46} cases Justice Powell surprisingly omitted from this discussion. By “that time,”\textsuperscript{47} presumably the early 1940s, Justice Powell said the Fourteenth Amendment could no longer be pegged “to the

\begin{footnotesize}
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\item Id.
\item Id. at 292 (first citing United States v. Carolene Prods. Co, 304 U.S. 144, 145–46, 148, 151 (1938) (holding the Equal Protection Clause did not apply to a Commerce Clause case); and then citing Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541–42 (1942) (holding an Oklahoma law allowing sterilization of certain repeat criminals but exempting embezzlers denied equal protection)).
\item See Carolene Products, 304 U.S. at 152–53 n.4 (raising a possibility that “more exacting judicial scrutiny” may be appropriate for “statutes directed at particular religious . . . or racial minorities” and that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry” (citations omitted)); Skinner, 316 U.S. at 541 (referring to “invidious” discriminations and laws selecting a particular “race or nationality for oppressive treatment”).
\item See Carolene Products, 304 U.S. at 152 n.4 (raising possibility that “prejudice against discrete and insular minorities” may occasion need for more rigorous judicial protection); Skinner, 316 U.S. at 541 (referring to danger of mistreatment, which “can cause races or types which are inimical to the dominant group to whither and disappear”).
\item See, e.g., Brown v. Bd. of Educ., 347 U.S. 483, 487–88 (1954) (noting petitioners’ sought judicial relief after being denied admission to schools that were segregated by law); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of a restrictive covenant forbidding Black people to own certain real estate constituted state action in violation of the Equal Protection Clause); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 349, 352 (1938) (ruling that a Black person’s Equal Protection Clause rights were violated when Missouri provided law school for White people but not Black people).
\item Bakke, 438 U.S. at 292; see cases cited supra note 42.
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struggle for equality of one racial minority.”48 During the period when the Court had ignored the Equal Protection Clause, “the United States had become a Nation of minorities,”49 Justice Powell wrote. The majority was not “monolithic” but “composed of various minority groups” whose “shared characteristic was a willingness to disadvantage other groups.”50 The Equal Protection Clause protected each group from “official discrimination,”51 Justice Powell reasoned.

Yet one could acknowledge the broad reach of the Equal Protection Clause consistent with its text and practice without concluding that the proliferation of “minority groups” affected the Equal Protection Clause’s historic mission to remedy the vestiges of official subjugation of Black people.52 Generally, as Professor Ely points out, racial classifications were suspect because the White majority had “chosen comparatively to advantage themselves” over Black people.53 In Bakke, however, White people collectively disadvantaged themselves to benefit Black people and certain other non-White people, rendering Justice Powell’s “majority of minorities” point inapplicable, indeed, “zany.”54 Surely the long denial of envisioned protection to Black people when the Equal Protection Clause was “strangled” and then in “desuetude”55 should not undermine their entitlements under it. Denying Black people their unique relationship to the Equal Protection Clause based on chronic misbehavior of White majorities would be the cruelest of ironies. Indeed, the protected groups in cases Justice Powell cited56 came from discrete and insular minorities subjected to prejudice, a connection the Court made explicit in Hernandez v. Texas,57 where it said the Equal

48 Bakke, 438 U.S. at 292.
49 Id.
50 Id.
51 Id.
52 See, e.g., Ely, supra note 11, at 171–72, 258–59 n.109 (discussing the need to make sure that race-conscious admissions plans are not misused to discriminate against other minority groups based on prejudice against them).
53 Id. at 258 n.105.
54 Id.
55 Bakke, 438 U.S. at 291.
56 Id. at 292.
Protection Clause applied to other groups, like persons of Mexican descent, who needed protection from “community prejudices.”

Justice Powell recognized that “[b]ecause the landmark decisions” regarding equal protection “arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the ‘majority’ white race against the Negro minority.” Yet he thought these cases “need not be read as depending upon that characterization for their results.” The fact that a case “need not be read” a particular way is not dispositive. The real question is what reading best fits the facts, language, and context. As is developed below, the context and language of landmark civil rights cases like *Brown v. Board of Education*, *Loving v. Virginia*, and others focused primarily on mistreatment of Black people. It is incongruous to reject their specific antisubordination reading linking the Equal Protection Clause to protecting marginalized groups from oppression to adopt a more general anticlassificationist reading that is more remote from the cases’ context and language.

In view of the Equal Protection Clause’s more capacious text and history, Justice Powell thought “[i]t is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.” But why? The Court had given groups meriting

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58 *Id.* at 478 (“Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection.”).

59 *Bakke*, 438 U.S. at 294.

60 *Id.*


63 *Bakke*, 438 U.S. at 295 (emphasis omitted). The statement echoed Justice Bradley’s similar comment in the Civil Rights Cases. The Civil Rights Cases, 109 U.S. 3, 24 (1883) (“When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men’s rights are protected. . . . [N]o one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement.”).
strict scrutiny (e.g., Black people, noncitizens) greater protection than those receiving intermediate scrutiny (e.g., women) or deferential review (e.g., elderly people). There would have been nothing anomalous about treating classifications that disadvantaged Black people as more suspect than those adverse to White people, especially when some appropriate objective motivated the latter. And why would treating Black people specially be inappropriate, given the Equal Protection Clause’s focus, their unique mistreatment, and the enduring consequences of those past misdeeds?

Justice Powell argued that the White majority included “various minority groups” who have themselves experienced discrimination. He thought it impractical to allocate preferences between various minority groups, and he concluded that the level of judicial review could not be varied to accord some groups preferred status. Justice Powell cited Hernandez to rebut the argument that the Fourteenth Amendment exclusively addressed discrimination against Black people, but ignored its focus on protecting groups mistreated due to “community prejudices.” Moreover, Bakke did not require determining the relative entitlements of Black people vis-à-vis other historically marginalized people. Moreover, mistreatment of Black people was different because of its systemic and continuing nature and lingering consequences. Many populations Justice Powell mentioned received benefits from being White. The grievances of other groups do not negate the unique history of Black people in the United States.

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64 See, e.g., McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (treating as suspect a law punishing cohabitation between a White and Black person and requiring an “overriding statutory purpose requiring the proscription of the specified conduct” between an interracial couple but not otherwise); Graham v. Richardson, 403 U.S. 365, 371–72, 375 (1971) (applying strict scrutiny against state law restricting access by noncitizens to certain welfare benefits and requiring a compelling justification for it).

65 Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion) (applying intermediate scrutiny against a federal statute limiting the right of a widower to receive retirement benefits attributable to deceased wife as constituting discrimination against the women wage earners).


67 Bakke, 438 U.S. at 295.

68 Id. at 295–97; see also id. at 298 (arguing that preference raised various “problems of justice” including determining whether the purpose was benign, the danger of reinforcing stereotypes, and inequity in innocent persons having to bear “burdens of redressing grievances not of their making”).

69 Bakke, 438 U.S. at 295 (citing Hernandez v. Texas, 347 U.S. 475, 478 (1954)).

70 Hernandez, 347 U.S. at 478.
Varying the levels of judicial review may have presented judicial challenges, but refusing to recognize and address the unique situation of American Black people meant decades, indeed centuries, of societal discrimination went unremedied. That refusal was a problem and imposed costs too, and ignoring that reality did not make it disappear.

Calling strict scrutiny an “inexact term,” Justice Powell applied it, arguably for the first time, in a race case. To justify using a suspect classification, Justice Powell said California must show “that its purpose or interest is both constitutionally permissible and substantial” and that using the classification was “necessary” to achieve the purpose or interest. Other times he referred to the “purpose or interest” standard as requiring a “compelling justification” or a “compelling state interest.”

Having determined that strict scrutiny applied, Justice Powell rejected as insufficiently substantial justifications “reducing the historic deficit of traditionally disfavored minorities” as doctors and remodeling effects of past societal prejudice. Although “in some situations a state’s interest” in providing doctors to care for underserved populations might be “sufficiently compelling to support the use of a suspect classification,” Davis had furnished insufficient evidence here. Justice Powell found, however, that Davis’ First Amendment right to academic freedom gave it a “compelling” interest in a diverse student body. Although Davis’ set-aside was a quota not “necessary” to advance that interest, race could be considered as one diversity factor among many, as a “plus” in a particular applicant’s file so long as a program was “flexible enough to consider all pertinent elements of diversity” regarding each applicant and “to place them on

71 Bakke, 438 U.S. at 295.
72 Id. at 287.
73 Fallon, supra note 33, at 1277–78.
74 Bakke, 438 U.S. at 305.
75 Id. at 309, 315.
76 Id. at 306-07.
77 Id. at 307–10. Justice Powell acknowledged the “regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups,” but said relief could not be granted to victims absent “judicial, legislative, or administrative findings of constitutional or statutory violations.” Id. at 296 n.36, 307.
78 Id. at 310, 311.
79 Id. at 311–14.
80 Bakke, 438 U.S. at 314–16.
the same footing for consideration, although not necessarily according them the same weight.”

Unlike Davis’ set-aside, “[n]o such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.” In fact, the university’s “good faith would be presumed[,]” and its admissions program would not trigger strict scrutiny unless discriminatory intent was proven.

Justice Powell showed little concern regarding America’s racist past, and his attachment to diversity may have reflected a strategy to allow universities to deliver better education or, as Anders Walker suggested, an attachment to pluralism as a safeguard against totalitarianism rather than as a door for Black people to become full Americans. Like the SFFA majority, Justice Powell cited earlier race cases notwithstanding their different context, although he at least conceded they were arguably different. Moreover, he recognized diversity as a compelling interest and provided guidance regarding how to structure university admissions plans consistent with law. Justice Powell’s opinion had analytical deficiencies, but it struck a balance that at least allowed race-conscious admissions plans to continue.

C. Grutter and Gratz

Justice Powell’s opinion was “the touchstone for constitutional analysis of race-conscious admissions policies” for the next quarter century. In 2003, the Court considered Grutter v. Bollinger, in which a White woman challenged the University of Michigan (UM) Law School’s race-conscious admissions program after being denied

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81 Id. at 316–17.
82 Id. at 318.
83 Id. at 318–19.
84 Id. at 318–19, 319 n.53.
85 See Joel K. Goldstein, Beyond Bakke: Grutter-Gratz and the Promise of Brown, 48 St. Louis U. L.J. 899, 943 (2004) [hereinafter Goldstein, Beyond Bakke].
86 Walker, supra note 26, at 1233.
87 Bakke, 438 U.S. at 294 (“Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the ‘majority’ white race against the Negro minority.”).
88 Grutter v. Bollinger, 539 U.S. 306, 323 (2003); see also Bowen et al., supra note 5, at 143 (confirming reliance of selective institutions of higher education on Justice Powell’s opinion for continued use of race in admissions).
admission, and *Gratz v. Bollinger*, in which White applicants challenged the undergraduate program’s admissions plan. Justice O’Connor had written opinions that had constricted affirmative action in other contexts during her prior two decades on the Court, but in *Grutter* she joined the four most liberal members in a 5–4 decision upholding the race-conscious admissions plan at UM’s law school, even while the Court, 6–3, struck down UM’s undergraduate admissions program in *Gratz*.

Writing for the Court in *Grutter*, Justice O’Connor endorsed Justice Powell’s conclusion “that student body diversity is a compelling state interest that can justify the use of race in university admissions.” She agreed that strict scrutiny should apply to racial classifications because only a “searching judicial inquiry” could “‘smoke out’ illegitimate uses of race” to determine that a “‘benign’ or ‘remedial’” purpose actually motivated it. Strict scrutiny was not “strict in theory, but fatal in fact” since racial classifications could survive if narrowly tailored to meet compelling state interests.

Whereas Justice Powell had justified a university’s use of race based on its First Amendment interest in campus diversity, Justice O’Connor recognized a broader array of “substantial” virtues of a
diverse education including preparing participants for a global marketplace, enhancing national security, fostering citizenship, training future leaders representing all racial and ethnic groups, and enhancing the legitimacy of American institutions. Unlike Justice Powell, she linked diversity to the Equal Protection Clause, citing landmark civil rights cases and invoking themes of inclusivity. “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”

Justice O’Connor concluded that the admissions plan at UM’s law school was narrowly tailored to the compelling interest of diversity because it did not involve a “quota system” but treated race or ethnicity as a plus factor in a flexible, nonmechanical program that considered “all pertinent elements of diversity” in a “highly individualized, holistic review of each applicant’s file.” Although narrow tailoring did not require exhausting “every conceivable race-neutral alternative,” a university had to make a “serious, good faith consideration of workable race-neutral alternatives.” It also could not “unduly harm” nonmembers of racial or ethnic groups receiving plus factors. Finally, race-conscious admissions programs must have “a logical end point.”

Noting that Bakke first approved using race to foster diversity twenty-five years earlier, during which time racial and ethnic minority applicants’ grades and test scores had improved, Justice O’Connor wrote, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” That formulation provoked various understandings.

