Political Affirmative Action

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INTRODUCTION

In the Supreme Court's most recent affirmative action decision—*Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College*—the Court wrongly continued to believe that it has a role to play in determining the constitutionality of affirmative action.[1] Where the Constitution lacks a legal standard that is sufficiently precise to provide meaningful constraint on the exercise of judicial discretion, questions concerning proper interpretation of that standard are what *Marbury v. Madison* deemed to be "in their nature political"[2] and therefore "only politically examinable."[3] In such cases, the Constitution simply means what the political branches of government say it means, so there is no basis for the Supreme Court to declare a representative branch interpretation unconstitutional.[4] The contemporary Supreme Court itself recognized this need for judicial deference in its 2019 *Rucho v. Common Cause* decision, when it declined to rule on the constitutionality of partisan gerrymandering.[5] Although the challengers there argued that the Equal Protection Clause made partisan gerrymandering unconstitutional, the Court held that the Equal Protection Clause's lack of judicially manageable standards was enough to render the constitutional challenge a nonjusticiable political question.[6]

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1. *See* Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023). The Court's decision also resolved *Students for Fair Admissions, Inc. v. University of North Carolina* (UNC), addressing a constitutional equal protection claim and Title VI statutory claim. *Id.* at 197–98. While Justice Jackson dissented in the UNC case, *id.* at 382 (Jackson, J., dissenting), she recused herself from the Harvard case because she had previously been a member of the Harvard Board of Overseers. *See id.* at 231 (Jackson, J., taking no part in the consideration or decision of the Harvard case); Jimmy Hoover, *Justice Jackson Steps Aside from Harvard Admissions Case*, LAW360 (July 22, 2022, 8:20 PM), https://www.law360.com/articles/1514456/justice-jackson-steps-aside-from-harvard-admissions-case.

2. 5 U.S. (1 Cranch) 137, 170 (1803) (recognizing need to insulate executive political policymaking decisions from judicial interference).

3. *Id.* at 166.

4. Consistent with Occam's razor, I think that this is the most efficient way in which to conceptualize the political question doctrine for present purposes. *See* Brian Duignan, *Occam's Razor*, BRITANNICA (Jan. 2, 2024), https://www.britannica.com/topic/Occams-razor [https://perma.cc/2473-R3LF] (describing the principle of Occam's razor as "of two competing theories, the simpler explanation of an entity is to be preferred"). However, the political question doctrine can also be understood as having considerably more complexity. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 597–601, 622–25 (1976); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 643, 668–69 (1989); Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 441–44 (2004); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1203–06 (2002).

5. 588 U.S. 684, 717–21 (2019).

6. *See id.* at 691, 717–19.

Under the doctrine of separation of powers,[7] the same Equal Protection Clause that rendered partisan gerrymandering nonjusticiable should also have rendered challenges to majoritarian affirmative action programs nonjusticiable. But the Supreme Court has gerrymandered its justiciability rules in a way that vests the Court with the precise political and ideological discretion that *Marbury*'s political question doctrine was intended to guard against. And the Court's selective application of its justiciability rules has, in turn, enabled the Court to gerrymander its substantive law of affirmative action, in a way that ironically makes the Equal Protection Clause itself a doctrinal tool that an ideologically motivated Supreme Court can use to facilitate discrimination against racial minorities.

Since the Supreme Court first considered the constitutionality of racial affirmative action in the 1970s,[8] the Court has adopted ambiguous and inconsistent interpretations of the Equal Protection Clause. Sometimes the Court upheld challenged affirmative action programs,[9] and sometimes it held affirmative action programs to be unconstitutional violations of equal protection.[10] But because neither the language nor the original meaning of the Equal Protection Clause has changed since its adoption, those inconsistent interpretations themselves attest to the doctrinal imprecision of the equal protection standard. That imprecision is further highlighted by the divergent interpretations of the majority, concurring, and dissenting opinions in the Court's *SFFA* case.[11] But those interpretive

7. Although separation of powers is typically used to describe the horizontal division of powers between branches of the federal government, here I am also using the term to encompass the federalism-based vertical separation of powers between the Supreme Court and state policymaking authorities that govern the appropriate public and private uses of race.

8. *See* DeFunis v. Odegaard, 416 U.S. 312, 319–20 (1974) (per curiam) (dismissing affirmative action challenge as moot); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J.) (addressing merits of racial affirmative action challenge for the first time); *see also* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 723 (W. Acad. 21st ed. 2022) ("The Court first faced these questions in reviewing challenges to preferential admissions programs in higher education."); GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 10–18, 161–63 (2000) (tracing history of early Supreme Court affirmative action cases).

9. *See, e.g.*, Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 369, 376 (2016) (upholding affirmative action for student admissions at University of Texas); Grutter v. Bollinger, 539 U.S. 306, 311, 343 (2003) (upholding law school affirmative action for student admissions at University of Michigan Law School); Metro Broad. v. FCC, 497 U.S. 547, 552 (1990) (upholding federal affirmative action for broadcast licenses); Fullilove v. Klutznick, 448 U.S. 448, 453, 492 (1980) (plurality opinion) (upholding federal affirmative action for construction contractors); *cf.* Easley v. Cromartie, 532 U.S. 234, 237, 258 (2001) (upholding redistricting as partisan rather than racial gerrymander).

10. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 251 (2003) (invalidating undergraduate affirmative action for student admissions at University of Michigan); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 477, 486 (1989) (invalidating municipal affirmative action for construction contractors); *Bakke*, 438 U.S. at 271 (invalidating medical school affirmative action for student admissions); *cf.* Miller v. Johnson, 515 U.S. 900, 927–28 (1995) (invalidating redistricting as racial gerrymander); Adarand Constructors v. Peña, 515 U.S. 200, 235–39 (1995) (remanding federal affirmative action plan for construction contractors, with instructions to apply typically fatal strict scrutiny). *But see id.* at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting *Fullilove*, 448 US. at 519 (Marshall, J., concurring in judgment))).

11. *See* SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 188 (2023).

inconsistencies are not the product of mere judicial inattention. Rather, they emanate from the subjective, and ultimately normative, nature of "equality" itself.

Although bans on invidious discrimination may remain judicially enforceable, it is now apparent that the concept of racial equality demanded by the Constitution is inherently too elusive to permit a judicial interpretation to trump a majoritarian political interpretation regarding affirmative action. A judicial interpretation risks a countermajoritarian judicial usurpation of legislative and executive policymaking functions in a way that is inconsistent with the Madisonian Republicanism-based separation of powers that is demanded by the Constitution. Since the introduction of slavery into what would become the United States, race has remained such a persistent and pervasive force in the culture that it is unrealistic to think that any concept of colorblind race neutrality could exist in a way that was not itself influenced by the political and ideological preferences that continue to make the nation's race relations so contentious. While those political and ideological concerns are inevitable components of the legislative and executive policymaking processes, they are not properly part of a countermajoritarian adjudicatory process that engages in constitutional interpretation. Nevertheless, it is difficult to deem the Supreme Court's affirmative action decisions as anything other than the substitution of judicial policy preferences for the political policy preferences about race that should properly determine the appropriateness of racial affirmative action.

The substitution of judicial for political policymaking is especially pernicious in the context of race because the Supreme Court has often interpreted the Equal Protection Clause in a way that facilitates the subordination of racial minority interests to the interests of the white majority. That was obviously true in many of the Court's historically infamous race discrimination cases.[12] And it remains true in the Court's *SFFA* affirmative action decision as well. Accordingly, when the Supreme Court intervenes in the political process to invalidate majoritarian racial affirmative action programs, there is a danger that it will simply be perpetuating the nation's history of discrimination against racial minorities, as it has done in the past. And such a countermajoritarian facilitation of white supremacy would squarely violate the Constitution's command that the government not "deny to any person within its jurisdiction the equal protection of the laws."[13]

Part I of this Article discusses the Supreme Court's recent affirmative action decision in *SFFA*. Section I.A describes the opinions in the case. Section I.B highlights the ambiguities and inconsistencies in interpreting the Equal

12. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05, 407 (1857) (enslaved party) (finding that Blacks cannot be "citizens" within meaning of United States Constitution), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; *id.* at 451–52 (invalidating congressional statute limiting slavery); Plessy v. Ferguson, 163 U.S. 537, 544–52 (1896) (upholding separate-but-equal regime of racial segregation); Korematsu v. United States, 323 U.S. 214, 216–20 (1944) (upholding World War II exclusion order that expelled people of Japanese ancestry from certain areas on West Coast and ultimately led to their forcible relocation into concentration camps), *abrogated by* Trump v. Hawaii, 585 U.S. 667, 710 (2018).

13. U.S. CONST. amend. XIV, § 1.

Protection Clause that exist in those divergent opinions and in the Court's prior affirmative action decisions.

Part II argues that the Court's inability to settle on a consistent interpretation of the Equal Protection Clause in affirmative action cases reveals that the constitutionality of affirmative action is a nonjusticiable political question. Section II.A explains that judicial resolution of nonjusticiable political questions is barred by the separation of powers doctrine and argues that the same absence of constraint on the exercise of judicial discretion that made the equal protection standard nonjusticiable in the partisan gerrymandering case also makes the constitutionality of racial affirmative action a nonjusticiable political question. Section II.B suggests that the imprecision inherent in the concept of equality itself makes the meaning of the Equal Protection Clause in the context of affirmative action a subjectively normative political question that the Court cannot answer without usurping from the representative branches a social policymaking function that the Supreme Court is not institutionally competent to exercise—stressing that the Court's exercise of racial policymaking to date has undermined, rather than facilitated, our efforts to achieve racial equality.

This Article concludes by arguing that there are political actions that the representative branches could take to neutralize Supreme Court invalidations of majoritarian efforts to promote racial affirmative action. However, those actions are unlikely to be taken unless the democratic majority's avowed belief in racial equality comes to overtake its submission to the mystique of judicial review.

I. *SFFA* AND THE CONSTITUTIONAL AMBIGUITY OF AFFIRMATIVE ACTION

The Supreme Court's most recent affirmative action decision, *SFFA*, exhibits a high degree of doctrinal ambiguity concerning the equal protection standard that the Court should use to assess the constitutionality of affirmative action. There are conceptual differences in the various understandings of equality that have been adopted by the majority, concurring, and dissenting opinions. Moreover, those conceptual differences have given rise to doctrinal inconsistencies that have characterized the Court's racial jurisprudence since the Court first began to address the constitutionality of affirmative action. Among the doctrinal inconsistencies revealed by the divergent *SFFA* opinions are disagreements concerning the proper standard of review, the proper application of those standards, the significance of *Brown v. Board of Education* (*Brown I*),[14] and the meaning of affirmative action itself.

A. CASE AND OPINIONS

Harvard College and the University of North Carolina (UNC) both considered an applicant's race as one of the factors relevant to student admission decisions.[15] Other factors considered by one or both schools included an applicant's academic

14. 347 U.S. 483 (1954).
15. *SFFA*, 600 U.S. at 195.

program, academic performance, extracurricular activities, essays, character attributes, athletic ability, legacy status, and geographic location.[16] The stated goal of the schools was to enhance student body diversity, and in some cases any of those factors—including race—could be dispositive.[17]

A nonprofit organization called Students for Fair Admissions (SFFA), founded in 2014 to oppose affirmative action, filed separate suits that year against Harvard and UNC.[18] The suits alleged that the consideration of race by Harvard (a private college, *not* directly subject to the Equal Protection Clause) violated Title VI of the Civil Rights Act of 1964 and that the consideration of race by UNC (a state school that *is* directly subject to the Equal Protection Clause) violated both Title VI and the Equal Protection Clause of the Fourteenth Amendment.[19] After bench trials, federal district courts in both cases upheld the use of race by the schools.[20] The First Circuit affirmed the trial court decision in the Harvard case, and the Supreme Court granted certiorari. The Supreme Court also granted certiorari in the UNC case prior to judgment by the Fourth Circuit, and then combined the two cases for decision.[21] After holding that SFFA had Article III standing to maintain the challenges,[22] the Supreme Court reversed the lower court decisions and held that the use of race as a factor in admissions was unconstitutional.[23]

1. Roberts Majority Opinion

Chief Justice Roberts wrote a 6–3 majority opinion in *SFFA*—joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett—holding that the consideration of race in admissions by Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment.[24] The Court further held that the constitutional violation was a statutory violation of Title VI as well.[25]

The majority opinion by Chief Justice Roberts noted that the original purpose of the Fourteenth Amendment's Equal Protection Clause, adopted in 1868, was to prohibit the racial discrimination that had been prevalent in the United States prior to the Civil War.[26] Roberts admitted that the Supreme Court had itself failed to honor this aspirational equality when it upheld the constitutionality of the

16. *Id*. at 195–96.

