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## The Post-Racial Deception of the Roberts Court

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# THE POST-RACIAL DECEPTION OF THE ROBERTS COURT

*Cedric Merlin Powell\**

## ABSTRACT

*Students for Fair Admissions v. Harvard/UNC (SFFA) is a post-racial deception unmoored from precedent and societal reality. SFFA deceives the polity and signals an all out assault on anti-discrimination law. To preserve its institutional legitimacy, the Roberts Court promotes doctrinal and conceptual distortions—post-racial deceptions of cognizable injuries advanced through reverse discrimination claims of white plaintiffs; racial proxy claims of discrimination proffered by Asian-Americans; and the fairness rationale of the Court’s circular post-racial edict that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” Chief Justice Roberts’s majority opinion discards the anti-subordination principle of the Fourteenth Amendment and replaces it with a post-racial anti-differentiation principle: “Eliminating racial discrimination means eliminating all of it.” Expanding the circularity of Chief Justice Roberts’s post-racialism even further, Justice Thomas’s concurrence offers an ostensibly originalist re-interpretation of the Fourteenth Amendment that erases the race-conscious history of the Reconstruction Amendments and reframes it as the codification of the Declaration of Independence. Rejecting this post-racial deception, Justices Sotomayor and Jackson, in dissent, foreground the anti-subordination principle as the essential doctrinal core of the Fourteenth Amendment and offer a rebuke of the Court’s facile post-racialism with a comprehensive discussion of systemic racism, structural inequality, and the present-day effects of past discrimination. The Court’s post-racial constitutionalism is a post-racial deception which must be discredited and rejected if we are to ever achieve the multi-racial democracy promised by the Second Founding.*

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## I. INTRODUCTION

IT was only a matter of time before the United States Supreme Court invalidated the consideration of race in higher education admissions processes—the Roberts Court’s post-racial jurisprudence is firmly established. Similarly solidified is its post-racial deception—a neutral and linear progress narrative that sets limits on substantive equality and inclusion—which serves as a jurisprudential catalyst for dismantling anti-discrimination law buttressed by the contrived fairness claims of reverse discrimination suits.

The Court has always been post-racial<sup>1</sup>—from sanitizing the murderous overthrow of a multi-racial Republican government in Reconstruction Louisiana,<sup>2</sup> expressing exasperation at the recently emancipated former slaves for being “special favorite[s] of the law,”<sup>3</sup> to blessing the color-line as a mere societal convention with a perverse conception of inclusivity,<sup>4</sup>

1. See CEDRIC MERLIN POWELL, *POST-RACIAL CONSTITUTIONALISM AND THE ROBERTS COURT: RHETORICAL NEUTRALITY AND THE PERPETUATION OF INEQUALITY* xiii (2023).

2. See *United States v. Cruikshank*, 92 U.S. 542, 559 (1876); CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* 251–52 (Holt 2008).

3. *The Civil Rights Cases*, 109 U.S. 3, 31 (1883).

4. See *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Sherrilyn Ifill, *Why Are U.S. Courts Afraid of the 14th Amendment? Because It’s Radical.*, WASH. POST (Nov. 24, 2023, 6:30 AM), <https://www.washingtonpost.com>.

to today's circular post-racial adage that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>5</sup> A post-racial deception continues to be propagated by the Court so that race does not exist unless the Court says it does. And it exists, for the Court, only when white privilege and supremacy are disrupted and threatened. When too much "progress" has been made, there is a color-coded backlash response to preserve white supremacy.<sup>6</sup>

This is a defining feature of the Third Reconstruction. Specifically, the Court's post-racial deception—the narrative that so much progress has been made that any benefit to people of color is an unconstitutional racial windfall—is a modern reiteration of the Redemption rhetoric deployed during the First Reconstruction.<sup>7</sup> *Students for Fair Admissions v. Harvard*

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com/opinions/2023/11/24/us-courts-fear-14th-amendment-radical [https://perma.cc/N4VZ-HBZW]:

During Reconstruction and the first half of the 20th century, it was the Supreme Court that left unprotected Southern Black people seeking to vote and engage in the political process in the face of deadly violence by White mobs seeking to disenfranchise them (*United States v. Cruikshank*, 1875). It was the Supreme Court that held that the 14th Amendment did not protect Black citizens from discriminatory conduct by private actors (*Civil Rights Cases* of 1883). And it was the Supreme Court that endorsed a system of Jim Crow segregation (*Plessy v. Ferguson*, 1896) that essentially nullified the 14th Amendment for Black people in the South for nearly 100 years after its ratification. Later, the court created onerous burdens to prevailing in discrimination cases brought under the Fourteenth Amendment.

While it is beyond the scope of this Article, these Reconstruction Era decisions form the basis of the Court's modern day post-racialism—post-racial federalism denotes how the Court conceptualizes state power in determining who is included in the American polity and which rights are worthy of protection, this is a new component of post-racial constitutionalism. Formalistic equality and neutrality, while still important in the Court's analysis, have given way to an all-out assault on anti-discrimination law and a re-envisioning of what American society is in terms of its values and normative principles. This concept was introduced in the inaugural Broady Lecture at Howard University School of Law on April 13, 2023, and will be fully explored in *POST-RACIAL FEDERALISM: RACE, LIBERTY, AND THE DEMOCRATIZATION OF OPPRESSION* (forthcoming 2025).

5. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

6. See TERRY SMITH, *WHITELASH: UNMASKING WHITE GRIEVANCE AT THE BALLOT BOX* 8 (2020) ("A salient feature of whitelash is the construction of equality as zero-sum: the advancement of minorities must necessarily come at the expense of whites."); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (noting that "racism is a central ideological underpinning of American society" and that the goals of anti-discrimination law must be conceptualized as something more than "mere rejection of white supremacy," as a normative principle, and more "to the eradication of the substantive conditions of Black subordination").

7. Theorizing the First Reconstruction as the historical antecedent to today's post-racial Reconstruction, historian Peniel E. Joseph concludes,

[R]edemptionists maintained unity behind the broad arc of white supremacy that Trump championed. Trump's America unleashed white supremacy's pervasive anti-democratic impulses . . . Brutal authoritarian goals of keeping Black Americans in chattel slavery fueled Confederate treason, secession, and a Civil War that threatened to destroy the republic from within. Large portions of the Republican Party's political leadership and electoral base remained in the Trump coalition—pleased with his tax policies, his Supreme Court appointees, and the Lost Cause nostalgia for a pre-Great Society America. The devil's bargain had been made.

and *University of North Carolina (SFFA)*<sup>8</sup> fits squarely within this post-racial canon. *SFFA* constitutionalizes post-racial deception because it excises race from admissions decisions while noting that race can be referenced if it is neutralized in the process.<sup>9</sup>

*SFFA* is the ultimate post-racial deception: it creates a reverse injury, which is the protection of white privilege, based on reading the anti-subordination principle out of the Fourteenth Amendment; it stigmatizes African-American and Latinx college, graduate, and professional school students as the unworthy beneficiaries of racial preferences; it foregrounds Justice Thomas as a Black proxy for post-racial formalism;<sup>10</sup> and, all of this is belied by the fact that the opinion's author, Chief Justice Roberts, is forced to acknowledge the salience of race but only as a convenient afterthought.<sup>11</sup> His duplicity is further evinced in his armed services exception for diversity.<sup>12</sup> This has created disarray, uncertainty, and massive retreat based on the impending threat of further action by conservatives.<sup>13</sup> There have been recent attacks on affirmative action, in light of the Court's ruling, and this will certainly intensify. This post-racial deception has had a chilling effect across the nation.<sup>14</sup>

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PENIEL E. JOSEPH, *THE THIRD RECONSTRUCTION: AMERICA'S STRUGGLE OF RACIAL JUSTICE IN THE TWENTY-FIRST CENTURY* 28 (2022).

8. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023).

9. *See id.* at 230 (“[A]ll 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.”).

10. *See* Cedric Merlin Powell, *Woke? John McWhorter’s Woke Racism*, 25 *GREEN BAG* 2d 123, 129–131 (2022) (conceptualizing the Black proxy as a Black person who diminishes the significance race and acknowledges the existence of racism, while noting that claims of systemic racism and structural inequality are largely exaggerated and contribute to balkanization and racial politics—these observations, by a member of the Black community gain resonance, legitimacy, and credibility because they are espoused by a Black man who is an independent thinker and not a member of the liberal elite); KEVIN MERIDA & MICHAEL A. FLETCHER, *SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS* 22 (2007) (detailing how Justice Thomas responds to criticism of his conservative views as, “I have no right to think the way I do because I’m black”); Cedric Merlin Powell, *Identity, Liberal Individualism, and the Neutral Allure of Post-Blackness*, 15 *GREEN BAG* 2d 341, 346–47 (2012).

11. *See SFFA*, 600 U.S. at 230 (“[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life . . .”).

12. *See id.* at 213 n.4 (stating that U.S. military academies were not parties to these cases; the lower courts did not address the constitutionality of race-based military admissions systems; and military academies have “distinct interests”). Those distinct interests were central to the Court’s reasoning in *Grutter*. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003).

13. *See, e.g.*, Katie Buehler, *Supreme Court Lets West Point Consider Race for Now*, *LAW360* (Feb. 2, 2024), <https://www.law360.com/pulse/articles/1792202/supreme-court-lets-west-point-consider-race-for-now> [<https://perma.cc/QBX3-M9TW>].

14. *See, e.g.*, Erin Connell, Mike Delikat & Jill Rosenberg, *U.S. Supreme Court Decision Does Not Foreclose Legally Compliant DEI Initiatives in Corporate America*, *LAW.COM* (July 6, 2023, 10:51 AM), <https://www.law.com/corpocounsel/2023/07/06/u-s-supreme-court-decision-does-not-foreclose-legally-compliant-dei-initiatives-in-corporate-america> [<https://perma.cc/DYH9-CWZC>] (noting that the *SFFA* opinion “may have a chilling effect on some corporate DEI initiatives”); Todd Richmond, *Wisconsin University System Reaches Deal With Republicans That Would Scale Back Diversity Positions*, *ASSOCIATED PRESS* (Dec. 8, 2023, 4:18 PM), <https://apnews.com/article/universities-of-wisconsin-diversity-initiatives-republican-lawmakers-e371fae1d6adbe1616ae457a691d07fe> [<https://perma.cc/P8ML-XHB7>] (discussing a university dismantling diversity initiative and freezing diverse faculty hires all in the

Our history proves, again and again, that we cannot ignore race; it is the central organizing feature of our polity,<sup>15</sup> and its impact as a mechanism for subordination resonates across the centuries. Yet the Roberts Court's defining jurisprudential mission is to constitutionalize post-racialism— "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>16</sup>

Based on its own precedent, there was no legitimate basis for the Court to declare the Harvard and University of North Carolina (UNC) programs unconstitutional. Indeed, one searches far and wide for an injury to white and Asian-American rejected student applicants to Harvard and UNC. There is no cognizable injury other than, "I was not admitted, and I had great credentials"—any unsuccessful applicant can make that claim. But this claim is substantiated by the Court's irrebuttable presumption that race predominates and permeates the admissions process—selecting winners and losers based upon their race—making it constitutionally noxious.<sup>17</sup>

This leads to the disconcerting conclusion that the Court employs an elastic standing requirement, creates a reverse discrimination remedy to redress the claims of Asian-Americans as model minorities,<sup>18</sup> and completely disregards nearly fifty years of precedent embracing the diversity principle as constitutionally permissible.<sup>19</sup> This is the Court's post-racial deception.

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name of ostensibly neutral goals like student achievement); *but see* Lindsay Kornick, *University of Wisconsin Board Rejects \$800 Million Deal That Would Limit DEI Initiatives*, Fox News (Dec. 11, 2023), <https://www.foxnews.com/media/university-wisconsin-board-regents-rejects-800-million-deal-limit-dei-initiatives> [<https://perma.cc/8V3X-LKDV>] (noting that the Wisconsin Board responded by choosing to affirm and expand diversity efforts and rejected attempts to limit DEI initiatives).

15. *See supra* note 6 and accompanying text.

16. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

17. *SFFA*, 600 U.S. at 217 ("Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.")

18. *See* Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 90, 91–92 (2016) ("Asian Americans provide a convenient opportunity for affirmative action opponents to disguise their underlying motives. The true, unstated concern of such opponents is that affirmative action would disrupt the existing racial hierarchy—one that primarily benefits white people."); Johnathan P. Feingold, *SFFA v. Harvard: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 717 (2019).

19. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (Powell, J., announcing the judgment of the Court) (marking the first time diversity was embraced as a constitutionally permissible justification for race-based admissions). This is an essential component of the Court's post-racial federalism, discarding settled precedent in the name of post-racial constitutionalism, libertarianism, state power in determining the scope of personal autonomy, or religious orthodoxy (a theocratic state rooted in white Christian nationalism). *See, e.g., Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (overturning Section 4 of the Voting Rights Act as an impermissible intrusion on state sovereignty in the absence of current voting rights discrimination by the state); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 70–71 (2022) (expanding the Second Amendment and invalidating a New York proper-cause requirement as an impermissible obstacle to the exercise of the right to keep and bear arms for self-defense); *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022) (overruling *Roe* and *Casey*, and holding that there is no constitutional right to abortion marking the first time that the Court has taken away a fundamental right); *303 Creative LLC v. Elenis*, 600 U.S. 570, 602–03 (2023) (holding that the state of Colorado cannot compel a web designer to violate her religious beliefs by requiring her to design a website for same-sex marriages). The Court is entering a post-racial *Lochner* Era with the Court determining



The Roberts Court advances its post-racial deception by (i) creating a reverse discrimination injury based on its post-racial constitutionalism; (ii) employing a formalistic interpretation of the Fourteenth Amendment and *Brown v. Board of Education*;<sup>20</sup> (iii) rejecting diversity as a racial proxy, rendering it meaningless unless it can be connected to neutral factors that submerge race;<sup>21</sup> and (iv) espousing a post-racial Redemption narrative legitimizing the retrogression and retrenchment that will inevitably result from overruling *Bakke* and its progeny.