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99 Id. at 330–33. See generally Goldstein, Beyond Bakke, supra note 85, at 918, 944–49, 951–53.
100 Grutter, 539 U.S. at 331–33 (citing various civil rights cases).
101 Id. at 332.
102 Id. at 334–37.
103 Id. at 339.
104 Id. at 341 (stating requirement not to “unduly harm” or “unduly burden” persons in such groups).
105 Id. at 342.
106 Grutter, 539 U.S. at 343.
107 See, e.g., id. at 346 (Ginsburg, J., concurring) (calling the twenty-five-year expectation a “hope,” not a “firm[] forecast”); id. at 351 (Thomas, J., concurring and dissenting) (disingenuously referring to the “Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years” and repeating that basic idea several times); id. at 386–87 (Rehnquist, C.J., dissenting) (concluding that the law school’s program is not narrowly tailored because it lacks “any reasonably
Grutter was part of a mixed result since Gratz struck down the more formulaic undergraduate admissions plan at UM, which awarded twenty points to applicants belonging to specified groups, as not narrowly tailored.\footnote{Gratz v. Bollinger, 539 U.S. 244, 270 (2003).} Whereas Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas complained that Justice O’Connor had not truly applied strict scrutiny in Grutter,\footnote{See, e.g., Grutter, 539 U.S. at 378–87 (Rehnquist, C.J., dissenting) (arguing that the majority opinion errs in finding the means is narrowly tailored); id. at 387–395 (Kennedy, J., dissenting) (arguing that the Court failed to apply narrowly tailored test but agreeing that diversity in higher education was a compelling interest); id. at 354–78 (Thomas, J., concurring in part and dissenting in part) (arguing that the Court misapplied compelling interest and narrowly tailored tests); see also Goldstein, Beyond Bakke, supra note 85, at 922–23.} most who joined her opinion thought policies of inclusion should be subject to milder review than exclusionary or oppressive policies.\footnote{Gratz, 539 U.S. at 298–30 (Ginsburg, J., dissenting) (speaking for herself and Justices Souter and Breyer); Grutter, 539 U.S. at 346 (Ginsburg, J., concurring) (speaking for herself and Justice Breyer); see also Goldstein, Beyond Bakke, supra note 85, at 921–22.} Although Justices Scalia and Thomas formally concurred in part with Justice O’Connor’s opinion, that characterization reflected a contrived and opportunistic misreading of the twenty-five-year durational expectation; they were actually her biggest critics, since they concluded there was no “pressing public necessity” to support using race in university admissions,\footnote{Grutter, 539 U.S. at 346–47 (Scalia, J., concurring in part and dissenting in part); id. at 354–78 (Thomas, J., concurring in part and dissenting in part).} in addition to joining Chief Justice Rehnquist’s narrower dissent regarding the lack of narrow tailoring.

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D. Fisher I and Fisher II

In *Fisher v. University of Texas (Fisher I)*, a White woman challenged the undergraduate admissions process at the University of Texas (UT), which considered race as a factor. After the Court of Appeals for the Fifth Circuit affirmed the district court’s grant of summary judgment for the university, the case went to the Supreme Court. With Justice Elena Kagan recused (she had participated as solicitor general in the case when it was before the Fifth Circuit), Justice Kennedy became the decisive vote, positioned as he was between Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor to his left and Chief Justice Roberts and Justices Scalia, Thomas, and Samuel A. Alito, Jr. to his right. The Supreme Court held, 7–1, in Justice Kennedy’s opinion, that the lower court failed to hold the university to “the demanding burden of strict scrutiny” set out in *Grutter* and *Bakke*. Instead, it limited Fisher to challenging whether UT acted in good faith in reintroducing race into its admissions criteria after *Grutter*, rather than performing the “searching examination” strict scrutiny required. The Court vacated and remanded the decision for further proceedings.

The lopsided vote masked internal divisions, as concurrences by Justices Scalia and Thomas and the dissent by Justice Ginsburg revealed. Whereas Justice Scalia’s one-paragraph concurrence simply reiterated his view that diversity was not a compelling interest and that *Grutter* should be reversed (relief Fisher did not seek), Justice Thomas’s nineteen-page opinion not only made those same points but also equated arguments for race-conscious admissions with the defenses of segregated

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113 Id. at 300–02.
114 Id. at 303, 306–07.
116 Id.
117 Fisher I, 570 U.S. at 303.
118 Id. at 312.
119 Id. at 315.
121 Fisher I, 570 U.S. at 315 (Scalia, J., concurring).
education that southern school districts advanced in Brown\textsuperscript{122} and argued that the Equal Protection Clause mandates a colorblind Constitution.\textsuperscript{123} Justice Ginsburg argued that the Fifth Circuit had already adequately determined that UT’s plan met the applicable criteria.\textsuperscript{124}

Three years later, the case returned to the Court when it remained below full capacity due to Justice Kagan’s recusal and Justice Scalia’s more recent death. This time the Court upheld the race-conscious admissions plan at UT, 4–3, in an opinion by Justice Kennedy, joined by Justices Ginsburg, Breyer, and Sotomayor.\textsuperscript{125} Justice Kennedy read \textit{Fisher I} to reaffirm that strict scrutiny applied and required the university to “demonstrate with clarity” a constitutionally permissible and substantial purpose that the racial classification was necessary to achieve.\textsuperscript{126} Justice Kennedy interpreted \textit{Fisher I} to allow a university considerable deference in its decision that diversity would serve its educational goals\textsuperscript{127} but no deference regarding whether its means were narrowly tailored.\textsuperscript{128} The majority regarded UT’s approach as “\textit{sui generis}” because it took race into account after first applying a legislatively mandated plan which automatically admitted applicants who finished in the top 10 percent of their high school class.\textsuperscript{129} Fisher had not ranked that highly, and although that aspect of the admissions program most hurt her prospects, she had not challenged it.\textsuperscript{130} Citing \textit{Fisher I} and other precedents, the Court recognized as a compelling interest “the educational benefits that flow from student body diversity,” including “promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, . . . enable[ing] students to better understand persons of different races,”\textsuperscript{131} promoting learning outcomes, and preparing students for work and societal activity.\textsuperscript{132} Although an admissions program could not be

\begin{footnotesize}
\textsuperscript{123} \textit{Fisher I}, 570 U.S. at 327–28 (Thomas, J., concurring).
\textsuperscript{124} \textit{Id.} at 337 (Ginsburg, J., dissenting).
\textsuperscript{125} Fisher v. Univ. of Tex. at Austin (\textit{Fisher II}), 579 U.S. 365, 367, 388–89 (2016).
\textsuperscript{126} \textit{Id.} at 376.
\textsuperscript{127} \textit{Id.} at 376–77.
\textsuperscript{128} \textit{Id.} at 377.
\textsuperscript{129} \textit{Id.} at 377–79.
\textsuperscript{130} \textit{Id.} at 378.
\textsuperscript{131} \textit{Fisher II}, 579 U.S. at 381 (quoting Grutter v. Bollinger, 539 U.S. 306, 328, 330 (2003)).
\textsuperscript{132} \textit{Id.}.
\end{footnotesize}
reduced to “pure numbers,” the university’s “goals” could not be “elusory or amorphous” but “must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.”  

UT had submitted sufficient evidence to justify its program, including the absence of workable race-neutral means of achieving diversity.

Whatever consensus Fisher I had projected proved illusory. Justice Alito, joined by Chief Justice Roberts and Justice Thomas, issued a strenuous dissent arguing that Fisher II was inconsistent with Fisher I. Their dissent asserted that the Court had failed to require UT to identify with specific certainty the interests its race-conscious admissions plan pursued or to show that the classification was tailored to the objectives. Justice Thomas also wrote separately to again assert his view that the Constitution precluded any use of race in university admissions.

E. SFFA

The operative part of Chief Justice Roberts’s SFFA majority opinion discussing the prior race-conscious admissions cases occupied less than its latter half. After embracing strict scrutiny as the
applicable measure\textsuperscript{138} and acknowledging that Bakke\textsuperscript{139} and Grutter\textsuperscript{140} had recognized diversity as a compelling state interest, the Chief Justice proceeded to discuss and distort Grutter’s treatment of narrow tailoring and apply new tests.

The majority opinion stated that Grutter imposed limits on the permitted means to achieve the compelling interests recognized, limits that “were intended to guard against two dangers” of race-based governmental action.\textsuperscript{141} The first risk the SFFA majority attributed to Grutter was “that the use of race will devolve into ‘illegitimate . . . stereotyping.’”\textsuperscript{142} In fact, Justice O’Connor wrote that “the narrow tailoring requirement” was designed to create a close enough fit between the compelling goal and the classification so “there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”\textsuperscript{143} In other words, strict scrutiny was a means of minimizing, though not necessarily eliminating (“little or no possibility”), the risk that a racial classification had as its motive “illegitimate racial prejudice or stereotype.” She did not purport to eliminate all possibility that using race would have the effect (“devolve into”) of generating some improper stereotype, as the majority opinion implied.

\textsuperscript{138} Id. at 2162–63. The majority claimed that the first time a governmental racial classification satisfied “the most rigid scrutiny” was in Korematsu v. United States, 323 U.S. 214, 216 (1944), and that the decision shows that even the strictest scrutiny may miss an illegitimate racial classification, SFFA, 143 S. Ct. at 2162 n.3, which is a veiled warning against adopting a less rigorous test. But it is widely acknowledged that the Court did not apply rigorous scrutiny at all in Korematsu since the Court did not state any sort of “fit” requirement and accepted the military’s racial classification with the most minimum proof. See, e.g., Fallon, supra note 33, at 1276–77 (stating that notwithstanding the Court’s promise, it upheld the order excluding Japanese American citizens without a very searching review); Eugene V. Rostow, The Japanese American Cases: A Disaster, 54 YALE L.J. 489, 491 (1945), https://doi.org/10.2307/792783 (criticizing the Court for upholding the government action without any factual record in which its justification was addressed); Rostow, supra, at 508 (stating that Korematsu applied relaxed judicial review of military conduct); Rostow, supra, at 508–09 (criticizing the Court for lack of scrutiny of the military’s findings and their basis or connection to the situation).

\textsuperscript{139} SFFA, 143 S. Ct. at 2163–64.

\textsuperscript{140} Id. at 2164.

\textsuperscript{141} Id. at 2164–65.

\textsuperscript{142} Id. at 2165 (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

The second risk the SFFA majority attributed to Justice O’Connor “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. A university’s use of race, accordingly, could not occur in a manner that ‘unduly harm[ed] nonminority applicants.’” The SFFA majority opinion claimed that “even with these constraints in place, Grutter expressed marked discomfort with the use of race in college admissions” because it “stressed the fundamental principle” that, as Justice Powell wrote in Bakke, “there are serious problems of justice connected with the idea of [racial] preference itself.”

In fact, the majority rearranged Justice O’Connor’s text in a way that changed its meaning to suggest that her concern regarding the use of race in college admissions largely remained after she imposed the narrow tailoring constraints she identified. Grutter actually introduced the second purported limit—the no-undue-harm-to-nonminorities point—after quoting Justice Powell’s “serious problems of justice” statement. Far from Grutter maintaining its alleged “marked discomfort” notwithstanding the “undue harm” limit, that concept was part of narrow tailoring to mitigate potential injustice. SFFA claimed that Grutter later said racial classifications were “dangerous,” but in fact, Grutter stated that they “are potentially so dangerous that they may be employed no more broadly than the interest demands.” Far from repudiating their use, Grutter confirmed that racial classifications could be used consistently with the interest they served, and it did so in the context of explaining the rationale for a durational limit as part of narrow tailoring, which, again, managed the concern.

Moreover, and far more importantly, Justice O’Connor did not use the “negative” concept the SFFA majority attributed to her. She had said race could be used as a “plus” and that the race-conscious admissions program could not “unduly harm” nonpreferred

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144 SFFA, 143 S. Ct. at 2165 (alteration in original) (quoting Grutter, 539 U.S. at 341).
145 Id.
146 Id. (quoting Grutter, 539 U.S. at 341).
147 Grutter, 539 U.S. at 341 (“We acknowledge that ‘there are serious problems of justice connected with the idea of preference itself.’ Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group.” (citation omitted)).
148 SFFA, 143 S. Ct. at 2165 (quoting Grutter, 539 U.S. at 342).
149 Grutter, 539 U.S. at 342 (emphasis added).
150 Id. at 341–42.
applicants but wrote that a rejected applicant whose qualifications were weighed “fairly and competitively . . . would have no basis to complain.” The SFFA majority apparently invented the “no negative” requirement and misattributed it to Grutter. When the majority applied the tests a few pages later, it further revised them, without citation or acknowledgement of that fact, to obscure its disregard of precedent.

After stating its (in some cases new) tests, that “[u]niversity programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end,” the majority decreed that Harvard’s and UNC’s systems “fail each of these criteria.” That was a strange formulation in part because the last three tests (no stereotype, no negative, and durational limit) were presumably aspects of narrow tailoring (or strict scrutiny). Although the basic diversity interests Harvard and UNC identified had been recognized as “compelling state interests” in Bakke, Grutter, and Fisher II, the Court now referred to them simply as “commendable goals” but “not sufficiently coherent for purposes of strict scrutiny.”

The majority then reprised the type of arguments from Justice Alito’s Fisher II dissent to the effect that the sort of objectives the Court had previously viewed as compelling were not “measurable and concrete enough to permit judicial review” and accordingly did not satisfy strict scrutiny.