17. *See id*. at 193–96, 215–16.

18. *Id*. at 197.

19. *Id*. at 197–98; *see id*. at 198 n.2 (noting that violations of the Equal Protection Clause by institutions that accept federal funds are also violations of Title VI).

20. *Id*. at 198.

21. *Id*.

22. UNC had challenged the standing of SFFA, arguing that SFFA was "not a 'genuine' membership organization," but the Supreme Court rejected that challenge. *Id*. at 198–201. The Article III standing requirement, which like the political question doctrine imposes another constitutional prerequisite to justiciability, rests on notoriously elusive legal standards that the Supreme Court has in the past applied in ways that seem racially correlated. *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1423–24 (1995).

23. *SFFA*, 600 U.S. at 230–31.

24. *Id*. at 188, 230–31.

25. *See id*. at 206 n.2.

26. *Id*. at 201–02, 206; *see id*. at 311 (Kavanaugh, J., concurring).

nation's separate-but-equal regime in the 1896 *Plessy v. Ferguson* decision.[27] But the Court corrected that constitutional error by overruling *Plessy* in its 1954 *Brown v. Board of Education* decision prohibiting de jure racial segregation in public schools—a prohibition that was eventually extended to other government instrumentalities and activities as well.[28] The majority opinion cited *Brown* for the proposition that public education "must be made available to all on equal terms" and noted that *Brown* "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional."[29] Roberts noted that the Court had previously held that "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination."[30]

The Roberts majority opinion reaffirmed the Court's prior holdings that racial classifications could be upheld under the Equal Protection Clause only if they survived an exacting two-step strict scrutiny test. The classifications had to advance a "compelling governmental interest[]" and had to be so "narrowly tailored" as to be "necessary" to the advancement of that interest.[31] The opinion then noted that in its 2003 *Grutter v. Bollinger* decision upholding a University of Michigan Law School student admissions affirmative action program, the Supreme Court had largely adopted the reasoning of Justice Powell's 1978 "touchstone" affirmative action opinion in *Regents of the University of California v. Bakke*.[32] Like Powell's opinion, *Grutter* recognized that pursuing student diversity was a compelling governmental interest that could satisfy strict scrutiny.[33] However, schools could not use racial quotas or insulate applicants from competition with other applicants on the basis of race or ethnic origin. *Grutter* therefore sought to prohibit racial stereotyping, to prohibit the use of race as a negative factor that would discriminate against those who were not the beneficiaries of race-based preferences, and to ensure that racial affirmative action programs had "reasonable durational limits" and "a logical end point."[34]

The *SFFA* majority opinion went on to hold that the Harvard and UNC affirmative action plans were unconstitutional because they failed strict scrutiny, used race as a stereotype or negative factor, and lacked a logical end point.[35] Because the diversity interests of the school were not "sufficiently measurable to permit judicial [review],"[36] they were "not sufficiently coherent for purposes of strict

27. *Id.* at 203 (majority opinion) (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

28. *See id.* at 203–06 (citing *Brown I*, 347 U.S. 483 (1954)).

29. *Id.* at 204 (first quoting *Brown I*, 347 U.S. at 493; and then quoting Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 298 (1955) (alteration in original)).

30. *Id.* at 206 (quoting Loving v. Virginia, 388 U.S. 1, 10 (1967)).

31. *Id.* at 206–07 (first quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003); and then quoting *Fisher I*, 570 U.S. 297, 311–12 (2013)).

32. *Id.* at 208–13 (discussing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J.), and *Grutter*, 539 U.S. at 323).

33. *Id.* at 211.

34. *Id.* at 211–12 (quoting *Grutter*, 539 U.S. at 342).

35. *Id.* at 213. In a footnote, the opinion specifically disclaimed any consideration of a military academy's use of race as an admissions factor. *Id.* at 213 n.4.

36. *Id.* at 214 (alteration in original) (quoting *Fisher II*, 579 U.S. 365, 381 (2016)).

scrutiny."[37] In addition, the racial categories used by the school were not narrowly tailored to the goal of diversity because they were too imprecise and ambiguous.[38] And the schools were not entitled to academic deference in their pursuit of diversity because the Constitution does not allow "separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review."[39]

Because college admissions is a "zero-sum" activity, Roberts found that the use of race as a plus factor for some racial groups made it a prohibited negative factor for others, as illustrated by the 11.1% decrease in the number of Asian-American applicants admitted to Harvard as a result of its affirmative action program.[40] In addition, the use of race as a proxy for diversity violated the equal protection prohibition on the stereotyped "assumption that 'members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike.'"[41]

Roberts concluded that the challenged affirmative action programs also lacked a logical end point because admissions data revealed that the schools pursued racial diversity in terms of numerical proportionality, which violated the well-established rule that "'[o]utright racial balancing' is 'patently unconstitutional.'"[42] In addition, the need to pursue diversity when defined as maintaining such racial proportionality would have to go on indefinitely.[43] Neither the *Grutter* suggestion that affirmative action might continue to be valid until 2028[44] nor the promised periodic reexamination by the schools of the need for affirmative action was sufficient to constitute an adequate end point.[45]

Chief Justice Roberts finally dismissed the suggestion of the dissenters that racial affirmative action could properly be used to remedy the ongoing effects of societal discrimination. He noted that the Court had repeatedly rejected the core proposition that remedying societal discrimination was a compelling interest in cases ranging from *Bakke* to *Grutter* to *Fisher II*.[46] He emphasized that racial classifications could not properly "impose[] disadvantages upon persons . . . who

37. *Id.*
38. *See id.* at 214–18.
39. *Id.* at 217.
40. *Id.* at 218.
41. *Id.* at 220 (quoting Schuette v. Coal. to Def. Affirmative Action, Integration & Immigr. Rts. & Fight for Equal. by Any Means Necessary (BAMN), 572 U.S. 291, 308 (2014) (plurality opinion)).
42. *Id.* at 221–24 (quoting *Fisher I*, 570 U.S. 297, 311 (2013)).
43. *See id.* at 223–24.
44. *See id.* at 213 ("*Grutter* thus concluded with the following caution: 'It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.'" (omission in original) (quoting Grutter v. Bollinger, 539 U.S. 306, 343 (2003))).
45. *Id.* at 223–25.
46. *Id.* at 226–30.

bear no responsibility for [the] harm[s]" suffered by the beneficiaries of affirmative action.[47] He stated:

> Most troubling of all is what the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit.[48]

While invalidating the Harvard and UNC plans, the majority opinion of Chief Justice Roberts did not expressly overrule *Grutter* or *Fisher II*—cases that had upheld affirmative action plans as narrowly tailored efforts to advance the compelling interest in educational diversity. The opinion also stressed 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. 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. . . . [T]he student must be treated based on his or her experiences as an individual—not on the basis of race.[49]

In summary, the majority in *SFFA* held that the Equal Protection Clause demanded a colorblind approach to equality, that the affirmative action programs failed to pass constitutional muster because they relied on imprecise and stereotyped racial categorizations, and that the programs lacked a logical end point.

2. Concurring Opinions

a. Justice Thomas

Justice Thomas wrote a concurrence in *SFFA*, arguing that *Brown* prohibited racial discrimination in student admissions but that *Grutter* "pulled back" from *Brown* in allowing racial affirmative action to increase the educational benefits of diversity.[50] Because Thomas thought that "[t]wo discriminatory wrongs cannot make a right," he had previously and repeatedly argued that *Grutter* should be overruled.[51] He interpreted *SFFA* as accomplishing that, stating "[t]oday, and despite a lengthy interregnum, the Constitution prevails."[52] He went on to offer an extended "originalist defense of the colorblind Constitution" under the Thirteenth

47. *Id.* at 226 (omission in original) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 310 (1978) (opinion of Powell, J.).
48. *Id.* at 229.
49. *Id.* at 230–31 (citations omitted).
50. *Id.* at 232 (Thomas, J., concurring).
51. *Id.*
52. *Id.*

and Fourteenth Amendments, which he said prohibited all forms of racial discrimination, including affirmative action.[53] Justice Thomas argued that the post-Reconstruction Freedmen's Bureau Acts, which provided benefits to former Black slaves, were themselves race-neutral because they applied to all "freedmen . . . , a formally race-neutral category," and to white refugees.[54] Accordingly, he rejected the view that the Fourteenth Amendment could be understood as a mere antisubordination provision that permitted benign uses of race.[55] He argued that other congressional statutes that seemed facially to benefit Blacks were also better understood as neutral laws that sought to remedy the effects of past discrimination and merely had a constitutionally permissible, racially disparate impact.[56]

Thomas agreed with the majority opinion that the strict scrutiny required for affirmative action was not satisfied for the Harvard and UNC plans because the schools had not established an actual link between racial discrimination and educational benefits, the schools did not deserve deference in their justifications for discrimination, and attempts to remedy past discrimination were not closely tailored to discrimination by those institutions.[57] Despite the Supreme Court's past mistaken tolerance of the separate-but-equal doctrine, originalist history insists that the Constitution be colorblind—as asserted in Justice Harlan's famous *Plessy* dissent and recognized in *Brown*.[58] For Thomas, the difficulty in trying to distinguish benign from invidious discrimination was illustrated by the fact that racial segregation in education—as well as slavery itself—were once justified as benign uses of racial classifications.[59]

Thomas stated that affirmative action can harm minorities by placing them in environments where they are less likely to succeed and by stigmatizing them as less-qualified recipients of affirmative action.[60] Thomas, therefore, characterized any benefits of affirmative action as "aesthetic" rather than substantive.[61] The zero-sum nature of scarce resource allocations meant that beneficial affirmative action for one racial group would adversely affect other groups, such as the Asian-American applicants who were adversely affected by the *SFFA* affirmative action programs.[62] Rather than advancing racial equality, affirmative action on college

53. *See id.* at 231–46.

54. *Id.* at 247 (emphasis omitted).

55. *See id.* at 246–49 (noting that "advocates of the law explicitly disclaimed any view rooted in modern conceptions of antisubordination").

56. *Id.* at 246–51.

57. *See id.* at 253–61.

58. *See id.* at 262–66 (noting that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens" and that "'in the field of public education the doctrine of "separate but equal" has no place' and '[s]eparate educational facilities are inherently unequal'" (second alteration in original) (first quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); and then quoting *Brown I*, 347 U.S. 483, 495 (1954))).

59. *Id.* at 266–68.

60. *Id.* at 268–70.

61. *Id.* at 271.