Ignoring the systemic and structural components of racism, the Court focuses instead on formal neutrality as the defining feature of its post-racial constitutionalism. “The Court plays a central role in constructing the narrative of racial progress in this country, and it has done so in a manner that either ignores history or substantively revises it, all in the name of moving beyond race.”<sup>22</sup> Thus, the Roberts Court’s post-racial deception is a re-imagining of the American polity so that history is redeemed to portray racism as a series of missteps in our democracy that have been largely resolved; discrimination is defined so narrowly that it is virtually impossible to prove claims advanced by African-Americans and people of color, but easier to prove reverse discrimination claims advanced by whites (and racial proxies like Asian-Americans);<sup>23</sup> and the post-racial

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who is included in the polity, what fundamental rights they have, and whether state power should be used to determine the scope and validity of those rights. Of course, the Court has provided some remedial solace to disempowered groups—people of color, women, and the LGBTQ+ community—but it is nearly always an embedded limitation that can be used by the Court to halt transformative social progress. The Court is re-envisioning the anti-canon to include *Roe*, *Shelby County*, and now *Bakke*. This is the Court’s post-racial *Lochner* era.

20. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also *SFFA*, 600 U.S. at 203–04 (interpreting the conclusions of *Brown*).

21. *SFFA*, 600 U.S. at 209 (“The role of race [via the diversity interest] had to be cabined. It could operate only as ‘a “plus” in a particular applicant’s file.’” (quoting *Bakke*, 438 U.S. at 317)); but cf. *id.* at 230 (overruling precedent that diversity is a compelling interest but concluding 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”). Under this reasoning, “discrimination” is simply a life experience to be overcome incidental to the applicant’s race. That is, this is an *individual* experience, not a stereotypical racial group experience.

22. POWELL, *supra* note 1, at 12; see *infra* note 23 and accompanying text.

23. There is a marked contrast between the level of proof required for non-white and white plaintiffs—non-white plaintiffs carrying a heavier evidentiary burden because the Court demands “exacting proof” while white reverse discrimination plaintiffs carry a lighter burden because discrimination is presumed:

In contrast to the loose inferences regarding the mistreatment of Whites, the colorblind affirmative action cases demand exacting proof of prior mistreatment against non-Whites.

. . . .

. . . There is no case in which the Court has upheld a race-conscious remedy because it responds to identified discrimination. A Supreme Court finding of either malicious or identified discrimination remains purely a theoretical proposition.

Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1864, 1866 (2012). *SFFA* is precisely that case with “loose inferences” privileging reverse discrimination claims with Asian-Americans foregrounded as a racial proxy for the mistreatment of whites. It is the perfect post-racial deception—a reverse discrimination suit advanced by Asian-Americans for themselves and similarly situated whites against the positive racial windfalls given to

rhetoric of progress is used to rationalize the permanence of racism and inequality.<sup>24</sup>

*SFFA* is a paradigmatic example of Rhetorical Neutrality. The Court's race jurisprudence has three distinct doctrinal and narrative components: a historical myth, where history is revised to reflect a post-racial perspective; a definitional myth which posits a rigid formulation of discrimination and what is required to prove it; and a rhetorical myth (and now full-blown post-racial Redemption rhetoric)<sup>25</sup> that legitimizes the Court's own institutional authority and signals to the polity that the persistence of inequality is a neutral outcome of a post-racial system:

Rhetorical Neutrality unpacks the narrative structure of the Court's race jurisprudence. It is a means of describing the underlying neutral rhetoric of the Court's race decisions and how these rhetorical moves perpetuate subordination. By distorting the historical mandate of the Reconstruction Amendments, redefining discrimination so that its existence must be established through nearly impregnable burdens of proof, and then rationalizing inequality as an ostensibly neutral systemic outcome, the Court preserves the status quo of inequality. This leads the Court to adopt a formalistic view of equality where discrimination claims of historically oppressed minorities are ignored.<sup>26</sup>

Essentially, *SFFA* is an advisory opinion with binding effect—a constitutional oddity and post-racial deception. It remedies a non-injury (with Asian-Americans receiving a “benefit” on behalf of white applicants who are mysteriously in the background of this litigation), further constitutionalizes post-racialism, and obliterates nearly fifty years of precedent on the basis of a skeptical presumption that where there is even the mention of race (as a factor of a factor of a factor),<sup>27</sup> it must be the decisive factor in an ostensibly neutral system. This deception is the Roberts Court's post-racial reality.

Rooted in neutrality, *SFFA* is deceptive because it purports to restore our constitutional legacy of colorblind constitutionalism and equality,<sup>28</sup> but actually constitutionalizes post-racialism so that *any* consideration of race is presumed unconstitutional. And diversity, which the Court finally held to

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African-American and Latinx students thereby undermining the “fairness” of the admissions process.

24. See Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 423–24 (2017) (unpacking post-racialism and the distinct viewpoints of whites, who embrace a participatory racial injustice (“PRI”) perspective, and Blacks, who reference structural inequality and endorse a distributive racial injustice (“DRI”) perspective):

In short, while whites are more likely to judge racial progress based on how far the nation has come from slavery, Jim Crow, and Bloody Sunday (i.e., addressing PRI), blacks are more likely to do so based on an ideal of where the nation needs to be, and for them genuine progress toward full racial equality must involve mitigating racial disparities (i.e., addressing DRI).

25. See POWELL, *supra* note 1, at 13.

26. *Id.* at 12.

27. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 375 (2016).

28. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 230–31 (2023).



be a compelling interest twenty-five years after *Bakke*,<sup>29</sup> is now discarded as immeasurable.<sup>30</sup> This is the core of the Roberts Court's post-racial deception. This Article unpacks the Court's post-racial deception in *SFFA*.

Identifying the salient features of the Roberts Court's post-racial deception—relaxing standing requirements and creating a cognizable Article III injury where none existed;<sup>31</sup> neutralizing the race-conscious mandate of the Reconstruction Amendments;<sup>32</sup> gutting the anti-subordination principle through a post-racial interpretation of *Brown*;<sup>33</sup> and jettisoning the diversity principle as a rank racial proxy for impermissible quotas<sup>34</sup>—this Article posits that the Roberts Court intentionally deceives the polity about the significance of race and racism in American society. This is a postmodern incantation of the Redemption claim that was deployed to legitimize the continued subordination of oppressed peoples to preserve the flawed nobility of the Lost Cause.<sup>35</sup> And neutrality is the ideal rhetorical device to rationalize and reify systemic racism and structural inequality. *SFFA* embodies the post-racial rhetoric and deception by the Court—it advances formalistic equality and then presumes that affirmative action is constitutionally invalid because it “protects” (and benefits) Black and Latinx applicants while “discriminating” against Asian-American (and by extension, white) applicants.<sup>36</sup>

By privileging this reverse discrimination rationale, the Court's post-racial deception is obvious: notwithstanding its admonition against selecting winners and losers based on their race (a post-racial proposition), it does so by choosing to preserve and maintain the exclusionary boundaries of white privilege.<sup>37</sup> In short, *SFFA* will determine who is included and excluded from the societal avenues of education, power, and progress.

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29. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[T]oday we endorse Justice Powell’s view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). Chief Justice Roberts’s opinion for the Court in *SFFA* does not fully or adequately address the precedential value of the diversity interest. Indeed, he focuses primarily on two compelling interests—identifiable discrimination by the state and preventing inmate violence in the context of prisons. *See infra* Section III.

30. *SFFA*, 600 U.S. at 214–15.

31. *See id.* at 198–201.

32. *See id.* at 201–03.

33. *See id.* at 203–07.

34. *See id.* at 221–24.

35. *See generally* David W. Blight, *Europe in 1989, America in 2020, and the Death of the Lost Cause*, *NEW YORKER* (July 1, 2020), <https://www.newyorker.com/culture/cultural-comment/europe-in-1989-america-in-2020-and-the-death-of-the-lost-cause> [<https://perma.cc/LT8A-2PUK>].

36. *See SFFA*, 600 U.S. at 229 (criticizing the dissent for promoting the selection of winners and losers based on race and concluding that “[w]hile 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”).

37. *See* EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 84 (5th ed. 2018) (“Negotiating the seemingly contradictory views that ‘race does not matter’ but, at the same time, that ‘race matters’ a little bit for minorities [because their discrimination claims are viewed skeptically] and a lot for whites in the form of reverse discrimination is not an easy task.”). Indeed, the contradictory views cannot be navigated in the absence of an intentional deception by the Court supported by its own formalism. The Court’s race jurisprudence is littered with its selection of

Part II begins by briefly discussing the lower court decisions in *SFFA* and underscoring the fact that, since there was no clear error, the Court should have affirmed its own precedent. Moreover, for purposes of standing, although all the courts presumed that Students for Fair Admissions (SFFA) was a representational party, there was no clearly discernible injury to remedy. The Court should not have rendered an advisory decision disrupting nearly fifty years of precedent. It was deceptive to pretend that there was a remediable injury based upon the Court's post-racial constitutionalism.

Building upon this theme, Part III offers a critique of Chief Justice Roberts's 6–3 majority opinion by analyzing the Court's post-racial formalism through its interpretation of the Fourteenth Amendment; rejection of the anti-subordination principle in *Brown*; wholesale re-interpretation of the Court's affirmative action (diversity) jurisprudence; and, finally, the counterintuitive racial “add on” at the end of the opinion, which seeks to preserve an applicant's whole identity but, in effect, opens the way for either a complete neutralization of race or a performative portrayal of race which inevitably fosters the very stereotypes that the opinion claims are prohibited. Reality must be suspended to fully understand the Court's post-racial rationale—this is a form of doctrinal deception.

Connecting Chief Justice Roberts's majority opinion and Justice Thomas's concurrence, Part III.B offers a critique of the post-racial deception embedded in Justice Thomas's reasoning. As the senior justice on the Court, his three-decades-long tenure has culminated in the eradication of affirmative action by advancing formalisms even more absolute and extreme than Chief Justice Roberts's strand of post-racial constitutionalism. Justice Thomas's unique brand of the Redemption narrative is appealing to opponents of affirmative action because his narrative function is that of the Black proxy—his conservative views are legitimized by his willingness to aggressively oppose any purportedly unearned racial benefit to Blacks and other people of color.

Parts III.C–D conceptualize the primary dissent of Justice Sotomayor and the dissent of Justice Jackson, which is the first comprehensive structural inequality opinion in the Court's history. This is noteworthy because it is a direct attack on the Roberts Court's post-racial deception and should serve as a model in dismantling structural inequality. Concluding with an argument for rejecting the current stampede of retreats from substantive inclusion through race-conscious remedial approaches, the Article ends with a proposal to embrace substantive equality as a defining principle in the Court's race jurisprudence restoring the jurisprudential primacy of the Reconstruction Amendments.

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“winners” based on race, and even when the Court upholds initiatives that benefit people of color it comes at a price. All the Court's race jurisprudence, especially its affirmative action decisions, confirm this. See generally POWELL, *supra* note 1. *SFFA* is the culmination of this incrementalistic and transitory race jurisprudence.

## II. THE LOWER COURT DECISIONS: SETTLED PRECEDENT

Although the lower courts and the Supreme Court found that SFFA effectively established associational standing,<sup>38</sup> there are serious concerns as to whether the Court should have heard these cases.<sup>39</sup> Compiling a formidable factual, policy, and precedential record, and after conducting bench trials in each case, the lower courts concluded that the Harvard and UNC admissions programs passed constitutional muster under the Court's affirmative action precedents.<sup>40</sup>

Rejecting SFFA's argument that Harvard's admissions process fails strict scrutiny "because it engages in racial balancing, uses race as a mechanical plus factor, and has [available] race-neutral alternatives,"<sup>41</sup> the First Circuit Court of Appeals upheld the admissions program finding that, under *Fisher II* and related precedent, diversity is a compelling<sup>42</sup> and definable interest.<sup>43</sup>

Eschewing deference in its analysis of the asserted purposes of diversity, pursuant to the Court's *Fisher* decisions, the First Circuit held that Harvard met this rigorous standard with its narrowly tailored admissions program.<sup>44</sup> Specifically, there was no evidence of racial balancing or impermissible quotas;<sup>45</sup> Harvard did not use race mechanistically in its admissions

38. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard)*, 397 F. Supp. 3d 126, 132 (D. Mass. 2019), *aff'd. sub nom.*, 980 F.3d 157, 164 (1st Cir. 2020), *rev'd on other grounds* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 198–99 (2023); *Students for Fair Admissions, Inc. v. Univ. of N.C. (UNC)*, 567 F. Supp. 3d 580, 588 (M.D. N.C. 2021), *rev'd on other grounds* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 198–99 (2023).

39. This appears to be a recurring judicial practice in the Court's reverse discrimination jurisprudence; there were similar concerns raised in the *Fisher* litigation. *See, e.g.*, POWELL, *supra* note 1, at 129 (positing that Abigail Fisher's reverse discrimination suit lacked a cognizable Article III injury); *id.* at 129 n.7 (citing Mario Barnes, Erwin Chemerinsky & Angel Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action*, 62 UCLA L. REV. 272, 286–88 (2015)) (referencing Fisher's lack of standing and the Court's jurisprudential eagerness to decide an affirmative action case); Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 604 (2008):

In the *Resegregation* case [*Parents Involved*], the Supreme Court went out of its way to recognize a cause of action allowing disappointed white parents to trump the integration interests of minority school children. And it did so even though the Court's jurisdiction to entertain the claims of those white parents was questionable.