The SFFA majority next held that Harvard’s and UNC’s “race-based admissions systems . . . also fail to comply with the twin commands of the Equal Protection Clause that race may never be used

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151 Id. at 341 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978)).
152 SFFA, 143 S. Ct. at 2166.
153 Id.
154 Id.
155 See Bakke, 438 U.S. at 311–15 (1978) (holding diversity in college admissions to be clearly a compelling interest).
156 See Grutter, 539 U.S. at 328–33.
157 Fisher v. Univ. of Tex. at Austin (Fisher II), 579 U.S. 365, 381–82 (2016).
158 SFFA, 143 S. Ct. at 2166.
159 See id. at 2166–68.
161 SFFA, 143 S. Ct. at 2168.
162 Id. at 2168 & n.5 (stating that universities had failed to satisfy the “standard” for reviewing racial classifications).
as a ‘negative’ and that it may not operate as a stereotype.”\textsuperscript{163} Having just held that the universities failed to satisfy strict scrutiny, the Court apparently imposed additional equal protection requirements. The Court did not offer any citation to support these “twin commands,”\textsuperscript{164} but the similarity to the earlier discussion of \textit{Grutter}\textsuperscript{165} suggested the majority relied on the two points it misattributed to Justice O’Connor’s \textit{Grutter} opinion.

The next sentence proclaimed that “our cases have stressed that an individual’s race may never be used against him in the admissions process.”\textsuperscript{166} What? No citation was provided,\textsuperscript{167} and neither \textit{Grutter} nor the other college admissions cases had made, much less “stressed,” that point. It is important to note that, to the majority, “used as a negative” did not mean intentionally targeting some nonpreferred group to exclude its members. Rather, the \textit{SFFA} majority equated “used as a negative” to operating the admissions plans to have the effect of disadvantaging an applicant from a group whose members did not receive a plus. The majority clearly focused on the effect since it repeatedly complained of “negative” effects without ever arguing that the universities intentionally targeted members of some demographic for exclusion.\textsuperscript{168} The majority concluded that Harvard and UNC impermissibly used race as a “negative” because race was “determinative for at least some”\textsuperscript{169} students and had the effect of decreasing Asian American and White admittees.\textsuperscript{170}

But, of course, any system that considers race will be decisive for some students’ acceptances and will also mean that others, presumably of other races, will not be admitted. \textit{Bakke, Grutter,} and \textit{Fisher} understood and accepted that reality. Indeed, in \textit{Grutter}, Justice O’Connor said not that a nonpreferred student could not be harmed but that a race-conscious admissions program could not “unduly harm” any student.\textsuperscript{171} She used that or synonymous formulations four times

\textsuperscript{163} \textit{Id.} at 2168 (emphasis added).
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 2164–65.
\textsuperscript{166} \textit{Id.} at 2168.
\textsuperscript{167} See \textit{SFFA}, 143 S. Ct. at 2168.
\textsuperscript{168} See, e.g., \textit{id.} at 2168–69.
\textsuperscript{169} \textit{Id.} at 2169.
\textsuperscript{170} \textit{Id.} at 2168–69.
on one page.\textsuperscript{172} A test prohibiting undue harm implicitly accepts that some harm will occur and be allowed so long as it is not “undue.” \textit{Grutter} did not impose the “no negative” restriction that was patently inconsistent with its “no undue harm” criteria. While purporting to follow \textit{Grutter} on this point, the \textit{SFFA} majority silently dropped the adverb “undue,” a consequential excision that covertly converted a balancing test to minimize disadvantage to nonminorities into an absolute prohibition against using race. The majority’s protest against race-conscious decision-making’s effect on results calls to mind the constable in the classic movie \textit{Casablanca} who professed himself “shocked! shocked!” upon discovering gambling at “Ric’s” nightclub immediately before receiving his evening winnings.\textsuperscript{173} In fact, as others had pointed out, the negative impact on any applicant’s admissions chances from race-conscious admissions programs was very small.\textsuperscript{174}

The majority opinion also found the programs defective for stereotyping,\textsuperscript{175} but again, the majority manufactured a nonexistent problem to correct. It said that “\textit{Grutter foreshore}[] stereotyping”\textsuperscript{176} and rejected the idea that “minority students” will generally “express some characteristic minority viewpoint on any issue.”\textsuperscript{177} Right after those words, \textit{Grutter} had explained that, far from acting based on stereotype, proper affirmative action plans seek to diminish them by enrolling enough students from historically marginalized groups to demonstrate diversity of perspectives within those communities: “To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”\textsuperscript{178}

Notwithstanding these statements and contrary to them, \textit{SFFA}’s majority, remarkably, accused race-conscious admissions plans of

\textsuperscript{172} \textit{Id.} (stating that race-conscious admissions programs cannot “unduly harm members of any racial group”; that programs must not “unduly burden” members of nonfavored groups; and that programs cannot “unduly harm nonminority applicants”); \textit{see also id.} (emphasizing the need for continuing oversight to ensure programs “work the least harm possible to other innocent” applicants (quoting \textit{Regents of Univ. of Cal. v. Bakke}, 438 U.S. 265, 308 (1978))).

\textsuperscript{173} \textit{Casablanca} (Warner Bros. Pictures 1942).

\textsuperscript{174} \textit{See}, e.g., Liu, \textit{supra} note 12, at 1053–54, 1073–78; Bundy, \textit{supra} note 8.

\textsuperscript{175} \textit{SFFA}, 143 S. Ct. at 2169–70.

\textsuperscript{176} \textit{Id.} at 2170.

\textsuperscript{177} \textit{Id.} at 2169 (quoting \textit{Grutter}, 539 U.S. at 333). Surprisingly, the majority presents the last quoted fragment as \textit{Grutter}’s statement of law, but it was part of the representation by UM about its plan. \textit{See Grutter}, 539 U.S. at 333.

\textsuperscript{178} \textit{Grutter}, 539 U.S. at 333.
operating on precisely the opposite assumption that members of a race "think alike."\textsuperscript{179} \textit{Grutter} recognized that Black people and other people of color are likely to have experiences that differ from those who are White. "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."\textsuperscript{180} The \textit{SFFA} majority characterized that view as a "pernicious stereotype."\textsuperscript{181} Whereas most people, including conservative Justices Powell, O’Connor, and Kennedy, had no difficulty understanding that members of racial and ethnic minorities, including and perhaps especially Black people, typically have some different experiences than many White people, the \textit{SFFA} majority attacked that perspective as demeaning\textsuperscript{182} and impermissible stereotyping.

Finally, the majority rejected the admissions plans for lack of a durational limit.\textsuperscript{183} \textit{Grutter} did state that "race-conscious admissions policies must be limited in time" and "must have a logical end point."\textsuperscript{184} That requirement stemmed from the belief that a purpose of the Fourteenth Amendment was to eliminate governmental uses of race.\textsuperscript{185} Although most, no doubt, broadly share the idea that race-conscious decision-making imposes risks and needs scrutiny, the propriety of a durational limit would seem contingent on the objective a particular racial classification serves, the extent to which the purpose has been achieved, and the benefits of continued use compared to its costs. If the Equal Protection Clause seeks to remedy the effects of long-standing societal discrimination against Black people and other historically disadvantaged groups, enforcing a durational limit before past effects had been mitigated would prematurely terminate efforts to achieve the constitutional mandate. Similarly, if racial classifications


\footnotesize{\textsuperscript{180} \textit{Grutter}, 539 U.S. at 333.}

\footnotesize{\textsuperscript{181} \textit{SFFA}, 143 S. Ct. at 2170 (referring to Harvard’s statement, to which Justice Powell cited with approval, that “a [B]lack student can usually bring something that a [W]hite person cannot offer” (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316 (1978))).}

\footnotesize{\textsuperscript{182} \textit{Id.} ("It demeans the dignity and worth of a person to be judged by ancestry . . . ").}

\footnotesize{\textsuperscript{183} \textit{Id.} at 2166, 2170.}

\footnotesize{\textsuperscript{184} \textit{Grutter}, 539 U.S. at 342.}

\footnotesize{\textsuperscript{185} \textit{Id.} at 341–42 (citing Palmore v. Sidoti, 466 U.S. 429, 432 (1984))).}
are needed to achieve the compelling interest of diversity that Bakke, Grutter, and Fisher (but not SFFA) recognized, ending them prematurely would be inappropriate if they were still needed to meet that objective.\footnote{See generally Goldstein, Justice O’Connor’s Twenty-Five Year Expectation, supra note 107, at 118–30.}

Justice O’Connor’s statement in \textit{Grutter} that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”\footnote{\textit{Grutter}, 539 U.S. at 343.} was not, of course, a holding as Justices Thomas and Scalia repeatedly claimed\footnote{\textit{Id.} at 351, 375–77 (Thomas, J., concurring in part dissenting in part).} in a characterization that strained credulity.\footnote{Goldstein, Justice O’Connor’s Twenty-Five Year Expectation, supra note 107, at 91–94.} Moreover, those who use her statement to sunset race-conscious programs ignore the pivotal word “necessary” in her formulation. That word’s clear implication is that if the expectation was not realized and the use of racial classifications remained “necessary” to achieve the compelling interest, race-conscious admissions programs would not terminate. “Necessary” was not a random word. It was a synonym for “narrowly tailored” and sometimes used in its place to express that element of strict scrutiny.\footnote{See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 143 S. Ct. 2141, 2162 (2023) (“[W]e ask whether the government’s use of race is ‘narrowly tailored’—meaning ‘necessary’—to achieve [a compelling] interest.”); Fisher v. Univ. of Tex. at Austin (Fisher I), 570 U.S. 297, 311–12 (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.”); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978) (stating that use of suspect classification requires, in part, that the state show that its use is “necessary”); see also Goldstein, Justice O’Connor’s Twenty-Five Year Expectation, supra note 107, at 104–05, 105 n.126.} Thus, if the use of racial classifications remained “necessary” to achieve the compelling interest the Court had repeatedly recognized before \textit{SFFA}, their continued use would thereby continue to satisfy strict scrutiny since such use would continue to be narrowly tailored to that end. As the majority conceded, Justice O’Connor’s expectation proved optimistic.\footnote{SFFA, 143 S. Ct. at 2172 (calling \textit{Grutter’s} expectation “oversold” and contrary to universities’ current beliefs). Of course, Justice O’Connor expected universities to explore alternatives and determine whether race-
neutral options existed. The justices on the Court would be charged with deciding what to do at the end of the period based on constitutional principles, presumably, if workable alternatives did not exist, continued use of race-conscious plans would remain “necessary.” The suggestion of the majority and especially Justice Kavanaugh that the twenty-five-year expectation might expire with the class graduating in 2028, not the one admitted that year, is fanciful. Justice O’Connor’s phrase “the use of racial preferences” referred to the admissions process that accepted or rejected applicants. Preferences were “use[d]” during that process, not at some later point, and that basic fact was understood, including by Grutter dissenters, as the pertinent time to which any durational limit should apply. Her expectation could not preclude a future Court from reversing course, something this Court, more than others, has proven ready to do. The Court does not enhance its legitimacy when it misrepresents precedent to do so.

SFFA departed from the Court’s prior approach to race-conscious admissions decision-making. To a great extent, Justice Powell’s decision in Bakke and Justice O’Connor’s in Grutter, to apply strict scrutiny and reject compelling interests other than diversity, were fateful. They limited the ability of universities to use and justify programs to increase the enrollment of disadvantaged groups and made programs more vulnerable to judicial challenge. Bakke, Grutter, and Fisher II were not uniform, and they reflected differences in the approaches of Justices Powell, O’Connor, and Kennedy. Nonetheless, 192 Sandra Day O’Connor & Stewart Schwab, Affirmative Action in Higher Education over the Next Twenty-Five Years 62 (Cornell Legal Stud. Rsch. Paper No. 16-4, 2010), https://ssrn.com/abstract=2705444.

193 Id.

194 SFFA, 143 S. Ct. at 2172 (relating the twenty-five-year time to racial diversity on campus); id. (referring to the class that would graduate in 2028 as a relevant marker).

195 Id. at 2224 & n.1 (Kavanaugh, J., concurring) (suggesting that Grutter’s twenty-five-year period might end with the class graduating in 2028, not admitted in 2028).

196 See Grutter v. Bollinger, 539 U.S. 306, 351 (2003) (Thomas, J., concurring in part and dissenting in part) (understanding the Grutter statement as making use of race in “higher education admissions” illegal in twenty-five years); id. at 375 (referring to racial classifications “in admissions” to be “given another 25 years before it is deemed no longer narrowly tailored”); id. at 377 (stating that the twenty-five-year limit applies to when deference “to the Law School’s educational judgments and refusal to change its admissions policies will . . . expire”); id. at 386 (Rehnquist, C.J., dissenting) (referring to lack of precise time in Law School’s use of race in admissions); id. at 394 (Kennedy, J., dissenting) (referring to the Court’s “pronouncement that race-conscious admissions program will be unnecessary 25 years from now”).
each made accommodations that preserved race-conscious admissions programs.