62. *Id.* at 272–74.

campuses has had the effect of increasing racial separation, resentment, polarization, and the socially constructed salience of race.[63] Justice Thomas disagreed with the claim in Justice Jackson's *SFFA* dissent that the economic and social disadvantages of minorities should be attributed to racial discrimination rather than to other causes.[64] He deemed this a "race-infused world view" that was "irrational" and "an insult to individual achievement" that could prove "cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood."[65] Finally, Justice Thomas argued that statistics showed that race-neutral, meritocratic admissions could produce as much diversity as race-based affirmative action and that Historically Black Colleges and Universities showed that quality education can be secured from schools without racial diversity.[66] Justice Thomas was happy that the majority opinion "rightly makes clear that *Grutter* is, for all intents and purposes, overruled."[67]

b. Justice Gorsuch

Justice Gorsuch wrote a concurring opinion joined by Justice Thomas, arguing that, as recipients of federal funds, Harvard and UNC had adopted affirmative action programs that violated the language and original intent of Title VI of the Civil Rights Act of 1964.[68] Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," thereby treating race as a prohibited but-for factor in decisionmaking.[69] Harvard and UNC violated Title VI by intentionally using overbroad and ambiguous racial categories in their admission decisions in a way that adversely affected whites, Asian-Americans, and other nonbeneficiary racial groups.[70] Although the parties debated the degree to which race was considered, the motive for considering race, and the adequacy of nonracial alternatives, none of those things were relevant to a Title VI inquiry.[71] Justice Gorsuch rejected the dissenters' claim that the schools were not engaged in prohibited intentional discrimination.[72] Since *Bakke*, the Supreme Court had wrongly equated the meaning of Title VI with the meaning of the Equal Protection Clause and thereby inflicted on Title VI all the ambiguities and inconsistencies of the Court's equal protection jurisprudence.[73] However, the two provisions do not mean the same thing, and Title VI contains a clear and

63. *See id.* at 274–77.
64. *Id.* at 278–83.
65. *Id.* at 280.
66. *See id.* at 284–86.
67. *Id.* at 287.
68. *Id.* at 287–89 (Gorsuch, J., concurring).
69. *Id.* at 287–88 (quoting 42 U.S.C. § 2000d).
70. *Id.* at 290–97.
71. *Id.* at 297–301.
72. *Id.* at 303–04.
73. *Id.* at 305–07.

unambiguous statutory prohibition on racial affirmative action by recipients of federal funds.[74]

c. Justice Kavanaugh

Justice Kavanaugh joined the majority opinion in full, but he concurred to emphasize that affirmative action could not continue indefinitely.[75] He relied heavily on Justice O'Connor's 2003 statement in *Grutter* asserting that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[76] He read that language as tolerating the use of racial affirmative action in admissions for only one additional generation after the 2003 *Grutter* decision, and he stressed that even *Brown* remedies for school segregation had to expire after a certain period of time.[77] Because racial affirmative action had persisted for approximately fifty years since its 1974 consideration in *DeFunis v. Odegaard*, and its 1978 authorization in *Bakke*, the temporal limit had now been reached.[78] Although the dissenters were correct that the effects of slavery and Jim Crow America still persisted, they now had to be addressed in a race-neutral manner.[79]

3. Dissenting Opinions

a. Justice Sotomayor

Justice Sotomayor wrote a dissent—joined by Justices Kagan and Jackson—arguing that *Brown* recognized that the Fourteenth Amendment guarantee of racial equality could "be enforced through race-conscious means in a society that is not, and has never been, colorblind."[80] For forty-five years the Supreme Court allowed colleges and universities to consider race in their efforts to promote educational diversity, thereby helping to equalize educational opportunities, but the Court's *SFFA* decision "roll[ed] back decades of precedent and [educational] progress."[81] It also cemented colorblindness as a constitutional principle despite the "endemically segregated" nature of our society—"where race has always mattered"—thereby "further entrenching racial inequality in education" and subverting "the very foundation of our democratic government and pluralistic society."[82]

Justice Sotomayor offered an originalist history to show that the nation was structured around the institution of slavery from its birth—emphasizing the

74. *Id.* at 308–10.

75. *See id.* at 311 (Kavanaugh, J., concurring).

76. *Id.* at 312 (quoting Grutter v. Bollinger, 539 U.S. 306, 343 (2003)).

77. *Id.* at 314.

78. *Id.* at 316 (discussing DeFunis v. Odegaard, 416 U.S. 312 (1974), Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), and *Grutter*, 539 U.S. 306).

79. *Id.* at 316–17.

80. *Id.* at 318 (Sotomayor, J., dissenting). Justice Jackson did not participate in or join Justice Sotomayor's dissent with respect to the Harvard case, as she had previously been on the Harvard Board of Overseers. *Id.* at 317 n.*; Hoover, *supra* note 1.

81. *SFFA*, 600 U.S. at 318 (Sotomayor, J., dissenting).

82. *Id.* at 318–19.

original intent of the Constitution to support slavery, and the subsequent original intent of the Reconstruction Amendments to abolish slavery and its incidents.[83] In addition, southern state legal bans on Black education showed that "the freedom to learn was neither colorblind nor equal."[84] After the Civil War and the Thirteenth Amendment's abolition of slavery, the Fourteenth Amendment authorized race-conscious Reconstruction laws to remedy southern peonage, Black Codes, and other efforts to prolong Black racial inequality. One such law was the Freedmen's Bureau Act, which made the race-conscious education of Blacks a foundational component of those efforts.[85] Another was the Civil Rights Act of 1866, which expressly gave all citizens the same rights enjoyed by white citizens.[86] These and other race-conscious Reconstruction statutes were passed over the express objection that they excluded white people from their benefits.[87] Justice Sotomayor said that "[t]his history makes it 'inconceivable' that race-conscious college admissions are unconstitutional."[88]

Justice Sotomayor argued that, nevertheless, the Supreme Court resisted the equality envisioned by the Fourteenth Amendment. In 1896, the Court upheld the separate-but-equal regime of racial segregation in its *Plessy v. Ferguson* decision, despite Justice Harlan's "colorblind constitution" dissent.[89] *Plessy* remained the law for half a century until it was overruled by *Brown*, which triggered the use of race-conscious school desegregation remedies.[90] Indeed, *Green v. School Board of New Kent County* squarely rejected a formalistic rule of colorblindness when it invalidated a freedom of choice plan that would have allowed de facto segregation to persist—as did other post-*Brown* school desegregation cases.[91] Justice Sotomayor said the *SFFA* majority's recharacterization of *Brown* as a prohibition on race-conscious remedies was "revisionist history" that placed "rhetorical flourishes about colorblindness" above the need to remedy years of class-based discrimination against Black Americans.[92] She argued that "[e]quality requires acknowledgment of inequality."[93]

Justice Sotomayor stressed that the Supreme Court's post-*Brown* decisions in *Bakke*, *Grutter*, *Fisher I*, and *Fisher II* repeatedly upheld the use of race-conscious affirmative action in school admissions.[94] The *SFFA* majority's insistence

83. *Id.* at 319–26.
84. *Id.* at 319.
85. *Id.* at 322–23.
86. *Id.* at 323–24.
87. *See id.* at 322–25.
88. *Id.* at 325–26 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 398 (1978) (opinion of Marshall, J.)).
89. *Id.* at 326–27 (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896)).
90. *Id.* at 327.
91. *See id.* at 328–30 (citing Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437, 441–42 (1968)).
92. *Id.* at 330–31.
93. *Id.* at 334.
94. *Id.* at 331–33 ("In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body.").

that "indifference to race is the only constitutionally permissible means to achieve racial equality . . . [is] grounded in the illusion that racial inequality was a problem of a different generation," and it ignores the fact that "[e]ntrenched racial inequality remains a reality today."[95] That is especially true for Black and Latinx students, in a society that remains "inherently unequal."[96] Both the UNC and Harvard affirmative action plans were efforts to address long histories of racial discrimination, remnants of which persist today.[97] Disregarding the doctrine of stare decisis, the majority overruled *Grutter* and other controlling precedents.[98] The majority also improperly reconstructed the record and conducted its own factfinding to supplant the factfinding of the lower courts.[99] After extensive trials, the trial courts found that the UNC and Harvard plans were narrowly tailored responses to the inadequacy of race-neutral alternatives and did not entail the use of quotas.[100]

Justice Sotomayor accused the *SFFA* majority of using the "veneer of colorblindness" to overrule precedent without the "special justification" demanded by stare decisis, as evidenced by the fact that each of the majority's arguments was made by dissenters in the precedents that the majority overruled.[101] Some of those precedents allowed the use of racial profiling by border patrol agents in assessing individualized suspicion, but the *SFFA* majority prohibited the same use of race to establish individualized contributions to diversity.[102] In addition, the majority not only suggested that race could be considered by military academies, but the Gorsuch, Kavanaugh, and Thomas concurrences conceded that race could be taken into account under the strict scrutiny standard—thereby undermining any claim to a colorblind view of the Constitution.[103] The "newly constituted Court" sought "cover behind a unique measurability requirement of its own making," but many other equally amorphous interests have been found to be compelling for the purposes of strict scrutiny—such as protecting public confidence in judicial integrity or protecting the integrity of the Medal of Honor.[104]

For Justice Sotomayor, the majority's suggestion that racial affirmative action harms nonbeneficiaries overlooked the fact that race is but one component of a holistic admissions structure that overall benefits all students—and disproportionately benefits nonminority students. But by prohibiting only that part of the admissions structure that sought to address the continuing effects of racial past discrimination, the majority not only perpetuated the white privilege that the

95. *Id.* at 333.
96. *Id.* at 334, 337 (quoting *Brown I*, 347 U.S. 483, 495 (1954)).
97. *See id.* at 338–41.
98. *Id.* at 341–42.
99. *Id.* at 350.
100. *Id.* at 343–51.
101. *Id.* at 352–53 (quoting Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 388 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting)).
102. *Id.* at 354–55.
103. *Id.* at 355–57.
104. *Id.* at 357–58.

Fourteenth Amendment was intended to remedy, but precluded holistic individualized consideration of applicants whose race was an important part of their self-identity.[105] Justice Sotomayor insisted that "[t]he law sometimes requires the consideration of race to achieve racial equality."[106] The majority's suggestion that applicants remain free to disclose how race had affected them personally merely put "lipstick on a pig" and camouflaged the degree to which the majority circumscribed a university's ability to consider race at all.[107] The ensuing decrease in campus diversity will also increase the likelihood of the racial stereotypes that the majority claims to disfavor.[108]

The majority's insistence on "measurable" diversity was designed to ensure that any increased level of precision will violate the majority's ban on specified percentages, so that "race-conscious plans *must* be measured with precision but also *must not* be measured with precision."[109] The racial categories that Harvard and UNC used were no more imprecise, opaque, or arbitrary than the racial categories used by the federal government for data collection, compliance, and administrative proposes,[110] and the majority's holding that the time for affirmative action had come to an end improperly read *Grutter*'s aspirational language as if it were a cutoff date.[111] Moreover, the attention that the schools paid to diversity numbers was part of their effort to assess the success of their diversity programs and not unconstitutional racial balancing.[112] Justice Thomas's assertions that affirmative action inflicts "mismatch" and stigmatization harms on minorities, promotes affinity-group campus segregation, and discriminates against Asian-Americans are not supported by reliable empirical studies.[113] In addition, some Asian-American students benefit from existing race-conscious affirmative action programs.[114] The majority's invalidation of affirmative action also upset the reliance and settled expectations that have been generated by the Court's prior affirmative action decisions, thereby constituting "a stunning indictment of its decision."[115]

Justice Sotomayor concluded that affirmative action should not be abandoned simply because it is working, especially where experience from California, Michigan, and Oklahoma shows that the majority's decision will undo years of progress in increasing minority enrollments.[116] It will also harm democratic society by decreasing the number of minorities in the pipeline for crucial professions

105. *See id*. at 359–62.
106. *Id*. at 361 n.34.
107. *Id*. at 362–63.
108. *Id*. at 364–65.
109. *Id*. at 366–67.
110. *Id*. at 367.
111. *Id*. at 368–70.
112. *Id*. at 370–71.
113. *Id*. at 371–74.
114. *Id*. at 375–76.
115. *Id*. at 376–77 (quoting Dobbs v. Jackson Women's Health Org., 597 U.S 215, 412 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting)).
116. *Id*. at 377–79.

(such as medicine, teaching, and law), the military, public service, American business (including science and technology), and leadership roles.[117] All of this will unfortunately entrench racial segregation in our increasingly multicultural American community.[118]

b. Justice Jackson

Justice Jackson also wrote a dissenting opinion in the UNC case, joined by Justices Sotomayor and Kagan.[119] She joined Justice Sotomayor's dissent in full, but stressed that the United States "has never been colorblind," as evidenced by the "[g]ulf-sized race-based gaps exist[ing] with respect to the health, wealth, and well-being of American citizens," causing the country to "fall[] short of . . . the 'self-evident' truth that all of us are created equal."[120] The majority invalidated UNC's effort to address that inequality "without any basis in law, history, logic, or justice."[121]

Justice Jackson documented the many ways in which state and federal government policies systematically, pervasively, and intentionally used discrimination against Blacks to benefit whites, even after the abolition of slavery and the Jim Crow retreat from the Reconstruction Amendments and implementing legislation. Those policies inhibited the ability of Blacks to acquire the wealth possessed by whites and perpetuated the racial wealth gaps that presently exist.[122] Today, dramatic disparities between whites and minorities persist with respect to wealth, income, home ownership (a primary way of accumulating wealth), college degrees, law degrees, business achievements, general mortality rates, mortality rates for infants, mortality rates for mothers, COVID deaths, and health disparities relating to obesity, hypertension, stroke, asthma, life expectancy, health care costs, and medical debt.[123] If a white UNC applicant can make reference to the privileged lineage that made him a seventh-generation UNC applicant, a Black applicant should also be able to make reference to the historical forces that made him only a first generation applicant.[124] This would ensure that the "individual lives and inheritances" of both applicants are assessed "*on an equal basis*."[125]

Justice Jackson emphasized that under the UNC holistic admissions process, a student has the option of disclosing his or her race, which would then be evaluated with the other forty factors that are considered in the process.[126] Those