The standing issue is fully discussed in Part III.

40. *SFFA*, 600 U.S. at 198. The analysis under Title VI for Harvard as a private university and the Fourteenth Amendment's Equal Protection Clause is the same. *Harvard*, 980 F.3d at 184–85.

41. *Harvard*, 980 F.3d at 185.

42. *See id.* at 185–87 (citing Harvard-created Khurana Committee Report and endorsing specific diversity goals such as training future leaders, adaptability to an inclusive pluralistic society, and pedagogical and new knowledge returns emanating from diverse outlooks); *accord UNC*, 567 F. Supp. 3d. at 655–57 (holding that diversity is a compelling interest that is measurable, identifiable, and had clear educational benefits).

43. *See Harvard*, 980 F.3d at 187.

44. *See id.* at 187–204; *accord UNC*, 567 F. Supp.3d at 605–12 (noting that there was no non-statistical evidence that race was a predominant factor in UNC admissions decisions); *id.* at 612–20 (affirming UNC's holistic review of candidates and holding that there was no statistical evidence that race was a predominant factor in admissions decisions).

45. *Harvard*, 980 F.3d at 188 (noting that there was no evidence of a quota where Asian-Americans increased for the classes of 1980 to 2019 "from a low of 3.4% to a high of 20.6% in

process;<sup>46</sup> there were no workable race-neutral alternatives;<sup>47</sup> and there was no evidence of intentional discrimination against Asian-Americans.<sup>48</sup>

All lower court decisions affirmed well-established precedent. Because there was no conflict in the circuits, the diversity principle had been reaffirmed just six years earlier,<sup>49</sup> and colleges, universities, corporations, and the military had relied on the Court's pronouncements, it is difficult to accept the Court's *SFFA* decision as anything more than a raw assertion of post-racial power. Indeed, the post-racial deception is that there is a decisional error that needs to be corrected and that affirmative action causes an identifiable injury. Yet the Court is never quite explicit in defining what that is.

SFFA's claim—a reverse-reverse discrimination case foregrounding a model minority as a proxy for whiteness<sup>50</sup>—is the perfect post-racial

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2019,” and concluding that “[t]he level of variation in the share of admitted Asian American applicants is inconsistent with a quota, as is the fact that the share of admitted Asian Americans co-varies almost perfectly with the share of Asian American applicants”); *accord UNC*, 567 F. Supp. 3d at 634 (noting that race plays a miniscule role in admissions decisions: “1.2% for in-state residents and 5.1% of out-of-state students,” and concluding that “race appears to be less than or equally important to several other data points considered within a holistic process”).

46. *Harvard*, 980 F.3d at 190–91 (acknowledging Harvard's periodic reviews of the use of race and emphasizing that “Harvard's admissions process is so competitive that race is not decisive for highly qualified candidates”); *accord UNC*, 567 F. Supp. 3d at 634–35.

47. *Harvard*, 980 F.3d at 195–203; *id.* at 202 (concluding that the statistical model using the personal rating showed no intentional discrimination against Asian-Americans and stating that “an Asian American student has a .08% lower chance of admission to Harvard than a similarly situated white student and that this effect is statistically insignificantly different from zero”); *accord UNC*, 567 F. Supp. 3d at 634–48 (noting that none of the models presented provided a workable race-neutral alternative). Emphasizing the need for *workable* race-neutral alternatives, not merely conceivable ones, the First Circuit affirmed precedent stating that universities did not have to sacrifice academic excellence for diversity and highlighted the fact that under an exclusively race-neutral process (Simulation D, the model proffered by SFFA), “African American representation in Harvard's admitted class would decrease by about 32%.” *Harvard*, 980 F.3d at 194.

48. *Harvard*, 980 F.3d at 195–96 (finding no clear error in the district court's holding that Harvard did not intentionally discriminate against Asian-Americans); *accord UNC*, 567 F. Supp. 3d at 659–62, 667 (concluding that race is not a predominant factor in UNC's admissions process and stating that “underrepresented minorities are admitted at lower rates than their white and Asian American counterparts, and those with the highest grades and SAT scores are denied twice as often as their white and Asian American peers”). No admissions process is perfect, and it is not readily discernible, when there are so many factors to consider, if race predominates unless there is a presumption that because race is even *considered*, then race predominates. *See infra* Part III.

49. *See Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 388–89 (2016) (analogizing universities as akin to states as “laboratories for experimentation,” and concluding that “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission”).

50. *See* Vinay Harpalani, *Asian Americans and the Bait-and-Switch Attack on Affirmative Action*, AM. CONST. SOC'Y (May 13, 2023), <https://www.acslaw.org/expertforum/asian-americans-and-the-bait-and-switch-attack-on-affirmative-action> [https://perma.cc/5344-TLAM] (critiquing the contrived discrimination claim against Asian-Americans as a bait (conflating negative discrimination such as the impact of Athletes, Legacy, Dean's Interest, and Children of Faculty (ALDCs) and implicit bias in evaluating Asian-American candidates) and switch (a violation of a re-interpreted post-racial *Grutter* and *Fisher* means that affirmative action is unconstitutional)).

formalism. And it is a perverse example of interest convergence<sup>51</sup>—the interests of Asian-Americans and whites coalesce in an integrated argument for the preservation of a meritocratic hierarchy with Asian-Americans and whites at the top of the admissions process securing the seats impermissibly set aside for Black and Latinx students<sup>52</sup>—the discrimination privileges whites in the preservation of the status quo.<sup>53</sup>

The Roberts Court transforms clear error analysis—the deferential standard for reviewing lower court decisions—into an irrebuttable presumption that because race could be considered, amongst a myriad of factors, its use as a “plus” factor was akin to race predominating in a neutral process to guarantee an impermissible race-based outcome. This runs counter to post-racial constitutionalism. The Court’s reasoning is advanced through a series of post-racial deceptions.

### III. *SFFA V. HARVARD/UNC*: THE ULTIMATE POST-RACIAL DECEPTION

Doctrinally, it has always been counterintuitive that diversity is a compelling interest in higher education, but not in elementary and secondary education.<sup>54</sup> Chief Justice Roberts’s opinion bridges this conceptual gap by

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51. See Melvin J. Kelley IV, *Retuning Bell: Searching for Freedom’s Ring as Whiteness Resurges in Value*, 34 HARV. J. RACIAL & ETHNIC JUST. 131, 177 (2018) (offering a unified theory of interest convergence illustrating how the claim to whiteness (as property) can be revoked at will: (i) racial progress is permitted as an accommodation to group interests in racial equality “pursuant to a revocable license” [this is the tenuousness of affirmative action]; (ii) access is granted conditionally depending on whether “political, economic, social or psychological benefits . . . accrue to the owners of Whiteness, particularly affluent owners, without dismantling the value of Whiteness itself” [these are the doctrinal compromises underpinning *Bakke* and its progeny]; and (iii) “[o]nce permitting access to Whiteness begins to diminish its value, especially for affluent owners, without a sufficient offset in political, economic, social or psychological benefits, then the license will be curtailed in scope or outright revoked” [this is the reasoning inherent in *SFFA*]); see generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

52. It will be noteworthy as circumstances evolve how this argument will be made when white interests are negatively impacted in post-racial admissions processes. That is, when the number of enrolled Asian-Americans “threaten” white privilege or the presumed share that whites are implicitly entitled to, given the reverse-reverse discrimination rationale. This conflict seems inevitable. Cf. *Harvard*, 980 F.3d at 201 (“Privilege is correlated with race.”). The Court’s obliviousness to structural racism and systemic inequality is graphically illustrated in Chief Justice Roberts’s opinion for the Court in *SFFA*. But see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 384 (2023) (Jackson, J., dissenting) (“Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations.”).

53. Notably, there was no challenge to the ALDCs receiving these tips in the admissions process. See *Harvard*, 980 F.3d at 171 (discussing ALDCs). 67.8% of white applicants are in this category, and while ALDC applicants are less than 5% of Harvard’s applicants, they make up 30% of applicants admitted annually. *Id.*

54. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (distinguishing higher education as a unique context where diversity can be considered, and noting that elementary and secondary schools “are not governed by *Grutter*”); but see Christine Rienstra Kiracofe, *Diversity as a Compelling Interest: The Logical Application of Grutter v. Bollinger to K–12 Schools*, 208 ED. L. REP. 691, 693, 695–703 (2006) (positing that “[w]hile there has been no U.S. Supreme Court decision stating that diversity is a compelling interest



broadening the scope of *Parents Involved* and concluding that the Harvard and UNC admissions programs violate Title VI and the Equal Protection Clause, respectively, because race predominates in admissions decisions at these highly selective private and public universities.<sup>55</sup> Now the diversity interest is viewed as a racial proxy that is impermissible in the elementary, secondary, and post-secondary educational contexts.

“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>56</sup> This post-racial edict underscores the circularity inherent in the Court’s post-racial deception—racism exists (in the sense of proof and remediation) only when it disrupts ostensibly neutral processes. That is, if the perception is that Blacks and Latinx students receive a racial “windfall” that displaces whites (or the proxy interests of Asian-Americans), then it is presumed that race predominates, and the decision-making process is unconstitutional. But what is striking here is that this racial windfall presumption makes it easier to advance reverse discrimination claims and *SFFA* is especially “easy” for the Court in this regard—there is a Model Minority, close in its proximity to whiteness,<sup>57</sup> that has been “injured” by a race-conscious admissions process. Apparently, societal discrimination is circumstantially relevant but not determinative in challenges brought by Black plaintiffs, but it is determinative (and presumed) in claims brought by white plaintiffs who have a lighter evidentiary burden.<sup>58</sup>

Discrimination is presumed in reverse discrimination suits while discrimination must be proven with virtually unattainable exactitude when

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in K–12 schools,” there is strong evidence that diversity is even more significant in the K–12 context).

55. See *SFFA*, 600 U.S. at 217–18, 230–31.

56. *Parents Involved*, 551 U.S. at 748; see generally Ronald Turner, “*The Way to Stop Discrimination on the Basis of Race . . .*,” 11 *STAN. J. C.R. & C.L.* 45 (2015) (critiquing the innate formalism of Chief Justice Robert’s post-racial proclamation).

57. See Joyhanna Yoo, Cheryl Lee, Andrew Cheng & Anusha Ànand, *Asian American Racialization & Model Minority Logics in Linguistics*, 152 *DAEDALUS* 130, 130 (2023) (“Asian Americans have historically been racialized relative to the imagined Black-white racial dichotomy in the United States; thus, their treatment as a model minority reifies ideologized racial hierarchies and obfuscates the ways that racialization processes are mutually constitutive of one another.”). Indeed, this is yet another layer to the Court’s post-racial deception that discrimination against Asian-Americans is equal in scope and kind to the discrimination of white reverse discrimination plaintiffs. See Vinay Harpalani, *The Need for an Asian American Supreme Court Justice*, 137 *HARV. L. REV. F.* 23, 28–32 (2023) (discussing the exploitation of the model minority stereotype and the conflation of “negative action” and “affirmative action” to overturn affirmative action programs).

58. See Brian K. Landsberg, *Race and the Rehnquist Court*, 66 *TULSA L. REV.* 1267, 1304 (1992):

On the one hand, the Justices treat race discrimination on a very general level, so that affirmative action is treated the same as discrimination against blacks [this is formalistic equality]. On the other hand, they require that proof of discrimination and proof of justifications for affirmative action proceed on a very specific level, thus placing a heavier burden on black plaintiffs and on defendants seeking to support affirmative action.

*SFFA* is emblematic of the Court’s privileging of white plaintiffs’ reverse discrimination claims.



the claim is advanced by Blacks and other people of color.<sup>59</sup> The post-racial deception here is that there is a cognizable injury.<sup>60</sup>

The Court's standing jurisprudence has conflated Article III's case and controversy constitutional<sup>61</sup> and prudential requirements<sup>62</sup> so that selective choices are made about whose claims are heard. The personal policy preferences of SFFA's founder Ed Blum have been constitutionalized.<sup>63</sup> Although the lower courts and the Supreme Court found that SFFA established its associational standing, there are serious concerns as to whether this case should have even been heard.<sup>64</sup> Indeed, it is hard to conceive of SFFA's claim as little more than a generalized grievance unworthy of being heard in a federal court.

Notwithstanding uncontroverted facts that there was no discrimination in the Harvard and UNC admissions processes,<sup>65</sup> the Court found standing

59. See *id.* at 1274–75 (Cataloguing twenty-nine Rehnquist Court race decisions and noting a growing trend, now firmly established with the Roberts Court, of reverse discrimination suits brought by whites because of the “climate of political opposition to affirmative action and from the perception that the current Court is friendly to challenges to affirmative action. . . . [I]t may represent a new willingness of the current Court to grant review of such cases.”); see, e.g., *Washington v. Davis*, 426 U.S. 229, 239–46 (1976) (stating that disproportionate impact, without evidence of discriminatory intent or particularized discrimination, is insufficient to prove discrimination under the Fourteenth Amendment). In *Washington v. Davis*, the discriminatory intent requirement is only obliquely referenced in the Court's decision as it is presumed that race predominated in the admissions systems thus making the reverse discrimination claims easy to prove. This, no doubt, explains the Court's expansive and novel reading of standing and its eagerness to overturn decades old precedent.