Although each case applied strict scrutiny, the standard’s propriety was always fiercely contested. Since Bakke, the justices have been split pretty evenly between those who favored applying strict scrutiny to all racial classifications and those supporting a more lenient standard to assess measures to remedy past wrongs or increase inclusion. Of the twenty-four justices on the Court since Bakke, eleven supported applying strict scrutiny to race-conscious university admissions plans,197 and eleven opposed that standard, either favoring intermediate scrutiny or arguing that inclusionary policies should be treated differently than exclusionary uses of race.198 Chief Justice Warren Burger and Justices Potter Stewart and William Rehnquist did not publicly take a position on that subject in Bakke since they would have decided Bakke based on Title VI,199 but during the Court’s internal deliberations regarding that case, they apparently expressed the view that strict scrutiny should apply, so perhaps they should be added to that group.200 Even so, three justices favoring strict scrutiny—Justices Powell, O’Connor, and Kennedy—found diversity to be a compelling state interest that was narrowly tailored and accordingly satisfied strict scrutiny.201 Moreover, Justice O’Connor was accused of applying an insufficiently strict version of strict scrutiny in Grutter by those to her right,202 and Justice Kennedy was accused of the same offense in Fisher

197 Chief Justices Rehnquist and Roberts, and Justices Powell, O’Connor, Scalia, Kennedy, Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.
200 SCHWARTZ, supra note 18, at 66–67 (reporting that Chief Justice Burger favored strict scrutiny in an October 1977 memorandum); id. at 87–88 (reporting that Justice Stewart later concurred with Chief Justice Burger’s position); see also id. at 72–73 (reporting that Justice Rehnquist agreed that strict scrutiny should apply to a claim by a White person alleging racial discrimination; note that Justice Rehnquist is already included in the statistics based on his opinions in Grutter and Gratz).
201 Fisher v. Univ. of Texas at Austin (Fisher II), 579 U.S. 365, 381–88 (2016); Grutter, 539 U.S. at 343; Bakke, 438 U.S. at 311–12, 318–19.
202 Grutter, 539 U.S. at 380 (Rehnquist, C.J., dissenting) (referring to the majority’s application of strict scrutiny as “unprecedented in its deference”); id. at 387 (Kennedy, J., dissenting) (endorsing Justice Powell’s approach in Bakke but criticizing the majority for not applying strict scrutiny correctly).
II,\textsuperscript{205} perhaps suggesting that they adhered to a less rigid version of that concept. Accordingly, for more than forty-two years from \textit{Bakke} until Justice Ginsburg’s death on September 18, 2020,\textsuperscript{204} the Court consistently had four justices who thought racial classifications for inclusive purposes merited more deferential review, and either Justice Powell, O’Connor, or Kennedy in the Court’s center had been willing to provide more limited support for race-conscious decision-making in admissions until Justice Kennedy’s retirement on July 31, 2018.\textsuperscript{205}

Yet even putting aside the differences regarding the appropriate level of judicial scrutiny, application of strict scrutiny as in \textit{Bakke}, \textit{Grutter}, and \textit{Fisher} would have reached a different result than the Court reached in \textit{SFFA}. A change in Court personnel produced \textit{SFFA}. The three \textit{Fisher II} dissenters, Chief Justice Roberts and Justices Thomas and Alito, advocated an approach in that case whose only prior supporters had been Justices Scalia and Thomas. The appointments of Justices Neil M. Gorsuch, Brett M. Kavanaugh, and Amy Coney Barrett to replace Justices Scalia, Kennedy, and Ginsburg—the latter two of whom were part of the \textit{Fisher II} majority—reinforced their position and moved the Court dramatically to the right. That rightward shift resulted from the fortuitous timing of Court vacancies, not from Republican electoral success. The nine justices on the Court that considered \textit{SFFA} were appointed by presidents and confirmed by Senates between 1991 and the present.\textsuperscript{206} Although Democratic presidents have served for nineteen of the thirty-three years\textsuperscript{207} and the parties have controlled the Senate an even number of years since 1991,\textsuperscript{208} Republican presidents appointed six of the nine justices.\textsuperscript{209}

\textsuperscript{205} See \textit{Fisher II}, 579 U.S. at 389 (Thomas, J., dissenting) (“[T]he Court’s decision today is irreconcilable with strict scrutiny . . . .”); \textit{id.} at 390 (Alito, J., dissenting) (describing the majority opinion as unduly deferential to satisfy strict scrutiny).


\textsuperscript{206} See \textit{id.}

\textsuperscript{207} Chronological List of Presidents, First Ladies, and Vice Presidents of the United States, Libr. of Cong., https://www.loc.gov/rr/print/list/057_chron.html (last visited Apr. 21, 2024).

\textsuperscript{208} Party Division, U.S. Senate, https://www.senate.gov/history/partydiv.htm (last visited Apr. 21, 2024).

\textsuperscript{209} See \textit{Current Members, supra} note 205.
The fortuity of these appointments to the Supreme Court, the ideological leanings of the majority, and their willingness to ignore long-standing precedent produced SFFA. In SFFA, the majority acted as if it was following and applying its precedents regarding race-conscious admissions plans. It did not, and some justices said so.  

II. THE MAJORITY’S SILENCE REGARDING AMERICA’S RACIAL HISTORY

The SFFA majority opinion said very little about America’s racial history and its continuing consequences, and the little that it did say did not communicate much angst about the subject. The majority acknowledged that for nearly a century after the Civil War, “state-mandated segregation” in much of the United States was “a regrettable norm”—which seems to be a gross understatement, to say the least—and made a passing reference to the Court’s part in the “ignoble history” of segregated institutions. The majority opinion did not discuss “slavery,” the ways laws and practices systematically disadvantaged Black people on a continuing basis even after slavery ended, or the enduring consequences of hundreds of years of unimaginable mistreatment in America. Justices Sotomayor and Ketanji Brown Jackson gave prominence to that history and its consequences in their dissents, but Chief Justice Roberts dismissed their points, saying “the entirety of their analysis of the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice.”

210 See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 143 S. Ct. 2141, 2207 (2023) (Thomas, J. concurring) (“The Court’s opinion rightly makes clear that Grutter is, for all intents and purposes, overruled.”); id. at 2208 (Gorsuch, J., concurring) (“For some time, [Harvard and UNC] have decided which applicants to admit or reject based in part on race. Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice.”); id. at 2245 (Sotomayor, J., dissenting) (“In reality . . . the Court . . . overrules its ‘higher-education precedents’ following Bakke.”).

211 Id. at 2159 (majority opinion).

212 Id.; see also id. (referring to the “perniciousness” of “separate but equal” doctrine); id. at 2207 (Thomas, J., concurring) (“The great failure of this country was slavery and its progeny. . . . [T]he tragic failure of this Court was its misinterpretation of the Reconstruction Amendments. . . . I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination . . . .”); id. at 2224 (Kavanaugh, J., concurring) (“[T]he dissenting justices] thoroughly recount the horrific history of slavery and Jim Crow in America as well as the continuing effects of that history on African Americans today.” (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 395–402 (1978) (Marshall, J.,))).

213 Id. at 2276–77 (Jackson, J., dissenting) (“[T]he race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter [to the majority].”).
Protection Clause—the statistics, the cases, the history . . . has been considered and rejected before.”\textsuperscript{214}

The Court had previously rejected “[the dissenters’] analysis,”\textsuperscript{215} but one might have expected the US Supreme Court at least to engage with America’s long-standing mistreatment of Black people and its continuing consequences rather than adopt such a dismissive tone.

After all, it is hard to imagine a more embarrassing chapter of American history, although the enduring mistreatment of Black people and other historically marginalized groups suggests it is more accurate to think of that experience as representing multiple chapters. Some believe the past and continuing mistreatment of “racial minorities” raise challenging questions regarding the legitimacy of the constitutional system, at least in their eyes,\textsuperscript{216} that would require substantial attention to address.\textsuperscript{217} That history influenced the views of many justices over the past sixty years, including four members each of the \textit{Bakke}\textsuperscript{218} and \textit{Grutter}\textsuperscript{219} Courts and three current justices.\textsuperscript{220} Especially given the liberties the majority took with precedents, including established affirmative action doctrine, it is hard to see why the dissenters were not entitled to raise their positions.

Chief Justice Roberts rebuked Justice Sotomayor for citing Justice Thurgood Marshall’s \textit{Bakke} opinion “nearly a dozen times” while giving

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\item \textsuperscript{214} \textit{Id.} at 2174 (majority opinion).
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textsc{Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court} 29 (2018) (raising the possibility for further study “that our nation’s historic and continuing mistreatment of racial minorities” may make our legal system “morally illegitimate, at least from the perspective of minority groups”).
\item \textsuperscript{217} \textit{Id.} at 31.
\item \textsuperscript{218} \textit{See} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 359, 369 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (concluding that the Equal Protection Clause allowed race-conscious measures to address past societal discrimination and that the Court should apply intermediate scrutiny).
\item \textsuperscript{219} \textit{See} Grutter v. Bollinger, 539 U.S. 306 (2003); \textit{see also} Gratz v. Bollinger, 539 U.S. 244, 281-82 (2003) (Breyer, J., concurring) (stating Justice Breyer’s alignment with Part I of Justice Ginsburg’s opinion); \textit{Gratz}, 539 U.S. at 298–302 (Ginsburg, J., dissenting) (representing the views of Justices Souter, Ginsburg, and Breyer that racial classifications that seek to promote equality or inclusion should not be subjected to same scrutiny as exclusionary uses); \textit{Adarand Constructors, Inc. v. Pena}, 515 U.S. 200, 242, 248 n.6 (Stevens, J., dissenting) (stating that uses of race for inclusive purposes should be treated differently from exclusive uses).
\item \textsuperscript{220} \textit{See} SFFA, 143 S. Ct. at 2225–26 (Sotomayor, J., dissenting); \textit{id.} at 2276–77 (Jackson, J., dissenting).
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insufficient attention to Justice Powell’s “controlling opinion,” which Justice Jackson “ignore[d] . . . altogether.” Grutter superseded Justice Powell’s opinion in important respects in 2003, which might explain the dissenters’ treatment of it. They thought Justice Marshall’s Bakke opinion deserved continuing attention. So do I.

Although syllabus constraints in the Constitutional Law courses I taught largely sidelined Bakke after Grutter-Gratz came down, I still assigned Justice Marshall’s Bakke opinion until retiring in 2019. He played such a historic role; his connection to the subject was so strong, his voice so unique, and his opinion so powerful and eloquent that students (and other citizens) should read and consider it even though it had not carried that day. A summary follows, although much is lost in condensing his opinion. It’s only fifteen pages and well worth reading.

After very brief introductory matters, Justice Marshall got right to his point:

[I]t must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

A quarter century earlier, on May 17, 1954, then-lawyer Marshall had celebrated the most hopeful day in twentieth-century constitutional history when the Court had unanimously ruled for the Black school children he represented and struck down segregated public schools in Brown v. Board of Education because that institution sent a message that Black children were inferior. Marshall had optimistically predicted the demise of racial discrimination and school segregation in a decade or less. He was wrong. His history lesson began:

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor,

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221 Id. at 2174 (majority opinion).
223 Id. at 387.
225 Id. at 494.
the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave.227

Justice Marshall sketched America’s systematic mistreatment of Black people, noting how racism infected the Declaration of Independence, the Constitution, and Supreme Court decisions; how the correction brought by the Civil War and subsequent constitutional amendments yielded to pernicious Black Codes and associated practices with Supreme Court approval; and how even the decisions culminating with Brown had not produced racial justice.228 “Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.”229

“The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment,” Justice Marshall continued.230 Far from a reality, “meaningful equality remains a distant dream for the Negro.”231 For, in 1978, a Black child could expect a shorter life by five years compared to a White child, Black women were three times more likely to die of childbirth, and Black people were four times more likely to live in poverty and far more likely to be unemployed.232 Black people made up 11.5 percent of the population but were only between 1.1 percent and 2.6 percent of the engineers, lawyers and judges, doctors, and professors.233 “At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro,” Justice Marshall wrote.234 This “sorry history of discrimination and its devastating impact on the lives of Negroes” made “bringing the Negro into the mainstream of American

228 Id. at 388–94.
229 Id. at 394.
230 Id. at 395.
231 Id.
232 Id.
234 Id. at 396.
life a state interest of the highest order.” Failure to do so would make America “forever . . . a divided society.”

The Congress that had proposed the Fourteenth Amendment had passed legislation conferring benefits principally on Black people, showing its belief that such measures were consistent with the amendment. For centuries, Black people had suffered discrimination, not as individuals but “solely because of the color of their skins.” Individual proof was not necessary to substantiate that individual Black people had suffered racial discrimination; societal racism was “so pervasive that none, regardless of wealth or position, had managed to escape its impact.” Black people had been treated differently from other groups because “a whole people were marked as inferior by the law” on an enduring basis. “The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.”

The Court’s divided nature in the years since Bakke and the embrace of diversity as the authorized rationale for race-conscious admissions plans minimized discussions of America’s racial history in subsequent Supreme Court decisions on the subject. Dissenting in Gratz, Justice Ginsburg observed that “we are not far distant from an overtly discriminatory past, and the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools,” but her discussion extended to just over two pages.