117. *Id.* at 379–82.
118. *See id.* at 381, 383.
119. *See id.* at 384 (Jackson, J., dissenting). Justice Jackson did not participate in the Harvard case because she had served on the Harvard Board of Overseers. *See id.* at 231 (Jackson, J., taking no part in the consideration or decision of the Harvard case); Hoover, *supra* note 1.
120. *SFFA*, 600 U.S. at 384–85 (Jackson, J., dissenting).
121. *Id.* at 385.
122. *See id.* at 386–93.
123. *See id.* at 393–96.
124. *Id.* at 396–98.
125. *Id.* at 398.
126. *Id.* at 398–99.

factors encompass the relative advantages or disadvantages emanating from the applicant's background. Moreover, such consideration of race as a potential plus factor in admissions is available to all students—including a seventh-generation white UNC applicant or a first-generation white student whose family in Appalachia struggled during the Great Recession.[127] Accordingly, race is not part of an automatic quota system favoring minorities, as evidenced by the fact that a lower percentage of academically excellent in-state Black applicants were admitted than the percentage of academically comparable white and Asian-American applicants.[128]

Justice Jackson asserted that the majority's insistence on race blindness in admissions will widen the race-linked opportunity gap that exists between applicants and delay the pursuit of equal opportunity through remedial efforts such as the UNC race-conscious admissions plan.[129] It will also adversely affect diversity that aids minority and nonminority students alike on campus, in the professions occupied by UNC graduates, and in our economy and democratic society as a whole.[130] She believed that through these holistic admissions programs, institutions such as UNC are helping to move the country forward on the path toward racial equality, and they could continue to do so if the Supreme Court would "get out of the way and let them do their jobs."[131] Instead, "[w]ith let-them-eat-cake obliviousness . . . [a]nd having so detached itself from this country's actual past and present experiences, the Court . . . proceeds (ostrich-like) from the hope that preventing consideration of race will end racism."[132]

Justice Jackson concluded that "[t]he only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field."[133] By invalidating the UNC affirmative action plan, the majority is "[t]urning back the clock" and "indulg[ing] those who either do not know our Nation's history or long to repeat it."[134] Justice Jackson characterized Justice Thomas's claim that she was overly obsessed with race as "a prolonged attack" that "responds to a dissent [she] did not write in order to assail an admissions program that is not the one UNC has crafted."[135] She further argued that Justice Thomas's own "obsession with race consciousness" was simply ignoring "the race-linked disparities that continue to impede achievement of our great Nation's full potential" and was "deterring our collective progression toward becoming a society where race no longer matters."[136]

127. *Id.* at 401–02.
128. *Id.* at 402–03.
129. *Id.* at 403.
130. *Id.* at 404–06.
131. *Id.* at 407.
132. *Id.* at 407–08.
133. *Id.* at 408.
134. *Id.* at 410.
135. *Id.* at 408 n.103.
136. *Id.*

B. DIVERGENT INTERPRETATIONS IN THE COURT'S AFFIRMATIVE ACTION JURISPRUDENCE

The various opinions in *SFFA* adopt divergent interpretations of the Equal Protection Clause as applied to racial affirmative action. Those divergent interpretations are not new, but rather reflect doctrinal ambiguities and inconsistencies that have been present since the Court first began addressing the constitutionality of racial affirmative action. The Court has been noticeably inconsistent in articulating and applying the governing legal standards including the proper standard of review, the governmental interests that satisfy the applicable standard of review, the required fit between affirmative action and the advancement of governmental interests, the role of racial stereotypes, the significance of *Brown*, and even the definition of affirmative action itself.

1. *SFFA* Case

The biggest difference between the majority and dissenting opinions in *SFFA* was the divergence between their respective understandings of the concept of "equality" under the Equal Protection Clause. The majority believed that race-conscious affirmative action undermined the colorblind vision of equality that is required by the Constitution.[137] The dissenters believed that race-conscious affirmative action was necessary to rectify continuing inequalities in the distribution of college admissions and other societal resources and that the majority's insistence on colorblindness itself perpetuated historic racial discrimination.[138]

Those divergent views rested on different baseline assumptions about the constitutional acceptability of existing inequalities. Although Justices in the majority conceded that racial disparities continue to exist in the allocation of societal resources, they viewed colorblind race neutrality as the proper prospective way to address those inequalities.[139] The dissenters, however, believed that existing inequalities could only be remedied through prospective race-conscious remedial

137. *See id.* at 206 (majority opinion) ("[T]he 'core purpose' of the Equal Protection Clause . . . [is] 'do[ing] away with all governmentally imposed discrimination based on race.'" (third alteration in original) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984))); *cf. id.* at 232–33, 246, 262 (Thomas, J., concurring) (offering an "originalist defense of the colorblind Constitution," endorsing view of colorblind Constitution advanced by Justice Harlan's dissent in *Plessy*, and noting that "[t]he Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that 'all men are created equal'").

138. *See id.* at 318, 329–30, 357 (Sotomayor, J., dissenting) (noting that "[t]he Court long ago concluded that this guarantee [of racial equality] can be enforced through race-conscious means in a society that is not, and has never been, colorblind," reasoning that the Supreme Court rejected claim that *Brown* mandated colorblindness in *Green v. County School Board of New Kent County*, 391 U.S. 430, 437 (1968), and arguing that the majority's claim of colorblindness actually reflects the "Court's own value judgments about" justifiability of race-conscious measures); *id.* at 385, 408 (Jackson, J., dissenting) (noting that "[o]ur country has never been colorblind" and that the only way to forestall race-based disparities and level the playing field is "to stare at racial disparity unblinkingly").

139. *See, e.g.*, *id.* at 277–78 (Thomas, J., concurring) (stating that "I, of course, agree that our society is not, and has never been, colorblind" but that "[t]he solution to our Nation's racial problems . . . cannot come from policies grounded in affirmative action or some other conception of equity"); *id.* at 317 (Kavanaugh, J., concurring) ("[R]acial discrimination still occurs and the effects of past racial discrimination still persist. . . . [But] governments and universities . . . [must] 'act to undo the effects of

measures.[140] Those conflicting baseline assumptions led to conflicting interpretations of the doctrinal rules that govern affirmative action.

The majority thought that the efforts by the schools to enhance the racial diversity that had been suppressed by past discrimination failed to satisfy the strict scrutiny standard that applies to racial classifications because they used imprecise and overbroad racial categories that were not narrowly tailored to the goal of achieving diversity[141] and that the mere assertion by the schools that their diversity goals were compelling was not entitled to deference.[142] But Justice Sotomayor's dissent argued that the schools' racial categories were as precise as the racial categories "used across the Federal Government for data collection, compliance reporting, and program administration,"[143] and that the Court's strict scrutiny precedents for racial affirmative action seeking diversity were in fact satisfied.[144] She characterized the reasoning of the majority as being rooted in the illusion that entrenched inequality no longer exists.[145]

The majority accused the schools of using racial stereotypes about minority perspectives in a way that amounted to a "negative factor" that was harmful to Asian-American and white students[146] and of using racial quotas to pursue impermissible racial balancing.[147] However, Justice Sotomayor's dissent countered that "[i]t is not a stereotype to acknowledge the basic truth that" perspectives can be formed by the burden of continuing racial barriers[148] and that trial court findings had concluded that the schools were using diversity statistics not as quotas, but as measures of how well their programs were working.[149] She also argued that reducing diverse perspectives among students would actually perpetuate racial stereotypes.[150]

What is perhaps most telling is the majority's emphasis that the affirmative action plans adopted by the schools were unconstitutional because they lacked a logical end point.[151] Not surprisingly, Justice Sotomayor's dissent argued that the

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past discrimination in many permissible ways that do not involve classification by race.'" (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in judgment))).

140. *See id.* at 334 (Sotomayor, J., dissenting) ("Equality requires acknowledgment of inequality."); *id.* at 361 ("In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups . . . ."); *id.* at 361 n.34 ("The law sometimes requires consideration of race to achieve racial equality."); *id.* at 383 ("[T]here is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold."); *id.* at 403 (Jackson, J., dissenting) (arguing that majority's insistence on race blindness will widen, not narrow, race-linked opportunity gap).

141. *See id.* at 216–18 (majority opinion).

142. *See id.* at 217.

143. *Id.* at 367 (Sotomayor, J., dissenting).

144. *Id.* at 344, 346, 357.

145. *Id.* at 333.

146. *Id.* at 213, 218–20 (majority opinion).

147. *See id.* at 223–24.

148. *Id.* at 364 (Sotomayor, J., dissenting).

149. *Id.* at 350; *see also id.* at 398–403 (Jackson, J., dissenting) (reasoning that use of race as one of forty admissions factors available to whites from Appalachia as well as minorities was not racial quota).

150. *See id.* at 332, 364–65 (Sotomayor, J., dissenting).

151. *See id.* at 212–13 (majority opinion).

logical end point was when it was no longer the case that race-conscious remedial programs were "still necessary," stressing that racial inequality will not end at a predictable hour.[152] Similarly, the majority insisted that race-conscious remedies for ongoing societal discrimination were unconstitutional, stressing the need to protect innocent nonminorities.[153] But the dissenters appear to believe that the whole point of the Equal Protection Clause is to eliminate continuing societal discrimination, with its attendant white privilege,[154] and to stop "reserving 'positions of influence, affluence, and prestige in America' for a predominantly white pool of college graduates."[155]

2. Prior Cases

The divergent concepts of equality that generated doctrinal ambiguities and inconsistencies in the *SFFA* opinions have been present ever since the Supreme Court began considering the constitutionality of racial affirmative action. In the 1978 *Bakke* case, which served as the foundation for the Court's subsequent affirmative action decisions, the Court split badly over the governing legal standards. Four Justices believed that race could be used to "remedy[] the effects of past societal discrimination," while four other Justices believed that the affirmative action plan at issue violated the Title VI statutory prohibition on racial discrimination—a statutory standard that seemed merely to echo the constitutional prohibition contained in the Equal Protection Clause.[156]

Justice Powell, writing only for himself, believed that the pursuit of diversity in an educational context could constitute an interest that was sufficiently compelling to satisfy the strict scrutiny that should be applied to racial classifications.[157] He emphasized that deference should be accorded a university's decision to pursue student diversity but that schools could not use racial quotas or stereotypes in admissions. In the years following *Bakke*, the Supreme Court generated additional ambiguities and inconsistencies in the law governing racial affirmative action. Sometimes the Court upheld racial affirmative action plans,[158] and

152. *Id.* at 369–70 (Sotomayor, J., dissenting) (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

153. *See id.* at 226–27 (majority opinion).

154. *See id.* at 359–60, 377–84 (Sotomayor, J., dissenting) (emphasizing general societal benefits of diversity and that majority's decision will benefit whites at expense of minorities); *id.* at 403–06 (Jackson, J., dissenting) (asserting that majority's decision impedes efforts to reduce "race-linked gaps in health, wealth, and well-being that still exist in our society").

155. *Id.* at 383 (Sotomayor, J., dissenting) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 401 (1978) (opinion of Marshall, J.)).

156. *Id.* at 210 (majority opinion) (quoting *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part)). Justices Gorsuch and Thomas have now argued that the Title VI and equal protection standards are, indeed, different. *See infra* note 190 and accompanying text.

157. *SFFA*, 600 U.S. at 208–11.

158. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 453–54, 490–92 (1980) (plurality opinion) (upholding federal affirmative action plan for minority contractors).

sometimes it invalidated them.[159] But, as in *Bakke*, it was unable even to issue a majority opinion in this area for the next fifteen years.[160]

The Court initially failed to agree on the appropriate standard of review for racial affirmative action. Because benign affirmative action was intended to promote racial equality rather than racial discrimination, intermediate judicial scrutiny might arguably apply, rather than the strict scrutiny that governed invidious discrimination.[161] But when the *Fullilove v. Klutznick* plurality opinion upheld a federal affirmative action plan for minority construction contractors in 1980, the Court sidestepped the issue, holding that the plan would satisfy either standard of review.[162] However, when the *Wygant v. Jackson Board of Education* plurality opinion invalidated an affirmative action plan for minority teachers in 1986, it insisted on applying strict scrutiny.[163]

When the Court was finally able to issue a majority opinion in its 1989 *City of Richmond v. J. A. Croson Co.* decision, the majority applied strict scrutiny and invalidated a municipal affirmative action program for minority construction contractors that was based on the *Fullilove* plan.[164] However, the Court distinguished the *Fullilove* plan as being entitled to more deference because it was a federal, rather than state or local, program.[165] But a year later, in 1990, a different 5–4 majority applied intermediate scrutiny to another benign federal affirmative action plan designed to promote broadcast diversity by giving an FCC licensing preference to minority broadcasters in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[166]

Then, in the 1995 *Adarand Constructors, Inc. v. Peña* decision, the Court issued a 5–4 majority opinion overruling *Metro Broadcasting* and applying strict scrutiny to all affirmative action programs whether federal or nonfederal.[167] The *Adarand* opinion also rejected the argument that there was a difference between invidious discrimination and benign affirmative action and insisted that strict scrutiny applied equally to both.[168] That prompted Justice Stevens in dissent to

159. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269–70, 274–84 (1986) (plurality opinion) (invalidating affirmative action plan protecting minority teachers from layoffs).

