The Incoherence of the "Colorblind Constitution"

Russell K. Robinson*

The Students for Fair Admissions, Inc. v. President & Fellows of Harvard College *(*SFFA*) majority opinion has been widely misunderstood as a victory for those who believe in the "colorblind Constitution." By juxtaposing the opinion's main rule with the exception for admitting students based on essays that discuss students' lived experiences with race, I reveal the opinion's fundamental incoherence, as well as its furtive race-consciousness. The majority opinion asserted that equal protection requires that a student's race may never be used as a "negative," policies may not "stereotype" students based on race, and policies must have a fixed endpoint. Yet the Court's exception for race-based essays violates each of these requirements. Rather than banish race from admissions decisions, the opinion merely channels race consciousness into the consideration of essays. This examination reveals the chasm between colorblind rhetoric—engaged in by conservatives and liberals—and the inescapability of racially-forged realities. This matters because conservative lawyers and funders are brandishing* SFFA *as a complete victory for colorblindness and the touchstone of a national movement to eliminate anti-racist policies.*

Introduction 998
I. Rewriting *Grutter*.....1004
II. The Essay Exception 1012

DOI: https://doi.org/10.15779/Z38W950Q35

* Walter Perry Johnson Professor of Law & Faculty Director, Center on Race, Sexuality & Culture, UC Berkeley School of Law. I am grateful to Dayo Ajanaku, Johnsenia Brooks, Mica Elise Jordan, Blair Akira Matsuura, and Andy Lattimer Secondine for research assistance and KT Albiston, Khiara M. Bridges, Devon W. Carbado, Sumi Cho, Kimberlé W. Crenshaw, Erwin Chemerinsky, Elizabeth F. Emens, Sheldon Evans, Jonathan P. Feingold, Jonathan Glater, Paul Gowder, Vinay Harpalani, Osamudia James, Jerry Kang, Randall Kennedy, Emmanuel Mauleon, David Pozen, David Simson, Sarah Song, India Thusi, Leti Volpp, Lauren Campbell, and the participants at the Berkeley Law faculty workshop, Northwestern Law Review Symposium, 2024 Langston Midwest Writing Workshop, and Columbia Law Critical Methods class for comments on an earlier draft.

III. Why Equal Protection Requires Race-Conscious Admissions 1022
IV. Selective "Equality": *SFFA*'s Exploitation of Asian Americans....1027
Conclusion: Racial Classifications and Silver Linings 1032

INTRODUCTION

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard* College (*SFFA*)[1] has been misunderstood as a victory for those who believe in the "colorblind Constitution." The Justices in the majority and in the dissent strongly debated the value of a "colorblind" conception of the Equal Protection Clause. Chief Justice Roberts argued that his majority opinion enforced what he called *Brown v. Board of Education*'s[2] commitment to colorblindness.[3] Justice Thomas contended that the framers of the Fourteenth Amendment intended it to require colorblindness.[4] Roberts, Thomas, and the dissenters laid claim to Justice Harlan's famous dissent in *Plessy v. Ferguson*, although they construed it differently.[5] Thomas quoted Harlan extensively, including his claim that "[o]ur Constitution is color-blind."[6] In dissent, Justice Sotomayor castigated the Court for "cement[ing] a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[7] And Justice Jackson's dissent seethed: "With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat."[8]

The colorblind rhetoric in the *SFFA* majority opinion has distracted mainstream media and prominent, liberal law professors, who have overstated what *SFFA* bans. The *Wall Street Journal* declared that the Court "outlaw[ed] affirmative action in higher education"[9] and "found it unconstitutional to consider race in university admissions."[10] The *San Francisco Chronicle*

1. 600 U.S. 181 (2023).
2. 347 U.S. 483 (1954).
3. *See SFFA*, 600 U.S. at 203–07; *id.* at 227 (characterizing "colorblindness" as the "proud pronouncement" of cases including Loving v. Virginia, 388 U.S. 1 (1967)).
4. *See SFFA*, 600 U.S. at 230–35 (Thomas, J., concurring).
5. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), overruled by Brown v. Bd. of Educ., 347 U.S. at 494–95; *see SFFA*, 600 U.S. at 230; *id.* at 231 (Thomas, J., concurring); *id.* at 326–27 (Sotomayor, J., dissenting) (quoting Harlan with approval but excising his affirmation of White supremacy); *id.* at 388 (Jackson, J., dissenting).
6. *SFFA*, 600 U.S. at 231 (Thomas, J., concurring); *see also id.* at 246 ("For Justice Harlan, the Constitution was colorblind . . . .").
7. *Id.* at 318 (Sotomayor, J., dissenting); *see id.* at 383.
8. *Id.* at 407 (Jackson, J., dissenting).
9. Brent Kendall, *How Supreme Court Justices Sparred on Affirmative Action*, WALL ST. J. (June 29, 2023), https://www.wsj.com/articles/how-supreme-court-justices-sparred-on-affirmative-action-50087fa3 [https://perma.cc/Y9ME-UWY3].
10. Jess Bravin & Jan Wolfe, *Supreme Court Concludes Session with Rulings on Affirmative Action, Student Debt, and Where Gay Rights and Free Speech Intersect*, WALL ST. J. (June 30, 2023), https://www.wsj.com/articles/supreme-court-cases-affirmative-action-free-speech-student-debt-

proclaimed that the Court "killed affirmative action."[11] Legal scholars also have simplified a rather complex and knotty opinion. A Harvard Law School professor declared: "Affirmative action died today at the hands of the Supreme Court's conservative constitutional revolution."[12] Scholars and pundits have described the majority opinion as enshrining the conservative viewpoint that the Constitution is colorblind.[13] A major flaw in the analysis of the opinion has been accepting Roberts's colorblindness rhetoric at face value and failing to see the opinion's internal tensions and contradictions.[14] Legal scholars have generally

91549085 [https://perma.cc/X7UB-K5EE]; *see also* Bob Egelko, *Supreme Court Strikes Down Affirmative Action at U.S. Colleges*, S.F. CHRON. (June 29, 2023), https://www.sfchronicle.com/politics/article/supreme-court-affirmative-action-18148520.php [https://perma.cc/68Q7-NXVN] ("The Supreme Court outlawed affirmative action at colleges and universities nationwide Thursday, saying consideration of an applicant's minority race or ethnicity in admissions is an act of racial discrimination.").

11. Soleil Ho, *The Supreme Court Just Killed Affirmative Action in the Deluded Name of Meritocracy*, S.F. CHRON. (June 29, 2023), https://www.sfchronicle.com/opinion/article/supreme-court-affirmative-action-meritocracy-18168315.php [https://perma.cc/7E7A-349G]. Some coverage was more measured. *See, e.g.*, Robert Barnes, *Supreme Court Rejects Race-Based Affirmative Action in College Admissions*, WASH. POST (June 29, 2023), https://www.washingtonpost.com/politics/2023/06/29/affirmative-action-supreme-court-ruling/ [https://perma.cc/RJB8-UABW] ("While leaders of elite private and public institutions have said they fear a dramatic drop in diversity if they are prohibited from taking race into account, Roberts noted that those rules are already the norm in many places."); David Savage, *Supreme Court Strikes Down Race-Based Affirmative Action in College Admissions*, L.A. TIMES (June 29, 2023), https://www.latimes.com/politics/story/2023-06-29/supreme-court-strikes-down-affirmative-action-in-college-admissions [https://perma.cc/WQZ7-CG2F] (stating that the decision "won't prevent [universities] from pursuing diversity or giving extra consideration to students who have overcome hardships or discrimination").

12. Noah Feldman, Opinion, *Affirmative Action Is High Court's Latest Casualty*, BLOOMBERG L. (June 29, 2023), https://news.bloomberglaw.com/us-law-week/affirmative-action-is-high-courts-latest-casualty-noah-feldman [https://perma.cc/R29R-4EWE].

13. *See id.* ("Roberts articulated a theory of equal protection that conservatives have been advocating almost since affirmative action began: that it is effectively always wrong to treat people differently based on race, no matter why."); Jamelle Bouie, Opinion, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/opinion/harlan-thomas-roberts-affirmative-action.html [https://perma.cc/3Q7C-WM4J] ("[T]he Supreme Court's decision in *Students for Fair Admissions v. Harvard* is a victory for the conservative vision of the so-called colorblind Constitution—a Constitution that does not see or recognize race in any capacity, for any reason.") (italics added).

14. For example, Professors Jeannie Suk Gersen and Sonja Starr uncritically accept Chief Justice Roberts's purported distinction between admitting students "on the basis of race" and admitting students based on personal essays that discuss their racial experiences. *See* Jeannie Suk Gersen, *The Supreme Court Overturns 50 Years of Precedent on Affirmative Action*, NEW YORKER (June 29, 2023), https://www.newyorker.com/news/daily-comment/the-supreme-court-overturns-fifty-years-of-precedent-on-affirmative-action [https://perma.cc/GTV2-A948]; Sonja B. Starr, *Admissions Essays After* SFFA, IND. L. J. (forthcoming 2025) (manuscript at 12) (claiming that the essay exception "makes perfect sense"). *But see* Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 702 (2024) (noting in passing that the exceptions for essays and the military rendered Roberts's endorsement of colorblindness "equivocal").

given the exception short shrift.[15] By noting the exception mostly in passing, they have overlooked its power.

This emphasis on colorblindness threatens to mislead readers, including lower courts and students applying to college. The colorblindness debate obscures a gap between rhetoric and reality. At the tail end of the majority opinion, the Court authorized race consciousness, even as it claimed to vindicate colorblindness. The Court invalidated the race-conscious admissions policies before it, but it also ruled that equal protection does not prevent universities from admitting students based on essays that discuss their lived experiences with race. By juxtaposing the main rule[16] with the underexamined and undersung essay exception,[17] I reveal the majority opinion's fundamental incoherence. The Court asserted that equal protection requires that a student's race may never be used as a "negative," policies may not "stereotype" students based on race, and policies must have a fixed endpoint. Yet, if we accept as given the Court's definitions of "stereotype" and "negative," the Court's exception for race-based essays violates all three requirements.

My close reading of the Court's opinion demonstrates that it cannot plausibly be interpreted as a complete victory for "colorblindness." The majority opinion modified when and how universities may consider race, but it did not banish race or "color" from the process altogether. Roberts failed to

15. *See, e.g.*, Erwin Chemerinsky, Opinion, *The Supreme Court's Ultimate Judicial Activism: Striking Down Affirmative Action in College Admissions*, L.A. TIMES (June 29, 2023), https://www.latimes.com/opinion/story/2023-06-29/harvard-affirmative-action-case-supreme-court-race-college-admissions [https://perma.cc/VK3T-QFA7] (arguing primarily that *SFFA* constitutes judicial activism and that the Court disrespected precedent, history, and the experiences of public and private universities); Stephen L. Carter, Opinion, *Affirmative Action Ruling Follows Half-Baked Logic*, BLOOMBERG L. (June 29, 2023), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XA8P83G4000000?bna_news_filter=us-law-week#jcite [https://perma.cc/8UXN-EMGV] (dismissing the essay exception as a "bad joke"). By contrast, Dean Angela Onwuachi-Willig devotes a significant section of her analysis to the essay exception. *See* Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 210–16 (2023). The main thrust of her analysis, however, is that Roberts mischaracterized the experiences of applicants of color who have confronted racial discrimination as a "benefit." *Id.* at 214; *see also id.* at 218, 225 (arguing that students of color may not know that they were discriminated against, which limits their ability to discuss discrimination in their essays); *id.* at 242–43 (encouraging students of color to tell their personal racialized stories). She does not recognize or analyze the tension between the main rule of the opinion and the essay exception.

16. The Court stated: "University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end." Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 213 (2023).

17. *Id.* at 230 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise . . . ."). Benjamin Eidelson and Deborah Hellman also provide an extended analysis of the essay exception in an insightful article. *See* Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions After* SFFA, 4 AM. J. L. INEQ. 295, 317 (2024). While Eidelson and Hellman hone in on the essay exception, my Essay juxtaposes the essay portion against the broader claims made in Roberts's opinion, as well as the discourse on so-called "colorblindness."

acknowledge this truth and to explain why admitting students based on essays that engage race is consistent with equal protection.[18] This Essay not only demonstrates the failure of the Court's colorblind rhetoric, but it also provides the missing rationale for the Court's authorization of race-conscious essays.

Identifying *SFFA*'s fundamental incoherence matters because conservative lawyers are brandishing the majority opinion as a complete victory for colorblindness.[19] Not long after the Court released its opinion in *SFFA*, Edward Blum, the founder and president of Students for Fair Admissions, held a press conference that applauded the majority opinion as "the beginning of the restoration of the *colorblind legal covenant* that binds together our multi-racial, multi-ethnic nation."[20] Blum and right-wing lawyers are flaunting the *SFFA* majority opinion as the touchstone of a widespread movement to squash anti-racist policies and programs in education, employment, and far beyond.[21] The recent election of Donald J. Trump as president has further galvanized the "anti-woke" movement. Actions brought by right-wing lawyers against several law firms have already led some firms to strip out the identity-based language of their diversity programs.[22] They have sued top law reviews, alleging that their

18. The Court tried to gloss the tension between its main rule and essay exception by deeming the grant of admission to a student who wrote about "overc[oming] racial discrimination" as "not on the basis of race." *SFFA*, 600 U.S. at 231. I explain below how this effort to disentangle "race" and "racial discrimination" fails.