Yet judicial silence did not erase that history or its consequences. Justice Jackson began her SFFA dissent, for herself and Justices Sotomayor and Kagan:

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great

235 Id.
236 Id.
237 Id. at 397–98.
238 Id. at 400.
239 Bakke, 438 U.S. at 400 (opinion of Marshall, J.).
240 Id.
241 Id. at 400–01.
243 Id. at 298.
244 Id. at 298–301.
country falls short of actualizing one of its foundational principles—the “self-evident” truth that all of us are created equal.\textsuperscript{245}

Justice Jackson retraced events Justice Marshall had raised, sometimes exposing the appropriation of wealth from Black people in different terms—slavery enriching enslavers,\textsuperscript{246} sharecropping exploiting Black people,\textsuperscript{247} and Jim Crow comprehensively replacing the Black Codes to perpetuate “economic exploitation.”\textsuperscript{248} And on and on and on.\textsuperscript{249} Suburbanization between 1930 and 1960 allowed homeowners to accumulate wealth based on housing appreciation, but, due to government action, less than 1 percent of mortgages went to Black families.\textsuperscript{250} Veterans’ benefits went to White but not Black veterans, and other government policies exacerbated these practices.\textsuperscript{251} “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.”\textsuperscript{252} As such, the median wealth of White families was eight times greater than that of Black families, and even college-educated Black families possessed an average of $300,000 less than their White counterparts, with race-based income disparities widening rather than narrowing over time.\textsuperscript{253} Black people are half as likely to have college degrees and carry twice the college debt.\textsuperscript{254} Only 5 percent of America’s lawyers are Black, and various structural barriers impede Black people from succeeding as large and small business entrepreneurs.\textsuperscript{255} Unsurprisingly, health disparities coincide with these economic measures.\textsuperscript{256}

\textsuperscript{245} Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 143 S. Ct. 2141, 2263 (2023) (Jackson, J., dissenting).
\textsuperscript{246} Id. at 2265.
\textsuperscript{247} Id. at 2266.
\textsuperscript{248} Id.
\textsuperscript{249} See id. at 2266–67 (recounting some federal and state actions economically disadvantaging Black people).
\textsuperscript{250} Id. at 2267.
\textsuperscript{251} SFFA, 143 S. Ct. at 2267–68 (Jackson, J., dissenting).
\textsuperscript{252} Id. at 2268.
\textsuperscript{253} Id. at 2269.
\textsuperscript{254} Id.
\textsuperscript{255} Id. at 2269–70.
\textsuperscript{256} Id. at 2270.
The majority’s response that “the history[] has been considered and rejected before” seemed odd—how could history be rejected?—but it was telling. America’s racial history was inconsistent with the SFFA majority’s approach to the Equal Protection Clause, particularly its embrace of a rigid anticlassification position that percolated throughout its opinion. Writing before the SFFA decision, Pulitzer Prize-winning historian Eric Foner observed that “[t]he Court appears to view ‘racial classifications,’ whether remedial or oppressive, not inequality, as the root of the country’s race problems”; he attributed this approach to politics, not to the history of the Reconstruction period, an era he has studied for more than one-half century. The Court’s approach “fuel[ed] a long retreat from race-conscious efforts to promote equality.” The SFFA majority admitted that viewpoint in its revealing statement that “[t]he entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.” Taken alone, the Court’s comment is a bit ambiguous and might simply be stating the uncontroversial truism that differential treatment based on a person’s race differs from all or most other bases of distinction. Yet the context suggests the Court meant to imply something more since the prior sentence states that “government actors” cannot “intentionally allocate preference” based solely on race and the following sentence refers to race as “a forbidden classification.”

If, as seems likely, the majority means that the “entire point of the Equal Protection Clause” is prohibiting racial classifications, then no degree of racial inequality justifies even limited use of race-conscious decision-making in university admissions. The majority underscored its commitment to this position when it declared that “the ‘core purpose’ of the Equal Protection Clause” is eliminating “all

257 SFFA, 143 S. Ct. at 2174 (majority opinion).
258 See, e.g., id. at 2161 (“Eliminating racial discrimination means eliminating all of it.”); id. at 2166 (“[W]e have permitted race-based admissions only within the confines of narrow restrictions.”); id. at 2168 n.5 (criticizing as “folly” Justice Jackson’s call for greater judicial deference); id. at 2170 (describing race “as a forbidden classification”).
260 Id.
261 SFFA, 143 S. Ct. at 2170.
262 Id.
governmentally imposed discrimination based on race.”263 Chief Justice Roberts’s majority opinion is not as overtly obsessed with the "metaphor"264 of a colorblind Constitution as Justice Thomas’s concurrence—whereas the majority opinion mentions that phrase a handful of times;265 generally quoting others, Justice Thomas invoked it more than two-dozen times, hammering it in on most pages of his opinion.266

Yet the Equal Protection Clause does not say anything about eliminating all racial classifications or mandating a colorblind Constitution.267 The aspiration to not treat people differently based on race or ethnicity is appealing in most respects, but the constitutional text does not contain those phrases, and history provides substantial reason to doubt they were absolute constitutional imperatives or objectives.268 The 39th Congress proposed the existing formulation of the Equal Protection Clause instead of one that

263 Id. at 2161 (emphasis added) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).
264 PAUL A. FREUND, ON LAW AND JUSTICE 45 (1968), https://doi.org/10.4159/harvard.9780674332461 (terming Justice Harlan’s “colorblind Constitution” phrase a “constitutional metaphor” not a “constitutional text”).
265 SFFA, 143 S. Ct. at 2160, 2164, 2174–75.
266 Id. at 2176–77, 2179, 2182 & n.2, 2184–88, 2188 n.4, 2193, 2195 & n.6, 2197 n.7, 2200, 2202–03, 2206–07 (Thomas, J., concurring).
267 See FREUND, supra note 264, at 33 (“Equal protection, not color blindness, is the constitutional mandate . . . .”).
268 See, e.g., FALLON, supra note 216, at 5 (“Abundant evidence suggests that the Framers and ratifiers of the Fourteenth Amendment’s Equal Protection Clause did not view it as barring all race-based classifications.”); KENNEDY, FOR DISCRIMINATION, supra note 10, at 26 (“Overwhelming evidence indicates that the framers of the Fourteenth Amendment did not intend to create a color-blind Constitution.”); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 18 (2004), https://doi.org/10.1093/oso/9780195129038.001.0001 (stating that the Fourteenth Amendment’s failure to prohibit official “race consciousness” was deliberate); Kermit Roosevelt III, Judicial Supremacy, Judicial Activism: Cooper v. Aaron and Parents Involved, 52 ST. LOUIS U. L.J. 1191, 1208 (2008) (suggesting that a colorblind Constitution is inconsistent with original understanding); Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753, 754–83 (1985), https://doi.org/10.2307/1073012 (pointing to extensive federal legislation from 1865 to 1870 benefitting Black people as indicative of contemporaneous Congress’ understanding that race-conscious measures to help Black people were constitutional); Terrance Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. CHI. L. REV. 653, 664–66 (1974) (rejecting the idea that the Equal Protection Clause was intended or understood when proposed and adopted to create a colorblind Constitution).
specifically prohibited racial discrimination, certainly a suggestive move.269 The same Congress that proposed the Fourteenth Amendment also passed legislation that specifically aided Black people.270 And, when President Andrew Johnson vetoed the legislation for that reason, Congress overrode his veto with a two-thirds vote in each chamber and enacted the law.271 Contemporaneous Congresses adopted numerous measures to help Black people.272

Although in prior opinions, Justice Thomas had strenuously argued that race-conscious admissions programs are unconstitutional on consequential and moral grounds,273 in SFFA he presented an “originalist defense of the colorblind Constitution.”274 Notably, none of the other justices joined his opinion,275 and the majority opinion does not offer an originalist argument, limiting itself to a few random comments in a single paragraph, most of which can be read in different ways.276 When confronted with evidence of laws Congress passed that employed racial classifications around the time it proposed the Fourteenth Amendment, Justice Thomas often speculated regarding what “may not have been possible[,]” that “Congress thus may have enacted the measure not because of race,” that the laws were “likely” remedial,277 or that “[i]t thus may have been the case” that certain race-

272 See Schnapper, supra note 268, at 754, 760–84 (documenting numerous laws passed to assist Black people).
275 Id. at 2176.
276 Id. at 2159 (majority opinion).
277 Id. at 2186 (Thomas, J., concurring).
specific laws were “necessary” due to local neglect. Yet such speculation regarding mere possibilities surely cannot rebut extensive historical evidence of race-conscious measures enacted by contemporaneous Congresses to help Black people, including the one that proposed the Fourteenth Amendment.

The Equal Protection Clause, proposed and ratified immediately after the Civil War to end slavery and restore the Union, discusses equal protection of the laws, not classifications or colorblindness. The Clause is not limited to race, but surely a principal and animating purpose concerned equality for Black people. Of course, as Chief Justice Roberts wrote, racial distinctions bear more scrutiny than those between urban and suburban dwellers or judgments regarding relative musical proficiency. The Supreme Court justices who have been most supportive of race-conscious decision-making have agreed that even seemingly benign classifications need some elevated scrutiny.

But what is significant about Chief Justice Roberts’s comment about “[t]he entire point of the Equal Protection Clause” is its total emphasis on the vice of all racial distinctions and its apparent failure to recognize any mission of the Clause to make sure that Black people and other marginalized groups are not oppressed in America. In so stating, the majority overlooks the Equal Protection Clause’s equality focus while confusing what often is a means to that objective with the objective itself. That statement reflects the fundamental difference between the views of the Clause of the SFFA majority, on the one hand and Justice Marshall’s and the modern dissenters’ views on the other, and it helps explain the majority’s indifference to America’s racial history. The majority’s stated attitude that the “entire” purpose of the

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278 Id. at 2187.
279 See id. at 2225 (Sotomayor, J., dissenting) (“The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality.”); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) (“The existence of laws in the States where the newly emancipated [Black people] resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”).
281 SFFA, 143 S. Ct. at 2170.
282 The majority also skips over the difficult question of how one decides what the objective much less “the entire point” of a constitutional provision is, relying instead simply on its assertion rather than any analysis. Some who have studied the Equal Protection Clause have identified multiple purposes.
Equal Protection Clause is to attack racial classifications makes evidence of societal discrimination and its consequences irrelevant.

The majority makes a second flawed assumption that helps explain its aversion to this history. “Eliminating racial discrimination means eliminating all of it,” Chief Justice Roberts proclaimed. Yet, Justice Marshall’s and Justice Jackson’s opinions make clear the hollow nature of that pronouncement absent a willingness to address the consequences of systemic societal discrimination. Past systemic racial discrimination has shaped the present and will reverberate into the future. The Court, however, is not prepared to allow race-conscious measures to remedy past discrimination except in the limited cases where a claimant can show “specific, identified instances of past discrimination” that violated law. As such, the majority’s commitment is not really to eliminate all discrimination. Absent the onerous proof the Court has required, whatever advantage and disadvantage past discrimination has conferred is built into the status quo from which society moves forward; race-conscious remedies cannot be used to mitigate the unequal protection past laws and governmental practices furnished historically marginalized populations, especially Black Americans. The Court’s increasingly rigid anticlassificationist approach will have the effect of perpetuating the vestiges of policies that subordinated Black people. As Justice Sotomayor wrote, “the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions.” The Court’s view, she wrote, was “contrary to precedent and the entire teachings of our history” and “grounded in the illusion that racial inequality was a problem of a different generation.” Nonetheless, she observed that “[e]ntrenched racial inequality remains a reality today.” Only by ignoring history, by imagining a reality in which the consequences of the past are irrelevant, can the majority make sense of its slogan about ending all discrimination.

283 SFFA, 143 S. Ct. at 2161.
284 Id. at 2162.
285 Kennedy, Persuasion and Distrust, supra note 5, at 1337.
286 SFFA, 143 S. Ct. at 2234 (Sotomayor, J., dissenting); see also id. at 2274 (Jackson, J., dissenting) (“The majority seems to think that race blindness solves the problem of race-based disadvantage.”).
287 Id. at 2234 (Sotomayor, J., dissenting).
288 Id.
History embarrasses a third basic tenet of the majority’s approach. The majority treats all racial classifications as equally prohibited. It states that all racial classifications are “pernicious” and “demean[]” individuals appropriating the adjectives used for malicious discrimination against Black people to describe race-conscious admissions plans. The majority and Justice Thomas’s concurrence suggest a moral equivalency between segregationists and affirmative action proponents by applying these words used to condemn heinous behavior from Reconstruction through Jim Crow to race-conscious admissions designed to include disadvantaged groups. On other occasions, Justice Thomas has been even more explicit, stating that “government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.”

Such an association is preposterous. Motive matters, and it is regarded so in societal and personal interactions. Slaps on the back from an assailant intending harm are entirely different from those same strikes by a rescuer trying to save a person who is choking. One merits criminal prosecution and tort suits, the other is a good Samaritan, a hero. Like other governmental programs, race-conscious admissions did not operate perfectly and required monitoring, but it is ludicrous to associate university efforts to build an inclusive society by giving small benefits to some historically disadvantaged groups with those of the segregationists who were intent on excluding all members of those classes generally because they viewed them as inferiors. As Justice John Paul Stevens explained:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a

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289 See, e.g., id. at 2193 (Thomas, J., concurring) (“‘[A]ll racial classifications are ‘inherently suspect.’”).

290 Id. at 2168 (majority opinion); see also id. at 2177 (Thomas, J., concurring) (referring to “the pernicious effects of all such discrimination”).

291 SFFA, 143 S. Ct. at 2170 (majority opinion); see also id. at 2190 (Thomas, J., concurring) (“[A]ll racial stereotypes harm and demean individuals.”).

292 See id. at 2196 (Thomas, J., concurring) (“‘What was wrong’ when the Court decided Brown . . . ’cannot be right today.’” (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 778 (2007) (Thomas, J., concurring))).

disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.\textsuperscript{294} American history makes vivid the differences between the segregationists and proponents of affirmative action; the majority ignored those realities in making such an offensive and specious association.