160. *See* SPANN, *supra* note 8, at 164 ("The Court began considering the affirmative action issue in 1974, but was unable to achieve majority agreement on an appropriate standard of review until its 1989 decision in *City of Richmond v. J.A. Croson Co.*").

161. *See id.*

162. 448 U.S. at 491–92.

163. 476 U.S. at 279–80 ("Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose.").

164. 488 U.S. 469, 477, 480, 493–94, 511 (1989) (plurality opinion).

165. *Id.* at 477–86.

166. 497 U.S. 547, 566, 600–01 (1990) (concluding that the FCC's policies "are substantially related to the achievement of the important governmental objective of broadcast diversity").

167. 515 U.S. 200, 227, 235 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.").

168. *Id.* at 226.

say that the majority could not tell "the difference between a 'No Trespassing' sign and a welcome mat."[169]

Although the Court has applied strict scrutiny to benign affirmative action since *Adarand*, it has nevertheless been inconsistent in its view of what it takes to satisfy the compelling governmental interest test of strict scrutiny. In *Croson*, Justice O'Connor's plurality opinion for the Court seemed to say that only the goal of providing a remedy for particularized acts of past discrimination was sufficiently compelling to satisfy strict scrutiny.[170] However, Justice Powell's *Bakke* opinion had identified educational diversity as a compelling governmental interest,[171] and the Supreme Court subsequently adopted the gist of Justice Powell's *Bakke* position in Justice O'Connor's majority opinion upholding the University of Michigan Law School diversity-based affirmative action plan in *Grutter*.[172] The Court adhered to that view in upholding the University of Texas at Austin's diversity-based plan in its two *Fisher* decisions.[173] However, the Court has curiously limited its recognition of the diversity rationale to higher education—rejecting it in the context of primary and secondary education, even though that is where diversity is likely to have its most beneficial effects on younger students.[174] And in its most recent *SFFA* decision, the Court now seems to have completely rejected the view that racial diversity is compelling.[175] That suggests that strict scrutiny for racial affirmative action will now be "fatal in fact," despite the Court's earlier assurance in *Adarand* that it was not.[176]

The Supreme Court has also been inconsistent in determining what it takes to satisfy the narrow-tailoring requirement of strict scrutiny. In *Bakke*, Justice Powell's opinion read narrow tailoring to require that the use of race had to be *necessary* to promote the government's compelling interest.[177] However, in

169. *Id.* at 245 (Stevens, J., dissenting).

170. *See Croson*, 488 U.S. at 485–89; *see also Metro Broad.*, 497 U.S. at 610–14 (O'Connor, J., dissenting) (finding diversity not compelling, and concluding "that the racial classifications cannot be upheld as remedial measures"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 & n.* (1986) (O'Connor, J., concurring in part and in judgment) (addressing the "governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, [which] cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny," and noting that it is unnecessary to discuss racial diversity interest since that was not brought up in the lower courts); Hopwood v. Texas, 78 F.3d 932, 941–48 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996) (rejecting Justice Powell's identification of diversity as compelling interest).

171. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (opinion of Powell, J.).

172. *See* SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 211 (2023).

173. *See Fisher I*, 570 U.S. 297, 300–01, 314–15 (2013) (remanding for more stringent application of strict scrutiny); *Fisher II*, 579 U.S. 365, 376 (2016). Both were cited throughout *SFFA*. *See, e.g.*, *SFFA*, 600 U.S. at 207, 214; *id.* at 331–32 (Sotomayor, J., dissenting).

174. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–25 (2007) (limiting diversity rationale to higher education); *cf. id.* at 838–45 (Breyer, J., dissenting) (arguing that diversity is a compelling state interest in primary and secondary schools, and citing to research showing the benefits of integrated schools).

175. *See SFFA*, 600 U.S. at 230.

176. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment))).

177. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305, 315 (1978) (opinion of Powell, J.).

Grutter, the Court held that "[n]arrow tailoring does *not* require exhaustion of every conceivable race-neutral alternative."[178] Then in *Fisher I*, Justice Kennedy tried to reconcile the two positions in his majority opinion by simultaneously asserting that "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative"[179] and that a "reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[180] The problem is illustrated by comparing the Court's *Grutter* decision upholding the University of Michigan Law School affirmative action program[181] with its decision the same day in *Gratz v. Bollinger* invalidating the University of Michigan undergraduate affirmative action program.[182] Although the two programs seem very similar in their pursuit of student diversity, the Court held that the *Grutter* program was narrowly tailored but that the *Gratz* program was not.[183]

The Supreme Court's strenuous aversion to the use of racial quotas in affirmative action has been quite clear.[184] The Court has repeatedly deemed the pursuit of racial balance or proportionality to be "patently unconstitutional."[185] But the Court has not always applied this prohibition consistently. The Court authorized the consideration of racial balance as a post-*Brown* desegregation remedy, thereby increasing student diversity in previously segregated classrooms.[186] And *Grutter* deemed the school's consideration of racial ratios to be a permissible measure of a diversity program's success, rather than an impermissible quota.[187] It is difficult to know what view should prevail, because it is not clear why quotas or racial balance should be so disfavored at all. In the aspirational colorblind, race-neutral society favored by proponents and opponents of affirmative action alike, societal resources would be allocated in a racially proportional manner, so it is not clear why pursuing that outcome directly should be so objectionable.[188]

The Supreme Court has also been unclear about precisely what the "equality" requirement of the Equal Protection Clause demands. Prior to *SFFA*, the Court seemed to assume that the constitutional antidiscrimination principle of the Equal Protection Clause and the statutory antidiscrimination principle of Title VI were

178. Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (emphasis added).

179. 570 U.S. 297, 312 (2013) (alteration in original) (quoting *Grutter*, 539 U.S. at 339).

180. *Id.*

181. *Grutter*, 539 U.S. at 322–44.

182. 539 U.S. 244, 249–51, 268–75 (2003).

183. *See* Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 601–02 (2015) (arguing *Grutter* and *Gratz* were functionally indistinguishable with respect to narrow tailoring).

184. *See, e.g.*, City of Richmond v. J. A. Croson Co., 488 U.S. 469, 507–08 (1989) (plurality opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272–75, 315, 319–20 (1978) (opinion of Powell, J.).

185. *E.g.*, *Grutter*, 539 U.S. at 330; *Fisher I*, 570 U.S. 297, 311 (2013); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723, 730, 732, 740 (2007).

186. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16, 25 (1971).

187. *Grutter*, 539 U.S. at 334–36.

188. *See* Spann, *supra* note 183, at 603 (arguing that prohibition on racial balancing is instrumentally incoherent).

the same.[189] But in *SFFA*, Justice Gorsuch, joined by Thomas, argued that Title VI contains a different and more demanding prohibition on racial discrimination than does the Equal Protection Clause.[190] They believe that Title VI imposes a but-for prohibition on *all* uses of race—a prohibition that does *not* vary with the differential standards of judicial review that apply under the Equal Protection Clause.

It is also unclear precisely what defines the racial affirmative action that is now banned by *SFFA*. Justice Roberts was careful in his *SFFA* majority opinion to emphasize that "as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[191] But it is not clear why a school's consideration of such racial factors would not entail the now-prohibited form of affirmative action that is based on race. In addition, the Court has permitted the use of other facially neutral affirmative action plans that were plainly adopted in order to enhance the racial diversity of the student body, such as the Texas Top Ten Percent plan, whose constitutionality the Court declined to consider in *Fisher II*.[192] And it is now unclear whether such plans would survive the new *SFFA* prohibition. It is similarly unclear whether *SFFA* will also ban race-based scholarships,[193] racially correlated legacy preferences,[194] or even corporate diversity efforts.[195]

Since *Bakke*, the Supreme Court has opposed the use of racial stereotypes in affirmative action plans, and the *SFFA* majority concluded that racial stereotypes in an applicant's personal rating resulted in discrimination against Asian-American and white applicants.[196] However, the dissenters in *SFFA* noted that the trial court had found no such discrimination against Asian-Americans and that, like other minorities, some Asian-Americans were in fact advantaged by the Harvard

189. *See* SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 210 (2023).

190. *See id*. at 287–90, 308–10 (Gorsuch, J., concurring).

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

192. *See Fisher II*, 579 U.S. 365, 371–75, 378 (2016) (describing and assuming validity of Top Ten Percent Plan, which "guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class").

193. *See* Susan Svrluga, *Colleges Scrutinize Race-Based Financial Aid After Affirmative Action Ruling*, WASH. POST (July 8, 2023, 7:00 AM), https://www.washingtonpost.com/education/2023/07/08/college-scholarships-financial-aid-affirmative-action/.

194. *See* Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions*, N.Y. TIMES (July 25, 2023), https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html; Stephanie Saul, *Harvard's Admissions Is Challenged for Favoring Children of Alumni*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/2023/07/03/us/harvard-alumni-children-affirmative-action.html; Erik Larson, *Harvard Legacy Admissions Should Be Probed by US, Groups Say (3)*, BLOOMBERG L. (July 3, 2023, 6:25 PM), https://news.bloomberglaw.com/us-law-week/harvard-legacy-admissions-targeted-in-minority-groups-complaint.

195. *See* Trisha Thadani & Jacob Bogage, *The Campaign Against Affirmative Action Shifts to Corporate America*, WASH. POST (July 19, 2023, 2:41 PM), https://www.washingtonpost.com/technology/2023/07/15/affirmative-action-workplace-diversity-equity-inclusion/; *see also infra* notes 253–61 and accompanying text (discussing other potential adverse effects of *SFFA* ruling on law firms and other institutions).

196. *See SFFA*, 600 U.S. at 218–21.

plan.[197] Moreover, in *Personnel Administrator of Massachusetts v. Feeney*, the Supreme Court in 1979 itself *upheld* an affirmative action plan for veterans, even though gender stereotypes governing military service gave it a dramatic adverse effect on women—who like Asian-Americans are also a constitutionally protected class.[198]

In support of its aversion to racial stereotyping, the *SFFA* Court ironically invoked *Shaw v. Reno*, which granted white voters standing under the Equal Protection Clause to challenge majority-minority voting districts that were created to increase minority voting strength under the Voting Rights Act.[199] But the very reason that the white voters had standing in *Shaw* was because the Court recognized as an adequate injury the stereotyped fear of white voters that they might not be adequately represented by minority candidates who could end up representing them.[200] The *Shaw* Court not only engaged in the very stereotyping that the *SFFA* Court condemned, but the inconsistencies in the two cases make it hard to ascertain what the actual equal protection standard should be.

Perhaps the most strikingly ambiguous inconsistency in the Supreme Court's application of the Equal Protection Clause to racial affirmative action lies in its invocation of *Brown*. The *SFFA* majority opinion relies on *Brown* for the proposition that race-conscious student selection is unconstitutional.[201] And the dissent relies on *Brown* for the proposition that race-conscious measures to achieve student racial diversity are not only constitutionally permissible but are constitutionally required.[202] Those competing invocations of *Brown* illustrate that the Supreme Court's equal protection jurisprudence is sufficiently malleable when applied to racial affirmative action that it provides little constraint on the exercise of judicial discretion. And that is especially true for a Court that is willing to overrule precedents that are inconsistent with its political and ideological preferences.[203]

II. THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION IS A NONJUSTICIABLE POLITICAL QUESTION

The many ambiguities and inconsistencies in the Supreme Court's racial affirmative action jurisprudence indicate that the Equal Protection Clause lacks "judicially manageable standards" that are sufficient to constrain the Court's

197. *Id*. at 374–75 (Sotomayor, J., dissenting); *see id*. at 402 (Jackson, J., dissenting).

198. 442 U.S. 256, 276–81 (1979).

199. *See SFFA*, 600 U.S. at 220 (citing Shaw v. Reno, 509 U.S. 630, 647 (1993)).