19. Kimberly West-Faulcon argues that this movement is the contemporary iteration of a battle to make "inclusion-motivated" attention to race categorically illegal but leave punitive and subjugating forms of race consciousness legally permissible. *See* Kimberly West-Faulcon, *The* SFFA v. Harvard *Trojan Horse Admissions Lawsuit*, 47 SEATTLE U. L. REV. 1355, 1407–12 (2024).

20. Press Release, Students for Fair Admissions, Students for Fair Admissions Applauds Supreme Court's Decision to End Racial Preferences in College Admissions (June 29, 2023) (emphasis added), https://studentsforfairadmissions.org/wp-content/uploads/2023/06/SFFA-Scotus-Opinion-Issued-Press-Release-June-2023.pdf [https://perma.cc/9RFJ-WKU3]; *see also* Alexander Hall, *Dean Caught Saying Berkeley Law Uses 'Unstated Affirmative Action:' 'I'm Going to Deny I Said This*,*'* https://www.foxnews.com/media/dean-caught-saying-berkeley-law-uses-unstated-affirmative-actiondenysaid [https://perma.cc/MG4E-MG7Z] (quoting author Kenny Xu: "[T]his is a great win for colorblind equality in our nation.").

21. *See, e.g.*, Nino C. Monea, *Next on The Chopping Block: The Litigation Campaign Against Race-Conscious Policies Beyond Affirmative Action in University Admissions*, 33 B.U. PUB. INT. L.J. 1, 5 (2024) ("[T]here is already a wave of litigation that looks poised to take advantage of the recent Supreme Court ruling."); Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html [https://perma.cc/9WRH-DNQQ] ("[W]ith a legal victory in hand, Mr. Blum is thinking about what's next in his work to remove the consideration of race from other parts of American life and law."); *see also* Jonathan Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949, 1952–54 (2022) (discussing how conservative lawmakers and lawyers have leveraged anti-antiracist backlash).

22. *See, e.g.*, Monea, *supra* note 21, at 63 ("Major law firms like Perkins Coie or Morrison Foerster dropped fellowships for underrepresented law students in response to lawsuits."). In a similar vein, the American Bar Association (ABA) proposed excising race from its guideline on diversity. Professor Jonathan Glater and I wrote a letter, which was joined by dozens of race scholars, that objected to the ABA proposal. *See* Letter from Jonathan D. Glater, Professor & Assoc. Dean, Berkeley L., to David A. Brennen, Chair of the Council on Legal Educ. & Admission to the Bar, ABA (Sept. 30, 2024) (on file with author).

processes for selecting editors and articles are illegal.[23] Recently, they have begun suing law schools for a supposed anti-White male bias in faculty hiring.[24] Sometimes, these allegations treat the mere presence of Black and other people of color in an institution as evidence of a breach of "colorblind" hiring practices.[25] These lawsuits are prominently citing *SFFA*.[26] Given these burgeoning disputes,[27] it is vital to clarify whether *SFFA* can tenably be read to require "colorblindness for all."[28]

A cursory examination of the Justices' valorization of Harlan's *Plessy* dissent illustrates the tension between colorblind rhetoric and race-conscious reality that runs throughout the entire *SFFA* opinion. In *Plessy*, the Court ruled that the Constitution permitted the state to require Black people to ride in segregated railway carriages.[29] Harlan dissented alone. He asserted: "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[30] According to the conventional narrative, the Court vindicated Harlan when it decided *Brown*, overturned *Plessy*, and ruled that separate is inherently unequal.[31] In *SFFA*, conservative and liberal Justices asserted that Harlan was on their side.[32] Yet depicting Harlan as a champion of racial equality required a

23. *See, e.g.*, Monea, *supra* note 21, at 26–27 (describing lawsuits against Harvard and NYU law reviews).

24. *See, e.g.*, Anemona Hartocollis, *Northwestern Law School Accused of Bias Against White Men in Hiring*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/us/affirmative-action-lawsuit.html [https://perma.cc/PV5Y-95KV] (describing a lawsuit against Northwestern Law as "the first in a wave of new legal challenges attacking the way that American universities hire and promote professors"). It is striking that one of the few specific examples of White male professors said to have been denied a job based on their race and sex is Eugene Volokh. Volokh, then a professor at UCLA Law, stoked controversy by using the N-word in class. *See* Joe Patrice, *Northwestern Law School Sued for Having ONLY 83 Percent White Faculty*, ABOVE THE L., https://abovethelaw.com/2024/07/northwestern-law-school-affirmative-action-lawsuit/ [https://perma.cc/7JVH-UQKB].

25. *Cf.* Jonathan D. Glater, *The Elision of Causation in the 2024 Affirmative Action Cases*, 48 J. COLL. & UNIV. L. 395, 401, 414 (2023) (suggesting that after the *SFFA* decision, courts may regard the inclusion of Black and Latine students as suspect).

26. *See., e.g.*, Complaint at 2, Fac., Alumni, and Students Opposed to Racial Preferences ("FASORP") v. Northwestern Univ., Case No. 1:24-cv-05558 (N.D. Ill. filed July 2, 2024) (citing *SFFA* to support its demand of "colorblind and sex-neutral faculty-hiring practices"); Plaintiff's Motion for Preliminary Injunction and Temporary Restraining Order at 5–6, Am. All. for Equal Rts. v. Founders First Cmtys. Dev. Corp., Case No. 4:24-cv-00327 (N.D. Tex filed Apr. 16, 2024); Plaintiff James Harker's Brief in Opposition to Defendant Meta, BBDO, and AICP's Motion to Dismiss at 12, Harker v. Meta Platforms, Inc., Case No. 1:23-cv-07865, (S.D.N.Y. filed Jan. 25, 2024).

27. *See* Monea, *supra* note 21, at 4 (observing "the vast collection of conservative and libertarian impact litigation firms challenging the use of race in any context" and counting "[o]ver five dozen ongoing and recent lawsuits across the country").

28. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 407 (2023) (Jackson, J., dissenting).

29. *See* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896).

30. *Id.* at 559 (Harlan, J., dissenting).

31. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

32. *See supra* text accompanying notes 5–7.

blinkered reading of his opinion. Right before the quote provided above, Harlan stated:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.[33]

This passage—as opposed to the truncated quote featured in the *SFFA* opinions—makes clear that Harlan viewed colorblindness in law as compatible with White supremacy. He regarded the Equal Protection Clause as creating a veneer of equality in circumscribed domains but failing to pose a real threat to White supremacy. Moreover, Harlan attacked the Louisiana statute for allowing "the Chinese race" to ride alongside White people.[34] He argued for the inclusion of Black citizens by arguing that they were more virtuous than "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."[35] The decisions by several Justices to erase Harlan's expression of anti-Chinese sentiment is particularly egregious because the *SFFA* plaintiffs included Chinese American students who argued that university admission policies disadvantaged them in favor of White and Black applicants.[36] This brief exploration of the discourse surrounding Harlan's dissent manifests how Justices across the ideological spectrum are invested in a colorblind myth[37] that requires overlooking virulent racism. It turns out that "colorblind" sometimes means the exact opposite.[38] Accordingly, this Essay

33. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

34. *See id.* at 561.

35. *Id.*

36. *See* Driver, *supra* note 14, at 710–12; *see also* Gabriel Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 155–57 (1996) (exploring Harlan's racist votes and rhetoric more generally); Russell K. Robinson, *Justice Kennedy's White Nationalism*, 53 UC DAVIS L. REV. 1027, 1044–45 (2019) ("Justice Kennedy never acknowledged the disconnect between Justice Harlan's rhetoric approving of white supremacy, including his claim that Chinese immigrants are unworthy of citizenship, and Justice Harlan's vote to invalidate a state law requiring racial separation in railroad travel.").

37. *See generally* David A. Strauss, *The Myth of Colorblindness*, 1986 S. CT. REV. 99, 100–01 (1986) (arguing that "affirmative action and nondiscrimination are, in important ways, the same thing"). Throughout this Essay, I frequently put "colorblindness" in quotation marks to remind the reader to think skeptically about whether it is truly possible in any particular context.

38. Jonathan Feingold argues that appeals to "colorblindness" often conceal assumptions about whether race does and should matter in law and society. *See* Feingold, *supra* note 21, at 1958–61. Randall Kennedy has charted how segregationists—those who opposed integration during the Jim Crow era—later began adopting colorblind rhetoric to try to defeat affirmative action. *See* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 163–64 (2013) (arguing that "'colorblind' racism" partially accounts for the popularity of colorblindness discourse). Given this history, claims of "colorblindness" that rejected almost half a century of precedents, overturned decisions made by public and private universities across the country, and ignored the history of the Fourteenth Amendment of the Constitution should not be taken at face value.

urges readers to "strictly scrutinize"[39] claims of colorblindness, which may mask deference to White dominance.

I.
REWRITING *GRUTTER*

This Part argues that Roberts gutted the diversity rationale at the heart of *Grutter v. Bollinger* but also oddly left in place a regime that resembles *Grutter*'s approval of individualized, race-conscious admissions. As Devon Carbado and I show in an essay in this volume,[40] Roberts's strategy exploited the ambivalence that had coursed through affirmative action jurisprudence ever since Justice Powell's pivotal opinion in *Bakke*. Yet Roberts also recast statements from *Grutter* to turn the case against itself. This facilitated his misleading claim that he was enforcing precedents such as *Grutter* in striking down the Harvard and University of North Carolina (UNC) admissions policies.

Roberts began his majority opinion by framing the key issue as the role of race in competitive college admissions:

> Founded in 1636, Harvard College has one of the most selective application processes in the country. Over 60,000 people applied to the school last year; fewer than 2,000 were admitted. Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity . . . . It can also depend on your race.[41]

This first paragraph thus introduces the two key factors in the opinion: race and personal adversity. Yet, as implied by Roberts's assignment of race and adversity to two separate sentences, Roberts fails to grapple with how deeply interwoven race and adversity can be. This oversight leads to an oscillating opinion—Roberts appears to unfurl a total ban on race-conscious admissions, but a last-minute swerve unravels much of his preceding analysis. Roberts abruptly announces that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[42] In asserting the relevance of students' experiences with discrimination, Roberts allows experiences of racial adversity to tip the balance. Contrary to the conventional understanding that the Court eliminated *Grutter* and ended affirmative action, I argue that this sentence preserved a distorted version of

39. This is a play on the conservative Supreme Court's longstanding claim that all racial classifications must be subjected to strict scrutiny. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 206 (2023) ("Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.'").

40. Devon W. Carbado & Russell K. Robinson, SFFA*:* Bakke's *Chickens Coming Home to Roost*, 113 CALIF. L. REV. 1035 (2025).

41. *SFFA*, 600 U.S. at 192–94.

42. *Id.* at 230.

Grutter through the essay exception. *SFFA* erased *Grutter*'s determination that the diversity rationale is a compelling interest but left in place its bottom-line approval of admissions regimes in which universities grant underrepresented minorities ("URMs") a "plus" based on their lived experiences with race.

Instead of banishing race-consciousness, *SFFA* merely relocates it; now it may occur only in the context of considering an applicant's personal essay, rather than the applicant's entire admissions file. Also, admissions officers may not consult the racial demographics of admitted students while considering individual applications. Under this new regime, students will exercise more agency—and bear more burden—in that their decision whether or not to write about race may be pivotal. The media coverage touting the death of affirmative action threatens to misguide students of color.[43] Some students may think avoiding race is the smartest strategy in this new, "colorblind" landscape. Yet *SFFA*'s fine print indicates that student essays are the only remaining path for race-conscious admissions. Students of color who engage race will be eligible for race-conscious consideration, while those who opt not to write about race will lose out. Because of how most White young people are socialized, including the "invisibility" of Whiteness in liberal domains,[44] White students are the least

43. *See supra* text accompanying notes 9–15.