The slogans the majority adopted—eliminating all discrimination, prohibiting any racial classification, enforcing a color-blind Constitution, and so forth—are related to its decision to ignore America’s racial history and its consequences. A focus on that history underscores a primary purpose of the Equal Protection Clause: to pursue equality for marginalized populations, especially Black people, not to prohibit appropriate racial classifications designed to serve that goal. Engaging that history spotlights the unjust consequences of ignoring a racist past. It also highlights the difference between the problems in the Court’s pre-\textit{Bakke} cases addressing prejudice-based discrimination against Black people and the more recent decisions dealing with race-conscious practices to promote inclusion, and cautions against using statements from the earlier cases to protect historically marginalized groups from oppression in the latter to preclude benign remedies. Part III discusses that subject.

III. DISTORTING CIVIL RIGHTS PRECEDENTS

The majority advanced its argument in part by a lengthy discussion of many pre-\textit{Bakke} Supreme Court decisions dealing with race to demonstrate a long-standing doctrinal aversion to racial classification. In doing so, it adopted two problematic techniques. First, it treated Supreme Court statements regarding racial classifications in earlier cases involving majoritarian discrimination against racial minorities as entirely applicable in cases dealing with race-conscious admissions programs for the benefit of Black people and some other marginalized groups. Second, it often omitted clarifying language or surrounding statements in presenting quotes from the earlier cases, thereby distorting their message. Part III.A below addresses the first technique, Part III.B the second.

\textsuperscript{294} \textit{Id.} at 243 (Stevens, J., dissenting); see, \textit{e.g.}, \textsc{Freund}, \textit{supra} note 264, at 47 (recognizing a “moral” difference between policies enacted to help and harm historically marginalized groups).
A. Pretending Context Does Not Matter

The SFFA majority recited language from various pre-Bakke Supreme Court precedents to support its view that the Equal Protection Clause prohibits essentially all racial classifications, not just those that subordinate some group. In particular, the majority suggested that earlier decisions regarding race, save for lamented mistakes like Plessy v. Ferguson\(^{295}\) and its progeny, had consistently interpreted the Equal Protection Clause to target racial classifications rather than those reflecting prejudice against historically disadvantaged groups. This account served the majority’s conclusion that the use of racial preferences in university admissions to benefit some such marginalized groups was suspect and unconstitutional.

Of course, the pre-Bakke citations and some thereafter involved fact patterns in which Black or other marginalized claimants challenged oppressive governmental action against them. Rather than disclosing or even considering that distinct context, the SFFA majority typically presented the statements as generally applicable without qualification. Perhaps the earlier Courts that had decided the cases involving mistreatment of Black people would have made the same statements had they anticipated the distinct posture of affirmative action, but it is also entirely possible that the context shaped the statements’ content. In separating the statements from that context, the Court provided an incomplete and misleading account of constitutional history. SFFA was certainly not the first case to adopt this approach, but the frequency of this technique does not resolve its problems.

The majority began its discussion of precedents with the hopeful claim that the Court had initially “embraced the transcendent aims of the Equal Protection Clause[,]” which it presented as establishing symmetrical treatment for White people and Black people.\(^{296}\) It began\(^{297}\) with Strauder v. West Virginia,\(^{298}\) an 1880 case, without mentioning an earlier decision, the Slaughter-House Cases,\(^{299}\) which

\(^{295}\) Plessy v. Ferguson, 163 U.S. 537 (1896); see also SFFA, 143 S. Ct. at 2159 (discussing Plessy).
\(^{296}\) SFFA, 143 S. Ct. at 2159.
\(^{297}\) Id.
\(^{298}\) Strauder v. West Virginia, 100 U.S. 303 (1880).
\(^{299}\) Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872). Of course, Slaughter-House involved claims of White butchers alleging economic, not racial, discrimination, but that distinction does not make the Court’s observations regarding the Equal
rejected a symmetrical approach\(^\text{300}\) and specifically emphasized that the Equal Protection Clause was designed to protect Black people from state laws discriminating against them as a class.\(^\text{301}\)

In discussing *Strauder*, as elsewhere, the *SFFA* majority ignored the common fact pattern of cases from Reconstruction until the mid-1970s—a White majority discriminated against racial minorities, generally Black people. It omitted that *Strauder* involved a Black man seeking relief from a state provision excluding all Black people from the jury pool.\(^\text{302}\) In discussing civil rights cases of the 1950s, the majority downplayed or sometimes avoided mentioning that they involved Black people seeking relief from prejudice-based segregation imposed by White majorities.

Since space does not permit cataloguing each instance of this practice, a few illustrations must suffice. The majority made a passing reference that some decisions between *Plessy* and *Brown* emphasized that *Plessy* required states to provide equal (even if separate) opportunities for Black students, before pivoting to denounce the “inherent folly of that approach—of trying to derive equality from inequality.”\(^\text{303}\) The *SFFA* majority’s formulation presented the doctrine of “separate but equal” neutrally when, in fact, it reflected prejudice against Black people. That general framing (i.e., the “folly . . . of trying to derive equality from inequality”) served the majority’s agenda by implicitly conflating “separate but equal” segregation and affirmative action, which fosters equality and inclusion by giving applicants from some historically marginalized groups a plus in admissions decision-making. The misleading reference to victims in pre-*Bakke* cases as

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\(^\text{300}\) *Id.* at 71 (stating that the “one pervading purpose” animating each of the Civil War Amendments was the protection of the “slave race” from “oppressions” on a continuing basis); see also *id.* at 67 (describing “unity of purpose” of Civil War Amendments); *id.* at 72 (referring to the Civil War Amendments’ “pervading spirit . . . the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it”).

\(^\text{301}\) *Id.* at 81 (“The existence of laws in the States where the newly emancipated [Black people] resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”).

\(^\text{302}\) *SFFA*, 143 S. Ct. at 2159.

\(^\text{303}\) *Id.* at 2160.
“students,” not Black students, also distorted context and ignored history.

Yet the problem with *Plessy* and its progeny was not that they tried to “derive equality from inequality” but that they reflected White supremacy. They demeaned and humiliated Black people, treating them as inferiors. Take *McLaurin v. Oklahoma State Regents for Higher Education*, a 1950 case the SFFA majority characterized as recognizing that “even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students” (not Black students in the majority’s curious language). That presentation might lead an unsuspecting reader to conclude that the *McLaurin* Court associated any relatively minor racial distinctions with racial subordination, a characterization that would support the conclusion that the case suggested that any race-conscious decision-making in a college admissions affirmative action program demeaned members of the White majority who did not receive a plus. The SFFA majority did not bother mentioning that Oklahoma’s characterization of the restrictions on McLaurin as “merely nominal” was absurd. Oklahoma authorities had initially confined McLaurin, the only Black student, to a classroom section railed off from White students with a “Reserved for Colored” sign and then to a row specified for students of his race and to separate library or cafeteria tables. “[N]o palpable effect”? Hardly! These restrictions, the Court recognized in 1950, “impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.” They certainly did “subordinate” McLaurin, not because Oklahoma was trying to “derive equality from inequality” but because Oklahoma’s behavior was demeaning, insulting, and humiliating and had everything to do with the fact that the “afflicted

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304 *Id.* (referring to “afflicted students” rather than Black students). In discussing one earlier case, the Court does specify that Black and White students were separated. *Id.*

305 *Id.*

306 *Id.* (stating that arguably palpable racial distinctions “subordinate the afflicted students”).


308 *Id.*


310 *Id.*

311 *McLaurin*, 339 U.S. at 641.
student” was Black. Indeed, the McLaurin Court tied its decision to the “circumstances” of the case.312

In each case where the Court criticized racial classification, the party invoking the Equal Protection Clause belonged to a marginalized group that had suffered racial discrimination at the hands of a government official, office, or program of the White majority. The litigants and justices operated in that context, and the resulting judicial utterances were made against that reality, yet the SFFA majority tended to ignore and obscure these significant factual distinctions.313

To be sure, one cannot know whether the earlier Court would have made the same anticlassificationist statements if the facts had been changed so that, for instance, a White litigant had invoked the Equal Protection Clause against a racial classification a White majority had imposed to remedy past oppression against Black people or to pursue some other valid objective. Maybe the earlier Court would have articulated a general prohibition against racial classification, but perhaps it would have distinguished the cases based on their entirely different facts. Pre-Bakke, the Court had not decided such cases.

But the SFFA majority (and even more so, Justice Thomas) ignored the reality that context often shapes how people, including justices, understand and express governing principles. Legal rules and principles are stated in response to and in contemplation of particular facts and must be understood with reference to them. An example borrowed from Richard H. Fallon, Jr. illustrates the problem. Emergency room medical personnel neither promise nor predict a patient’s immortality when they tell the anxious person “you are not going to die,”314 even though that message is consistent with their words. Context signifies that the assurance extends simply to the mishap that brought the patient to the emergency room and the resulting treatment. Similarly, when a patient asks his surgeon whether after a hand operation he will be able to play the piano, a positive answer does not guarantee musical competence to a novice (who, in a

312 Id. at 642 (“We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race.”).

313 See SFFA, 143 S. Ct. at 2160–61 (citing numerous pre-Bakke cases, which the SFFA majority depicts as “invalidat[ing] all manner of race-based state action” without disclosing totally different context and that none involved racial classifications to benefit racial minority); id. at 2161 (stating that in following decades the Court “continued to vindicate the Constitution’s pledge of racial equality” without disclosing that all involved discrimination against racial minorities).

familiar joke, is delighted because he had never acquired that skill) but simply addresses the procedure’s physical impact.

“Context matters when reviewing race-based governmental action under the Equal Protection Clause,” Justice O’Connor observed in *Grutter v. Bollinger.* It also matters in determining whether rules and principles from one case apply elsewhere and, if so, how. As Justice Frankfurter wrote in *Gomillion v. Lightfoot:*

Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.

To some extent, any use of precedent raises this problem. An interpreter must determine whether an earlier case provides a valid precedent notwithstanding contextual differences, i.e., whether the citation fairly governs the pending matter or whether factual differences render its precedential value limited or nonexistent for the contemplated use. Past or current law school students can recall the familiar classroom process of considering hypotheticals and new cases to determine the applicability and reach of legal propositions. Often, the hypothetical reveals limitations in the principle from a prior case or class. Supreme Court justices pose hypotheticals during oral arguments in recognition that changing facts can test the consequences and wisdom of particular rules and principles. The legal process involves adversarial consideration of analogies to test

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317 See, e.g., Sanford Levinson, *Why Strauder v. West Virginia Is the Most Important Single Source of Insight on the Tensions Contained Within the Equal Protection Clause of the Fourteenth Amendment,* 62 ST. LOUIS U. L.J. 603, 615 (2018) (“Is this a dilemma presented by all reliance on past precedents, i.e., that they are inevitably construed in a different context?”).
318 See, e.g., E. Barrett Prettyman, Jr., *The Supreme Court’s Use of Hypothetical Questions at Oral Argument,* 33 CATH. U. L. REV. 555, 556 (1984) (“[T]he Court is testing the outer reaches both of what the advocate is asking it to declare and of what the Court may, in fact, have to decide.”).
their applicability. The problems new cases present often produce refinement and revision of received propositions.

The SFFA majority’s practice of stripping these older cases of those critical facts was not accidental. It portrayed precedents in a disembodied way because its approach and conclusion depended on relying generally on statements of constitutional principle from quite different cases involving majority White oppression of marginalized racial groups. The SFFA majority justices may believe the principles are equally applicable, and they may so argue. But the Courts that decided the earlier cases uttered the quoted remarks in quite different racial paradigms from those SFFA raised, and these Courts neither confronted nor considered whether the principle would apply when a state allowed race to be considered in a limited way to benefit a disadvantaged group. The SFFA majority’s belief doesn’t license it to imply that abstract principles stated in a particular context necessarily apply to a different fact pattern. That requires a justification that the SFFA majority does not provide.

B. Manipulating Meaning Through Editing

Obscuring case context was not the only, or most objectionable, offense in the SFFA majority’s presentation of the constitutional history of the Equal Protection Clause. It also distorted precedents to convey the false impression that long-standing doctrine rejected any racial classification. Sometimes, the SFFA majority altered meaning by removing text from its linguistic context. On occasions, it highlighted a statement rejecting racial classification while omitting other comment associating the Equal Protection Clause with attacking oppression against historically marginalized groups, not prohibiting any classification. Although quotation always involves selectivity, candor requires presenting the intended, not wished for, meaning. SFFA’s treatment of three cases illustrates its practice.

1. Strauder v. West Virginia

Take the SFFA majority’s discussion of Strauder. “‘What is this,’ we said of the Clause in 1880, ‘but declaring that the law in the States shall be the same for the [B]lack as for the [W]hite; that all persons, whether [B]lack or [W]hite, shall stand equal before the laws of the

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320 FALLON, supra note 216, at 19 (expressing hope that new cases “enrich” a jurist’s understanding and prompt adjustment).
The omitted context alone—that a Black criminal defendant challenged a West Virginia statute excluding Black people from jury pools—could have triggered the question whether *Strauder* might have been saying simply that Black people should be elevated to the status accorded to their White counterparts without opining on the propriety of a Black person receiving a remedial benefit, an issue not before the Court.

Yet *Strauder* contained text, which the SFFA majority omitted, that impeached the SFFA majority’s representation that *Strauder* decreed that the Equal Protection Clause meant every law applied identically to White and Black people. Without these deletions, the sentence *Strauder* used read as follows, with the language SFFA’s majority omitted italicized:

> What is this but declaring that the law in the States shall be the same for the [B]lack as for the [W]hite; that all persons, whether [B]lack or [W]hite, shall stand equal before the laws of the States, and, in regard to [B]lack people, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?  