200. *See* Miller v. Johnson, 515 U.S. 900, 929–32 (1995) (Stevens, J., dissenting) (highlighting internal inconsistency in the *Shaw* majority's treatment of racial stereotypes); Spann, *supra* note 183, at 606–07.

201. *See SFFA*, 600 U.S. at 204.

202. *See id*. at 318, 329–30 (Sotomayor, J., dissenting).

203. Although the majority opinion by Chief Justice Roberts in *SFFA* never explicitly said that it was overruling the *Grutter* and *Fisher* precedents, Justice Thomas's concurrence viewed *Grutter* as having been overruled, *see id*. at 232, 287 (Thomas, J., concurring), and Justice Sotomayor's dissent made clear that *Grutter* and *Fisher* had been effectively overruled, *see id*. at 352, 358 (Sotomayor, J., dissenting).

discretion when ruling on the constitutionality of racial affirmative action. As a result, the constitutionality of majoritarian affirmative action is properly viewed as a nonjusticiable political question that has been constitutionally delegated to the representative branches for resolution, and not to the countermajoritarian Supreme Court. Because the concept of "equality" demanded by the Equal Protection Clause is subjectively normative rather than objectively ascertainable, in a democracy, the operative meaning of that concept as applied to racial affirmative action is best determined by the politically accountable branches of government. Such an allocation of policymaking authority is required by the separation of powers foundation of Madisonian Republicanism.

A. SEPARATION OF POWERS CONCERNS

Chief Justice Roberts summarized the current law governing the political question doctrine in his 2019 *Rucho v. Common Cause* opinion, holding that the constitutionality of partisan gerrymandering under the Equal Protection Clause was a nonjusticiable political question.[204] He said:

> Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'"
>
> Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]."[205]

It is this constitutional separation of policymaking and judicial powers that Chief Justice Marshall had in mind when he stated in *Marbury* that some questions were "in their nature political"[206] and were therefore "only politically examinable."[207] In such cases the Constitution means what the representative branches

204. 588 U.S. 684 (2019).

205. *Id.* at 695–96 (alteration in original) (first quoting Flast v. Cohen, 392 U.S. 83, 95 (1968); then quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006); then quoting Marbury v. Madison, 5 U.S. (1 Cranch) 37, 177 (1803); then quoting Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion); and then quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

206. *Marbury*, 5 U.S. (1 Cranch) at 170.

207. *Id.* at 166.

say it means, so the Supreme Court has no basis for invalidating that political interpretation. The constitutionality of racial affirmative action is one of those questions. This can be seen by comparing the equal protection standards that the Court found *not* to be judicially manageable for purposes of partisan gerrymandering to the functionally identical equal protection standards that govern the constitutionality of affirmative action. The ensuing lack of doctrinal constraint vests in the Supreme Court the precise political and ideological discretion that *Marbury*'s political question doctrine sought to prohibit. And the Court's justiciability decisions have been adjudicated in an inconsistent manner that reflects the Court's ideological and policy goals.

1. Partisan Gerrymandering

In *Rucho v. Common Cause*, a 5–4 Supreme Court rejected—on political question grounds—two equal protection challenges to the partisan gerrymandering of voting district lines by Republican and Democratic legislatures in a way that intentionally gave a disproportionate number of legislative seats to the political party that controlled the redistricting process.[208] In so doing, the Court set a high bar for what it takes to constitute a judicially manageable standard for equal protection purposes. Chief Justice Roberts rejected a large number of potential governing standards that the lower courts and the four dissenting Justices found to be sufficient. Some of those standards were mathematically precise—relying on proportionality or even more sophisticated mathematical models—and some relied on the same intent standard that the Supreme Court uses in adjudicating other equal protection claims.[209]

In fact, the *Rucho* Court rejected the adequacy of a "predominant intent" standard, even though that was the standard that the Court itself repeatedly found to be judicially manageable in adjudicating the constitutionality of racial gerrymandering and majority-minority voting districts under the Equal Protection Clause.[210] Indeed, the natures of the partisan gerrymandering and racial gerrymandering claims seem so similar that the same equal protection standard would seem naturally to govern both. And if there were thought to be a difference between the two, it would be easy to conclude that partisan gerrymandering should be the one that was deemed justiciable and racial gerrymandering should be the one that was deemed a nonjusticiable political question.[211]

The interchangeability of the *Rucho* political question holdings concerning partisan and racial gerrymandering further illustrates the lack of judicially

208. 588 U.S. at 691, 694–95, 718.

209. *See id.* at 704–13; *id.* at 734–46 (Kagan, J., dissenting); *see also* Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 985–87, 991–94 (2020) (discussing potential alternatives that could be deemed judicially manageable).

210. *Rucho*, 588 U.S. at 709–13; *see* Spann, *supra* note 209, at 986–87.

211. *See* Spann, *supra* note 209, at 990–1001 (arguing that Supreme Court's distinction between partisan and racial gerrymandering can easily be inverted so that partisan gerrymandering claims are the ones that appear to be justiciable and racial gerrymandering claims are the ones that appear to be nonjusticiable).

manageable standards under the Equal Protection Clause that are adequate to impose any meaningful level of constraint on the exercise of judicial discretion. This insight is additionally fortified by the realization that, in order to reach its nonjusticiability result for partisan gerrymandering, the majority opinion of Chief Justice Roberts had to overrule existing precedents that had previously found partisan gerrymandering to be justiciable.[212] That, of course, foreshadowed what Chief Justice Roberts would later go on to do in *SFFA*, where he effectively overruled the *Grutter* and *Fisher* precedents that had upheld racial affirmative action. Although *Rucho* seems wrong to me,[213] its vision of justiciability should nevertheless be applied in a doctrinally consistent manner.

2. Affirmative Action

If the constitutionality of partisan gerrymandering is a nonjusticiable political question under the Equal Protection Clause, so is the constitutionality of racial affirmative action. The bare constitutional requirement to treat things *equally*—which applies *equally* to both issues—is simply too imprecise to cabin the Court's exercise of discretion in a meaningful manner. Accordingly, that same Equal Protection Clause lacks the judicially manageable standards that are required for justiciability when applied to racial affirmative action. One might be tempted to argue that the strict scrutiny test the Supreme Court now applies to racial affirmative action *does* provide a standard that is judicially manageable. But for political question purposes, the issue is not whether strict scrutiny itself is judicially manageable, but whether the Equal Protection Clause tells us *when* strict scrutiny is to be applied (as was the case in *SFFA*), and when it is not (as was the case in *Rucho*).

As Section I.B of this Article demonstrates, the equal protection standard that the Court uses to rule on the constitutionality of affirmative action has led the Court to adopt numerous ambiguous and inconsistent interpretations of the Clause over the forty-five years that the Court has spent considering the issue—often in 5–4, and now 6–3, decisions that were split along ideological lines.[214] Those doctrinal ambiguities and inconsistencies have related to issues as fundamental as the proper standard of review, the governmental interests that satisfy the governing standards of review, the requisite fit between the governmental interests and the race-conscious means chosen to advance those interests, the

212. *See Rucho*, 588 U.S. at 700–03; *see also* Davis v. Bandemer, 478 U.S. 109, 125–27, 143 (1986) (plurality opinion) (finding a partisan gerrymandering claim justiciable under the Equal Protection Clause, and rejecting the view that racial gerrymandering claims are distinguishable from partisan gerrymandering claims with respect to justiciability); *cf.* Vieth v. Jubelirer, 541 U.S. 267, 306–08, 312 (2004) (Kennedy, J., concurring in judgment) (concurring in nonjusticiability holding, but joining three other Justices in view that some partisan gerrymandering claims could be justiciable).

213. *See* Spann, *supra* note 209, at 990–1001 (arguing that Supreme Court's distinction between partisan and racial gerrymandering can easily be inverted).

214. *See supra* Section I.B.

difference between statistical truths and racial stereotypes, the definition of what constitutes affirmative action, and the proper meaning of *Brown*.[215]

Amid all of that doctrinal ambiguity and inconsistency, it is striking that Chief Justice Roberts did not view the equal protection challenge to affirmative action as a nonjusticiable political question in *SFFA*, the way he viewed the equal protection challenge to partisan gerrymandering as nonjusticiable in *Rucho*. Indeed, all of the relevant doctrinal factors were emphasized in the *SFFA* majority opinion by Chief Justice Roberts himself. He stressed a lack of measurable standards that would permit meaningful judicial review.[216] He recharacterized the diversity interest—which the Court had previously held to be compelling—as too abstract and elusive for the application of strict scrutiny.[217] And he recognized that assessing the benefits of affirmative action is beyond judicial competence.[218] All of this is a tacit admission that the Court was presented with a political question. But rather than viewing this as evidence that the goals of equal protection are themselves too abstract and elusive in the context of racial affirmative action to allow the question to be deemed justiciable, Chief Justice Roberts chose instead to treat it all as a reason for ruling against the constitutionality of racial affirmative action.[219]

Chief Justice Roberts also highlighted his aversion to "a judiciary that picks winners and losers based on the color of their skin"[220] in the "zero-sum" competition for university admissions.[221] But that, of course, is precisely what he did by invalidating racial affirmative action and perpetuating the continued existence of white privilege in college admissions and the allocation of other societal benefits.[222] As Justice Sotomayor's dissent noted,

> At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.[223]

Where legal standards are phrased in language that is vague and imprecise, the Court can sometimes find sufficient constraint under the doctrine of stare decisis to reduce separation of powers concerns. Even though guarantees of abstract principles such as free speech, due process, or equal protection may not alone give a court much guidance, the history of precedents that have supplied concrete meaning to such standards in particular contexts can arguably provide the necessary

215. *See supra* Section I.B.
216. SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 214 (2023).
217. *Id.* at 214–15.
218. *See id.* at 215.
219. *See id.* at 215–16, 230.
220. *Id.* at 229.
221. *See id.* at 218.
222. *See id.* at 333–37 (Sotomayor, J., dissenting) (discussing continuing advantages whites have over racial minorities); *id.* at 393–96 (Jackson, J., dissenting) (same).
223. *Id.* at 353 (Sotomayor, J., dissenting).

constraint.[224] However, stare decisis cannot provide much help in applying the Equal Protection Clause to affirmative action, where there is a long and divisive history of shifting and conflicting precedents.[225] And, of course, stare decisis does nothing whatsoever to constrain judicial discretion where the Court chooses simply to overrule the currently governing precedents, as it appears to have done in *SFFA*.[226]

In this regard, the Supreme Court's 2022 decision overruling the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization* is enlightening.[227] Regardless of how one feels about the decision, and its significant impact on a woman's reproductive autonomy, *Dobbs* effectively treated proper application of the imprecise governing due process constitutional standard as a political question. When it overruled the controlling precedents that protected the right to abortion, it restored control over that contentious social policy issue to the democratic political branches of government.[228] In *SFFA*, however, when the Supreme Court overruled the controlling precedents that allowed racial affirmative action, it took control over that contentious social policy issue *away* from the democratic process that had adopted it and vested that policymaking power in the Court itself.[229]

Dobbs was arguably consistent with the instrumental objectives of the political question doctrine. But *SFFA* was not. It is perhaps for that reason that when Justice Stevens first confronted the affirmative action issue in *Bakke*, he argued that it should be resolved on statutory rather than constitutional grounds, thereby leaving control of the issue in the hands of the representative branches of government.[230]

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224. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (stating that content-based restrictions on speech "are presumptively unconstitutional" under First Amendment); Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (noting that the Due Process Clause protects fundamental rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (first quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting Palko v. Connecticut, 302 U.S 319, 325 (1937))); Washington v. Davis, 426 U.S. 229, 239–42 (1976) (holding that the Equal Protection Clause prohibits intentional racial discrimination and not mere disparate impact).

225. *See supra* Section I.B (discussing inconsistent Supreme Court precedents governing racial affirmative action).

226. *See SFFA*, 600 U.S. at 232, 287 (Thomas, J., concurring) (viewing *Grutter* as having been overruled); *id.* at 341–42, 352–53, 358 (Sotomayor, J., dissenting) (viewing *Bakke*, *Grutter*, and *Fisher* precedents as having been overruled).

227. 600 U.S. 215, 302 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973), and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

228. *See id.* ("We now overrule those decisions and return that authority to the people and their elected representatives."). Note that *Dobbs* could still be viewed as wrong, because it permitted invidious sex-based discrimination against women—an argument that Justice Ginsburg has forcefully made. *See* Louise Melling, *For Justice Ginsburg, Abortion Was About Equality*, ACLU (Sept. 23, 2020), https://www.aclu.org/news/reproductive-freedom/for-justice-ginsburg-abortion-was-about-equality [https://perma.cc/3AEX-HFVZ].