60. See Brief of Professor F. Andrew Hessick as Amicus Curiae in Support of Respondents at 18, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 3157690 (“The remedy, which goes to the association, thus does not redress an injury actually suffered by the association-plaintiff because the association-plaintiff suffered no injury. The true injury party, the member, receives nothing through a favorable judgment.”); see also Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, U. CHI. L. REV. (forthcoming 2024) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4540176](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540176) [<https://perma.cc/GGC4-4YWU>] (“Associational standing creates a glaring exception to Article III's injury-in-fact requirement. It allows an organization that has not itself suffered any legally cognizable harm to sue based solely on an injury suffered by one or more of its members.”).

61. See U.S. CONST. art. III, § 2, cl. 1.

62. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 108 (2d ed. 1988). Even if injury in fact, causation and redressability are established, a litigant “may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to litigants best suited to assert a particular claim.” *Id.* (quoting *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99–100 (1979)).

63. See Brief of Professor Hessick, *supra* note 60, at 4–5 (“SFFA was created and exists to carry ideological grievances into court . . . . SFFA thus provides a vehicle for those with no personal stake in an issue to require federal courts to adjudicate their personal policy preferences regarding the issue.”).

64. See Morley & Hessick, *supra* note 60 (manuscript at 2) (“The landmark decision overturned years of precedent permitting race-conscious admissions. Making the decision even more remarkable is that the Court should not have decided the case at all.”).

65. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard)*, 397 F. Supp. 3d 126, 195–206 (D. Mass. 2019) (affirming diversity as a compelling interest and concluding that Harvard does not engage in racial balancing; race is not used as a mechanistic plus factor; there were no workable race-neutral alternatives; and there was no intentional discrimination against Asian-American students), *aff'd*, 980 F.3d 157, 184–204 (1st Cir. 2020) (concluding that Harvard's admissions program comported with *Fisher I* and *Fisher II*, there was no evidence of intentional discrimination and that the number of Asian-Americans admitted to

and then proceeded to gut *Bakke*, *Grutter*, and *Fisher II* based on its contrived post-racial constitutionalism. Because race is at issue, the Roberts Court's profound skepticism of race consciousness guaranteed that the Harvard and UNC admissions programs would be declared unconstitutional; this is post-racial determinism,<sup>66</sup> which is the doctrinal engine of the Court's post-racial deception.

#### A. CHIEF JUSTICE ROBERTS'S POST-RACIAL DECEPTION

Compounding the Roberts Court's post-racial deception is its strict adherence to neutrality, formalistic equality through universality,<sup>67</sup> and post-racialism as guiding principles so that any consideration of race disrupts process-based neutrality;<sup>68</sup> the notion that societal discrimination is circumstantially relevant but constitutionally irremediable;<sup>69</sup> and the notion that race-conscious affirmative action is constitutionally noxious because "[e]liminating racial discrimination means eliminating all of it."<sup>70</sup> Context no longer matters.<sup>71</sup> This is because the Court creates its own post-racial reality—the deception that dismantling affirmative action cures the racial ills of society by making the admissions process “fair” for everyone.

Here, the deception is that discrimination has been thoroughly eliminated so that any race-conscious remedial approach will be deemed unconstitutional. Race should be excised from all decision-making. Whiteness, its inherent privilege, and the predominance of race and racism in the American polity is invisible to the Court.<sup>72</sup>

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Harvard has been consistently increasing for decades), *rev'd*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023); *Students for Fair Admissions, Inc. v. Univ. of N.C. (UNC)*, 567 F. Supp. 3d 580, 655–58, 666 (M.D.N.C. 2021) (holding that UNC established that there was a compelling interest in pursuing the educational benefits of diversity, and that the admissions programs passed strict scrutiny).

66. See POWELL, *supra* note 1, at 1–2, 18–19 (arguing that whenever race is a factor in decision-making, race-conscious remedial approaches will be struck down whether in affirmative action, school integration, employment, voting rights, or fair housing initiatives, and concluding that “the Court virtually predetermines the result in all its race decisions”—any incremental benefit for people of color is viewed skeptically as an unconstitutional racial windfall); Cedric Merlin Powell, *Justice Thomas, Brown, and Post-Racial Determinism*, 53 WASHBURN L.J. 451, 452 (2014) (setting out the conceptual premises which makeup the analytical framework of the Court's post-racial determinism).

67. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1601–02 (2009).

68. See Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 547.

69. See *SFFA*, 600 U.S. at 226–27.

70. *Id.* at 206.

71. The Court has discarded this well-settled proposition articulated in Justice O'Connor's opinion in *Grutter*. See *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (“Context matters when reviewing race-based governmental action under the Equal Protection Clause.”); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOWARD L.J. 1, 25 (1995) (noting that in *Adarand*, all nine Justices endorsed the proposition in Justice O'Connor's majority opinion that “strict scrutiny is not ‘fatal in fact’” and that context matters because heightened scrutiny is intended to uncover impermissible practices by the state).

72. See POWELL, *supra* note 1, at 93, 93 n.25 (citing STEPHANIE WILDMAN, MARGALYNNE ARMSTRONG, ADRIENNE DAVIS & TRINA GRILLO, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996)).

Identifying *doxa*—the underlying and unexamined cultural beliefs that reify the transparency of white privilege—Dean Onwuachi-Willig unpacks the narrative structure of Chief Justice Roberts’s post-racial deception:

[T]he “doxa” that Chief Justice Roberts relied on in crafting the majority opinion—the “set of unexamined cultural beliefs that structure[d] [his] understanding of everyday happenings”—involve a simplistic understanding of race and racism that is not grounded in the substantive realities of life for people of color. Such doxa include beliefs (1) that race is not socially constructed and is defined only by skin color; (2) that racism is aberrational; (3) that “Jim Crow racism” is the only racism that law should redress; (4) that racism is so obvious that people of color, including teenagers applying to college, will know all the ways that they are being discriminated against to discuss them in their essays; (5) that treating people “equally” and with “equality” requires treating them all exactly the same without accounting for history and context; (6) that the “traditional” means for measuring “merit” in admissions are race neutral and do not systematically advantage white people; (7) that white people do not still benefit from discrimination that occurred prior to *Brown v. Board of Education*; (8) that affirmative action creates preferences for Black and Latinx people; and (9) that he and his majority colleagues are simply “call[ing] balls and strikes” (as opposed to choosing how to rewrite past precedent and which facts to emphasize and ignore).<sup>73</sup>

These *doxa* closely align with Rhetorical Neutrality<sup>74</sup>—the historical, definitional, and rhetorical myths that form the basis of the Court’s race jurisprudence.<sup>75</sup> Each reflects an abject denial of history (the present-day effects of past discrimination are constitutionally irrelevant because they cannot be measured);<sup>76</sup> a highly circumscribed definition of discrimination (the only remediable discrimination is that which is clearly identifiable and akin to old Jim Crow racism which has been nearly eradicated);<sup>77</sup> and a legitimizing rhetoric, rooted in a contrived tale of racial progress, which privileges the experiences of whites as victims of affirmative action.<sup>78</sup>

The burden of proof for white reverse discrimination plaintiffs is markedly distinct from the one imposed on anti-discrimination claimants of color. Apart from the Court’s eagerness to hear reverse discrimination claims,<sup>79</sup> the Court is attuned to how white claimants “feel” while Blacks

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73. Angela Onwuachi-Willig, *Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 194–96 (2023) (alterations in original) (internal citations omitted).

74. See *supra* note 26 and accompanying text.

75. See POWELL, *supra* note 1, at 13.

76. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 226–27 (2023).

77. See *id.* at 207–08.

78. See Wendy Parker, *Recognizing Discrimination: Lessons from White Plaintiffs*, 65 FLA. L. REV. 1871, 1873–76, 1882–87 (2013) (discussing how the Roberts Court is especially solicitous of the claims of white reverse discrimination plaintiffs).

79. See *supra* Part II.

(and other claimants of color) must proffer particularized proof of intentional discrimination.<sup>80</sup>

This narrative artifice is a post-racial recitation of neutrality—race no longer matters and the elimination of discrimination against white people (reverse discrimination) is the defining purpose of the Fourteenth Amendment. This is the essence of formalistic equality. Any reference to race is constitutionally noxious, especially when it is perceived as a racial windfall to people of color. The Court is selectively and conveniently colorblind (when the protection of the rights of people of color is at issue) and *always* post-racial (when the interests of white claimants are at issue).<sup>81</sup> This explains the “let-them-eat-cake obliviousness” that Justice Jackson references in her powerful dissent.<sup>82</sup>

In race cases, the result is a foregone conclusion<sup>83</sup>—race-conscious programs are constitutionally impermissible because, despite nearly fifty years of precedent, there is no measurable diversity interest that is compelling;<sup>84</sup> race is so noxious that, whenever it is referenced it could be used negatively against disfavored groups like Asian-Americans (and whites);<sup>85</sup> the use of race can lead to stereotyping members of racial groups as monolithic;<sup>86</sup> and finally, there is no logical stopping point for the use of race<sup>87</sup> (although the temporal limit was five years away, the Court concludes that there was no end in sight for the use of racial remedies).<sup>88</sup>

There is a doctrinal inevitability to the Court’s race jurisprudence. Its decisions, built upon the reverse discrimination claims of aggrieved whites, lead to two distinct outcomes—either incremental progress for Blacks and other people of color (this is usually paired with a definitive limitation on

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80. See Khiara M. Bridges, Foreword, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 28 (2022) (“[T]he Court finds racism when white people *feel like* they have been victims of racism . . .”).

81. See *SFFA*, 600 U.S. at 357 (Sotomayor, J., dissenting) (“Instead, what the Court actually lands on is an understanding of the Constitution that is ‘colorblind’ *sometimes*, when the Court so chooses. Behind those choices lie the Court’s own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.”); Bridges, *supra* note 80, at 25–31 (discussing the different standards of proof for non-white and white claimants, and noting that white claimants are more likely to be successful in advancing reverse discrimination claims because “[c]onsequently, facially race-conscious affirmative action laws that may unsettle white people’s racial advantages in hiring and college admissions are deemed constitutionally suspect and are much more likely to be struck down”).

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

83. See Powell, *supra* note 68, at 528.

84. *SFFA*, 600 U.S. at 214–15.

85. See *id.* at 218–21.

86. See *id.* at 220–21.

87. *Id.* at 221.

88. This was an unrealistic aspirational goal articulated by Justice O’Connor in *Grutter* and underscores the Court’s inability to reference the present-day effects of past discrimination. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). The Court’s race jurisprudence has long been devoid of any reference to structural inequality and systemic racism. See, e.g., IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 3–11 (2016); ADAM COHEN, *SUPREME INEQUALITY: THE SUPREME COURT’S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA* xviii (2020); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 53 (2014).

the scope and temporal duration of the remedy)<sup>89</sup> or complete invalidation of well-established precedent as a function of the Court's post-racial constitutionalism.<sup>90</sup> Retrogression and retrenchment are part and parcel of the Roberts Court's race jurisprudence<sup>91</sup>—the Court neutralizes the anti-subordination principle so that the focus under the Fourteenth Amendment is on post-racialism, which is deceptive in its alluring rhetoric of fairness and inclusivity because it ignores structural inequality. The Fourteenth Amendment is interpreted as a mere formalism.

### 1. *The Fourteenth Amendment as Formalism*

Formalistic equality is the defining feature of the Court's post-racial constitutionalism.<sup>92</sup> In *SFFA*, Chief Justice Roberts redrafts the history of the Reconstruction Amendments as inherently post-racial;<sup>93</sup> reimagines the constitutional mandate of *Brown v. Board of Education*;<sup>94</sup> excises diver-

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89. See *Grutter*, 539 U.S. at 342 (“[R]ace-conscious admissions policies must be limited in time . . . . [This requirement] ‘assures all citizens that deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.’” (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989))).

90. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722–25, 747–48 (2007) (distinguishing *Grutter* and striking down voluntary school assignment programs designed to foster diversity and school integration); *id.* at 747–48:

For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way ‘to achieve a system of determining admission to the public schools on a nonracial basis’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

91. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384 (1988) (“The removal of formal barriers, although symbolically significant to all and materially significant to some, will do little to alter the hierarchical relationship between Blacks and whites until the way in which white race consciousness perpetuates norms that legitimate Black subordination is revealed.”).

92. See POWELL, *supra* note 1, at 8, 19–21 (critiquing how the Court constructs a post-racial history that ignores the subordinating effects of white supremacy); David Schraub, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L.J. 599, 602 (2017) (“Today, strict scrutiny is almost exclusively deployed against progressive efforts to ameliorate racialized injustice.”).

93. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 201–02 (2023) (referencing the Civil War in passing as an antecedent to the passing of the Fourteenth Amendment and noting that it reached “aliens and subjects of the Emperor of China,” “a native of Austria,” and a “Celtic Irishmen” (citations omitted)).

94. See *id.* at 203–06 (noting that *Brown* held that “the right to a public education ‘must be made available to all on equal terms’” without noting that the decision eradicated caste-based oppression overturning *Plessy* (citation omitted)); Spann, *supra* note 39, at 600 (describing *Parents Involved* as the Resegregation case and noting the fundamental distortion of *Brown* by the Court: “The *Resegregation* case therefore ‘overruled’ *Brown*’s prohibition on racial oppression, by sacrificing the integration interest of minority school children in order to advance what turns out to be simply the segregationist interest of white parents.”). This same reasoning is applicable to the Court’s opinion in *SFFA*, and there is little, if any, concern about the regression to institutions that are virtually all white. See *supra* note 47 and accompanying text.

sity as a compelling interest;<sup>95</sup> and rejects the settled precedent of *Bakke*, *Grutter*, and *Fisher II*<sup>96</sup> so that several post-racial deceptions emerge.