44. *See, e.g.*, Eve L. Ewing, *I'm a Black Scholar who Studies Race. Here's Why I Capitalize 'White*,*'* MEDIUM, https://zora.medium.com/im-a-black-scholar-who-studies-race-here-s-why-i-capitalize-white-f94883aa2dd3 [https://perma.cc/67TQ-L68Q] (arguing that the "invisibility" of their race "permits White people to move through the world without ever considering the fact of their Whiteness" and that "White people get to be only normal, neutral, or without any race at all, while the rest of us are saddled with this unpleasant business of being racialized"); Allan Bérubé, *How Gay Stays White and What Kind of White It Stays*, *in* THE MAKING AND UNMAKING OF WHITENESS 234 (Birgit Brander Rasmussen, Eric Klinenberg, Irene J. Nexica & Matt Wray eds., 2001) (discussing White gay men's difficulty acknowledging their racial identity and role in cultivating White gay spaces); *see also* Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969–72 (1993) (noting that "the white person has an everyday option not to think of herself in racial terms at all" and using the term "transparency phenomenon" to refer to "the tendency for whiteness to vanish from whites' self-perception"); Onwuachi-Willig, *supra* note 15 (applying some of this scholarship on Whiteness to *SFFA*'s analysis). As this Essay goes to print, President Trump has launched his second term in office by assailing diversity, equity, and inclusion (DEI) as "radical" and "discriminatory" and attempting to root it out of not just the federal government, but society as a whole. *See, e.g.*, Exec. Order No. 14151, Ending Radical and Wasteful Government DEI Programs and Preferencing, 90 Fed. Reg. 8339 (Jan. 20, 2025); Exec. Order No. 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8633 (Jan. 21, 2025); *see also* Jenyne Donaldson, *Baltimore City Part of Coalition Suing Trump Administration over DEI Executive Orders*, WBAL TV (Feb. 4, 2025), https://www.wbaltv.com/article/baltimore-suing-trump-administration-dei-executive-orders/63663004 [https://perma.cc/H24N-ECCC]. The official, vetted articulations of these policies often assume a "colorblind" form, endorse colorblindness rhetoric, and accordingly stop short of naming their purpose of protecting White men from "reverse discrimination." In their comments to the press, however, President Trump and Vice President Vance have been transparent about their plan to write White victimology into law. *See, e.g.*, Erica L. Green, *As Trump Attacks Diversity, A Racist Undercurrent Surfaces*, N.Y. TIMES (Feb. 3, 2025), https://www.nytimes.com/2025/02/03/us/politics/trump-diversity-racism.html [https://perma.cc/L74A-E2VJ] (quoting Trump as claiming that the Obama administration deemed the Federal Aviation Administration staff to be "too white"). These actions echo Justice

likely to write about "how race affected his or her life," whether through "discrimination" or "inspiration."[45] (Just imagine an essay talking about how being White is "inspiring.")[46]

SFFA retreated from *Grutter*'s core holdings that the First Amendment requires deference to universities, Harvard-style policies advance the compelling interest of diversity, and they are narrowly tailored. In so doing, *SFFA* partially overruled *Grutter*.[47] But make no mistake: *SFFA* authorized a race-conscious admissions regime of individualized consideration. By haphazardly approving of race-conscious consideration at the tail-end of his opinion, Roberts failed to provide any substantive rationale for why the Constitution permits—or perhaps even requires—taking race into account in the context of personal essays. Remarkably, not even Justice Thomas or Justice Alito dissented from this portion of the opinion. Perhaps they accepted Roberts's curt characterization of such admissions as "not on the basis of race." But this is an effort to proclaim colorblindness by fiat and requires overlooking how race and adversity intersect.

The first part of the *SFFA* majority opinion tells a story of the Court's gradual recognition that the Equal Protection Clause detests all racial distinctions in law. However, this ultimately proves to be a canard. This stylized recollection of precedents[48] such as *Shelley v. Kraemer*,[49] *Loving v. Virginia*,[50] and *Palmore v. Sidoti*[51] culminates in Roberts's pronouncement that "[e]liminating racial discrimination means eliminating all of it."[52] Roberts stated: "And the Equal Protection Clause, we have accordingly held, applies 'without regard to any differences of race, of color, or of nationality.'" It is "universal in [its] application," Roberts declared.[53] Yet even as Roberts announced a flat prohibition on what he called "racial discrimination," he immediately complicated it. He admitted that the Court had upheld racial classifications while purporting to apply "the most rigid scrutiny."[54] He also clarified that "[o]ur

Harlan's dissent in that they remind us that colorblindness rhetoric may be interwoven with White supremacy.

45. *SFFA*, 600 U.S. at 231.

46. That said, the exception permits White students who are race conscious to write about how race has sculpted their lives, just as *Grutter*'s diversity rationale encouraged White applicants to display their diversity.

47. *See* Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113, 114 (2023).

48. Dean Angela Onwuachi-Willig incisively identifies several lapses and distortions in the Court's historical analysis. *See* Onwuachi-Willig, *supra* note 15, at 208 (noting that "the Chief Justice never even mentioned slavery").

49. 334 U.S. 1 (1948).

50. 388 U.S. 1 (1967).

51. 466 U.S. 429 (1984).

52. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 206 (2023).

53. *Id.* (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

54. *Id.* at 207 n.3 (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

acceptance of race-based state action has been rare" rather than non-existent.[55] And he acknowledged that the bar on racial discrimination can be "overridden . . . in the most extraordinary case."[56]

"All of it," we quickly learn, doesn't *really* mean *all* "discrimination." This early equivocation exposes a gap between colorblind rhetoric and practical implementation and presages Roberts's ultimate exceptions: the Court's holding that universities may consider race in the context of student essays and its hint that it would approve an exception for the military. The "colorblind Constitution," it turns out, sometimes permits racial distinctions.

Moving from general equal protection doctrine to the context of affirmative action in education, Roberts recounted Justice Powell's analysis in *Bakke* and Justice O'Connor's majority opinion in *Grutter*, including their shared belief that universities had a compelling interest in the educational benefits of student body diversity. At the same time, Roberts warned, these precedents were deeply ambivalent about the use of race.[57] *Grutter*, for instance, referred to all racial classifications as "dangerous,"[58] and thus imposed limits to "cabin" the practice.[59]

After accurately summarizing the logic of these opinions, Roberts began quietly rewriting *Grutter* and *Fisher v. University of Texas at Austin*. A series of distortions facilitated his claim to be enforcing *Grutter*, rather than revising it. First, Roberts inverted one of *Grutter*'s central holdings. Roberts stated that "[b]ecause "[r]acial discrimination [is] invidious in all contexts,"[60] any compelling interest in the context of affirmative action must be "sufficiently measurable to permit judicial [review] under the rubric of strict scrutiny."[61] Roberts built this measurability requirement on a snippet from the *Fisher* case. After its remark about measurability, *Fisher* went on to say that "the University articulated concrete and precise goals."[62] The goals of the Harvard and UNC policies strongly resembled the goals of the University of Texas policy in *Fisher*. Roberts's citation is sleight of hand. It gives the impression that Roberts is enforcing *Fisher* while he is actually reversing its finding that diversity is a compelling governmental interest. Like *Fisher*, the *Grutter* majority dismissed concerns about the vagueness of "critical mass," deferred at least some extent to the university's judgment, and found that diversity is a compelling governmental

55. *Id.* at 208.

56. *Id.*

57. *Id.* at 212 ("But even with these constraints in place, *Grutter* expressed marked discomfort with the use of race in college admissions."). *See generally* Carbado & Robinson, *supra* note 40.

58. *Id.* at 212 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

59. *Id.* at 209 ("The role of race had to be cabined.").

60. *Id.* at 214 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991)).

61. *Id.* (quoting Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 381 (2016)).

62. 579 U.S. at 381.

interest.[63] The *SFFA* Court invented a new measurability test out of whole cloth. It effectively erased *Grutter*'s finding of a compelling interest; required the universities to relitigate the question from scratch; and then imposed a new, heightened test. Yet the majority opinion never acknowledged this deviation from *Grutter* and *Fisher*. Nor did it engage the stare decisis analysis that should have guided its consideration of whether to overturn a (recently re-affirmed) precedent.

Unlike the *Grutter* and *Fisher* majorities, Roberts went on to suggest that racial categories are as "elusive"[64] and ambiguous as the universities' asserted pedagogical interests. He argued that the racial categories utilized by the universities—"(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American"—are "opaque,"[65] "imprecise in many ways," "plainly overbroad," and "arbitrary or undefined."[66] Roberts first emphasized the "Asian" category. "[B]y grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other."[67] Roberts offered no support for his intuition that South Asian and East Asian do not belong in the same category. He also provided no citation for the claim that universities do not care if one of those subgroups is underrepresented. There is a squishy quality to Roberts's critiques of racial categories. He repeatedly assumed that universities do not care about subgroups without citing any statements from admissions policies, the universities' briefs, or oral arguments that actually said that.[68] Moreover, the upshot of Roberts's critiques of the universities' racial categories

63. *Grutter*, 539 U.S. at 329–30. Harvard and UNC proffered interests that closely resembled the interests that *Grutter* deemed "compelling." These included the following: "training future leaders in the public and private sectors"; "better educating its students through diversity"; "producing new knowledge stemming from diverse outlooks"; "preparing engaged and productive citizens and leaders"; and "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes." *SFFA*, 600 U.S. at 214. In *SFFA*, Roberts applauded these interests as "commendable goals," and yet he immediately rejected them because "they are not sufficiently coherent for purposes of strict scrutiny." *Id.*

64. *SFFA*, 600 U.S. at 215 ("[T]he question whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhance[s] appreciation, respect, and empathy,' or effectively 'train[s] future leaders' is standardless. The interests that respondents seek, though plainly worthy, are inescapably imponderable." (internal citations omitted)). Roberts joined a *Fisher* dissenting opinion making a similar argument. *See Fisher*, 579 U.S. at 413–14 (Alito, J., joined by Roberts, C.J., dissenting) (arguing that it is "ludicrous" to suggest that "Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world's population . . . have similar backgrounds and similar ideas and experiences to share.").

65. *SFFA*, 600 U.S. at 217.

66. *Id.* at 216.

67. *Id.*

68. *See id.* at 217 ("By focusing on underrepresentation, respondents would *apparently* prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter.") (emphasis added).

was that they should have paid *more* attention to race, not less. That is, they should have drawn distinctions among groups classified under "Asian" or "Middle Eastern." This desire for *greater racial specificity* clearly is not colorblindness.[69]

In the next section of his majority opinion, Roberts elaborated on what he named "the twin commands of the Equal Protection Clause": "race may never be used as a 'negative' and . . . it may not operate as a stereotype."[70] First, Roberts declared, "our cases have stressed that an individual's race may never be used against him in the admissions process."[71] Interestingly, Roberts cited *no case* for the assertion that he attributed to "our cases."

There is more quiet rewriting of precedent going on here. If "race may *never* be used as a 'negative,'" then how did *Bakke*, *Grutter*, and *Fisher* manage to approve policies that granted a "plus" to certain URM students less frequently than to White applicants? Roberts himself described college admissions as a zero-sum game.[72] Why did Powell and O'Connor wring their hands over the harms experienced by "innocent" White people[73] if the policies did not actually undermine their admissions prospects? If Roberts's constitutional "command" about race never being used as a negative were really a thing, the Court would never have approved affirmative action in the first place. Rather, it would have flatly barred universities from considering race in their admissions processes, and there would have been no need for the *SFFA* litigation. Just as with his newly minted measurability requirement, Roberts pulled the "race can't be used as a negative" rule out of thin air.

---

69. *Cf. id.* at 294 n.2 (Gorsuch, J., concurring) ("Title VI no more tolerates discrimination based on 60 racial categories than it does 6."). The admissions policies in *Bakke*, *Grutter*, and *Fisher* were no more refined and specific as to how to balance the representation of particular subgroups. Thus, if Roberts's questioning of racial categories is more than dicta, it too disregards settled precedent. As Cheryl Harris has observed, "When group identity is a predicate for exclusion or disadvantage, the law has acknowledged it; when it is a predicate for resistance or a claim of a right to be free from subordination, the law determines it to be illusory." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1710, 1766 (1993). Examples of the former set of cases include *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944).

70. *SFFA*, 600 U.S. at 218.

71. *Id.*

72. *Id.* ("College admissions are zero-sum.").

73. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (opinion of Powell, J.) ("The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others."); Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (echoing Justice Powell's statement about "innocent third parties 'who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered'").

Roberts's second "command," which forbids racial stereotyping,[74] resonates with a general concern expressed in various opinions.[75] As he did with *Fisher*, Roberts appropriated a quote from *Grutter* while concealing its relevant context: "We have long held that universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" [76] The *Grutter* majority opinion directly refuted the notion that Harvard-style policies promote the view that minorities express a singular viewpoint. After referring to the claim that the university assumed "that minority students always (or even consistently) express some characteristic minority viewpoint on any issue," O'Connor disavowed it.[77] "To the contrary," she asserted, "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."[78] *Grutter* held that "the Law School's admissions policy promotes 'cross-racial understanding,' *helps to break down racial stereotypes*, and 'enables [students] to better understand persons of different races.'"[79] These benefits, it concluded, are "substantial."[80] Thus, Roberts revived an argument about "stereotyping" that *Grutter* had rejected.[81] The universities in *SFFA*, like the University of Michigan in *Grutter*, had argued that the diversity rationale combats stereotypes, rather than perpetuating them. Yet, as noted above, Roberts dismissed this goal of eroding stereotypes as insufficiently measurable.[82]

Where *SFFA* appears to part company with *Grutter* and Powell's *Bakke* opinion is in Roberts's assertion that the racial identity of a student simply should not matter under the Constitution. Any policy that differentiates a URM from a "non-minority student," he suggests, is a stereotype.[83] This passage of the majority opinion, perhaps more than any other, may explain the scholarly perception that the opinion flatly demands colorblindness. O'Connor in *Grutter*

74. *SFFA*, 600 U.S. at 218 (stating that race "may not operate as a stereotype").

75. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 380 (2016) ("[D]iversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values.").

76. *SFFA*, 600 U.S. at 219 (citing *Grutter*, 539 U.S. at 333).

77. *Grutter*, 539 U.S. at 333.

78. *See id.*

79. *Id.* at 330 (emphasis added).

80. *Id.*

81. *Id.* at 319–20 (citing expert testimony finding that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students").

82. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 214–15 (2023).