229. *See SFFA*, 600 U.S. at 230–31 (taking control of affirmative action away from schools).

230. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 411–12 (1978) (Stevens, J., concurring in judgment in part and dissenting in part); *see also* Ramesh Ponnuru, *Affirmative Action Should Be Illegal — Not Unconstitutional*, WASH. POST (July 2, 2023, 7:00 AM), https://www.washingtonpost.com/opinions/2023/07/02/affirmative-action-supreme-court-civil-rights-law/ (endorsing the approach of Justice Stevens).

In *SFFA*, Chief Justice Roberts argued that, for equal protection purposes, there was no doctrinal difference between affirmative action racial classifications that were intended to benefit minorities and exclusionary racial classifications that were intended to harm them.[231] In so doing, he reiterated the Court's longstanding *Adarand* refusal to distinguish between benign affirmative action and invidious racial discrimination[232]—the very refusal that had prompted Justice Stevens to offer the No Trespassing versus welcome mat distinction in his *Adarand* dissent.[233] Chief Justice Roberts argued that supposedly benign affirmative action plans actually harmed nonbeneficiaries.[234] He said that the Harvard plan harmed not only whites, but Asian-Americans as well, whose enrollment at Harvard dropped by 11.1% as a result of the school's affirmative action program.[235]

Although I am arguing that the constitutionality of racial affirmative action is a nonjusticiable political question, I am *not* arguing that equal protection prohibitions on invidious discrimination against racial minorities are nonjusticiable. As the originalist history portion of Justice Sotomayor's *SFFA* dissent emphasizes, the very purpose of the Equal Protection Clause and its implementing Reconstruction legislation was to combat the Black Codes, peonage, forced free labor, and other forms of oppressive discrimination that southern states had adopted to prolong the subjugation of all Blacks, whether they were formerly slaves or formerly free.[236] This history explicitly rejected the colorblind interpretation of the Equal Protection Clause on which the *SFFA* majority's refusal to distinguish between benign and invidious discrimination rests.[237] Accordingly, judicial enforcement of the constitutional and statutory bans on invidious discrimination is completely justiciable, because the goal of preventing invidious discrimination against racial minorities *does* constitute a judicially manageable standard.

Racial discrimination that disadvantages Blacks seems pretty clearly to fall within the scope of the equal protection prohibition, as does discrimination against other racial groups—such as some Latinx and Asian-American groups—that are socially, economically, and politically disadvantaged in contemporary

231. *See SFFA*, 600 U.S. at 229 ("While the dissent would certainly not permit university programs that discriminated *against* black and Latino applicants, it is perfectly willing to let the programs here continue.").

232. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995).

233. *Id*. at 245 (Stevens, J., dissenting); *see supra* note 169 and accompanying text.

234. *See SFFA*, 600 U.S. at 212 (recognizing the risk "that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference").

235. *Id*. at 218 ("[T]he First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's 'policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted.'" (omission in original) (citation omitted) (quoting SFFA v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 178 (D. Mass. 2019))).

236. *See id*. at 319–26 (Sotomayor, J., dissenting).

237. *See id*. at 321–26.

culture. Under the representation-reinforcement theory of constitutional interpretation, which was first propounded by Justice Stone and then popularized by Professor Ely, racial groups are entitled to the constitutional safeguards of the Equal Protection Clause when their interests have been improperly discounted by the majoritarian political process.[238] For invidious discrimination, there is no need to characterize the issue as a political question, because the equality principle gives the courts adequately ascertainable guidance.

But where the majoritarian political process has chosen to disadvantage itself in the name of equality, by adopting affirmative action programs that are designed to counteract the continued discounting of racial minority interests, the judicially manageable representation-reinforcement standard should defer to that majoritarian judgment rather than override it. There is no ascertainable equality principle that compels, or even permits, the Court to disregard that majoritarian democratic policy determination. As Justice Sotomayor's dissent points out, the colorblind-Constitution principle that the *SFFA* majority invokes for this purpose is both artificial and ahistorical.[239] It is, at best, a sophomoric effort to reduce a complex issue of social policy to a linguistic oversimplification.

It is true that difficult issues can arise in trying to distinguish benign affirmative action from invidious discrimination. Although the *SFFA* dissenters characterize the Harvard and UNC affirmative action plans as benign efforts to benefit underrepresented racial minorities, and society as a whole,[240] the majority characterized the plans as invidious discrimination against whites and Asian-Americans.[241]

Chief Justice Roberts' majority opinion pointed to statistics showing that the enrollment of Asian-Americans dropped by 11.1% under the Harvard program.[242] But Justice Sotomayor pointed to statistics showing that Asian-Americans were accepted at the same rate as other applicants, that they comprised 20% of Harvard's enrollment even though they made up only 6% of the U.S. population, and that some Asian-Americans were among those who benefited from affirmative action programs such as those that had been adopted by Harvard and UNC.[243] The fact that there can be such a vast disagreement over proper application of the equality principle to a given set of facts suggests that the issue is a political question rather than a judicial one.

Stated differently, Chief Justice Roberts thought that Asian-Americans were harmed because their Harvard enrollments dropped, but Justice Sotomayor thought that the schools were trying to equalize enrollments by reducing the significance of factors that had disproportionately favored Asian-Americans and

238. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980). *See generally* John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

239. *See SFFA*, 600 U.S. at 326–31 (Sotomayor, J., dissenting).

240. *See id.* at 359–66; *id.* at 403–08 (Jackson, J., dissenting).

241. *See id.* at 218–21 (majority opinion); *id.* at 271–74 (Thomas, J., concurring).

242. *See id.* at 218 (majority opinion).

243. *See id.* at 351, 359–60, 372–76, 375 n.39 (Sotomayor, J., dissenting).

enhancing the significance of factors that would increase the presence of underrepresented minorities. One might wish to preserve the existing allocation of resources and treat the status quo as establishing the appropriate baseline for analysis—the way the *SFFA* majority did. Or one might wish to modify the existing skewed allocation and treat a more equal distribution as establishing the appropriate baseline for analysis—the way the *SFFA* dissenters did. But whichever option one chooses, one is asserting what ultimately amounts to a pure normative preference. And in a democracy, the societal choice between such competing normative preferences is a political choice. It is not a judicially manageable one.

B. CONSTITUTIONAL EQUALITY IS SUBJECTIVELY NORMATIVE

There is a reason that the Constitution separates adjudicatory power from legislative and executive policymaking power. As a matter of relative institutional competence, an unelected and politically unaccountable judiciary—which has been intentionally insulated from political influence[244]—should be limited to interpretive functions in which reasoned deliberation is more reliable than mere political compromise.[245] Where political compromise is desirable because issues are "in their nature political,"[246] Madisonian Republicanism relies on the deliberation among competing political factions for the formulation of sound social policy.[247] Because the concept of equality that is embodied in the Equal Protection Clause is subjectively normative, rather than objectively ascertainable, it is ill-suited to dispositive judicial interpretation in contested cases and is better allocated to the representative branches in order to avoid the countermajoritarian substitution of judicial policy preferences for the policies favored by our elected representatives.

Things are alike and different in a multitude of ways, and there is no objective way of determining which similarities and differences should count in particular cases. In the context of affirmative action, one cannot decide whether benign affirmative action is the same as, or different from, invidious discrimination without adopting a subjective normative view about the relative costs and benefits of permitting or prohibiting affirmative action. That determination necessarily entails the assessment and comparison of numerous imponderables including the long- and short-term effects of affirmative action; the identification of groups who will be affected and the relative magnitude of those effects; the likelihood that beneficiaries will be aided as opposed to stigmatized and the likelihood that nonbeneficiaries will be harmed, resentful, or disaffected; the degree to which existing inequalities ought to be tolerated or remedied; the manner in which racial diversity compares to wealth, legacy, and athletic preferences; the justice,

244. *See* U.S. CONST. art. III, § 1 (granting life tenure and salary protection).

245. *See* THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terrence Ball ed., 2003) (noting that federal Judiciary is "least dangerous" branch because it has "neither Force nor Will, but merely judgment").

246. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

247. *See* THE FEDERALIST NO. 10, *supra* note 245, at 43–44 (James Madison) (describing use of factions to promote liberty and public good in republican form of government).

fairness, and morality of requiring, permitting, or prohibiting affirmative action; and on, and on, *ad infinitum*. There is no reason to believe that a Supreme Court, staring at the words "equal protection" in the Constitution,[248] could do a better job than our elected representatives in answering those imponderable questions.

1. Social Policy

SFFA is technically about the degree to which explicit references to race can be used in university admissions, and the adverse effect that the decision will have on minority enrollments seems clear.[249] The case also seems likely to contribute to the "racial gamification" of the college admissions process.[250] It is uncertain whether race-neutral efforts to promote diversity will be prohibited by the decision as well,[251] and the Biden Administration has sought to provide some guidance.[252] But it is certain that the ramifications of the case will directly affect the public and private policies that govern the way that race is treated in the culture.

Demands for colorblind race neutrality may simply end up being demands to perpetuate the existing white privilege that has resulted from prior and ongoing societal discrimination, and as such, those demands can be viewed as a proxy for continued racial discrimination against minorities. Republican attorneys general and other conservative groups have already invoked *SFFA* as a basis for challenging corporate diversity and inclusion efforts.[253]

Although *SFFA* directly addressed only the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, its reasoning could also apply to the hiring and other practices of private employers under Title VII of that Act. As a result, the decision is likely to have downstream effects on the pipeline for workers, which further exacerbates existing racial inequities in companies and law

248. U.S. CONST. amend XIV, § 1.

249. *See* John J. DeGioia, *Today's Supreme Court Ruling and Our Commitment to Diversity, Equity, and Inclusion*, GEO. U. (June 29, 2023), https://president.georgetown.edu/todays-supreme-court-ruling-and-our-commitment-to-diversity-equity-and-inclusion/ [https://perma.cc/7GLV-MU37].

250. Tyler Austin Harper, *I Teach at an Elite College. Here's a Look Inside the Racial Gaming of Admissions.*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/opinion/college-admissions-affirmative-action.html.

251. *See* Jeannie Suk Gersen, *After Affirmative Action Ends*, NEW YORKER (June 26, 2023), https://www.newyorker.com/news/daily-comment/after-affirmative-action-ends; George F. Will, *The Court Did Not 'End' Affirmative Action. This Was Just a Skirmish.*, WASH. POST (June 29, 2023, 7:07 PM), https://www.washingtonpost.com/opinions/2023/06/29/affirmative-action-after-supreme-court-ruling/.

252. *See* U.S. DOJ & DEP'T OF EDUC., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT'S DECISION IN STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA (2023), https://www.justice.gov/d9/2023-08/post-sffa_resource_faq_final_508.pdf [https://perma.cc/37A8-8PT5]; *see also* Nick Anderson, *Federal Guidance Shows How Colleges May Still Address Race in Admissions*, WASH. POST (Aug. 14, 2023, 5:11 PM), https://www.washingtonpost.com/education/2023/08/14/affirmative-action-college-admissions-guidance/.