First, there can be no meaningful judicial review of diversity because it is immeasurable;<sup>97</sup> second, there is no connection between the means adopted to advance diversity and the goals underlying it;<sup>98</sup> third, race is used negatively whenever the expectation interests of whites are disturbed (Asian-American students are mere proxies in this rationale);<sup>99</sup> and, finally, race cannot be used stereotypically to categorize racial groups as monolithic.<sup>100</sup> And because there is no logical stopping point to the noxious use of race,<sup>101</sup> now is the time to stop “discriminating” pursuant to the Court’s temporal limit. Time is up for the use of race because there is no identifiable discrimination to be remedied and diversity cannot be defined meaningfully for constitutional purposes.

#### a. The Post-Racial Reconstruction Amendment

Advancing a deceptively linear post-racial history with no reference to structural inequality and the anti-subordination principle underlying the Fourteenth Amendment, the Court sanitizes its racist history with neutral rhetoric. *SFFA* is a paradigmatic example of Rhetorical Neutrality.<sup>102</sup> The interlocking myths of the Court’s post-racial deception are readily apparent: the historical myth is deployed to tell a story of “progress” in the face of unfortunate events that have now been ameliorated; the definitional myth explodes diversity as a constitutionally permissible goal and instead shifts the burden of proof to administrators to substantiate it as a measurable product of education;<sup>103</sup> and, finally, the rhetorical myth rationalizes *SFFA* as a decision faithful to a post-racial tradition underpinning the Fourteenth Amendment and *Brown*. This flawed reading offers the deceptive allure of fairness while gutting nearly fifty years of precedent.

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95. See *SFFA*, 600 U.S. at 207 (omitting any reference to diversity and concluding that there were only two identifiable compelling interests permitting the use of race—remediating clearly identifiable discrimination and “avoiding imminent and serious risks to human safety in prisons, such as a race riot”).

96. See *id.* at 229 (noting that the Court expressed “serious reservations” about the permissible use of race in *Bakke*, *Grutter*, and *Fisher* and overruling settled precedent *sub silentio*).

97. *Id.* at 214–17.

98. *Id.* at 215–17.

99. See *id.* at 218–21; see also Harpalani, *supra* note 57 and accompanying text; *id.* at 28 (noting the complexity of stereotypes and how they are employed to reify white privilege, and how Asian-Americans “are simultaneously valorized as hardworking achievers and ostracized as menacing foreigners, all to promote White supremacy”); *id.* at 28 n.32 (citing Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *Pol. & Soc’y* 105, 107 (1999)).

100. See *SFFA*, 600 U.S. at 220–21.

101. See *id.* at 221.

102. See *supra* notes 25–26 and accompanying text.

103. See *SFFA*, 600 U.S. at 357 (Sotomayor, J., dissenting) (“To avoid public accountability for its choice [to override diversity as a compelling interest], the Court seeks cover behind a unique measurability requirement of its own creation.”).



What is striking about Chief Justice Roberts's treatment of the legislative history of the Fourteenth Amendment is that it demonstrates that white normativity is the baseline for inclusion in the American polity—there is literally no mention of the anti-subordination principle that is the conceptual foundation of the Thirteenth, Fourteenth, and Fifteenth Amendments. Instead, the Fourteenth Amendment is read as an anti-differentiation amendment<sup>104</sup>—noting that the Equal Protection Clause embodied the “absolute equality of all citizens of the United States politically and civilly before their own laws.”<sup>105</sup> While the Civil War is referenced in the opinion, it is as if this event simply prompted Congress and the states to consider the absolute equality of all citizens to advance the “transcendent aims of the Equal Protection Clause.”<sup>106</sup> This is formalism rooted in the Court's post-racial deception.

Adopting formalistic equality,<sup>107</sup> Chief Justice Roberts interprets the Fourteenth Amendment as a universal, post-racial citizenship document broadly guaranteeing the rights of “aliens and subjects of the Emperor of China,” “native[s] of Austria,” and “Celtic Irishmen.”<sup>108</sup> This discussion seems counterintuitive and oddly out of place because it strains to ignore the central mission of the Fourteenth Amendment which was the eradication of caste-based oppression and the substantive inclusion of the newly emancipated slaves into the American polity.<sup>109</sup> The Fourteenth

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104. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1064 n.16 (2011):

Antisubordination advocates urge that the Equal Protection Clause should be understood to bar those government actions that have the intent or the effect of perpetuating traditional patterns of hierarchy . . . . Those who urge an anticlassification [anti-differentiation] understanding of the Equal Protection Clause, in contrast, take the view that the Constitution prohibits government from “[r]educ[ing] an individual to an assigned racial identity for differential treatment.”

(quoting Helen Norton, *The Supreme Court's Post-Racial Turn Toward a Zero Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 206–07 (2010)). See also Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1012 (1986) (“The anti-differentiation principle, in contrast, does a disservice to this history and fundamental aspiration by asserting that discrimination against whites is as problematic as discrimination against blacks.”); Cedric Merlin Powell, *Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory*, 56 CLEV. ST. L. REV. 823, 831 (2008).

105. *SFFA*, 600 U.S. at 201 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (statement of Rep. Bingham)).

106. *Id.* at 202.

107. See Darren Lenard Hutchinson, “*With All the Majesty of the Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371, 377 (2022) (“The nation has largely extricated formal race from the law, but racism remains intact.”).

108. *SFFA*, 600 U.S. at 202 (citations omitted). Interestingly, African-Americans are erased from this post-racial narrative and replaced with groups that either became white or were granted whiteness by proxy. See Harvey Gee, *Asian Americans and the Law: Sharing a Progressive Civil Rights Agenda During Uncertain Times*, 10 DEPAUL J. SOC. JUST. 1, 12 (2017) (“On a superficial level, Asian Americans seem to be on their way to becoming white through acculturation, education, achievement, intermarrying whites, and achieving professionally.” (quoting Min Zhou, *Are Asian Americans Becoming “White”?*, 2004 CONTEXT 3, 4)); Frank H. Wu, *From Black to White and Back Again*, 3 ASIAN L.J. 185, 211 (1996); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1296 n.24 (2002).

109. See Eric Foner, *The Supreme Court and the History of Reconstruction—And Vice Versa*, 112 COLUM. L. REV. 1585, 1596 (2012) (“[T]he main purpose of the Fourteenth

Amendment made citizens of the newly emancipated slaves, not Celtic Irishmen (the Civil War was not fought to secure white citizenship, but a multi-racial democracy *including* Blacks and affording them birthright citizenship, the privileges and immunities of such citizenship, due process, and equal protection of the laws).

Eschewing any specific reference to slavery and its pernicious legacy, and referencing Jim Crow segregation as a “regrettable norm,”<sup>110</sup> Chief Justice Roberts diminishes the impact of American apartheid and the Court’s active engagement in enshrining the colorline. Conceding that the Court played its “own role in that ignoble history,”<sup>111</sup> Chief Justice Roberts nevertheless posits that the Court came to a profound revelation after “labor[ing]” with the separate but equal doctrine for 58 years:

Some cases in the period attempted to curtail the perniciousness of the doctrine by emphasizing that it required States to provide black students educational opportunities equal to—even if formally separate from—those enjoyed by white students. [citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–350 (1938)]. But the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent . . . . By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.<sup>112</sup>

The colorline is described as “inherent folly” and an attempt to “derive equality from inequality” seemingly because the Court simply did not acknowledge the “inevitable truth” that “[s]eparate cannot be equal.” This antiseptic rendition of the despicable history of racism in this country lets the Court off the hook and makes it seem as if the Court was nobly prescient in repudiating the doctrine of separate but equal. And the Court eludes the central holding of *Missouri ex. rel Gaines*, implying that the decision attempted to preserve the colorline while providing “equality” for

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Amendment had been to protect the rights of the freedmen.”); *id.* at 1599:

Unfortunately, over the past two decades, despite changes in the Supreme Court’s membership, its basic approach to civil rights issues has not changed. The Justices have continued to employ the Fourteenth Amendment’s Equal Protection Clause primarily to support white plaintiffs who claim to be suffering “reverse discrimination” from affirmative action programs.

*See also* Anthony E. Cook, Book Review, *The Temptation and Fall of Original Understanding*, 1990 DUKE L.J. 1163, 1205 (“[W]e should own up to, rather than run away from, one clear and central meaning of the fourteenth amendment—that the amendment’s primary purpose was to protect the class of newly-freed slaves.”); *see generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (arguing that the legislative history of the Fourteenth Amendment was race-conscious through enactment of race-conscious Reconstruction programs).

110. *SFFA*, 600 U.S. at 203. This is, at least implicitly, an acknowledgement of the social construction of race and white normativity, but its significance is muted because of the Court’s liberal individualism. *See, e.g.*, IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477 (2006); Onwuachi-Willig, *supra* note 73, at 204–05 (discussing normative whiteness and the erasure of the nation’s history of racism and how Chief Justice Roberts deploys a linear post-racial narrative of progress in which *Brown* ended formal race-based discrimination).

111. *SFFA*, 600 U.S. at 203.

112. *Id.* (internal citation omitted).

African-American graduate students rather than ordering their admission to the in-state law school.<sup>113</sup>

Recasting the Fourteenth Amendment and the history of Reconstruction as little more than the expansion of post-racial universal citizenship rights, Chief Justice Roberts's opinion is the embodiment of the historical myth of Rhetorical Neutrality:

[There is] a singular focus on the formalism of equality, its underlying neutrality, and a shift from the anti-caste and anti-subordination principles, rooted in the Fourteenth Amendment, to a post-racial anti-differentiation principle. The anti-differentiation principle, meaning that the similarly situated should not be treated differently because of race, is a neutral principle premised on formal equality.<sup>114</sup>

And this formalism is the foundation of the reimagining of *Brown*—the post-racial deception that the eradication of the doctrine of “separate but equal” was simply an affirmation of formalistic equality.

The historical myth, then, leads to the definitional myth of Rhetorical Neutrality—the Fourteenth Amendment's anti-subordination principle is scuttled, and discrimination is defined as any disruption of the expectation interests of white students. In this post-racial deception, discrimination does not exist unless it impacts white expectation interests—the crux of any reverse discrimination claim—whether it is going to the school of choice in a public school system (*Parents Involved*) or gaining admission to Harvard or the University of North Carolina (*SFFA*). Chief Justice Roberts exploits the doctrinal limitations of *Brown*:

[A]lthough the court in *Brown v. Board of Education* condemned legalized segregation in schools as inherently unequal, and rejected the property right of whites in officially sanctioned inequality, it “failed to expose the substantive inequality in material terms produced by white domination and race segregation.” De facto white privilege remained unaddressed. *Brown* ratified and reified the status quo of substantive inequality and sheltered white expectations of race-based privilege. The transition from old to new forms of whiteness as property is achieved in this legitimation of substantive inequality and settled expectations of relative white privilege.<sup>115</sup>

Chief Justice Roberts plants this deception—that *Brown* was not about subordination or subjugation of Blacks students in a racial caste system but post-racial school assignments—sixteen years earlier in *Parents Involved*,<sup>116</sup>

113. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350–52 (1938) (rejecting practice of Black students leaving Missouri to obtain the same legal education afforded white students within the state and concluding that the petitioner was entitled to admission to the state university's law school).

114. POWELL, *supra* note 1, at 13–14 (citing CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 340 (1993)).

115. Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 *HARV. J. RACE & ETHNIC JUST.* 7, 9 (2015) (quoting Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1752 (1993)).

116. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747–48 (2007):

and it is in full bloom in *SFFA*. The Court legitimizes the settled expectations of white privilege in college admissions.

Next, Chief Justice Roberts completed the doctrinal and historical distortion of *Brown* that he began in *Parents Involved*.<sup>117</sup>

b. The Distortion of *Brown* and the Fallacy of Linear Progress

Quoting Robert L. Carter's<sup>118</sup> oral argument in *Brown*, Chief Justice Roberts reinterprets *Brown* as a post-racial decision advancing formalistic equality:

“We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” There is no ambiguity in that statement.<sup>119</sup>

Yet Chief Justice Roberts's declaration of clarity belies the ambiguity fostered by his own interpretation. Indeed, Judge Carter forcefully rejected this cramped (post-racial) interpretation of *Brown*.<sup>120</sup>

In self-congratulatory rhetoric, Chief Justice Roberts triumphantly states that *Brown* prompted the end of segregation in all areas of life, as the Court “began routinely affirming lower court decisions that invalidated all manner of race-based state action.”<sup>121</sup> This post-racial linear

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For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County [Louisville], the way “to achieve a system of determining admission to the public schools on a nonracial basis” is to stop assigning students on a racial basis.

(internal citation omitted).

117. *See id.* at 747 (holding that *Brown* prohibits differential treatment based on race with no distinction between state-mandated invidious discrimination and a voluntary plan designed to advance and preserve diversity).

118. Co-counsel in *Brown* and later federal judge in the Southern District of New York. *The Case That Changed America: Brown v. Board of Education*, LEGAL DEF FUND, <https://www.naacpldf.org/brown-vs-board/meet-legal-minds-behind-brown-v-board-education> [<https://perma.cc/QN4B-6DSA>].

119. *Parents Involved*, 551 U.S. at 747 (quoting Transcript of Oral Argument at 7, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1)).

120. *See* Mark Tushnet, *Parents Involved and the Struggle for Historical Memory*, 91 *IND. L.J.* 493, 494–95 (2016):

The surviving lawyers, by then elderly, who participated in the *Brown* litigation immediately responded. Judge Carter said, “All that race was used for at that point in time was to deny equal opportunity to black people . . . . It’s to stand that argument on its head to use race the way they use it now.” Jack Greenberg, another lawyer who worked on *Brown* . . . said that Chief Justice Roberts’s characterization of the plaintiffs’ position in *Brown* was “preposterous.” The plaintiffs “were concerned with the marginalization and subjugation of black people.” And William T. Coleman, Jr., who as a young lawyer had assisted in preparing the arguments in *Brown*, called the opinion [in *Parents Involved*] “dirty pool” and “100 percent wrong.”