83. *See id.* at 221 (arguing that race-conscious admissions policies treat URM students alike, "at the very least alike in the sense of being different from nonminority students"); *id.* at 364 (Sotomayor, J., dissenting) ("The Court goes as far as to claim that *Bakke*'s recognition that Black Americans can offer different perspectives than white people amounts to a 'stereotype.'").

and Powell in *Bakke* compared race to non-racial traits that could make a (White) applicant "diverse," such as playing the violin or hailing from a rural town.[84] Because the policies treated race as just one aspect of a broader interest in diversity, the Court found these policies consistent with equal protection. Roberts vehemently disagreed with that reasoning: "The 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."[85] Harvard erred, Roberts declared, by relying on "the pernicious stereotype that 'a black student can usually bring something that a white person cannot offer.'"[86] UNC similarly disrespected equal protection, Roberts claimed, by arguing that "race in itself 'says [something] about who you are.'"[87]

He continued: "[I]t demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[88] "[T]he university furthers 'stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'"[89] Moreover, "[s]uch stereotyping can only 'cause continued hurt and injury,' contrary as it is to the 'core purpose' of the Equal Protection Clause."[90] Later, I will demonstrate that this fiery condemnation of "stereotyping" cannot be squared with the majority opinion's validation of universities admitting students based on how race has impacted their lives. In order to vilify "stereotypes," Roberts had to overlook not only the *individualized* consideration of race that *Grutter* and *Bakke* approved,[91] but also the *individualized* consideration of race that his own opinion endorsed.[92]

---

84. *See, e.g.*, *Grutter*, 539 U.S. at 333 ("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."); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 321, 321 n.55 (1978) (appendix to opinion of Powell, J.) ("This statement [describing Harvard College's admissions policies] appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae[:] Fifteen or twenty years ago . . . diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians.").

85. *SFFA*, 600 U.S. at 220.

86. *Id.* (quoting *Bakke*, 438 U.S. at 316 (opinion of Powell, J.)).

87. *Id.*

88. *Id.* (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

89. *Id.* at 221 (quoting Miller v. Johnson, 515 U.S. 900, 912 (1995)).

90. *Id.* (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991)).

91. *Id.* at 361–62 (Sotomayor, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (finding that the law school policy affords "truly individualized consideration"); *Bakke*, 438 U.S. at 318 (opinion of Powell, J.) ("This kind of program treats each applicant as an individual in the admissions process."). This contrasts with the automatic assumption that URMs contribute diversity, which the Court rejected in *Gratz*. Gratz v. Bollinger, 539 U.S. 244, 267–74 (2003).

92. *See infra* text accompanying notes 99–106.

Roberts's final complaint about the admissions regimes was that they reflect a "numerical commitment" to maintaining the representation of each underrepresented group from year to year.[93] Roberts stated: "At Harvard, each full committee meeting begins with a discussion of 'how the breakdown of the class compares to the prior year in terms of racial identities.'"[94] Moreover, Harvard decisionmakers repeatedly consulted the numbers, and if they noticed a dip in the representation of a particular URM group, "the Admissions Committee may decide to give additional attention to applications from students within that group."[95] This fixation on numbers, which the Court called "racial balancing," strikes "[a]t the heart of the Constitution's guarantee of equal protection," which requires government to "treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."[96]

This Part has demonstrated Roberts's selective and sometimes misleading interpolations of *Grutter* and *Fisher*. Relying on the concern that the diversity rationale was diffuse and potentially endless in duration, he eliminated *Grutter*'s holding that diversity is a compelling governmental interest. Moreover, Roberts asserted the "twin commands" of equal protection—that is, the Constitution flatly prohibits racial "stereotyping" and does not allow a university to treat an applicant's race as a "negative." Further, *SFFA* departed from *Grutter* in condemning "some attention to numbers"[97] in the admissions process. At this point in the opinion, it seemed that *Grutter* was on the ropes.

II.
THE ESSAY EXCEPTION

Ultimately, the *SFFA* opinion does preserve what we might call the "essential holding"[98] of *Grutter*, yet it is not clear that Roberts recognized that he was doing so. The essay exception effectively revives *Grutter*. In a single sentence tacked onto the tail end of the majority opinion, Roberts undermined the core of his preceding analysis. After summarizing his holding, he wrote: "At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or

93. *SFFA*, 600 U.S. at 222.

94. *Id.* at 221 (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126, 146 (D. Mass. 2019)).

95. *Id.* (quoting *SFFA*, 397 F. Supp. 3d at 146). Roberts identified a similar problem with UNC's process, which required measuring the representation of admitted students of each particular URM group with its share of the state's general population. *See id.* at 222–23.

96. *Id.* at 223 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

97. Grutter v. Bollinger, 539 U.S. 306, 336 ("'Some attention to numbers,' without more, does not transform a flexible admissions system into a rigid quota.") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978)).

98. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

otherwise."[99] Roberts tried to distinguish the policies that he had just deemed illegal from the practice that "all parties" agreed was congruent with equal protection: "A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."[100]

There are two ways in which this distinction utterly fails. First, how can one understand conferring the "benefit" of admission to college (i.e., a "plus") on "a student who overcame racial discrimination" as "*not on the basis of race*"? Race is an integral casual factor in the admission of this hypothetical student.[101] She faced discrimination "on the basis of race." She chose to write her college essay on race by recounting the experiences of racial discrimination and how she worked to surmount it. Roberts's effort to expunge race from the causal chain leading to the student's admission is sheer *ipse dixit*.

Second, conferring admission on a student who wrote about racial discrimination or racial inspiration looks very similar to what colleges have done for decades under *Bakke*, *Grutter*, and *Fisher*. All three opinions stressed that all applicants must be considered on an *individualized* basis and based on a review of their entire file.[102] All three opinions rejected *automatic* assumptions about URM applicants.[103] If this was unclear, it was resolved when the Court decided *Gratz*. That 2003 case, a companion to *Grutter*, rejected the University of Michigan's undergraduate admissions regime, which conferred twenty points on URMs simply for checking a box.[104] The main difference between *Grutter* and

99. *SFFA*, 600 U.S. at 230.

100. *Id.* at 231.

101. *See* Eidelson & Hellman, *supra* note 17, at 306 ("Any plausible version of 'considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise' will involve considering the race of applicants, at least in the sense of awarding literal or figurative points in a manner that is sensitive to the identities that they convey or avow."); Issa Kohler-Hausmann, *What Did* SFFA *Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 312 (2024) ("The majority opinion does not ban all consideration of race or all instances where admissions decisions are based on race.").

102. *See, e.g.*, *Bakke*, 438 U.S. at 317 ("[R]ace or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."); *Grutter*, 539 U.S. at 334 ("[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way."); Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 387 (2016) ("[P]ercentage plans 'may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.'" (quoting *Grutter*, 539 U.S. at 340)).

103. *See, e.g.*, *Bakke*, 438 U.S. at 315 ("Petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."); *Grutter*, 539 U.S. at 334 ("[T]ruly individualized consideration demands that race be used in a flexible, nonmechanical way."); *Fisher*, 579 U.S. at 386 ("[P]rivileging one characteristic above all others does not lead to a diverse student body.").

104. Gratz v. Bollinger, 539 U.S. 244, 269–71 (2003).

SFFA is that *Grutter* permitted race to be considered when weighing the student's application as a whole and against the backdrop of the university's effort to attain "critical mass" of a particular underrepresented racial minority.[105] *SFFA* condenses the explicit consideration of race to a single entry-point in the admissions process: the student essay. Further, it permits the consideration of race only insofar as a student has chosen to write about race in her essay. Under *SFFA*, apparently an admissions officer could not admit a student based on a letter of recommendation that discussed how the student overcame racial discrimination. (There seems to be no principled basis for this distinction, unless the Court fears that those writing letters will foist a racial narrative on a student that the student themself would not co-sign.) Under *Grutter* and *SFFA*, the university's consideration of race is based on a particular, individualized experience, not a blanket assumption about the relevance of race.[106]

---

105. *Grutter*, 539 U.S. at 335.

106. Sonja Starr argues that the essay exception "makes perfect sense" if it is understood against the backdrop of the Roberts Court's "highly individualistic theory of the Equal Protection Clause." Starr, *supra* note 14 (manuscript at 12); *see also id.* (manuscript at 15) (stating that the "essay carveout fits well with other key components of the [*SFFA*] majority's logic"). Starr argues that "when race is relevant to understanding how a specific individual developed specific traits that are relevant to a university's valid nonracial objectives[,]" considering race is not stereotyping. *Id.* (manuscript at 12–13) ("But when an admissions officer considers a particular applicant's life experiences, it does not need to categorize groups at all."). In my view, this explanation does not work. First, as Benjamin Eidelson has argued, insofar as a person identifies with or is treated as a member of a group, respect for individual experience may require treating them as a member of a group. *See* Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1674 (2020) ("[R]efusing to consider race often means refusing to treat people respectfully as individuals, because it means ignoring a factor that illuminates the significance of their choices and experiences. So hostility to practically all race-based distinctions cannot be justified even from a perspective entirely internal to the Court's individualistic conception of equal protection."); *see also* Elise C. Boddie, *The Indignities of Colorblindness*, 64 UCLA L. REV. DISCOURSE 64, 67, 77 (2016) (criticizing equal protection precedents that "treat racial considerations as if they are external to—and perhaps even undermine—one's personhood and individuality").

Second, a reader of a student essay will unconsciously draw on background knowledge of common racial group experiences to make sense of the essay. *See* Eidelson & Hellman, *supra* note 17, at 322 ("[A]pplicants who identify themselves by race will be trading on the reader's sense, not the applicant's own, of the relevance of the facts that the applicant conveys."). For example, imagine that a Chinese American woman writes a personal essay that says she was racially profiled while driving and subjected to excessive force. A reader may struggle to understand and give weight to this statement because of background assumptions that Black people, and especially Black men (who are often stereotyped as hypermasculine), are typically vulnerable to racial profiling while driving, not Asian American women (who are often stereotyped as hyperfeminine). The reader's assumptions about different racial or gender groups and their typical experiences will inform how they make sense of the student's narrative. *See* Kohler-Hausmann, *supra* note 101, at 335. Stories that resonate with general understandings of racialized experiences will be easier to digest than those that diverge from them. Roberts might consider a reader's assumptions about which racialized experiences are typical for Chinese Americans or African Americans to be a "stereotype," but such impressions are inescapably interwoven into making meaning of an essay.

Some readers of a draft of this Essay argued that colleges were, irrespective of *Gratz* and *Grutter*, admitting students based on "race itself" rather than in an individualized, holistic manner. None of them have pointed me to any empirical proof of this. Roberts apparently shared that intuition and relied on it to demarcate what is illegal under *SFFA*—admitting students based on "race itself"—from

The main point here is that the very things that Roberts vilified as a "stereotype" and a "negative" and that "lack [a] meaningful end point" re-enter the law through the paragraph announcing the essay exception. Begin with Roberts's claim about "stereotyping." Earlier in his opinion, Roberts argued that admitting students "on the basis of race" "furthers 'stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."[107]

There are two plausible readings of this stereotyping language, and both run into serious problems. First, *Grutter*, *Fisher*, and *Bakke* all required individualized consideration based on how race functioned in the application of each particular student.[108] If Roberts views *that* as racial stereotyping, his essay exception committed the same sin. Moreover, if Roberts truly believes that race generally does not matter in the world, then he should have looked askance at students who write about experiences of racial discrimination. If race generally does not matter in life, and asserted differences between Black and White students are illusory,[109] shouldn't colleges assume that Black students who invoke race are "playing the race card"?[110] Roberts implicitly rejected these arguments and thus accepted that student descriptions of how race has forged their lives are normally credible, do not inflict "hurt and injury,"[111] and may legitimately serve as the basis of their admission.

---

what is permissible—admitting students based on essays that discuss how race has affected the student's life. Remarkably, Roberts gleaned no support from the considerable record before the Court for his assumption that universities have flouted *Gratz*/*Grutter*'s requirement of individualized consideration. *See id.* at 325. Moreover, if universities have been disregarding constitutional law, why would *SFFA*'s new rule change that practice?

107. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 220–21 (2023).

108. *See, e.g.*, *Grutter*, 539 U.S. at 333 ("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."); *id.* at 336–37 ("When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount."); *Bakke*, 438 U.S. at 318 n.52 (opinion of Powell, J.) (identifying the "denial . . . of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

109. *See SFFA*, 600 U.S. at 221 (arguing that race-conscious admissions policies treat URM students alike, "at the very least alike in the sense of being different from nonminority students").

110. *See generally* RICHARD THOMPSON FORD, THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE (2008); *see also* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1101 (2008) (describing "playing the race card" as the belief that "blacks who assert discrimination are likely using race strategically and dishonestly as an excuse for their own failings").

111. *SFFA*, 600 U.S. at 221 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 631 (1991)).

Second, if individualized consideration of race does not constitute stereotyping, then Roberts's condemnation of admissions policies that engage in racial stereotyping is revealed to be a straw man. It is as if he is calling out the policy in *Gratz*—a policy that was declared unconstitutional two decades before *SFFA*.[112] No policy that made automatic, acontextual assumptions about the significance of race was before the Court. Thus, Roberts's condemnation of policies that stereotype is ultimately mere dicta.[113]

Roberts's newfangled rule that race may never be used as a "negative" in the admissions process[114] fares no better. Earlier in his opinion, Roberts asserted that race-conscious admissions policies are zero-sum.[115] That is, conferring a "benefit" on an URM requires bestowing a "negative" on a White or Asian American applicant (even though scholarship casts doubt on the statistical significance of that "negative").[116] Technically, any student may write about experiencing racial discrimination or how their racial background has inspired them. In that sense, the essay exception is facially neutral. It does not contain a racial classification. Perhaps that is what Roberts meant by denying that admitting students based on their essays is admitting them "on the basis of race."[117] But the same was said of the admissions policies approved in *Grutter* and *Bakke*: White students too could display their "diversity." As a practical matter, moreover, we know that White people are less likely to regard their race as a significant part of their identities and less likely to report racial discrimination.[118] Black people, surveys suggest, are the most likely to report that they have been subjected to racial discrimination and Latine and Asian American reports of racial discrimination tend to fall in between those of Black people and White people. A 2023 USA Today/Ipsos survey asked respondents: "Have you ever experienced the following, or not? – Feeling like you were discriminated against for your race?" Just 27 percent of White respondents said they had suffered discrimination, compared to 71 percent of Black respondents

112. *See* Gratz v. Bollinger, 539 U.S. 244, 269–71 (2003).