253. *See, e.g.*, Thadani & Bogage, *supra* note 195; Khorri Atkinson, *Republican AGs Have Tough Legal Road Against Corporate Diversity*, BLOOMBERG L. (July 20, 2023, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/republican-ags-have-tough-legal-road-against-corporate-diversity; Julian Mark & Eli Tan, *Affirmative Action Ruling Puts Target on Corporate Diversity Programs*, WASH. POST (June 29, 2023, 6:00 PM), https://www.washingtonpost.com/business/2023/06/29/affirmative-action-business-diversity/.

firms.[254] The *SFFA* opinion also legitimates the use of "colorblind" rhetoric, which is presently being invoked to challenge even post-*Brown* integration efforts in public schools.[255] Moreover, *SFFA* is likely to strain the capacities of Historically Black Colleges and Universities (HBCUs) dealing with a surge in applications from minority students who will no longer be admitted to elite, predominantly white institutions.[256]

Even though affirmative action initiatives in the form of wealth, legacy, athletic, and male preferences produce higher admission rates than the rates for recipients of diversity initiatives, minority students are the only ones who carry the stigma of affirmative action.[257] *SFFA* not only reinforces this stigma, but it seems to have created an environment in which "race neutral" is the new "separate but equal."[258] The end of affirmative action has already been characterized as the end of efforts to address ongoing racial discrimination.[259] And in *SFFA*, the Supreme Court reinforced a cultural environment in which a United States Senator from Alabama felt free to state publicly that white nationalists were not racists, before a barrage of criticism forced him to retract that assertion.[260]

All of this raises profound social policy questions. The *SFFA* ban on racial affirmative action is likely to help white students and some Asian-American

254. *See* Khorri Atkinson, *Affirmative Action Ruling Sets Up Clash Over Workplace Diversity*, BLOOMBERG L. (June 30, 2023, 5:45 AM), https://news.bloomberglaw.com/daily-labor-report/affirmative-action-ruling-sets-up-clash-over-workplace-diversity; Tatyana Monnay, *Affirmative Action's Demise Threatens Big Law Diversity Pipeline*, BLOOMBERG L. (June 30, 2023, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/affirmative-actions-demise-threatens-big-law-diversity-pipeline; Tatyana Monnay, *Perkins Coie, Morrison Foerster Sued Over DEI Programs (2)*, BLOOMBERG L. (Aug. 22, 2023, 10:43 PM), https://news.bloomberglaw.com/business-and-practice/perkins-coie-morrison-foerster-sued-by-blum-over-dei-programs (describing conservative group suit seeking to invalidate law firm diversity fellowship programs); Marco Poggio, *Conservative Group Sues BigLaw Firms Over DEI Fellowships*, LAW360 (Aug. 22, 2023, 4:55 PM), https://www.law360.com/articles/1713809/conservative-group-sues-biglaw-firms-over-dei-fellowships (same).

255. *See* Janel A. George, *The Myth of Merit: The Fight of the Fairfax County School Board and the New Front of Massive Resistance*, 49 FORDHAM URB. L.J. 1091, 1091–95 (2022); Lydia Wheeler, *High School Poses New Race and Admissions Challenge for Justices*, BLOOMBERG L. (Aug. 22, 2023, 4:54 PM), https://news.bloomberglaw.com/us-law-week/affirmative-action-proxies-a-test-for-high-school-admissions (describing U.S. Supreme Court petition seeking to invalidate Thomas Jefferson High School race-neutral admissions policy as discrimination against Asian-Americans).

256. *See* Lauren Lumpkin & Corinne Dorsey, *HBCUs Revise Admissions Policies Amid Expected Surge in Applications*, WASH. POST (July 15, 2023, 7:00 AM), https://www.washingtonpost.com/education/2023/07/15/hbcu-admissions-affirmative-action-ruling/ (suggesting that the influx could, in part, be the result of an increased interest in HBCUs by "students who are seeking environments they perceive to be more welcoming" after the *SFFA* decision).

257. *See* Jerusalem Demsas, *No One Deserves to Go to Harvard*, ATLANTIC (July 27, 2023), https://www.theatlantic.com/ideas/archive/2023/07/harvard-admissions-affirmative-action-elite-colleges/674837/.

258. Uma Mazyck Jayakumar & Ibram X. Kendi, *'Race Neutral' Is the New 'Separate but Equal,'* ATLANTIC (June 29, 2023), https://www.theatlantic.com/ideas/archive/2023/06/supreme-court-affirmative-action-race-neutral-admissions/674565/.

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

260. *See* John Wagner, *Sen. Tommy Tuberville Relents and Says White Nationalists Are Racist*, WASH. POST (July 11, 2023, 3:49 PM), https://www.washingtonpost.com/politics/2023/07/11/tuberville-military-racists-white-nationalist/.

students, but statistics suggest that it is likely to harm other Asian-American students and minority students in general.[261] As the competing opinions in the *SFFA* case illustrate, proponents of affirmative action believe that this is a bad thing for our society, but opponents think that it advances our fundamental cultural principles. This is a wholly normative question, whose resolution will ultimately rest on subjective value preferences. Consistent with Madisonian Republicanism, our political representatives should deliberate and debate these issues at length. But such social policy choices should not be formulated by a mere majority of Justices on a divided Supreme Court.

2. Judicial Policymaking

When the Supreme Court tries to make social policy, bad things tend to happen. Historically, some of the Court's most infamous policymaking decisions have promoted, rather than prohibited, invidious racial discrimination. And policymaking decisions of the contemporary Court have impeded efforts to remedy the continuing effects of the past discrimination that the Court previously facilitated.[262] With respect to the formulation of the nation's racial policies, as Justice Jackson stressed in her *SFFA* dissent, the Supreme Court should just "get out of the way."[263]

Despite Alexander Hamilton's assurance that the Supreme Court would be the least dangerous branch of the federal government,[264] the Supreme Court has always been a covertly political court.[265] So it is not surprising that, historically, the Court's decisions reflected the prevailing racial attitudes of the times. Perhaps the most infamous example is the Court's 1857 decision in *Dred Scott v. Sandford* to invalidate a congressional statute that implemented a political compromise limiting the spread of slavery.[266] The Court's decision to preclude the possibility of Black citizenship, and to supplant congressional policy views about the contentious issue of slavery with the Court's own policy views, helped lead to

261. *See* Janice Kai Chen & Daniel Wolfe, *State Affirmative Action Bans Helped White, Asian Students, Hurt Others*, WASH. POST (June 29, 2023, 10:26 AM), https://www.washingtonpost.com/education/2023/06/29/affirmative-action-banned-what-happens/.

262. For a more extended discussion of the Supreme Court's historical and contemporary policymaking that sacrificed racial minority rights for the benefit of the white majority, see Girardeau A. Spann, *Random Justice*, 100 N.C. L. REV. 739, 749–67 (2022).

263. SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 407 (2023) (Jackson, J., dissenting).

264. *See* THE FEDERALIST NO. 78, *supra* note 245.

265. *See* Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy — and the Court*, 134 HARV. L. REV. 1, 224 (2020); Spann, *supra* note 262, at 743.

266. 60 U.S. (19 How.) 393, 404–05, 407, 451–52 (1857) (enslaved party) (holding that Blacks cannot be citizens, and invalidating congressional statute limiting slavery), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

the Civil War[267] and the need to add the Reconstruction Amendments to the Constitution.[268]

In 1896, the Court upheld southern state efforts to circumvent Reconstruction through the Jim Crow separate-but-equal regime of racial segregation in *Plessy v. Ferguson*.[269] And the Court's curious conception of separate-but-*equal* enabled the Court to uphold a segregated high school for white students but no high school for Black students in its 1899 *Cumming v. Richmond County Board of Education* decision.[270] In *Korematsu v. United States*, the Court upheld a World War II exclusion order that led to the internment in concentration camps of Japanese-Americans including those who were United States citizens—a case that has since become a national embarrassment.[271]

In 1954, *Brown v. Board of Education* (*Brown I*) overruled *Plessy* and promised to desegregate public schools.[272] But the following year the Court qualified its desegregation order by merely requiring compliance with "all deliberate speed," which resulted in no meaningful desegregation of southern schools for the next decade.[273] The majority opinion of Chief Justice Roberts in *SFFA* acknowledges some of these infamous Supreme Court historical cases.[274] But, nevertheless, Chief Justice Roberts now invokes *Brown* not as a basis for integrating schools, but as a basis for invalidating the affirmative action plans that have finally started to integrate diverse perspectives into the classroom.[275]

As the contemporary Court's affirmative action decisions illustrate, the Court has fluctuated in the degree to which it would allow racial affirmative action, previously permitting it only when the stringent standards of strict scrutiny were satisfied,[276] and now ultimately not allowing it at all.[277] Among the Court's most problematic policy decisions were its refusal to recognize a commonsense

267. *See* Paul Finkelman, *The* Dred Scott *Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 5–6 (1996) ("It would be an exaggeration to say that the *Dred Scott* decision *caused* the Civil War. But, it certainly pushed the nation far closer to that war. The decision played a decisive role in the emergence of Abraham Lincoln as the Republican Party's presidential candidate in 1860 and his election later that year. That in turn set the stage for secession and civil war."); *cf.* FELDMAN & SULLIVAN, *supra* note 8, at 466 ("Historians have debated how directly the Dred Scott decision led to Lincoln's election and the Civil War. But for at least some voters, a vote for the Republican Party was a vote against Dred Scott."). *But see* Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 CHI.-KENT L. REV. 49, 89–93 (2007) (questioning whether *Dred Scott* decision truly "hastened the coming of the Civil War by fanning the flames of division and secession").

268. *See* U.S. CONST. amend. XIII (abolishing slavery); *id.* amend. XIV (granting citizenship and guaranteeing, *inter alia*, equal protection of the laws); *id.* amend. XV (prohibiting discriminatory denial of right to vote).

269. 163 U.S. 537, 544–52 (1896).

270. 175 U.S. 528, 544–45 (1899).

271. 323 U.S. 214, 223–24 (1944), *abrogated by* Trump v. Hawaii, 585 U.S. 667 (2018).

272. 347 U.S. 483, 494–95 (1954).

273. *Brown II*, 349 U.S. 294, 301 (1955); Spann, *supra* note 262, at 755–56 (discussing decade-long delay in southern school desegregation).

274. *See* SFFA v. President & Fellows of Harvard Coll., 600 U.S. 181, 203–04 (2023).

275. *See id.*

276. *See supra* Section I.B.2 (discussing racial affirmative action precedents).

277. *See SFFA*, 600 U.S. at 230 (invalidating racial affirmative action).

distinction between benign and invidious discrimination,[278] its bizarre insistence that affirmative action could not seek to remedy societal discrimination,[279] and its inexplicable aversion to pursuing the very same racial balance that would exist in a truly colorblind society.[280] It is as if the Supreme Court has adopted a racial policy of its own—the policy of ensuring that white privilege, which has persisted in the United States since the beginning, never has to yield to the demands of racial equality. But as the political question doctrine reminds us, in a democratic society, that is not a policy decision that the Supreme Court is institutionally competent to make.

CONCLUSION

Consistent with the Supreme Court's own interpretation of the political question doctrine, the constitutionality of racial affirmative action is nonjusticiable. The Equal Protection Clause lacks the judicially manageable standards that are necessary to constrain the Court's exercise of normative discretion and prevent it from usurping the social policymaking functions that separation of powers doctrine allocates to the representative branches of government. The Court itself recognized this in its partisan gerrymandering case, and it is equally true in the context of racial affirmative action. However, the political and ideological preferences of the current Court suggest that it remains more interested in preserving existing white privilege than in achieving any meaningful measure of racial equality—just as prior Courts have typically been in the past.

If the Supreme Court insists on playing a role in the formulation of the nation's social policy about race, there are things that the political branches can do to reclaim their policymaking power. Recent disappointment with the Court's efforts to seize political power have prompted some to propose political responses, ranging from moderate ethics and term limit reforms to more aggressive Court-packing and jurisdiction-stripping interventions.[281] But even liberal Supreme Court

278. *See id.* at 214 (stating that "[r]acial discrimination [is] invidious in all contexts" (alterations in original) (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991))); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226–27 (1995) (rejecting distinction between benign and invidious discrimination).

279. *See SFFA*, 600 U.S. at 226 (declaring that racial affirmative action cannot be used to remedy societal discrimination).

280. *See id.* at 223 (finding that "'racial balancing' is 'patently unconstitutional'" (quoting *Fisher I*, 570 U.S. 297, 311 (2013))).

281. *See* Madeleine Carlisle, *Behind the Scenes of President Biden's Supreme Court Reform Commission*, TIME (Dec. 10, 2021, 4:51 PM), https://time.com/6127632/supreme-court-reform-commission/ (discussing Supreme Court reform proposals); Klarman, *supra* note 265, at 246–53 (advocating Court-packing); Girardeau A. Spann, *Neutralizing* Grutter, 7 U. PA. J. CONST. L. 633, 657–61 (2005) (discussing Court-packing and jurisdiction-stripping). *See generally* Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021) (discussing Supreme Court reform proposals).

skeptics, including President Biden, tend to oppose the imposition of structural limitations on the Supreme Court's political policymaking power.[282]

If the Supreme Court is simply another political player in our democratic governmental process, the use of political checks on Supreme Court excesses seems eminently sensible. But the consideration of such checks is unlikely to be taken seriously until the culture is somehow able to transcend its mystification by an idealized conception of judicial review—a transformation that this Article hopes to help facilitate.

282. *See* Anders Hagstrom, *Biden Still Does Not Support Court Packing, White House Confirms*, FOX NEWS (June 26, 2022, 1:55 PM), https://www.foxnews.com/politics/biden-still-does-not-support-court-packing-white-house-confirms [https://perma.cc/5TKZ-WKYZ].