(internal citations omitted).

121. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 204 (2023).

progression<sup>122</sup> excises years of struggle, strife, and even violence from our history and instead aggrandizes a “transformative promise ‘stemming from our American ideal of fairness.’”<sup>123</sup> Fairness is a nebulous concept<sup>124</sup> unmoored from the constitutional mandate of the Fourteenth Amendment, which is the eradication of caste-based oppression and subordination.

The anti-subordination principle is disconnected from post-racial fairness—a defining feature of formalistic equality—and the *SFFA* opinion creates a post-racial right of fairness which presumes “inequality” whenever race is considered and whites (and Asian-Americans) do not receive the advantageous results they expect. Fairness underpins the anti-differentiation principle.<sup>125</sup>

Thus, discrimination must be defined in a manner that reflects the post-racial imperative of “do[ing] away with all governmentally imposed discrimination based on race.’ . . . Eliminating racial discrimination means eliminating all of it.”<sup>126</sup> And to eliminate all discrimination the Court jettisons its own precedent by concluding that the compelling diversity interest recognized for nearly fifty years in *Bakke*,<sup>127</sup> and later reaffirmed in

122. *See id.* at 205 (cataloguing integration in parks, golf courses, neighborhoods, buses and trains, juries, and marriages); Onwuachi-Willig, *supra* note 73, at 208 (noting that Chief Justice Roberts’s opinion “ignored many of the forms of discrimination and subordination that Justices Jackson and Sotomayor included in their fuller versions of the nation’s history (like redlining), denying the existence of anything other than Jim Crow separate-but-equal racism”). Khiara Bridges conceptualizes this as an example of the Court’s racial common sense; that is, recognizing only the most virulent forms of racist oppression from yesteryear. Bridges, *supra* note 80, at 24:

When confronted with a claim of racial discrimination, the Roberts Court appears to be simply determining whether the alleged discrimination resembles what the country did in the pre-Civil Rights Era. If the Court sees a resemblance between the present-day harm and the racism of yesteryear, the Court provides relief. If it sees no resemblance, it provides no relief.

123. *SFFA*, 600 U.S. at 205 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

124. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 962, 964 (noting that the stock reverse discrimination narrative “frames the affirmative action debate in terms of racial preferences that depart from normal, universal, unbiased, and purportedly fair standards for determining merit” and concluding that “[f]airness, like merit, is also a concept with varying definitions”).

125. *See id.* at 955 n.11:

The history of affirmative action can be seen as a struggle over the fairness of the modern meritocracy, with minorities arguing that educational measures shouldn’t be the deciding factor in who gets ahead and opponents of affirmative action saying that to bend the criteria for blacks is to discriminate unfairly against more deserving whites.

(quoting Nicholas Lemann, *Taking Affirmative Action Apart*, N.Y. TIMES (June 11, 1995), <https://www.nytimes.com/1995/06/11/magazine/taking-affirmative-action-apart.html> [<https://perma.cc/G7CQ-B82Y>]). This is the crux of a reverse discrimination claim—a presumption that if a white person is unsuccessful, there must be a less deserving person of color occupying a space reserved for the most meritorious—in a neutral system, similarly situated applicants should be treated the same. As a practical matter, this is virtually impossible given how objective and subjective factors coalesce in evaluating candidates. This, of course, ignores the cumulative effects of structural inequality. *See generally* DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).

126. *SFFA*, 600 U.S. at 206 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

127. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (Powell, J., announcing the judgment of the Court).



*Grutter*,<sup>128</sup> *Parents Involved*,<sup>129</sup> and *Fisher II*,<sup>130</sup> is little more than an immeasurable constitutional platitude. Astonishingly, the Court now claims not to know what diversity is because it cannot be measured.<sup>131</sup> Yet another post-racial deception.

*Brown*'s revised post-racial history leads to a narrow definition of discrimination: "Just as the historical myth strips the historical core from the [Fourteenth Amendment], the definitional myth reinforces this historical distortion by disconnecting race from its social context. This rhetorical move essentially diminishes the scope and impact of structural racism by defining discrimination narrowly."<sup>132</sup> In *SFFA*, however, discrimination is not so much defined as it is inferred by the Court's privileging the reverse discrimination claims of aggrieved white and Asian-American students. Because the injury to white and Asian-American applicants is presumed, diversity is casually shelved by the Court.<sup>133</sup> Thus, *Bakke*, *Grutter*, and *Fisher II* are re-imagined as post-racial decisions.

### c. *Bakke*, *Grutter*, and *Fisher II*

Rejecting the diversity principle as a compelling interest, the Court has re-interpreted affirmative action as a set of post-racial measurables. Specifically, "laudable goals" must have an identifiable (even quantifiable)

128. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003):

But we have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination. Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

129. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007) (noting two interests that qualify as compelling in reviewing racial classifications—remedying the identifiable effects of past intentional discrimination and "[t]he second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*").

130. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 381 (2016) (concluding that University of Texas met its burden by showing that its admission program was narrowly tailored in pursuing "the educational benefits that flow from student body diversity" (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310 (2013))).

131. Justice Thomas has been particularly effective, as a Black proxy, in feigning ignorance as to what diversity is, focusing primarily on its stigmatizing effects. See *SFFA*, 600 U.S. at 253 (Thomas, J., concurring) ("Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields educational benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link."); see *id.* at 271 (discussing the risk of racial stigma that race-based admissions generate).

132. POWELL, *supra* note 1, at 15.

133. See Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 320 (2015):

This is the essence of the innocence paradigm; it rests on the premise that whites are "innocent" of continuing racial inequality and that they are, thereby, "injured" by state considerations of race that seek to redress it. As a result, the use of race to identify persons for the purpose of distributing government benefits is itself regarded as harmful, even if white plaintiffs have not been specifically denied a government benefit as a result of the contested policy itself.

Indeed, *SFFA* is the embodiment of the innocence paradigm with the added feature of the appropriation of whiteness by Asian-Americans who "stand in" for whites and expand the scope of the presumptive injury.



benefit—diversity must be conducive to measurement. And since it cannot be, to the Court, then diversity is not a compelling interest but rather a proxy for race that predominates in what should be a neutral and fair process. This is a glaring deception that is a product of the Court's formalism.

The Court's formalism leads to an interpretation of *Bakke* and its progeny that fundamentally alters how race-conscious admissions programs will be evaluated. Under this analysis, diversity is no longer a compelling interest. Indeed, Chief Justice Roberts rewrites the Court's affirmative action jurisprudence by acknowledging "only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot."<sup>134</sup> Notwithstanding previous decisions of the Court affirming diversity as a compelling interest, diversity is conspicuously absent from Chief Justice Roberts's opinion. Employing a doctrinal sleight of hand, diversity disappears as a compelling state interest, only to reappear as Chief Justice Roberts distinguishes *Bakke*, *Grutter*, and *Fisher II*; and this is particularly perturbing because he acknowledges that diversity is a compelling interest in *Parents Involved*<sup>135</sup> only to limit its applicability to higher education.<sup>136</sup>

*i. Diversity as a Compelling Interest?*

Under the Court's race jurisprudence, context has always mattered,<sup>137</sup> until now. Characterizing *Bakke* as a "deeply splintered"<sup>138</sup> and "fractured"<sup>139</sup> decision because it was a plurality opinion, Chief Justice Roberts advances a post-racial critique of the decision and its doctrinal progeny rooted in the diversity principle.

By focusing on clearly identifiable discrimination and prevention of imminent violent risks in prison race riots, Chief Justice Roberts completely shifts the analysis so that there are only two instances where race consciousness is permissible—when discrimination is obviously identifiable

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134. *SFFA*, 600 U.S. at 207 (internal citations omitted).

135. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722 (2007).

136. *See id.* at 725:

The Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

137. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("Strict scrutiny is not 'strict in theory, but fatal in fact.'" (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995))); *id.* at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

138. *SFFA*, 600 U.S. at 208.

139. *Id.* at 211 (quoting *Grutter*, 539 U.S. at 325). While Chief Justice Roberts is disparaging of the precedential value of the *Bakke* plurality, he is disingenuously selective in his use of precedent. *See Onwuachi-Willig, supra* note 73, at 209–11.

or to prevent a prison riot.<sup>140</sup> Quite strikingly, Chief Justice Roberts does not include diversity as a compelling interest until he limits its applicability to higher education, discards it as immeasurable, and then concludes that it was never truly adopted by a true majority of the Court, so its precedential value was questionable (this rhetorical posture downplays the significance of overruling a nearly 50-year-old precedent).<sup>141</sup>

Here, Chief Justice Roberts at least acknowledges diversity as a compelling interest,<sup>142</sup> but he notes that race could not be used stereotypically, nor could it be used negatively—“to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference.”<sup>143</sup> This deceptive notion of fairness is inverted so that African-American and Latinx students are recipients of the spoils of a racist system turned against white and Asian-American students. The diversity interest is *presumed* to be stereotypical and negatively aimed at whites and Asian-American students; there is little, if any, evidence of this in the extensive trial and appellate records.<sup>144</sup>

This culminates in a fundamental misreading of the core meaning of *Grutter* that race can be used in a holistic admissions process focusing on the individual, and that critical mass is *not* a quota, but meaningful inclusion of diverse viewpoints in a classroom exchange across cultures. Obviously, there are problems with this neutral, incremental, and process-based approach to substantive equality,<sup>145</sup> but it is much better than Chief Justice Roberts’s cramped post-racial deception. The diversity principle has been stunted.

Diversity, as a constitutional principle, is stripped threadbare as the Court essentially overrules *Grutter* by gutting each diversity rationale acknowledged since 2003 by the Court:

[Harvard and UNC] have fallen short of satisfying that burden [to provide sufficiently measurable method of using race]. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) “training future leaders in the public and private sectors”; (2) preparing graduates to “adapt to an increasingly pluralistic society”; (3) “better educating its students through diversity”; and (4) “producing new knowledge stemming from diverse outlooks.” UNC points to similar benefits, namely, “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens

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140. *SFFA*, 600 U.S. at 207.

141. *See id.* at 211 (noting how lower courts struggled to discern what was binding precedent in *Bakke*, and stating that 25 years later in *Grutter*, “in another sharply divided decision, the Court for the first time ‘endorse[d] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions,’” but emphasizing the Court’s limits on the use of race and the fact that the use of race had to be narrowly cabined (alteration in original) (quoting *Grutter*, 539 U.S. at 325)).

142. *See id.*

143. *Id.* at 212.

144. *See supra* Part II.

145. *See generally* Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014).

and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”<sup>146</sup>

Noting that “these are commendable goals, [but that] they are not sufficiently coherent for purposes of strict scrutiny,”<sup>147</sup> the Court advances a formalistic slippery slope argument that is high on contrivance and low on analytical coherence: “How is a court to know whether leaders have been adequately ‘train[ed]’; whether the exchange of ideas is ‘robust’; or whether ‘new knowledge’ is being developed?”<sup>148</sup> These rhetorical questions prove the opposite point and underscore how counterintuitive the Court’s reasoning is—the questions cannot and should not be answered by jurists because they are ill-equipped to expound on the reasonable curricular choices of scholars and administrators. Moreover, it is especially disheartening, in these existentially fraught times for democracy itself,<sup>149</sup> that the Court would so causally disregard bedrock diversity goals and their First Amendment underpinnings that are integral to our constitutional canon.

The Court nevertheless exudes confidence to make this determination because strict scrutiny has been made even more rigorous<sup>150</sup>—it is applied now to excise all race from decision-making—and the traditional deference accorded to educational administrators in the unique context of higher education has been severely limited, if not completely undermined.<sup>151</sup> The measurability argument is a post-racial deception—it gives the false impression that bedrock concepts like leadership, democratic ideals, and robust engagement in the ideological marketplace can be neatly quantified to satisfy the Court’s newly minted standard of constitutionality. “Some deference” now literally means no deference.<sup>152</sup>

There are three post-racial rhetorical moves employed in Chief Justice Roberts’s opinion. Without explicitly mentioning that *Bakke*, *Grutter*, and *Fisher II* have been overruled, the opinion advances the post-racial

146. *SFFA*, 600 U.S. at 214 (internal citations omitted).

147. *Id.*

148. *Id.* (alteration in original).

149. See, e.g., David M. Driesen, *The Spector of Dictatorship: An Introduction to the Special Issue*, 72 SYRACUSE L. REV. 1419, 1429 (2022) (noting that “the Supreme Court has continued to pave the way for future autocracy by championing the unitary executive theory”); Andrea Scoseria Katz, *Revisiting America’s Guardrails*, 70 DRAKE L. REV. 577, 586–93 (2023) (recounting the events leading to the January 6, 2021 insurrection and former President Trump’s attempt to undermine democracy in its aftermath).