The omitted language puts a different spin on *Strauder*’s meaning, stating that the Fourteenth Amendment was “primarily designed” to protect Black people, a point *Strauder* made repeatedly. And the

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322 *Strauder*, 100 U.S. at 307 (emphasis added).

323 See id. at 306 (describing the Fourteenth Amendment as “one of a series of constitutional provisions having a common purpose” to provide to “a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights” of White people); id. at 306 (“At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. . . . They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to [B]lack persons] the enjoyment of all the civil rights that under the law are enjoyed by [W]hite persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States.”); id. at 307 (noting that “the one pervading purpose” of the Civil War Amendments was “protection of the newly made freeman and citizen” against their former slave-owner and doubting
SFFA majority deleted language prohibiting discrimination “against” Black people owing to “their color,” which might seem suggestive. Strader expressly declared that the Equal Protection Clause banned discrimination against Black people but did not state it prohibited action benefitting “them.”

There is more. The paragraph containing the sentence the SFFA majority only partially presented included more language suggesting that the Equal Protection Clause might allow government action helping, but not hurting, Black people. Adjacent language described the Equal Protection Clause’s purpose of protecting Black people from “unfriendly action,” affording them the “enjoyment of all the civil rights that under the law are enjoyed by [W]hite persons[,]” and identifying them as the beneficiaries of the Fourteenth Amendment. Then, the paragraph began: “If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers.” This language stated the Fourteenth Amendment should be “construed liberally” to protect Black people and seemingly suggested it may provide Black people more protection than White people.

The sentences following the fragment SFFA quoted underscored the point more powerfully. Strader continued:

The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to [Black people]—the right to exemption from unfriendly legislation against them distinctively as [Black],—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

whether anyone else would ever be able to claim protection under them (quoting Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872))); id. at 309 (“The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment.”); id. at 310 (“As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it.”).

324 Id. at 306.
325 Id. at 307 (emphasis added).
326 It is possible the italicized language in the quote was meant to suggest that the Equal Protection Clause might also apply to protect groups other than Black people even though protecting them was its central mission.
327 Strader, 100 U.S. at 307–08.
Notably, some clauses of this quotation suggested the Fourteenth Amendment’s intent was to prohibit “unfriendly” action against Black people that signal their “inferiority” or “are steps towards reducing them to the condition of a subject race.” That language might imply that the Fourteenth Amendment might not address government action that was helpful (not “unfriendly”) to Black people or that did not demean or diminish them.

To be sure, *Strauder* did not confine the Equal Protection Clause to Black people. It said the Clause would be implicated if a state with a Black majority excluded all White people from juries or if a state barred “naturalized Celtic Irishmen,” another marginalized population. Yet these two qualifications contemplated a racial majority excluding a racial minority from jury service, a far cry from the situation in race-conscious college admissions cases where the majority has chosen to give some preference to applicants from disadvantaged groups. In fact, the Court made clear that it understood that the Equal Protection Clause focused on ending subordination of Black persons when it observed that the fact that a statute excluded qualified Black citizens from jury service was “practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.”

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328 *Id.* at 308.
329 *See*, e.g., Levinson, *supra* note 317, at 614–15 (suggesting the possibility that *Strauder* may view the Fourteenth Amendment as open to legislation benefitting Black people).
330 *Strauder*, 100 U.S. at 308 (“That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were [W]hite men. If in those States where [Black] people constitute a majority of the entire population a law should be enacted excluding all [W]hite men from jury service, thus denying to them the privilege of participating equally with . . . [B]lack[] people in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to [W]hite men of the equal protection of the laws.”).
331 *Id.* (“Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment.”).
332 *Id.*
2. Brown v. Board of Education

Chief Justice Roberts rightly identified Brown v. Board of Education as the “seminal decision” in the erosion of “separate but equal.” Yet SFFA presented a badly distorted view of Brown. Although later decisions applied Brown to overturn the “separate but equal” doctrine across the board, contrary to the majority’s assertion, Brown did not “overturn[] Plessy for good.” The Court in Brown said that “[w]e conclude that in the field of public education the doctrine of ‘separate but equal’ has no place,” which limited its immediate reach accordingly. Brown confined its additional rejection of Plessy to “any language” contrary to the Court’s finding that segregation sent a message to Black people that they were inferior. Plessy had denied that segregated rail transportation imposed a badge of inferiority on Black people, saying that they simply inferred that message.


See John A. Powell, The Law and Significance of Plessy, 7 Russell Sage Found. J. Soc. Sci. 20, 22 (2021), https://doi.org/10.7758/rsf.2021.7.1.02 (recognizing that Brown did not overturn Plessy); see also Christopher W. Schmidt, Brown and the Colorblind Constitution, 94 Cornell L. Rev. 203, 216–17 (2008) (“At no point in the decision did Chief Justice Warren come close to explicitly rejecting Plessy beyond its applications to schools; nor did he even hint at a blanket condemnation of racial classifications.”); Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown, 117 Harv. L. Rev. 1470, 1485 (2004), https://doi.org/10.2307/1337945 (explaining that Brown itself was limited to overturning Plessy regarding public education although acknowledging that later cases may have eliminated “separate but equal” entirely); Edmond Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150, 153 (1955) (noting that Plessy’s reasoning was not “disturbed” except regarding public education).

SFFA, 143 S. Ct. at 2160.

Brown, 347 U.S. at 495.

See id. at 494–95 (“Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected.”).

Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps [Black people] with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because [Black people] choose[] to put that construction upon it.”).
specifically rejected *Plessy’s* pronouncement that denied that segregation subjugated Black people.\(^{340}\) This point may seem trivial, but the *SFFA* Court’s mischaracterization of *Brown*’s impact on *Plessy* served its rewrite of *Brown*. Contrary to *SFFA*’s assertion, *Brown* did not target all racial classifications. It viewed “separate but equal” as pernicious for subjugating Black people, but it did not condemn all classification based on race.\(^{341}\)

Chief Justice Roberts described *Brown* as deciding that even where physical facilities and tangible factors were equal, racially segregated schools were unconstitutional because “[t]he mere act of separating ‘children . . . because of their race,’ we explained, itself ‘generate[d] a feeling of inferiority.’”\(^{342}\) That statement edited and removed Chief Justice Warren’s language from context to falsely imply that *Brown* associated separation with generating a feeling of inferiority in children *generally*, not that racial segregation created a feeling of inferiority among *Black* children.\(^{343}\) History prevents reading *Brown* as expressing concern that segregation made White children feel inferior.\(^{344}\) *Brown*’s language also renders such a formulation

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\(^{340}\) See Siegel, *supra* note 335, at 1485 (pointing out that *Brown* “explicitly rejected *Plessy’s* reasoning” in context of finding that segregation harmed Black children); *see also* Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation*, *supra* note 107, at 111 (stating that *Brown* associated the Equal Protection Clause with antisubordination theory by rejecting *Plessy’s* language); Fallon, *supra* note 216, at 53 (explaining that *Brown* refuted *Plessy’s* defense that separate could be equal “based on the effect of separate schools in demeaning and stigmatizing [B]lack children”).

\(^{341}\) See Powell, *supra* note 335, at 27 (“African Americans were never really meant to benefit from the ‘separate but equal’ doctrine, rather, the goal was to benefit White[ people] and teach African Americans ‘their place’ as an inferior race.”); *see also* *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting) (pointing out that “[e]very one knows” that the statute upheld in *Plessy* was designed to keep Black persons, not White persons, “to themselves”); Hernandez v. Texas, 347 U.S. 475, 475 (1954) (protecting people of Mexican descent from “community” oppression, thereby exposing the Court’s view of the purpose of the Equal Protection Clause in May 1954).


\(^{343}\) *See Brown*, 347 U.S. at 494 (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

\(^{344}\) *See* Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts’s Reinterpretation of Brown*, 69 OHIO ST. L.J. 791, 831 (2008) [hereinafter Goldstein, *Not Hearing History*] (pointing out that “feeling of inferiority” language could only apply to Black children given context of case); *see also id.* at 832 (noting that in 1954, no
nonsensical since “inferiority” requires a perceived relationship with a superior—segregation could not make all children feel inferior and none superior! \(^{345}\) “Separate but equal” was about White supremacy. \[^{345}\] Brown attacked it, although tactfully, not racial classification \[^{346}\] \[^{per se.}\]

Moreover, \[^{Brown}\] cited a lower court finding that racial segregation in public schools harmed Black children, \(^{346}\) a statement that further impeaches Chief Justice Roberts’s effort in \[^{SFFA}\] to extract from \[^{Brown}\] the principle that racial segregation imposed a feeling of inferiority symmetrically. \(^{347}\) Separation, especially when legally sanctioned, signaled the “inferiority” of Black people and the resulting sense of inferiority stunted the development of Black children, according to the lower court. \(^{348}\) \[^{Brown}\] focused on and rejected Plessy’s minimization of the reality and unconstitutionality of racial subjugation rather than targeting all racial discrimination, as the \[^{SFFA}\] majority would lead people to believe.

The \[^{SFFA}\] majority rearranged \[^{Brown}\]’s text to present a different opinion than exists in Volume 347 of the U.S. Reports. After its misleading suggestion that segregation generated inferiority generally, it stated that \[^{Brown}\] reached the “unmistakably clear” conclusion that “the right to a public education ‘must be made available to all on equal terms.’” \(^{349}\) \[^{Brown}\] contained the words in single quotes—“must be made available to all on equal terms”—and in isolation, that fragment is the only language in \[^{Brown}\] that might suggest it targeted racial classifications, not oppression of Black people. But those nine words were not written in isolation, and in context, that dictum did not support \[^{SFFA}\]’s interpretation.

Contrary to \[^{SFFA}\]’s presentation, the language, “must be made available to all on equal terms,” appeared before \[^{Brown}\] discussed how segregation sent a message of inferiority to Black children—not after.

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\(^{345}\) See Goldstein, \[^{Not Hearing History, supra note 344}, at 832\] (explaining that the concept of “inferiority” requires a superior).

\(^{346}\) \[^{Brown}, 347 U.S. at 494,\]

\(^{347}\) See \[^{SFFA}, 143 S. Ct. 2141, 2160 (2023)\] (paraphrasing \[^{Brown}\] misleadingly as saying that “[t]he mere act of separating ‘children . . . because of their race,’ we explained, itself ‘generate[d] a feeling of inferiority’” (quoting \[^{Brown}, 347 U.S at 494\]).

\(^{348}\) \[^{Brown}, 347 U.S. at 494,\]

\(^{349}\) \[^{SFFA, 143 S. Ct. at 2160 (quoting Brown, 347 U.S at 493).}\]
The quoted words came in a general discussion of the importance of public education in fostering good citizenship and furnishing a foundation for economic success, a paragraph that signals Brown’s central focus on inclusion.\textsuperscript{350} That paragraph and the issue in Brown addressed discrimination against Black children in primary and secondary education, not race-conscious admissions to benefit their older siblings. When the Brown Court wrote that the right “must be made available to all on equal terms,”\textsuperscript{351} it referred to a right to public primary and secondary education, not to whether colleges could consider race in admissions as Harvard and UNC did. No one suggested that segregation denied White children an equal education or imagined a world in which a racial classification would disadvantage some of them. Brown then pivoted to “the question presented: Does segregation of children in public schools solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?”\textsuperscript{352} The ensuing discussion, that segregation sent a message of inferiority to Black people, and the case’s context qualified the fragment the SFFA majority quoted.

Brown concerned racial “segregation” against Black children, not whether race-conscious affirmative action could be used to diversify the campus or American society or redress past wrongs.\textsuperscript{353} It addressed state denials of equal rights to Black children, not burdens that racial majority members might bear to promote inclusivity.

The SFFA majority attempted to bolster its misinterpretation of Brown by quoting a few sentences from the iconic lawyers who represented the Brown plaintiff-children that a state could not “use race as a factor” in educating its citizens and that “the Constitution is color blind is our dedicated belief.”\textsuperscript{354} Chief Justice Roberts and Justice Thomas have used this unconventional type of argument\textsuperscript{355}

\begin{itemize}
\item \textsuperscript{350} See Brown, 347 U.S. at 493.
\item \textsuperscript{351} Id. ("Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").
\item \textsuperscript{352} Id.
\item \textsuperscript{353} See Randall Kennedy, Say It Loud!: On Race, Law, History, and Culture 423–24 (2021) [hereinafter Kennedy, Say It Loud!] (stating in connection with Chief Justice Roberts’s opinion in Parents Involved that Brown “did not speak to the permissibility or wisdom” of race-conscious affirmative action policies).
\item \textsuperscript{354} SFFA, 143 S. Ct. at 2160.
\item \textsuperscript{355} See Schmidt, supra note 335, at 204 (explaining that in an earlier case Chief Justice Roberts had “ventured into previously unexplored territory for a Supreme Court opinion” by relying on “the history of the litigation that culminated in Brown”).
\end{itemize}
previously.\textsuperscript{356} It should not be persuasive because, among other reasons, these two justices take the statements out of context. As discussed below, these lawyer’s statements from \textit{Brown} somewhat strengthen the conclusion that \textit{Brown} recognized a view of the Equal Protection Clause that allows some race-conscious admissions plans and implicitly rejects a colorblind Constitution.