113. In perhaps the most memorable line of the opinions, Justice Jackson called out the hypocrisy of Chief Justice Roberts inveighing against racial stereotypes while creating an exception for the military. For Roberts, diversity belongs "in the bunker, not the boardroom." *SFFA*, 600 U.S. at 411 (Jackson, J., dissenting).

114. *Id.* at 218 ("First, our cases have stressed that an individual's race may never be used against him in the admissions process.").

115. *See id.*

116. *See* Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1048 (2002).

117. *SFFA*, 600 U.S. at 231.

118. *See, e.g.*, Andrea L. Dottolo & Abigail J. Stewart, *"I Never Think About My Race": Psychological Features of White Racial Identities*, 10 QUALITATIVE RSCH. IN PSYCH. 102, 113 (2013). The scholars asked White people in the Midwest how their race had influenced their lives. Most responses reflected defensiveness, confusion, evasion, anxiety, and "a lack of language and understanding." *Id.*

and 56 percent of Hispanic respondents.[119] An empirical study of college essays at the University of Michigan found that URM applicants were the most likely to write about race, followed by Asian American applicants. White applicants were the least likely to write about race, even when the prompt included "diversity" language.[120]

This pattern suggests that the students most likely to benefit from an essay discussing racial discrimination may be Black, Latine, and Asian American (in that order). Admitting such students on the basis of their discussions of race—and yes, "on the basis of race"—will likely mean fewer slots for White applicants, who are less likely to incorporate their racial identity into their essays. In other words, for some White applicants (and for some students of color who choose not to write about race) race will constitute a "negative" in their admission process. Moreover, for all of Roberts's insistence that race-conscious policies must have fixed termination dates,[121] his essay exception contains none. Once again, rhetoric that seems to be doing significant analytical work dissolves upon closer inspection. The very policy features condemned by his main rule quietly slip back into the law through the essay exception.

At some level, Roberts recognized the tension between the main rule and the exception because he warned:

> But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name."[122]

It is striking that Roberts's rebuke of the dissent appears to be based on text that does not exist. Note that Roberts's reprimand lacks the standard cross-reference to a specific passage in the dissent. Apparently, Sotomayor, in an early draft, argued that universities could use the essay exception to preserve race-

119. Ipsos produced a race-specific breakdown at my request. They did not have enough Asian American respondents to include them in these results. The general survey results can be found here: *Americans Divided on Whether "Woke" is a Compliment or Insult*, IPSOS (Mar. 8, 2023), https://www.ipsos.com/en-us/americans-divided-whether-woke-compliment-or-insult [https://perma.cc/TJ3Y-A7LV] (a detailed report provided by Ipsos is on file with author).

120. *See* Anna Kirkland & Ben B. Hansen, *"How Do I Bring Diversity?" Race and Class in the College Admission Essay*, 45 L. & SOC'Y REV. 103, 127, 135 (2011) (analyzing a sample of 176 diversity essays submitted to the University of Michigan in the aftermath of the *Grutter* decision). Professor Starr's survey of recent college applicants also found that White respondents were the least likely to write about their race and to write about experiencing discrimination, and Black respondents were the most likely to engage their race and to write about discrimination. *See* Starr, *supra* note 14 (manuscript at 29, 32). Professor Starr does not claim that her sample is representative of all recent college applicants. Her sample was constructed so that just 23 percent of participants were White. *See id.* (manuscript at 26).

121. *See SFFA*, 600 U.S. at 212–13.

122. *Id.* at 230–31.

conscious admissions. But by the time that she finished her dissent, she pivoted and adopted a different strategy—that the essay exception is meaningless.[123]

This is what Sotomayor wrote in her dissent:

> In a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. See *supra*, at 2247 – 2249. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.[124]

I think the dissent erred in demeaning the essay exception, and this dismissal contributed to the overarching narrative that the Court had eliminated affirmative action. In ringing the alarm for the public, Sotomayor overstated the effect of the majority opinion.[125] The Court did not "circumscribe[] universities' ability to consider race in *any* form."[126] A major contribution of this piece is that it shows how the essay exception authorizes a new version of race-conscious admissions if universities and students take it seriously. Dismissing the exception as a "false promise" and "lipstick on a pig" and acquiescing to the notion that the Court declared "colorblindness for all"[127] overlooks the generative possibilities that the exception provides.

Roberts's treatment of the exception is problematic for different reasons. Because Roberts seemed not to have thought deeply about the relationship between his opinion's main rule and its exception, he underestimated how hard it would be for courts to contain the exception in a principled manner. He warned

---

123. To be sure, this is speculation because scholars do not have access to early drafts of Justices' opinions. But it is rather odd for Roberts to rebuke Sotomayor's views on essays without citing a specific passage of her opinion. *Cf.* Starr, *supra* note 14 (manuscript at 16) ("Nothing in Justice Sotomayor's comments about options still open to universities touched on essays."); *id.* (manuscript at 47) ("[T]he Court does not specify exactly what, if anything, it thinks Justice Sotomayor is actually wrong about."). Professor Starr surmised that Roberts may have been referring to Sotomayor's argument that universities deploy "race-neutral" tools such as Top Ten percent plans. *See id.* (manuscript at 16). But as Starr recounts, conservative Justices, including some who wrote opinions in *SFFA*, have long encouraged schools to use such tools to promote diversity. *See id.*; *see also* Jonathan P. Feingold, *The Right to Inequality: Conservative Politics and Precedent Collide*, 57 CONN. L. REV. 57, 95–100 (2024) (discussing the conservative concurrences in *SFFA* and how Justices Kavanaugh, Gorsuch, and Thomas agreed that "racial diversity is not an impermissible motive").

124. *SFFA*, 600 U.S. at 362–63 (Sotomayor, J., dissenting) (quoting *id.* at 230 (majority opinion)).

125. "The devastating impact of this decision cannot be overstated," Sotomayor claimed. *Id.* at 383. *But see* Starr, *supra* note 14 (manuscript at 4) (arguing that colleges should "take the essay carveout seriously").

126. *SFFA*, 600 U.S. at 363 (Sotomayor, J., dissenting) (emphasis added).

127. *Id.* at 236 (Sotomayor, J., dissenting); *id.* at 407 (Jackson, J., dissenting).

that "universities may not simply establish through application essays or other means the regime we hold unlawful today."[128] However, the contents of the main rule—and "the regime we hold unlawful today"—as well as the reasons that justify it, are incredibly blurry. I have already shown how three key aspects of the main rule are in tension with precedent and the exception. The exception permits what Roberts's deems (1) "stereotyping"; (2) using race as a "negative"; and (3) it contains no endpoint.

The main thrust of the majority opinion cannot be a pure "colorblindness" command because the exception admits that race matters in the context of individual students' stories.[129] So what exactly does the main rule ban, and why? How can universities be blamed for not understanding the boundaries of the exception when Roberts himself apparently had not figured them out?

The combination of the Court's ban on consulting numbers to "balance" the class while reviewing admissions files and the essay exception may introduce unpredictability into admissions processes. Admissions officers are now required to evaluate each file, including the student essay, in isolation from the overall pool and its racial demographics. They cannot read the file of a particular Latine applicant, for example, with the knowledge that the university has already admitted the same number of Latine applicants that it did last year or that the university is falling far short of the number from last year. They also will not know and cannot control: (1) how many students of each racial group chose to write their essay about race, (2) whether members of some racial groups had particularly compelling essays or weaker essays, (3) whether *SFFA* led to a surge of students who wrote about race or avoided discussing race because of the Court's supposed colorblindness, and (4) whether those factors might interact to create a substantial increase or decrease in the admission of any particular URM group. Moreover, the *SFFA* Court said nothing about how much weight the university could give to a personal essay discussing race vis-à-vis other aspects of the applicant's file. In other contexts, the Court has at times suggested that race ought not be a "predominant" factor.[130] In *SFFA*, the Court failed to impose a similar limit, which further undermines the opinion's adherence to "colorblindness."

There are many more unresolved questions. Must all experiences with racial discrimination be given equal weight? The *SFFA* plaintiffs prominently included Asian American applicants. Should anti-Asian discrimination carry as much weight as anti-Black discrimination? Should an essay based on the "inspiration" of learning recipes from an immigrant grandmother count as much

128. *Id.* at 230 (majority opinion).

129. *Cf. id.* at 361–62 (Sotomayor, J., dissenting).

130. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995) (holding that a redistricting plan must satisfy strict scrutiny because race was "the predominant, overriding factor explaining the General Assembly's decision"). The *Grutter* Court indicated that admissions officers should not treat applicants "in a way that makes an applicant's race or ethnicity the defining feature of his or her application." Grutter v. Bollinger, 539 U.S. 306, 336–37 (2003). This caveat is absent from *SFFA*'s essay exception.

as an essay recounting the student's experience recovering from a hate crime? Must the university credit the claims of White men, who might follow President Trump in claiming that they are victims of racial discrimination?[131] Does the university retain broad discretion (as it had under *Grutter*) to decide which invocations of race are the most compelling? Given how extensively essays were discussed at oral argument, Roberts's relative silence on the use of essays in his opinion is baffling.

Also unclear is whether and how *SFFA* modifies *Grutter*'s assumption of good faith as universities navigate these questions about weighing essays. *Grutter* held that: "Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[132] In nullifying *Grutter*'s finding that diversity is a compelling interest, did the *SFFA* Court also dispense with *Grutter*'s presumption of good faith? It is troubling that the most prominent appearance of the concept of good faith in the *SFFA* majority opinion is deployed *against* universities: Roberts rejected the universities' claim that SFFA is a sham organization and lacked standing.[133]

These lacunae in the majority opinion, the unpredictability as to how applicants will (mis)understand *SFFA*'s new framework, and Roberts's caveat that the essay exception may not be used to perpetuate policies like Harvard's and UNC's[134] pose legal peril for universities.[135] As universities rushed to implement this new standard, there is a considerable risk that they have responded by doing what almost all observers expected to happen in the wake of *SFFA*—admit fewer URM students.[136] Initial reports suggest that many elite

131. *See* text accompanying notes 24–26 (discussing a lawsuit against Northwestern Law School) and note 44 (discussing Trump's anti-DEI executive orders).

132. *Grutter*, 539 U.S. at 329 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978)).

133. *See SFFA*, 600 U.S. at 201 ("Where, as here, an organization has identified members and represents them in good faith, our cases do not require further scrutiny into how the organization operates.").

134. *See id.* at 228.

135. According to a former Yale admissions dean, "[t]here are going to be a lot of unintended consequences . . . . Admissions officers are going to be in a very challenging position this coming year. I certainly see that students are going to be facing equally challenging guessing games about what's going to enhance or detract from their applications." Jessica Cheung, *Affirmative Action is Over. Should Applicants Still Mention Their Race?*, N.Y. TIMES (Sept. 4, 2023), https://www.nytimes.com/2023/09/04/magazine/affirmative-action-race-college-admissions.html [https://perma.cc/2W6M-BBYR].

136. *See, e.g.*, Barnes, *supra* note 11 (noting that presidents of universities "where the consideration of race already is banned said maintaining diversity will be difficult").

schools enrolled fewer URM students, but at other schools, the report was mixed or URM numbers were stable.[137]

Note how this sort of "compliance" with the opinion would require universities to engage in the very practices that the Court characterizes as unconstitutional discrimination. The majority opinion says that universities may not consult the numbers when considering individual applications.[138] However, ignoring the numbers entirely exposes the university to the risk of admitting "too many" URM students. Conservative movement lawyers have threatened to sue universities whose enrollment of URM initially remained stable after *SFFA*,[139] and such lawsuits are likely to escalate during the Trump administration. Thus, some—but not all—universities may consult the numbers during the admissions process to avoid litigation. Whereas under *Grutter*, universities may have checked the numbers to try to approximate the racial demographics of the prior year's class, under *SFFA*, some may very well consult the numbers to confer a "negative" on certain URM applicants, produce the expected drop in enrollment of URMs,[140] and avoid lawsuits. Whereas under *Grutter*, some Asian American applicants tried to "de-Asian" their applications to avoid disadvantage, some news reports suggest that some Black students have responded to *SFFA* by omitting racially-linked activities, such as a Black student union.[141] In case it is not clear, all of this is race-conscious decision-making. *Nothing* about this is colorblind. Indeed, it is just another version of "racial balancing,"[142] which *SFFA* supposedly quashed.

So what does *SFFA* accomplish if it does not install colorblindness and purge race-conscious decision-making from admissions practices? It *redirects* race-conscious decision-making. First, because essays are supposed to be the sole site of race-consciousness, *SFFA* places new pressures on students to decide

137. *See, e.g.*, Liam Knox, *An Early Look at Diversity Post-Affirmative Action*, INSIDE HIGHER ED (Sept. 6, 2024), https://www.insidehighered.com/news/admissions/traditional-age/2024/09/06/early-look-racial-diversity-post-affirmative-action [https://perma.cc/T3ZB-WWXK] (stating that schools such as the Massachusetts Institute of Technology (MIT) and UNC reported a decline in Black students, while Yale and the University of Virginia (UVA) reported stable enrollment of Black students, and Duke reported a slight increase in its share of Black and Latine students).