150. See *SFFA*, 600 U.S. at 217 (“Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.”).

151. See *id.*

152. See, e.g., *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365, 376 (2016) (“[T]he decision to pursue ‘the educational benefits that flow from student diversity’ . . . is, in substantial measure, an academic judgment to which *some*, but not complete judicial deference is proper.” (emphasis added) (quoting *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 310 (2013))); but see *SFFA*, 600 U.S. at 217 (rejecting the universities’ arguments as simply “trust us,” and stating that “we have been unmistakably clear that any deference must exist ‘within constitutionally prescribed limits’ and that ‘deference does not imply abandonment or abdication of judicial review’” (citations omitted)).

deception that race has tainted an otherwise neutral and meritocratic process because white and Asian-American students have been “displaced”<sup>153</sup>: (i) while the list of permissible bases for the use of race in decision-making is severely limited to two grounds, Chief Justice Roberts offers a *narrower* basis because he substitutes avoiding the risk of prison riots for diversity, which is not mentioned until later in the opinion;<sup>154</sup> (ii) contextual analysis is completely rejected, under an expansive reinterpretation of *Fisher I* and *Fisher II*, and the focus is on the goals of diversity, which, while laudable, cannot be measured in a manner that confirms a substantive educational benefit—so all of the previously acknowledged diversity interests are cast aside in one broad sweep;<sup>155</sup> and (iii) diversity is re-conceptualized, so it is a proxy for race *only*—which cannot be deployed negatively or stereotypically<sup>156</sup>—and not the broad definition of difference and inclusion used and relied upon by school administrators especially referencing the standards set out by the Court in *Fisher II*.<sup>157</sup>

*ii. No Negative or Stereotypical Use of Race*

Erasing the anti-subordination principle from the Fourteenth Amendment, Chief Justice Roberts states that the “race-based admissions systems [of Harvard and UNC] . . . fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.”<sup>158</sup> After discarding diversity as a compelling interest, Chief Justice Roberts’s next rhetorical move is to refashion it as a negative burden on the expectation interests of white and Asian-American applicants because their admission numbers decreased. This, to the Court, is clear evidence that race has been used as a “negative” against white and Asian-American students:

[O]ur cases have stressed that an individual’s race may never be used against him in the admissions process. Here, however, the 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.”<sup>159</sup>

The selectivity in Chief Justice Roberts’s use of the 11.1% decrease as akin to some type of racial “penalty” is deceptive—it omits any consideration of the yield rate<sup>160</sup> and it inflates the limited significance of the cited percentage; indeed, the First Circuit concluded, finding no constitutional

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153. See *supra* notes 45–47 and accompanying text.

154. See *SFFA*, 600 U.S. at 207.

155. See *id.* at 214–17.

156. See *id.* at 218.

157. See *Fisher II*, 579 U.S. at 376–77.

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

159. *Id.* (internal citations omitted).

160. “Empirically, Asian American and white students accept offers of admission at higher rates than African American, Hispanic, Native American, and multiracial applicants.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (Harvard), 980

violation in Harvard's admissions program, that the 11.1% decrease hewed closely to the percentages approved in *Grutter*.<sup>161</sup> There is *no* concern with the dramatic reduction in African-American and Latinx students if race, *as one of many factors*, is eliminated from consideration.<sup>162</sup>

Relying upon the 11.1% decrease in admissions to imply that there was a racial "penalty" against white and Asian-American applicants, thereby proving that race was used negatively against them, deceptively gives the impression that the lower courts found an "injury" and a constitutional violation where none existed. As a function of its post-racial determinism,<sup>163</sup> the only way to find a violation is to erase the legislative history of the Fourteenth Amendment, gut the diversity principle, and overrule *Bakke*, *Grutter*, and *Fisher II sub silentio*.

Expanding this contrived injury (or racial penalty) rationale even further, the Court goes on to conclude that "[c]ollege admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."<sup>164</sup> This formalistic deception is rooted in the notion that since discrimination has largely ended (Chief Justice Roberts's linear history advances this claim),<sup>165</sup> then any use of race taints the admissions process. Of course, this hyperbolic proposition is premised on the fact that African-American and Latinx students are receiving a racial windfall because white and Asian-American students are not admitted at their expected rate, which is never truly identified, and since there is a "decrease" in their numbers it must be attributable to "too many" people of color taking the place of deserving white and Asian American students. This stock narrative is the foundation of the maintenance of white privilege. "In essence, the Chief Justice offered a narrative in *SFFA* that could 'justify the world as it is, that is, with whites on top and browns and blacks at the bottom,' whether or not it reflected realities of race other than his own and other Whites?"<sup>166</sup>

Just as race cannot be used negatively, it cannot be used to perpetuate stereotypes. Here, Chief Justice Roberts recasts the core meaning of

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F.3d 157, 171 (1st Cir. 2020) (emphasis added), *rev'd* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181 (2023).

161. *Id.* at 191 n.29:

The United States attempts to make the impact of Harvard's use of race appear more significant than it is. It argues that Harvard "inflicts an 11.1% penalty" on Asian Americans because, absent the consideration of race, their representation would increase from 24% to 27%. It then claims that Harvard provides a 133% bonus to African Americans because their representation increases from 6% to 14%. *While these calculations are correct, similar calculations show that race was used about as extensively in the program approved in Grutter.*

(emphasis added).

162. *See id.* at 180 (concluding that there were no workable race neutral alternatives and stating that "eliminating race as a factor in admissions, without taking any remedial measures, would reduce African American representation at Harvard from 14% to 6% and Hispanic representation from 14% to 9%" (citation omitted)).

163. *See supra* note 66 and accompanying text.

164. *SFFA*, 600 U.S. at 218–19.

165. *See supra* Part III.A.

166. Onwuachi-Willig, *supra* note 73, at 209 (citation omitted).

diversity—the acceptance of difference and inclusion<sup>167</sup>—and inverts it to mean a monolithic depiction of individuals as members of racial groups categorized by their stereotypical commonality. Rather, it is Chief Justice Roberts’s determination of who “belongs” in the colleges and universities that is emblematic of the very stereotypes that he professes the Fourteenth Amendment prohibits.<sup>168</sup> This is because throughout his opinion, Chief Justice Roberts presumes that race predominates—it is the determining factor that “tips the scale” in favor of African-American and Latinx applicants<sup>169</sup>—and disadvantages white and Asian-American applicants. This ignores the fact that *Grutter* embraced a broad conception of race.<sup>170</sup> And it is a post-racial deception to presume that “when a university admits students ‘on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike.’”<sup>171</sup> Of course, this would be true if race *alone* was the only basis for students being admitted to Harvard and UNC, but that is *not* the case nor is Chief Justice Roberts’s reasoning supported by precedent.<sup>172</sup> Chief Justice Roberts completely misconstrues how holistic admissions review works.<sup>173</sup>

The “hurt” and “injury” that Chief Justice Roberts locates in stereotyping is never clearly defined<sup>174</sup>—it is not the kind of stigmatic harm that impacts people of color because it is a product of the colorline. This harm, although amorphous, is ostensibly the harm to the expectation interests of white and Asian-American students. In tandem, the prohibition against the negative use of race—so that whites and Asian-Americans are not burdened by race-conscious remedial efforts to eradicate structural inequality—and the prohibition against stereotypical classifications, which has been contorted to mean racial group classifications rather than *individualized* assessments of *difference* for inclusion, have been used to create an injury that never existed. The subordination of Black and Brown people is missing from Chief Justice Roberts’s post-racial narrative—this is a glaring deception as well because it presumes that discrimination has ended and that any positive race-conscious remedial efforts must be eliminated as

167. See *Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (noting that a critical mass of students is not a quota, but an assemblage of a class that is “both exceptionally academically qualified and *broadly* diverse,” promoting “cross-racial understanding,” breaking down racial stereotypes, and an engaged classroom rooted in First Amendment principles (emphasis added)).

168. See Onwuachi-Willig, *supra* note 73, at 213:

The Chief Justice—all while denigrating the dissenters, Harvard, and UNC for engaging in racial stereotyping—consistently engaged in his own harmful stereotyping. Throughout his opinion, he assumed that Black and Latinx students largely did not belong at either Harvard or UNC, yet assumed—without any question (not even once)—that Whites and Asian Americans fully earned their spots without any benefits from racial advantage.

169. *SFFA*, 600 U.S. at 195 (“In the Harvard admissions process, ‘race is a determinative tip for’ a significant percentage ‘of all admitted African American and Hispanic applicants.’”).

170. See *Grutter*, 539 U.S. at 330.

171. *SFFA*, 600 U.S. at 220–21 (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995)).

172. See Onwuachi-Willig, *supra* note 73, at 194, 213 n.115.

173. See *id.* at 213 n.115.

174. See *SFFA*, 600 U.S. at 220–21.



well: “Eliminating racial discrimination means eliminating all of it.”<sup>175</sup> And a step toward eliminating it is the Court’s constitutionalizing an end point for the use of race.

*iii. No Logical End Point*

After identifying the “injury” to nonminority applicants, the Court insists that race-conscious admissions must end *now*:

*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.”

Twenty years later, no end is in sight.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. [Harvard’s and UNC’s] admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.<sup>176</sup>

What was an aspirational comment, in *dicta*, by Justice O’Connor in *Grutter* fixing twenty-five years as the “end point” because *Grutter* was decided twenty-five years after *Bakke* and was the first time that the Court agreed as a majority that diversity was a compelling interest, has now been transformed into a constitutional deadline whose time has come five years earlier.<sup>177</sup> This is an example of what Professor Darren Hutchinson calls “Racial Exhaustion”; there is no end in sight for the present-day effects of past discrimination, the badges and incidents of slavery in the American society, and the reinvigoration of white supremacy in all of its virulent forms, but a post-racial Court wants nothing to do with the messy business of race (unless, of course, it disrupts the deeply rooted advantages of white privilege).<sup>178</sup>

What is fantastic about the Court’s insistence on a “logical end point” for race-conscious remedial approaches is that there is absolutely no appreciation of racism as structural, enduring, and persistent over generations.

175. *Id.* at 206.

176. *Id.* at 213 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003)).

177. *See id.* at 224–25.

178. *See* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 957–58 (2009):

The Court’s affirmative action jurisprudence has also viewed with skepticism claims of racial injustice toward persons of color . . . . The Court’s reluctance to view race as a contemporary barrier to economic opportunity mirrors majoritarian public opinion; it also follows the same historical logic that opponents to racial egalitarianism have consistently advanced to contest and dismiss the importance of race-based remedies.

The permanence of racism is well-established,<sup>179</sup> but the Court chooses to ignore it in its post-racial bliss. Here, the post-racial deception is that discrimination will dissipate if we stop referencing race. But this willful blindness only preserves, maintains, and reifies systemic racism and structural inequality—retrogression and retrenchment are recurring events in the Court’s race jurisprudence.<sup>180</sup> The Court’s misplaced devotion to a mythical history of colorblind progress and post-racial constitutionalism stands in stark contrast to reality.

Implying that Harvard and UNC employ racial quotas that will never end because each institution is impermissibly trying to achieve a proportional racial balance and treating applicants as members of racial groups rather than individuals,<sup>181</sup> Chief Justice Roberts concludes that “[t]heir admissions programs ‘effectively assure[] that race will always be relevant . . . and that the ultimate goal of eliminating’ race as a criterion ‘will never be achieved.’”<sup>182</sup> This post-racial deception invents a quota where none exists, retracts the Court’s deferential posture of permitting institutions to conduct periodic reviews to adjust their practices to ensure diversity, and then offers a breathtaking rebuke of the principal dissent that illuminates how profoundly disconnected the Court is from its own legacy of advancing the subordination of Black people and other people of color.<sup>183</sup> Perhaps this explains why the Court is so actively engaged in erasing the anti-subordination principle from the core of the Fourteenth Amendment.

The invented quota rationale is perhaps the most disingenuous and jarring aspect of Chief Justice Roberts’s post-racial deception. This purportedly substantiates the “injury” to white and Asian-American applicants, but instead belies the core contention of their reverse discrimination claims.<sup>184</sup>

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179. See Derrick Bell, *The Racism is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571, 573 (1993):

[R]acism is an integral, permanent, and indestructible component of this society . . . . “Black people will never gain full equality in this country. Even those Herculean efforts we hail as successful will produce no more than temporary ‘peaks of progress,’ short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies. We must acknowledge it, not as a sign of submission, but as an act of ultimate defiance.”

(quoting DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992)).

180. See Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1194–95 (2021) (“Despite a long period of racial retrenchment, the pursuit of racial transition continues. . . . In short, racism did not end with the abolition of slavery and Jim Crow—it endured and evolved. Nor was racial transition completed with the First and Second Reconstructions—it was postponed and prolonged.”). The Court has been actively engaged in postponing, prolonging, and undermining progress and transition throughout its existence as the Highest Court in the Land.

181. See *SFFA*, 600 U.S. at 222–23.

182. *Id.* at 224 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

183. See *id.* at 223–25, 227–28.

184. The percentages for *all* people of color listed in the chart as admittees to Harvard are small in range: African-Americans (10%–12%); Hispanic (Latinx) (8%–12%); and Asian-Americans (18%–20%). *Id.* at 222. While these numbers are incrementally small, the percentage of Asian-Americans admitted is *higher* than that for African-Americans and Latinx students. The Court does not explain why this is an “injury.” And there is no concern that

He crafts a *Share of Students Admitted to Harvard by Race* chart<sup>185</sup> depicting a consistent range of percentages of African-American, Hispanic (Latinx), and Asian-American admittees to Harvard. Dismissing the assertion that race-conscious admissions programs will end once there is “meaningful representation and meaningful diversity”<sup>186</sup> because the proffered metric are “[n]umbers all the same,”<sup>187</sup> Chief Justice Roberts concludes that,

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups . . .

UNC’s admissions program operates similarly. The University frames the challenge it faces as “the admission and enrollment of underrepresented minorities,” a metric that turns solely on whether a group’s “percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina.” The University “has not yet fully achieved its diversity-related educational goals,” it explains, in part due to its failure to obtain closer to proportional representation.<sup>188</sup>

The phrase “[n]umbers all the same” is implicitly equated with a quota. That is, since the range is “consistent” year after year, it must be part of a predetermined racial result.<sup>189</sup> This totally misconstrues previous precedent and operates to “overrule” *Grutter* and *Fisher* without explicitly saying it.<sup>190</sup> What stands out about the chart is that there is *no* reference to the total number of applications in each of the years catalogued (2009–2018); and, tellingly, there is no column for the white share of class,<sup>191</sup> which is odd since white students advanced their reverse discrimination claims with

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African-American and Latinx admittees are *limited* in the upper range to 12% compared to an upper limit of 20% for Asian-Americans.