Attorneys in \textit{Brown} uttered the words quoted in the immediately preceding paragraph, but the \textit{SFFA} majority misrepresented their meaning and significance by ignoring and distorting their context. The \textit{Brown} attorneys made the arguments in earlier times when Black people were the targeted victims of a pervasive web of invidious racial classifications reflecting White supremacist practice. The statements were not made in cases considering the use of race to achieve legitimate objectives or in times when such a use was under general discussion. At that time, the lawyers thought eliminating those pernicious measures against Black people would end their oppression.\textsuperscript{357} In the 1950s, the anticlassification and antisubordination points were viewed as parts of a common argument.\textsuperscript{358} Both addressed the unconstitutionality of Jim Crow practices and vindicated the claims of Black children. The attacks on these particular racial classifications were made to promote integration and make America more inclusive, and they were intermingled with arguments that racial classifications oppressed and subjugated Black people in violation of the Equal Protection Clause.\textsuperscript{359} As expected, the lawyers for the \textit{Brown} schoolchildren made available good-faith arguments regarding the Equal Protection Clause to advance their

\textsuperscript{356}See, e.g., Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (plurality opinion); \textit{id.} at 772–73 (Thomas, J., concurring).

\textsuperscript{357}See, e.g., Kennedy, \textit{Persuasion and Distrust}, supra note 5, at 1335 (pointing out that during the 1940s, 1950s and early 1960s many thought “that racial subjugation could be overcome by mandating the application of race-blind law”); \textit{id.} (“\textit{[T]he concept of race-blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated.”).

\textsuperscript{358}See Siegel, supra note 335, at 1474–75 (stating that anticlassification and antisubordination arguments were not seen as “competing principles” in \textit{Brown} era); Schmidt, supra note 335, at 225 (“\textit{[T]his [anticlassification] argument was never put forth in isolation from a more contextual and color-conscious analysis of the meaning of the Fourteenth Amendment and the harms of segregation. Anticlassification language was always intertwined with analysis of the social consequences of racial segregation and the value of integration.”); Kull, supra note 269, at 6 (stating that the arguments were not separated then but viewed as part of a common argument).

\textsuperscript{359}See, e.g., Goldstein, \textit{Not Hearing History}, supra note 344, at 802–18.
Contrary to the effort of the SFFA majority justices, it is logically impossible to associate the Brown attorneys with the anticlassificationist, rather than the antisubordinationist, position when they made both points in Brown in a context where they produced the same result, and it is disingenuous for the SFFA justices to do so. It is also inaccurate. Developments, including White resistance, and underestimating the depths of racial prejudice and the impact of long-standing oppression, undermined the Brown lawyers’ optimistic expectations. As events demonstrated that removing state-imposed racial classifications alone would not confer equality on Black people, vindicating the promise of the Equal Protection Clause and Brown required additional affirmative steps. As the anticlassification and antisubordination paths diverged, Justice Marshall and his colleagues understood that their fight had always been against racial subjugation—the societal practice of treating Black people as inferiors—not simply against racial classification. No one who has read Justice Marshall’s powerful Bakke opinion should have any doubt regarding his views, their principled basis, or their consistency. As Randall Kennedy points out, Marshall “always understood segregation to be oppressive” and that it created a caste system, and he dedicated his efforts to exposing and combating vestiges of White supremacy. Like people capable of growth, Marshall and his colleagues better understood their principle in response to changed events, and the SFFA majority justices would better understand Justice Marshall’s view of the Equal Protection Clause as it applied to race-conscious admissions if they read and engaged his Bakke opinion rather than criticizing those who do.

The SFFA majority’s point, that the lawyers made anticlassification arguments, makes even more significant the Court’s decision to rest Brown on the conclusion that states violated the Equal Protection Clause by treating Black people as inferiors. Brown neither said the Constitution was colorblind nor prohibited all racial classification.  

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360 See, e.g., id. at 818–19.
361 See id.
362 KENNEDY, SAY IT LOUD!, supra note 353, at 289–90.
363 See, e.g., Goldstein, Not Hearing History, supra note 344, at 820–22.
364 See, e.g., Roosevelt, supra note 268, at 1207 (“But whatever its merits and demerits . . . color blindness is not the view of meaning at work in Brown.”); Kennedy, Persuasion and Distrust, supra note 5, at 1336 (arguing that Brown does not vindicate the anticlassificationist view of Equal Protection Clause); Siegel, supra note 335, at 1481.
It did not accept the SFFA majority’s anticlassification and colorblind argument regarding the Equal Protection Clause.365

The SFFA majority continued to distort judicial precedent when it asserted that a year after Brown,366 the Court stated that “‘full compliance’ with Brown required schools to admit students ‘on a racially nondiscriminatory basis.’”367 In fact, the 1955 Brown v. Board of Education (Brown II) decision directed the offending school districts “to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”368 Once again the SFFA majority’s editing improperly generalized the meaning. The Brown II Court ordered White segregationists not to discriminate against the Black plaintiffs. The SFFA majority opinion wrote that Brown II stated that Brown “declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional”369 but the surrounding context gave that language its true meaning, that White majorities could not segregate Black children.

Justice Sotomayor correctly labeled the “Court’s recharacterization of Brown [as] nothing but revisionist history” and “an affront” to Justice Marshall’s legacy.370 If anything her characterization was generous to the majority in not castigating it more extensively for distorting a vital part of American history.

365 Cf. Schmidt, supra note 335, at 218 (arguing that language in Brown, notwithstanding its discussion of the anti-classification view, undermines the argument that the anticlassification position governed the case).


368 Brown, 349 U.S. at 301 (emphasis added).

369 SFFA, 143 S. Ct. at 2160 (quoting Brown, 349 U.S. at 298).

370 Id. at 2232 (Sotomayor, J., dissenting).
3. Loving v. Virginia

The SFFA majority cited Loving v. Virginia\(^{371}\) twice\(^{372}\) for the proposition that the Fourteenth Amendment prohibited official racial discrimination that was “invidious.” Loving and Brown bookended the Warren Court even as they reflected different rhetorical strategies in response to Jim Crow legislation. In Loving, a married couple consisting of a White man and a Black woman challenged their convictions for violating Virginia’s antimiscegenation statute as “repugnant” to the Fourteenth Amendment. Virginia claimed its statute was not “invidious” race discrimination since it punished a Black and White person equally, a claim the Court rejected. The Court referred to the dangers of racial classification but said that the pivotal question was whether a racial classification was “invidious.”\(^{373}\) Although the SFFA majority sought to characterize any racial classification as “invidious,”\(^{374}\) that is clearly not how Loving used the term. “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification,” Chief Justice Warren wrote.\(^{375}\) “The fact that Virginia prohibits only interracial marriages involving [W]hite persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain [W]hite [s]upremacy.”\(^{376}\)

Loving would not have used the phrase “invidious racial discrimination” if every racial classification was “invidious.”\(^{377}\) Quite

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\(^{372}\) See SFFA, 143 S. Ct. at 2161 (“[T]he Fourteenth Amendment ‘proscri[bes] . . . all invidious racial discriminations.’” (quoting Loving, 388 U.S. at 8)); id. (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” (quoting Loving, 388 U.S. at 10)).

\(^{373}\) Loving, 388 U.S. at 10 (“[T]he Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

\(^{374}\) See, e.g., SFFA, 143 S. Ct. at 2166 (“[R]acial discrimination [is] invidious in all contexts. . . .”)

\(^{375}\) Loving, 388 U.S. at 11.

\(^{376}\) Id.

\(^{377}\) See Washington v. Davis, 426 U.S. 229, 240 (1976) (stating that “invidious quality” turns on racially discriminatory purpose); Randall Kennedy, Colorblind
clearly, it understood that some racial classifications were not “invidious” even if most were. Chief Justice Warren underscored the adjective’s significance by noting that two members of the Court’s majority, Justices Potter Stewart and William O. Douglas, had previously stated\textsuperscript{378} that they could conceive of no situation in which race was relevant in a criminal statute. Moreover, the statute reviewed in \textit{Loving}, like those the Court considered in pre-\textit{Bakke} days, was a vestige of White supremacy. And Chief Justice Warren did not hesitate to label the racial classification before the Court as a “measure[] designed to maintain [W]hite [s]upremacy,” a characterization he had thought improvident thirteen years earlier in \textit{Brown}. When considered in its historical context and without editing out inconvenient language, \textit{Loving}, like \textit{Brown}, identified legislation reflecting White supremacy as the Equal Protection Clause’s target; affirmative action was not before the Court. Classification oppressing racial minorities are “invidious”; those promoting inclusivity, if properly designed, are not.

CONCLUSION

Given the composition of the Roberts Court and its trajectory on cases involving claims of racial discrimination, the outcome of \textit{SFFA} was no surprise. The Court, of course, misconstrued \textit{Grutter}’s twenty-five-year expectation, which was contingent on its necessity expiring, but that misreading did not cause the Court to end race-conscious admissions as it had operated for approximately sixty years. The decision in \textit{SFFA} simply reflected the hostility on the part of the Court’s ideologically driven conservative majority to race-conscious admissions.

Yet the predictability of the outcome should not lessen the concern regarding the result, how the Court justified the decision, or what it signals for the future. To begin with, the end of race-conscious admissions removes a limited, but useful, tool that some colleges and universities used to educate a more racially and ethnically diverse student body, to redress some disadvantages structural racism has imposed, and create a more inclusive America. Race-conscious admissions had its problems, as all remedies do, but most of the justices who have served on the Court since 1978 rightly thought it served “compelling interests.” Every member of the \textit{SFFA} Court thought the

\textsuperscript{378} McLaughlin v. Florida, 379 U.S. 184, 198 (1964) (Stewart, J., concurring); see also \textit{Loving}, 388 U.S. at 13 (Stewart, J., concurring).
stated objectives of Harvard and UNC were at least “commendable goals” and three justices thought them compelling and constitutional. Four of the justices at least acknowledged that such plans were associated with progress.

The decision in SFFA was deeply disappointing not only in its outcome but also in the manner the Court justified it. Even if one does not share the view expressed earlier that race-conscious admissions plans should be measured under some elevated level of review less onerous than strict scrutiny, the Court’s decision was inconsistent with its precedents. The stated interests had been found compelling in earlier cases, but the Court introduced new requirements for narrow tailoring, invented new tests that it misattributed to Grutter, and misapplied its twenty-five-year expectation by ignoring the implications of the “necessary” requirement.

The majority’s treatment of its precedents relating to race-conscious admissions was not the most troubling part of its opinion. Rather, a more concerning aspect of SFFA relates to the majority’s misunderstanding of the Equal Protection Clause and its distortion of doctrine from the Court’s civil rights cases involving societal discrimination against marginalized racial or ethnic groups. Time and again, in different formulations, the majority asserts that the principal mission of the Equal Protection Clause is to prohibit racial classifications. It ignores extensive evidence that this interpretation was not the meaning imputed to the Clause when created; it applies precedential statements out of context to create the false impression that earlier decisions opposed racial classifications to benefit disadvantaged groups; and it ignores or distorts statements from earlier Courts which associated the Equal Protection Clause with protecting Black people and other marginalized populations from

379 SFFA, 143 S. Ct. at 2166.

380 See, e.g., id. at 2226 (Sotomayor, J., dissenting); id. at 2264 (Jackson, J., dissenting). Justice Kagan, as previously stated, joined both dissents, and Justices Sotomayor and Jackson joined each other’s dissent. Justice Jackson recused herself from the Harvard case. Id. at 2176 (majority opinion).

381 See, e.g., id. at 2225 (Kavanaugh, J., concurring) (“[P]rogress has been made since Bakke and Grutter . . . .”); id. (Sotomayor, J., dissenting) (stating that “progress has been slow and imperfect” but that the plans “have advanced” equality and inclusivity); id. at 2274–75 (Jackson, J., dissenting) (stating that Black people and “other minorities” are making progress due to efforts of UNC and other such institutions). As previously stated, Justice Kagan joined both dissents making her the fourth justice associated with this view, and Justices Sotomayor and Jackson joined each other’s dissent.
oppression. The majority could have decided *SFFA* without such discussion. Its inclusion suggests that *SFFA* is not simply the end of race-conscious admissions plans as they have long existed but another step in a judicial agenda to further limit doctrine and remedies protecting civil rights of marginalized groups.

Finally, the majority’s apparent indifference to America’s racial past is deeply disturbing. In life and law, the past matters. It structures our society and shapes the terms of our existence, the reality we experience in the world we encounter. It confers advantage and disadvantage that enhances or inhibits opportunity.

Being White in America confers privileges that are denied to Black people and other people of color. Of course, advantage and disadvantage has been distributed differently among White people and among Black people, but that truth does not diminish the reality that White privilege exists and that it traces in considerable part to past actions by state and national actors. Race-conscious admissions was one small, but visible, means of responding to the reality that position and performance are not entirely neutral or merited but shaped in part by prior discriminatory laws and practices. *SFFA* treated that history as constitutionally irrelevant and race-conscious decision-making in college admissions as severely constrained. It sidelined that history by its commitment to a false mantra that the primary aim of the Equal Protection Clause is to prohibit virtually any racial classification. To do so, it reconfigured constitutional history of Supreme Court precedents involving discrimination against Black people and other marginalized groups by ignoring their context and language that showed their focus on addressing majoritarian oppression of Black people and other marginalized groups. It even misused its precedents that had upheld the use of race to achieve diversity and inclusion.

In so doing, the *SFFA* majority retreated from the constitutional project, of which the Equal Protection Clause is an important part, of building a more inclusive America that affords fair opportunity and treatment to a range of marginalized racial, religious, ethnic, and other populations.