138. *See SFFA*, 600 U.S. at 223–24.

139. *See, e.g.*, Anemona Hartocollis, *Yale, Princeton, and Duke Are Questioned over Decline in Asian Students*, N.Y. TIMES (Sept. 17, 2024), https://www.nytimes.com/2024/09/17/us/yale-princeton-duke-asian-students-affirmative-action.html [https://perma.cc/XE6E-8EL7] ("In the letters sent out Tuesday [to universities], Students for Fair Admissions hinted that the essay was going to be a big part of its investigation into admissions procedures."); Scott Jaschik, *The Demands of Students for Fair Admissions*, INSIDE HIGHER ED (July 13, 2023), https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions [https://perma.cc/3LPA-Z59N] (discussing a letter from Ohio Attorney General Dave Yost that "said that using application essays or other means to discover an applicant's race would be the sort of policy the Supreme Court struck down").

140. Lee Bollinger, outgoing president of Columbia University, predicted: "The effects . . . will be tragic—very, very serious." Barnes, *supra* note 11.

141. *See* Cheung, *supra* note 135.

142. *SFFA*, 600 U.S. at 223.

whether and how to discuss their racial experiences.[143] In so doing, it fosters greater race-consciousness among students—yet another subversion of *SFFA*'s "colorblind" rule. Moreover, even as the majority opinion invoked colorblindness, it implicitly instructed universities to make room for more White (and potentially Asian American) applicants. Roberts ended the section of the opinion on essays by warning that "universities may not simply establish through application essays or other means the regime we hold unlawful today."[144] The Court thus seems to imply that universities that follow its opinion will admit fewer URMs and more White students. This is the "right" outcome of considering race only in the context of student essays.[145] The Court thus gave the conservative legal movement the ability to claim a win for "colorblindness,"[146] when, in truth, it advanced White applicants' entitlement to being admitted "on the basis of race."[147]

III.
WHY EQUAL PROTECTION REQUIRES RACE-CONSCIOUS ADMISSIONS

Roberts treated it as obvious that the Equal Protection Clause does not bar universities from admitting students based on essays that engage race, apparently because the parties did not dispute this. However, I have argued that considering race-based essays may produce a racially disparate effect similar to the affirmative action policies invalidated by *SFFA* because students of color are more likely to write about racial discrimination. This Part provides the rationale for considering race-based essays, which is absent from the *SFFA* opinions. Critical race scholarship demonstrates that forbidding students from writing their essays about their lived experiences with race would not produce equality, colorblindness, or race-neutrality. To the contrary, it would impose a unique disadvantage on students whose lives have been marked by racial discrimination.

Roughly fifteen years before the Court decided *SFFA*, critical race scholars Devon W. Carbado and Cheryl I. Harris published an article entitled *The New*

143. Under *Grutter*, a student could benefit from affirmative action by doing nothing more than "checking the box" to identify as a member of an URM. At that point, an admissions officer could take the student's race into account in the context of the entire file and her individualized experiences with race. Under *SFFA*, if a student opts not to address their race, they should not qualify for a race-based "plus." Initial data suggest that many students before and after *SFFA* discuss their race on at least one of their college essays, *see* Starr, *supra* note 14 (manuscript at 29), but also that after *SFFA*, there was an uptick in students declining to report their race, *see* Knox, *supra* note 137 (finding "a nearly across-the-board bump in the number of students who declined to report their race—at many institutions, the number nearly doubled").

144. *SFFA*, 600 U.S. at 230.

145. Sonja Starr argues: "This is faulty logic; demographic stability (or even increased diversity at some schools) has many plausible explanations that would not run afoul of the Court's warnings." Starr, *supra* note 14 (manuscript at 5, 37, 39–40).

146. *See supra* text accompanying note 13.

147. In other words, if admissions staff admit more White students to create the appearance of compliance with *SFFA*, they will admit such students "on the basis of race." *See SFFA*, 600 U.S. at 217.

Racial Preferences.[148] Carbado and Harris, who are professors at UCLA Law School, wrote in the context of California's decision to ban "preferential treatment . . . on the basis of race" and a similar decision by Michigan voters.[149] Carbado and Harris asked: "What do 'anti-preference' mandates require with respect to personal statements?"[150] This piece was largely a thought experiment. The authors considered how various public figures who have experienced racial discrimination would have managed writing a personal essay in an admissions regime that forbids "racial preferences." They built on Carbado's prior work establishing that people of color often must "work" their racial identities—attempting, for example, to be "Black enough" but not "too Black," depending on the institutional context.[151] The ambiguity as to whether California universities considered personal essays based on race to violate Proposition 209 created a dilemma for students whose lives were deeply intertwined with race.

The problem is that "prohibiting explicit references to race in the context of admissions does not make admissions processes race neutral. On the contrary, this racial prohibition installs what [they] call a 'new racial preference.'"[152] If a law such as Proposition 209 demands that students suppress their racialized experiences, it penalizes "applicants for whom race is a central part of their social experience and sense of identity."[153] On the flip side, "[t]his racial preference benefits applicants who (a) view their racial identity as irrelevant or inessential and (b) make no express mention of it in the application process. These applicants are advantaged vis-à-vis applicants for whom race is a fundamental part of their sense of self."[154] In other words, this would be a "preference" for (most) White applicants.

Carbado and Harris made their case by examining the life stories of four public figures: future President Barack Obama, then a U.S. Senator and the Democratic presidential candidate; Dalton Conley, a sociologist; Justice Clarence Thomas; and Professor Margaret Montoya.[155] Carbado and Harris imagined personal statements by these people, drawing on excerpts from their biographies. Obama, the son of a White mother and Kenyan father, wrote about

148. Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

149. CAL. CONST. art. I, § 31(a); MICH. CONST. art. I, § 26(1).

150. Carbado & Harris, *supra* note 148, at 1144.

151. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (discussing how "incentives and pressures to signal and work one's identity shape the workplace behavior and experiences of outsider groups, such as women and minorities"); DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA, 1 (2015) ("The central conflict is to demonstrate that one is black enough from the perspective of the supporting cast and white enough from the perspective of the main characters. The 'double bind' racial performance is hard and risky.").

152. Carbado & Harris, *supra* note 148, at 1147.

153. *Id.* at 1148.

154. *Id.*

155. *Id.* at 1151.

an incident in which his father defused a situation in which a White man called him the N-word. He also wrote about the struggles of racial liminality: "Sometimes I would find myself talking to [his black friend] Ray about white folks this or white folks that, and I would suddenly remember my [white] mother's smile, and the words that I spoke would seem awkward and false."[156]

With respect to Thomas, Carbado and Harris observed that, for all of Thomas's valorization of "colorblindness," his opinions frequently focus on the Black community and its interests.[157] Although Thomas converges ideologically with fellow conservatives, Thomas's race opinions frequently go places where an Alito or Scalia would not venture. They emerge from his lived experience as a Black man who grew up in the racially segregated South. Whatever one might think about Thomas's highly contested arguments about Black people, we can agree that his opinions would be less distinctive if he were not able to draw on and express his racial experiences and opinions.

On its face, a rule that barred students from writing about race would not constitute a racial classification. As a formal matter, it would treat each student equally. As a practical matter, however, it would impose burdens predominantly on race-conscious students of color. Most White applicants could write about their full range of life experiences and would not have to self-censor. By contrast, many students of color would have to edit out their racialized experiences and also figure out whether certain stories would even make sense after excising racial dimensions. Moreover, as Carbado and Harris argued, students of color who remove racial references from their essays risk being read as White because "white identity is normative, or put another way, whiteness 'goes without saying.'"[158] Neither an essay that explicitly invokes one's experience as a person of color nor an essay that omits that experience is "colorblind."[159] Carbado and Harris's insightful examination of the racial politics of essay writing and reading strongly suggests that genuine colorblindness and race-neutrality is simply not possible in this context.

It is striking that the facial neutrality of a legal rule that barred any student from engaging race in their essay did not attract a single conservative vote in *SFFA*. As Carbado and Harris made clear, in the wake of state laws banning "racial preference," conservatives argued that schools that admitted students on the basis of essays that engaged race would be "cheating" or breaking the law.[160] By contrast, in *SFFA*, there was no partial dissent by Alito or Thomas regarding

156. *Id.* at 1154.

157. *Id.* at 1175 ("What distinguishes his opinions from those of other justices who share his views, such as Justice Antonin Scalia, is that Justice Thomas frequently invokes black cultural references or adopts a specifically black subject position."); *id.* at 1176 (stating that Thomas argues that "the Constitution compels colorblindness" "from a racially specific position"). *But cf.* Driver, *supra* note 14, at 724–26 (resisting an "essentializing vision" of Thomas).

158. Carbado & Harris, *supra* note 148, at 1181 n.147 (citation omitted).

159. *See id.* at 1182.

160. *Id.* at 1149 n.30.

the majority's validation of admission decisions that rest on racial narratives. Conservatives have long claimed that Black people are "obsessed" with race and have a "victim mentality."[161] Indeed, Thomas's unusually harsh critique of his junior colleague Ketanji Brown Jackson echoed that trope.[162] Many White Americans are skeptical when Black people and other people of color report racial discrimination. My earlier article reviewed social science on the skepticism and retaliation that often confront people of color who assert racial discrimination.[163] White critics have long attacked Critical Race Theory (CRT) for relying on personal narratives.[164] Indeed, while the Court was hearing *SFFA*, a conservative media campaign was vilifying CRT as "toxic" and "crazy."[165]

Recent surveys indicate enduring skepticism of people of color who report discrimination. A 2023 Pew survey asked which is "the bigger problem for the country today": (1) "people NOT seeing racial discrimination where it really does exist" or (2) "people seeing racial discrimination where it really does not exist."[166] Overall, respondents were closely divided, with a narrow majority of

161. *See* Robinson, *supra* note 110, at 1139–40.

162. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 279 (2023) (Thomas, J., concurring) ("Justice Jackson uses her broad observations about statistical relationships between race and select measures of health, wealth, and well-being to label all blacks as victims. Her desire to do so is unfathomable to me."); *id.* at 280 ("Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood."). Jackson fired back: "Justice Thomas's opinion also demonstrates an obsession with race consciousness that far outstrips my or UNC's holistic understanding that race can be a factor that affects applicants' unique life experiences." *Id.* at 408 n.103 (Jackson, J., dissenting). For all of Thomas's claims that Black liberals, such as Jackson, falsely blame racism for Black people's hardships, Thomas has not hesitated to play the race card against his liberal White colleagues, such as Justice Breyer, when they have argued for inclusive, race-conscious policies. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 776–78 (2007) (Thomas, J., concurring) (comparing Breyer to White segregationists).

163. *See* Robinson, *supra* note 110, at 1139–40, 1148–51.

164. *See generally* Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

165. Christopher Rufo, the leader of this campaign, tweeted: "The goal is to have the public read something crazy in the newspaper and immediately think 'critical race theory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans." Zach Beauchamp, *Chris Rufo's Dangerous Fictions*, VOX (Sept. 10, 2023), https://www.vox.com/23811277/christopher-rufo-culture-wars-ron-desantis-florida-critical-race-theory-anti-wokeness [https://perma.cc/5VTF-3B3T]; *see also* Benjamin Wallace-Wells, *How a Conservative Activist Invented the Conflict over Critical Race Theory*, NEW YORKER (June 18, 2021), https://www.newyorker.com/news/annals-of-inquiry/how-a-conservative-activist-invented-the-conflict-over-critical-race-theory [https://perma.cc/XU9H-VXJJ].

166. *See* Kiley Hurst, *Americans Are Divided on Whether Society Overlooks Racial Discrimination or Sees It Where It Does Not Exist*, PEW RSCH. CTR. (Aug. 25, 2023), https://www.pewresearch.org/short-reads/2023/08/25/americans-are-divided-on-whether-society-overlooks-racial-discrimination-or-sees-it-where-it-doesnt-exist/ [https://perma.cc/7D2B-DEDD]; *see also* PEW RSCH. CTR., 2023 PEW RESEARCH CENTER'S AMERICAN TRENDS PANEL: WAVE 126 APRIL 2023 (Apr. 10 2023), https://www.pewresearch.org/wp-content/uploads/2023/08/SR_2023.08.25_discrimination_topline.pdf [https://perma.cc/K7S6-MXWS] (a group of panelists was surveyed as to whether they think it is a "bigger problem for the country today"

53 percent stating that not seeing discrimination is the bigger problem. White respondents (54 percent) were the racial group most likely to assert that seeing discrimination that doesn't exist is the bigger problem, with a significant subset of Hispanic (40 percent) and Asian American (33 percent) respondents sharing that view. Just 11 percent of Black respondents agreed. Black respondents at 88 percent were far and away the racial group most likely to identify not seeing discrimination as the bigger problem.[167]

Considering this skepticism, particularly among conservative White Americans, the *SFFA* majority opinion's willingness to accept student narratives of racial discrimination at face value is rather striking. Could it be that some Justices understood the inequality of banning racial narratives, even though such a ban would not take the shape of a racial classification? Perhaps at some level, Roberts and those who joined his opinion could not deny that race matters in students' experiences, and forbidding students from expressing that would be discrimination. If so, that would be a notable expansion of equal protection doctrine in two respects. First, for all of Roberts's efforts to deny that race matters, it would suggest that at some level he acquiesced to the dissenters. The main theme of the dissenting opinions was surely *race matters*.[168] Perhaps there was some implicit common ground between the majority and the dissenters. Second, it would constitute a rare judicial acknowledgement of racial harm experienced by people of color in the absence of a racial classification.[169] This is less meaningful as precedent of course because the Court provided no rationale for the essay exception.[170] Nonetheless, the essay exception, in combination with the majority's suggestion of a military exception,[171] and validation of race-consciousness in a contemporaneous voting rights case[172] refute the notion that the Equal Protection Clause imposes "colorblindness for all."[173] Given that the Court failed to provide any principles for exempting essays and the military from a presumption of "colorblindness," it will initially fall to lower courts to draw lines between contexts when race-consciousness is and is not permissible.

---

that "[p]eople [are] seeing racial discrimination where it really does not exist" or that "[p]eople [are] NOT seeing racial discrimination where it really does exist").

167. Hurst, *supra* note 166.

168. *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 364 (2023) (Sotomayor, J., dissenting) ("It is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters . . . . Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students.").

169. *See, e.g.*, Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 172–73 (2016) (criticizing the Court's obsession with racial and gender classifications).

170. Indeed, the discordant language in the *SFFA* majority opinion may enable a future Court to pluck the language that exalts "colorblindness" and simply ignore the race-conscious elements of the decision. I thank David Simson for pointing this out to me.

171. *See* Students for Fair Admissions, Inc. v. U.S. Naval Acad., 707 F. Supp. 3d 486, 491–92, 503–04 (relying heavily on *SFFA*, 600 U.S. at 213 n.4).

172. Allen v. Milligan, 599 U.S. 1 (2023).

173. *See SFFA*, 600 U.S. at 407 (Jackson, J., dissenting).

IV.
SELECTIVE *"*EQUALITY*"*: SFFA'S EXPLOITATION OF ASIAN AMERICANS

This final Part builds on the preceding by revealing the Court's selective approach to the two equality violations that SFFA asserted. SFFA's first claim pitted Asian Americans against White applicants, while the second claim asserted that the two groups shared a disadvantage vis-à-vis Black, Latine, and Indigenous applicants. Roberts's divergent treatment of SFFA's distinctive claims of racial discrimination further undercut his valorization of "colorblindness." As explained by the First Circuit, SFFA's lawsuit challenged two different aspects of Harvard's admissions policy: (1) Harvard's reliance on a "personal rating" stereotyped the personalities of Asian American applicants and thus reduced their odds of admission;[174] and (2) Harvard's granting of a "plus" to URM students for diversity illegally conferred a "negative" on Asian American and White applicants.[175] The Supreme Court majority endorsed the rhetoric of anti-Asian bias during oral argument and in opinions by conservative Justices. But the majority ultimately failed to rule on SFFA's challenge to the personal rating and even declined to explain this move. The Court granted Asian American applicants relief only insofar as their interests aligned with White applicants. The Court simply ignored SFFA's argument that White applicants received an unfair advantage because they were said to be more personable. Despite the Court's colorblind rhetoric, the interests of White applicants provided the fulcrum of the Court's legal reasoning.[176]

---

174. Harvard instructed decision makers to consider "an applicant's perceived leadership, maturity, integrity, reaction to setbacks, concern for others, self-confidence, likeability, helpfulness, courage, kindness, and whether the student is a 'good person to be around.'" Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 145–46 (2022). "[T]he First Circuit described SFFA's 'central allegation' as the claim that 'Harvard discriminates against Asian American applicants in favor of white applicants.'" *Id.* at 146. Jerry Kang coined the term "negative action" to describe admission policies that intentionally divert slots from Asian Americans to White people. *See* Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin's Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 17 (1996) ("[N]egative action forces Asian Americans out for White applicants.").

175. The *SFFA* plaintiffs tried to use the facial racial classification in Harvard's admissions policy, which admitted using race as a "plus" for some students, to trigger strict scrutiny of the "personal rating," which it argued perpetuated implicit bias against Asian Americans. The First Circuit observed that "[i]t is not entirely clear how SFFA's arguments about Harvard's use of race to benefit African American and Hispanic applicants relate to SFFA's central allegation that Harvard discriminates against Asian American applicants in favor of white applicants." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 185 n.23 (1st Cir. 2020). However, the court purported to acquiesce to this strategy of tethering a challenge to negative action to an attack on affirmative action and apply strict scrutiny to both aspects of Harvard's policy. *See id.* at 195.

176. My colleague Khiara Bridges predicted this outcome. *See* Bridges, *supra* note 174, at 153 (citing Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980)). The principal dissent addressed the claim of anti-Asian American bias but found the evidence lacking. *SFFA*, 600 U.S. at 347–76 (Sotomayor, J., dissenting). Two other essays in this volume consider the role of Asian Americans in this litigation. Jerry Kang, *Asians Used, Asians Lose: Strict Scrutiny from Internment to* SFFA, 113 CALIF. L. REV. 979 (2025); Vinay Harpalani, *Missing the Trees for the Forest: How Progressives Neglect Anti-Asian*

Claire Jean Kim wrote about the "evolving weaponization of Asian Americans" in affirmative action doctrine.[177] The initial plaintiffs in key affirmative action precedents were a White man (Alan Bakke) and White women (Barbara Grutter and Abigail Fisher). Beginning with a cameo appearance in *Bakke*,[178] Asian Americans became more prominent in the *Fisher* litigation, although they were not among the plaintiffs.[179] Ed Blum is a wealthy White man who funded both *Fisher* and *SFFA*.[180] He specifically recruited the *SFFA* plaintiffs, proclaiming "I needed Asian plaintiffs," and created a website to enlist them.[181] Conservative Chinese immigrant groups played an important role in recent cases. They filed amicus briefs and faced off against progressive Asian American groups, which filed briefs in support of race conscious admissions.[182] Professor Kim argued that the concepts of "White supremacy" and "people of color" obscure the reality of anti-Blackness; they wrongly imply that all non-White people are equivalent, as if Black people and Asian Americans are similarly situated.[183] Kim summed up the U.S. racial hierarchy as follows: "*White is best but the most important thing is not-Blackness*, and its corollary, *Better Asians than Blacks*."[184] Asian Americans are "simultaneously *pushed down by white supremacy and lifted up by anti-Blackness*. They are located, that is, at the turbulent juncture where the two forces meet."[185] Scholars such as Professors Kim and Vinay Harpalani have argued that certain segments of the

Animus in Magnet School Admissions Controversies, 113 CALIF. L. REV. 943 (2025). In my view, Sotomayor should have explained how the conservative majority's corruption of equal protection doctrine, which began in the 1970s, imposed tremendous evidentiary hurdles for Asian Americans and other people of color attempting to prove racial bias. *See generally* Carbado & Robinson, *supra* note 40 (expanding on Sotomayor's *SFFA* antisubordination argument).

177. CLAIRE JEAN KIM, ASIAN AMERICANS IN AN ANTI-BLACK WORLD 321 (2023) [hereinafter Kim (2023)]; *see also* Claire Jean Kim, *Are Asians the New Blacks? Affirmative Action, Anti-Blackness, and the "Sociometry" of Race*, 15 DU BOIS REV. 217, 228 (2018) [hereinafter Kim (2018)] ("[C]onservatives quickly grasped the opportunity to weaponize Asian claims of discrimination by suturing the ceiling/quota question to race-conscious admissions.").

178. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 296 n.36 (1978) (opinion of Powell, J.); *id.* at 309 n.45 (characterizing the inclusion of Asian Americans in a UC Davis affirmative action as "especially curious"); *see* Kim (2023), *supra* note 177, at 321–24.

179. *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 375 (2016) (citing Brief for Asian American Legal Defense and Education Fund et al. as amici curiae to argue that "the contention that the University discriminates against Asian Americans is 'entirely unsupported by evidence in the record or empirical data'"); *id.* at 391, 396, 406, 410–414 (Alito, J., joined by Roberts, C.J., dissenting) (arguing extensively that the university policy favors Black and Hispanic applicants over Asian Americans and also that the category "Asian" is incoherent); Kim (2023), *supra* note 177, at 328–29.

180. *See* Kim (2023), *supra* note 177, at 333.

181. *See* HARV. UNIV. NOT FAIR, http://harvardnotfair.org [https://perma.cc/47YM-9LHM].

182. *See* Kim (2023), *supra* note 177, at 321, 332.

183. *See id.* at 327–28, 341; Kim (2018), *supra* note 177, at 224 ("Black abjection disappeared in a sea of equivalences.").

184. Kim (2023), *supra* note 177, at 323. Kim criticized the briefs by conservative Asian American groups for making misleading arguments about racial hierarchy, suggesting that "*Asians are the new Blacks*. In this sociometry, the Asian–Black gap is not only denied but turned on its head." *Id.* at 331.

185. *Id.* at 10.

Asian American community are more susceptible than others to anti-affirmative action politics.[186] Given their liminal position between Whiteness and Blackness, Asian Americans and other non-Black people of color may be seduced into trying to align themselves with White people and thus partake in the many benefits of Whiteness. But does this strategy actually work? The following doctrinal discussion takes up this question in the context of *SFFA*.

During oral argument in the UNC case, an SFFA lawyer stated that the university would not violate equal protection if it admitted a hypothetical Asian American student based on their essay discussing a visit to their grandmother's country of origin.[187] Roberts interjected and effectively changed the topic. Such a student, Roberts contended, would be a "not very savvy applicant, right? Because the one thing his essay is going to show is that he's Asian American, and those are the people who are discriminated against."[188] Justice Gorsuch echoed Roberts: "What do we say to Asian Americans who there's a veritable cottage industry[,] we're told by the briefs[,] that they are encouraging Asian applicants to avoid [disclosing their racial identity] and beat 'Asian quotas'? That's how they perceive it."[189]

Despite Roberts's assertion at oral argument that Asian Americans are "the people who are discriminated against," his majority opinion had very little to say about Asian Americans. At one point, he pitted Asian Americans against Black applicants, suggesting that Black students lack merit.[190] Elsewhere, he framed Asian Americans as victims of discrimination and suggested that Asian American and White applicants face similar racial disadvantages in the admissions process.[191]

---

186. *See id.* at 332 (noting that "the Asian spoilers trope was going strong, nurtured by a distinctive ideological alliance of conservative Chinese immigrant professionals and conservative whites"); Vinay Harpalani, *The Need for an Asian American Supreme Court Justice*, 137 HARV. L. REV. F. 23, 29 (2023) ("This wave of immigrants [after the Immigration and Nationality Act of 1965] and their children became the high-achieving Asian Americans whose numbers have grown at elite institutions over the last fifty years. Importantly, there are also many Asian immigrants and Asian Americans who do not fit this profile.").

187. *See* Transcript of Oral Argument at 28, Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023) (No. 21-707), at 28.

188. *Id.* at 29.

189. *Id.* at 165. Gorsuch's ostensible deference to Asian American perceptions of disadvantage is curious because the Court's equal protection doctrine does not treat minority perception of bias as sufficient to prove a constitutional violation. *See, e.g.*, Robinson, *supra* note 169, at 172 ("As long as racial discrimination remains concealed or implicit, as it often does, it will not trigger the protection of the Fourteenth Amendment because the Court requires litigants to prove the existence of a racial classification as a threshold requirement to meaningful scrutiny.").

190. *See, e.g.*, *SFFA*, 600 U.S. at 194–95, 197 n.1 (citing a brief filed to the Court that claimed "[a]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%).").

191. *See, e.g.*, *id.* at 218–19 ("College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."); *see also id.* at 296 (Gorsuch, J., concurring) (referring to White and Asian American applicants as "clear losers").

The concurring opinions were more attentive to the plight of Asian Americans, although this concern was merely rhetorical. Thomas provided a brief description of anti-Asian discrimination in U.S. history, including Supreme Court decisions that upheld that racism.[192] His summary, however, omitted any critique of Harlan, whom he held up as the pioneer of the "colorblind Constitution." As discussed in the introduction, Harlan's opinions depicted Chinese people as perpetual foreigners unworthy of citizenship.[193] Thomas stressed that "Asian Americans can hardly be described as the beneficiaries of historical racial advantages."[194] Moreover, "[g]iven the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants."[195] Thomas then quickly pivoted to extend Asian Americans' moral capital to White applicants: "But this problem is not limited to Asian Americans; more broadly, universities' discriminatory policies burden millions of applicants who are not responsible for the racial discrimination that sullied our Nation's past." [196] In other words, White college applicants bear no more responsibility than Asian Americans for the country's racist legacy.[197] Even though White applicants lacked a history of enduring victimhood comparable to that experienced by Asian Americans, they got to share in the glow of racial innocence. Thomas raised the ugly history of anti-Asian racism mainly to absolve White applicants.

Gorsuch also discussed Asian Americans more extensively than the majority opinion. He used Asian Americans as the prime example of the "incoherent stereotypes" said to underpin racial classification policies.[198] As he did at oral argument, Gorsuch invoked the "cottage industry" that helps some Asian American applicants hide their identity: "Paid advisors . . . tell high school students of Asian descent to downplay their heritage to maximize their odds of admission."[199] However, Gorsuch did not carry this analysis to its natural conclusion. If certain Asian Americans are trying to "pass" as non-Asian,[200] precisely how do they want to be perceived racially? Are they seeking to identify

192. *See id.* at 272–73 (Thomas, J., concurring).

193. *See supra* text accompanying notes 33–36.

194. *SFFA*, 600 U.S. at 272.

195. *Id.* at 273.

196. *Id.* at 273–74.

197. Elsewhere, Thomas equated Asian Americans with White ethnic groups and put "white" in quotation marks. *See id.* at 273 n.10 ("Their 'affirmative action' programs do not help Jewish, Irish, Polish, or other 'white' ethnic groups whose ancestors faced discrimination upon arrival in America, any more than they help the descendants of those Japanese American citizens interned during World War II."); *see also id.* at 282–83 (criticizing Jackson for an ostensible worldview that overlooks anti-Asian American bias and asserting that "white communities . . . have faced historic barriers").

198. *Id.* at 291 (Gorsuch, J., concurring).

199. *Id.* at 293.

200. *Cf.* Harris, *supra* note 69, at 1710–14 (describing passing in a Black-White context).

as Black or Latine and gain a "plus"? Stripping cultural references that signal Asian American identity would seem to permit an Asian American student instead to assimilate to background assumptions of Whiteness.[201] This suggests that Asian Americans perceive White applicants as having an advantage over Asian American applicants and are seeking equality with White people. Yet Gorsuch failed to acknowledge White advantage.

Even though they devoted significant space in their opinions to discussing Asian Americans, Thomas and Gorsuch joined the majority opinion, which relegated Asian Americans to the margins of the opinion. Literally. Many of Roberts's references to Asian Americans are contained in a single footnote responding to the principal dissent.[202] Roberts refused to overturn the lower court's findings that the Harvard policy did not discriminate against Asian Americans.[203] Indeed, the Court's opinion did not even bother to engage that claim. At oral argument, Roberts and Gorsuch asserted that the real victims of discrimination were Asian Americans,[204] yet the majority opinion protected Asian Americans only insofar as their interests converged with White applicants. Moreover, Roberts created an exception for students who discuss race, even though at oral argument he had asserted that a wise Asian American applicant under *Grutter* would not disclose their race in their essay.[205]

Thomas and Gorsuch, despite their virtue signaling, joined the majority opinion in full. When it was convenient, these conservative Justices trotted out Asian Americans to excuse White people of responsibility for racism, but then they promptly dismissed Asian Americans and shelved their distinctive claim of racial bias. In short, Asian Americans only "won" insofar as they provided cover

---

201. *See* Carbado & Harris, *supra* note 148, at 1181 n.147.

202. I counted seven references in footnote 1. *See SFFA*, 600 U.S. at 197 n.1.

203. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 203 (1st Cir. 2020). Vinay Harpalani has pointed out that the SFFA lawyers' framing of the case shifted as it climbed to the Supreme Court. First, the claim of "negative action" against Asian Americans went from central to marginal in the briefing. Second, while SFFA initially argued for what it called complete colorblindness in admissions, it ultimately agreed that universities could consider racial experiences discussed in student essays. Vinay Harpalani, *"Bait and Switch": How Asian-Americans Were Weaponized to Dismantle Affirmative Action*, 71 DRAKE L. REV. 323, 326 (2024). Although the SFFA lawyers' emphasis evolved, Roberts did not claim that SFFA had forfeited its claim of negative action. And Sotomayor's dissent addressed the claim on the merits. The lawyers' minimization of the claim of Asian American injury and what Jonathan Feingold has called "White bonus" is consistent with the idea that alliances between Asian Americans and White conservatives are unlikely to benefit Asian Americans. Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707 (2019).

204. *See* Transcript of Oral Argument at 29, Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023) (No. 21-707); *see also SFFA*, 600 U.S. at 296 (Gorsuch, J., concurring) (referring to Asian Americans as "clear losers" in the admissions game). Note that this certainty in the existence of systemic discrimination against Asian Americans was not based on the sort of "smoking gun" evidence demanded by precedents such as *McCleskey v. Kemp* to prove anti-Black discrimination. Rather, the Justices relied on the existence of a "cottage industry" advising Asian Americans how to conceal their racial identity as evidence that Harvard actually discriminated.

205. *See* Transcript of Oral Argument at 29, Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023) (No. 21-707).

for the interests of White applicants.[206] When Asian Americans claims threatened, rather than bolstered, White dominance, the Court ruled against Asian Americans. This is yet another way in which the *SFFA* opinion violated "colorblindness," even as it claimed to enforce it. Once again, the opinion betrayed a divide between rhetoric and reality. The conservative Justices' rhetoric at oral argument and in their opinions expressed a special concern for anti-Asian racism. Yet when it came down to adjudicating the two claims that made up SFFA's case, the outcome revealed this to be mere lip service.

CONCLUSION: RACIAL CLASSIFICATIONS AND SILVER LININGS

This Essay has sought to make visible how colorblindness rhetoric may mask race-conscious realities. The Court's ruling in *SFFA* does not install colorblindness across the board.[207] To the contrary, it creates a veneer of colorblindness that masks the approval of race conscious admissions. It encourages students to write race-conscious essays and permits universities to admit students based on their lived experiences with race. This means that *Grutter*'s authorization of race-conscious individualized consideration lives on in the context of essays.[208] As Jonathan Feingold has suggested, "colorblindness" should be understood as a heuristic that conceals multiple assumptions about whether race does and should matter in law and society.[209] Accordingly, I urge judges and scholars to unpack and deconstruct assertions of colorblindness. Close scrutiny reveals that claims about "colorblindness," "preferences," "race neutrality," and "merit" often turn on a fictional baseline in which race does not matter.[210] Race has always mattered in America, and the 2024 election suggests that it will continue to do so at least for our lifetimes. When liberals acquiesce to colorblind discourses, they ignore racially-forged realities and cede the moral high ground.[211]

206. *See* Jerry Kang, *Ending Affirmative Action Does Nothing to End Discrimination Against Asian Americans*, CONVERSATION (Aug. 3, 2024), https://theconversation.com/ending-affirmative-action-does-nothing-to-end-discrimination-against-asian-americans-209647 [https://perma.cc/5NED-42F7]; Kang, *supra* note 176.

207. *See* Eidelson & Hellman, *supra* note 17, at 32 ("*SFFA* revealed that the Court's conservative majority could not live with its own abstract commitment to colorblindness. But the Court did not squarely or openly reckon with that predicament.").

208. Randall Kennedy has aptly characterized the Court's jurisprudence on affirmative action as "marked by ambivalence and confusion, obfuscation, and inconsistency. The Court has made a series of ambiguous, ad hoc rulings that reflect the country's racial anxieties." KENNEDY, *supra* note 38, at 182; *see also id.* at 217–218 (stating that Powell's *Bakke* opinion "rewarded obfuscation over forthrightness"). Instead of a clean break from race consciousness and a clean victory for color-blindness, the *SFFA* opinion should be understood as yet another muddled compromise.

209. *See* Feingold, *supra* note 21, at 1958–61.

210. *See* Issa Kohler-Hausmann, *supra* note 101, at 344–45 ("When the majority uses the term 'racial preferences' or 'negative,' they are just question begging because they do not disclose, much less defend, what the norm or benchmark is in their view.").

211. *See* Feingold, *supra* note 21, at 1958–61; Carbado & Robinson, *supra* note 40.

The extent to which *SFFA* shifts the status quo will depend heavily on how liberal constituencies, universities, and students respond to a conservative decision. The initial response of prominent universities was to reaffirm their commitment to diversity and assert their determination to pursue innovations that protect diversity while complying with the law.[212] It remains to be seen whether these commitments will withstand the assaults on DEI and universities beginning to emerge from the early days of Trump's second term in office.

The more nuanced understanding of the *SFFA* decision that I provide offers reasons to be hopeful and reasons to fight. First, although the Court declined to endorse the diversity rationale, it described diversity as "plainly worthy,"[213] which suggests that universities may continue to pursue it.[214] They may not use racial classifications or consult racial demographics. But this rule would seem to leave universities ample discretion to use "race neutral" policies to advance diversity, following in the footsteps of the University of California, which has doggedly worked to recover from Proposition 209's ban on affirmative action in the 1990s.[215] After California voters approved Proposition 209, it was unclear whether universities could consider student essays that discussed race, or whether such students should be treated as lawbreakers.[216] The *SFFA* Court's unanimous endorsement of admitting students based on essays resolves doubts about the legality of this practice.

Of course Ed Blum and conservative groups will try to read the *SFFA* opinion broadly and to police universities (including the University of California)[217] who continue to enroll racially diverse classes. But this will be a more onerous battle without the benefit of policies that contain racial classifications. Without the advantage of a racial classification or "smoking gun" evidence of intent to evade the *SFFA* opinion, conservatives may struggle in court. At the Supreme Court level, much will turn on whether the Justices have the appetite to wade into race conscious admissions in the near future or decide

212. *See, e.g.*, *President Pollack Message on Supreme Court Decision*, CORNELL CHRON.(June 29, 2023), https://news.cornell.edu/stories/2023/06/president-pollack-message-supreme-court-decision [https://perma.cc/VS9S-NKNJ] (asserting that diversity and inclusion are "core values" at Cornell); Kate McGee, *UT-Austin only Texas Public University Affected by Supreme Court's Ending Use of Race in Admissions*, TEX. TRIB. (June 29, 2023), https://www.texastribune.org/2023/06/29/supreme-court-affirmative-action-ruling-texas/ [https://perma.cc/5XB2-XPBK] (quoting statements by presidents at UT-Austin and Rice University reaffirming their commitment to diversity).

213. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 215 (2023).

214. *See* Feingold, *supra* note 21, at 36–41; Starr, *supra* note 14 (manuscript at 45–46).

215. *See*, Zachary Bleemer, *Diversity in University Admissions: Affirmative Action, Top Percent Policies, and Holistic Review* (Ctr. for Stud. in Higher Educ. UC Berkeley Rsch. & Occasional Paper Series, 2019), at 1, 2–3, https://cshe.berkeley.edu/publications/diversity-university-admissions-affirmative-action-percent-plans-and-holistic-review [https://perma.cc/34ZZ-B9AB].

216. *See* Carbado & Harris, *supra* note 148, at 1148–49 n.30.

217. *See* Anemona Hartocollis, *The University of California Increased Diversity. Now It's Being Sued.*, N.Y. TIMES (Feb. 3, 2025), https://www.nytimes.com/2025/02/03/us/affirmative-action-california.html [https://perma.cc/KMD7-QTDT].

to let the issues percolate. In the context of religious freedom, the Court has increasingly assumed the worst of liberal governments and depicted (White) evangelicals as victims of discrimination in the absence of smoking gun evidence of malice.[218] The *SFFA* majority largely avoided commenting on whether universities remain entitled to an assumption of good faith. The Court's recent decision not to review a Virginia school policy that was motivated by diversity, but did not use racial classifications, suggests that schools may retain broad latitude.[219]

The *SFFA* Court set few boundaries on university use of student essays. One benefit of this new regime is that students will exercise more autonomy in deciding whether and how to discuss race in their essays. At the same time, the Court's colorblind rhetoric and overblown claims of the death of affirmative action may deter students from engaging race. This regime places new burdens on students and admissions officers to work through these questions. But given the Court's blinkered awareness of race, leaving these questions to students and universities would be better for society. The impact of *SFFA* may ultimately depend on the individual and collective action of students and universities—both of which are often vilified by "anti-woke" advocates for their progressive racial politics.[220] The heightened awareness of race and racism after the racial uprising of 2020, particularly as it has infused students and university administrations, might matter more than the colorblind rhetoric of the *SFFA* majority.

218. *See, e.g.*, Russell K. Robinson, *What Christianity Loses When Conservative Christians Win at the Supreme Court*, 2021 SUP. CT. REV. 185, 201 (2021) (arguing that the Court has presumed that certain state and local governments "harbor animus against Christianity").

219. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 218 L. Ed. 2d 71 (2024) (denying petition for certiorari); *id.* (Alito, J., dissenting); Richard D. Kahlenberg, *Alito's Furious Dissent in a New Admissions Case Is a Good Sign for Student Body Diversity*, SLATE (Feb. 22, 2024), https://slate.com/news-and-politics/2024/02/alito-thomas-jefferson-dissent-admissions-scotus.html [https://perma.cc/SQ72-KKZC]; *see also* Glater, *supra* note 25, at 414 ("[A]fter [*SFFA*], potential Asian American plaintiffs seeking to redress the unresolved sources of their underrepresentation confront the same challenges that face Black and Latinx applicants, needing to find evidence of intentional discrimination in an opaque admissions regime."). In *Fisher*, Justice Alito's dissent touted a percentage plan as a "race-neutral alternative" to affirmative action. *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 426–27 (2016) (Alito, J., dissenting). Yet in the Virginia case, he treated a facially neutral percentage plan as suspect and the diversity interest as tantamount to racial malice against Asian Americans. Only Thomas signed onto this argument.

220. *See, e.g.*, *How Did American "Wokeness" Jump from Elite Schools to Everyday Life?*, ECONOMIST (Sept. 4, 2021), https://www.economist.com/briefing/2021/09/04/how-did-american-wokeness-jump-from-elite-schools-to-everyday-life [https://perma.cc/VNX2-VJ54] (identifying "a new generation of students keenly aware of social problems" and "a pliant university administration" as drivers of wokeness).