185. *Id.*

186. *Id.* at 221 (citation omitted).

187. *Id.*

188. *Id.* at 222–23 (internal citations omitted).

189. This flawed presumption does not consider the limited *pool* of eligible and qualified African-American, Latinx, Asian-American (and white) applicants as a comparative sample. Moreover, because of the requirement of periodic review, this means that universities will adjust, year-to-year, to ensure constitutionally permissible diversity. This proposition was overruled in *SFFA*. *Id.* at 225 (“But *Grutter* never suggested that periodic review could make unconstitutional conduct constitutional. To the contrary, the Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted.”). The Court rewrites its own precedent to create a quota where none existed. See Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54, 60–64 (2017) (noting that *Fisher* introduced a measurability requirement for affirmative action goals, and noting that “*Grutter* suggests that while race-conscious measures *are* being used, a measure of *fluctuation* in minority enrollment may avoid the inference that an admissions program operates as a racial quota”); see also *id.* at 69 (noting that there is a degree of constitutionally permissible imprecision, and stating, “Thus, universities that wish to enroll a diverse student body consistent with constitutional constraints should measure diversity using broad and imprecise ‘educational values’ rather than specific and quantifiable enrollment goals.”). Neither approach mattered with this Court.

190. See *SFFA*, 600 U.S. at 224–25.

191. See *id.* at 222.

Asian-American students. This gives the impression of a racial hierarchy with minorities fighting for limited spaces in white institutions—this conflict is fueled by the false narrative of discrimination against Asian-Americans who stand in as a proxy for whiteness.<sup>192</sup> Moreover, it is presumed that Asian-Americans meet meritocratic standards while Blacks and Latinx students receive a racial windfall.<sup>193</sup>

And a number that is *never* mentioned by the majority opinion, or the concurrences, is that both Harvard and UNC are overwhelmingly white institutions,<sup>194</sup> and while considering race, as one of many factors, has made the institutions more diverse, the student population of color is still demonstrably small.<sup>195</sup> Affirmative action is conceived as a fight for limited places in predominantly white spaces<sup>196</sup>—it is as if too many seat numbers have been given to Blacks and Latinx students as it is presumed that race predominates in the admissions process, thus whites (and Asian-Americans) are displaced. The Court decides that this must end.

Concluding that there is no end in sight for the use of race-conscious admissions programs,<sup>197</sup> the Court then seeks to rationalize (through rhetorical myth)<sup>198</sup> its post-racial deception (this is the final prong of Rhetorical Neutrality after history has been grossly distorted and discrimination has been defined so formalistically that there is no discrimination *unless* the prerogatives of white supremacy are disrupted)<sup>199</sup> by dismissing the dissents as mired in a long rejected interpretation of the Equal Protection Clause which seeks to reach irremediable societal discrimination.<sup>200</sup>

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192. See Sandhya Dirks, *Affirmative Action Divided Asian Americans and Other People of Color. Here's How*, NPR (July 2, 2023, 8:00 AM), <https://www.npr.org/2023/07/02/1183981097/affirmative-action-asian-americans-poc> [<https://perma.cc/VG7Q-EGPP>].

193. See *supra* note 168 and accompanying text.

194. *SFFA*, 600 U.S. at 339 (Sotomayor, J., dissenting) (cataloguing the racist history of UNC, and stating that “the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black”); *id.* at 339–41 (recounting similar history of racist oppression at Harvard and noting that Black and Latinx applicants account for only 20% of domestic applicants to Harvard each year).

195. See *id.* at 339–41.

196. See generally Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 410 n.42 (2010) (discussing exclusion, race, and the social construction of space and race—affirmative action has a spatial dimension especially when it is conceptualized, as the Court does here, as a contest for a place in a predominantly white space).

197. *SFFA*, 600 U.S. at 221–25.

198. See *supra* notes 25–26, 74, 102 and accompanying text.

199. See *SFFA*, 600 U.S. at 357 (Sotomayor, J., dissenting):

[W]hen the Court speaks of a “colorblind” Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is “colorblind” *sometimes*, when the Court so chooses. Behind those choices lie the Court’s own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.

That choice is to preserve white privilege by constitutionalizing reverse discrimination claims as normative constitutional principles.

200. *Id.* at 226–27.

## 2. *The Present-Day Effects of Past Discrimination*

Buttressed by the discriminatory intent requirement<sup>201</sup> and the proposition that the Constitution protects individuals, not groups (liberal individualism),<sup>202</sup> the Court has long denied the existence of structural inequality and the present-day effects of past discrimination: “[A]n effort to alleviate the effects of societal discrimination is not a compelling interest’ . . . . Permitting ‘past societal discrimination’ to ‘serve as the basis for rigid racial preferences would open the door to competing claims for ‘remedial relief’ for every disadvantaged group.’”<sup>203</sup> This is the post-racial deception of the non-existence of systemic racism, which diminishes the salience of race as an organizing principle in American society, guts positive race-conscious remedial efforts, and recasts discrimination as any burden on white expectation interests (or the perception that racial largess has run its course). It is disconcerting that this is true given the relatively moderate success of affirmative action—it is clear that the concern is with limited institutional spaces being overrun by Blacks, Latinx, and other people of color but not Asian-Americans who stand in as a proxy for whiteness. And their voices are nowhere to be found in the decision (except for the fabricated injury that thrusts them in the forefront in the maintenance of white privilege which is invisible to the Court).<sup>204</sup> The Court has embraced the white narrative of innocence in its affirmative action jurisprudence, but not here because the injury is presumed.<sup>205</sup> And this permits the Court to

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201. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

202. See *SFFA*, 600 U.S. at 206 (stating that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color” (citation omitted)).

203. *Id.* at 226–27 (citations omitted).

204. See Harpalani, *supra* note 57, at 24–25 (noting that while other scholars have unpacked the “raceless” privilege of white people, the Asian-American perspective is missing):

The majority opinion, along with the concurrences by Justice Thomas and Justice Gorsuch, did tell a story about us. But it was a cursory, flawed, and short-sighted narrative of Asian Americans as victims of affirmative action. And yet this narrative prevailed, not just legally but rhetorically, because no alternative was presented.

Indeed, this is yet another layer of the Court’s post-racial deception—the editing of the Asian-American experience to create a narrative that reifies subordination and racial hierarchy (whites are still on top, but Asian-Americans have been tapped to give their reverse-discrimination claim narrative power).

205. Professor Charles Lawrence III distills the basis of this presumption:

By claiming not to be able to know when racism or white supremacy is at work, they have removed the question of white supremacy’s presence from the doctrine that applies the Equal Protection Clause to questions of race. The Court presumes a law that produces discriminatory impacts is benign without ever asking whether that discriminatory impact furthers white supremacy. Facial racial classifications are presumed invidious, again without asking whether the classification perpetuates white supremacy or operates to disestablish American Apartheid. We have the 14th Amendment only because we had slavery and a war that ended slavery. The origin is anti-racist, the Court’s interpretation is not.

Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”*, 40 CONN. L. REV. 931, 955 (2008).

turn substantive anti-discrimination claims inside-out so that anti-discrimination law protects white claimants.<sup>206</sup>

After dismantling all the once permissible grounds for the consideration of race, as *one* factor in the admissions process, the Court makes a counterintuitive turn that renders *SFFA* unintelligible considering precedent. It is a glaring post-racial deception to say that race can be considered after holding that the Harvard and UNC admissions programs are constitutionally invalid. That is, race matters only when the Court says it does, and it does only when race can be neutralized by framing it in liberal individualistic terms—the performance of race is embraced by the Court. Race must be connected to the *individual*, not to a racial group, history of subordination, systemic racism, and structural inequality, or anything that is not suitably post-racial. This erasure is belied by the personal essay exception.

### 3. *The Personal Essay Exception: Performing Race?*

After characterizing the admissions programs of Harvard and UNC as constitutionally invalid because “[b]oth programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaning end points,”<sup>207</sup> the Court’s offers yet another deception—that race can be referenced sometimes under just the right circumstances.

Coming as an afterthought or a meek response to the searing dissents of Justices Sotomayor and Jackson, Chief Justice Roberts offers this deceptively reassuring closing to his decision decimating affirmative action:

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise . . . . A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.<sup>208</sup>

Post-racial liberal individualism and universality are defining principles of the Roberts Court’s post-racial constitutionalism and post-racial deception. The key phrases in the quote above is that an individual student must *neutralize* her own race because her experiences of “overcome[ing] racial

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206. Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26, 26 (2009):

The essence of this postracial form of discrimination would entail the transformation of a conventional discrimination claim asserted by racial minorities into a claim of re verse [sic] discrimination asserted by whites. That transformation could be achieved by stressing the absence of any legally cognizable basis for providing remedial resources [sic] to the original minority claimants, in order to free up those resource [sic] for allocation to worthier whites.

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

208. *Id.* at 230–31.



discrimination” must be connected to her courage—a neutral character trait—and “not on the basis of race.” Chief Justice Roberts’s constitutional benevolence is breathtaking—he permits an applicant to hold on to a piece of their identity if it comports to the way it must be performed in a neutral, post-racial way. The deception here is that students are still permitted to present their whole self when, in practical reality, they must obscure part of their identity so that their performance will be palatable<sup>209</sup> under the Court’s crabbed holding. An applicant could be deceived to think that she could present her whole self outside of the post-racial boundaries set by the Chief Justice, but the opinion “offered a revisionist and whitewashed narrative about a colorblind Constitution, country, and Court that did not and does not at all comport with the lived realities of people of color in this nation.”<sup>210</sup> This, then, is a form of erasure—a person of color must neutralize a part of themselves to be accepted as whole. Their story must fit in the singular narrative that Chief Justice Roberts has constructed.<sup>211</sup> This could also have an impact on the stories that are told in admissions applications, and there could be a censoring and chilling effect.<sup>212</sup>

As discussed above, *SFFA* is a paradigmatic example of Rhetorical Neutrality: the historical myth reinterprets the Fourteenth Amendment, disaggregated from the Reconstruction trilogy abolishing slavery (Thirteenth Amendment), enshrining a multi-racial democracy through equal citizenship, equal protection, and due process (Fourteenth Amendment), and affording freedmen the right to vote (Fifteenth Amendment); the definitional myth rewrites the anti-subordination principle into an anti-differentiation principle protecting the interest in whiteness as property and its inherent advantages; and, the rhetorical myth explains the resulting inequality and exclusion of people of color as neutral, natural, and in the interest of *fairness* although no injury is clearly identified.

What was intended as a post-racial edict—“the way to stop discrimination on the basis of race is to stop discriminating on the basis of race”—collapses under the weight of its own circularity. Chief Justice Roberts’s

209. See John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL’Y 99, 111 (2005) (“Given the fundamental features of historic and current racism, black performance constitutes ‘an individualized project of self-examination—confirming membership without conforming to [those] performative mandates’ of whiteness as audition. In performing blackness, I am claiming membership within the social group of other African-Americans without essentializing my representation of them.” (alteration in original) (citation omitted)); see generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA* (2013); ANTHONY ABRAHAM JACK, *THE PRIVILEGED POOR: HOW ELITE COLLEGES ARE FAILING DISADVANTAGED STUDENTS* (2019).

210. Onwuachi-Willig, *supra* note 73, at 241.

211. See *id.* at 241–42.

212. See Bernard Mokam, *After Affirmative Action Ban, They Rewrote College Essay with a Key Theme: Race*, N.Y. TIMES (Jan. 20, 2024), [https://www.nytimes.com/2024/01/20/us/affirmative-action-ban-college-essays.html?te=1&nl=race/related&emc=edit\\_rr\\_20240127](https://www.nytimes.com/2024/01/20/us/affirmative-action-ban-college-essays.html?te=1&nl=race/related&emc=edit_rr_20240127) [<https://perma.cc/NP2K-T45Z>] (“But the ruling also allowed admissions officers to consider race in personal essays, as long as decisions were not based on race, but on the personal qualities that grew out of an applicant’s experience with their race, like grit or courage”—some students felt that “they were not writing for themselves, but for someone else” and some left out their racial identity entirely.).

attempt to excise race is futile because, in responding to the powerful dissents of Justices Sotomayor<sup>213</sup> and Jackson,<sup>214</sup> he must concede that race is an essential component of a candidate's identity that cannot be suppressed or erased. But he does succeed in limiting how race may be expressed, discussed, or indeed performed.

*SFFA* is a standardless decision in search of a post-racial result, and it finds one based on a revision of the core meaning of the Fourteenth Amendment and overturning precedent, not by name, but by completely hollowing out the concept of diversity. And no member of the Court is as exuberant in this post-racial deception and rejection of diversity as is Justice Thomas.

#### B. JUSTICE THOMAS'S POST-RACIAL DECEPTION (CONCURRENCE)

Justice Thomas's concurrence,<sup>215</sup> rooted in originalist and textualist contrivances<sup>216</sup> that he has evoked over three decades on the Court, is an attempt to "respond" to Justice Jackson's landmark structural inequality dissent. The tenor of his concurrence is bitter, snide, and disconcertingly personal, all to prove that "[t]wo discriminatory wrongs cannot make a right."<sup>217</sup> He fails because he, and the Court, are willfully oblivious to systemic racism, structural inequality, and the continuing effects of past discrimination. But this is to be expected from a post-racial Court.

Justice Thomas's post-racial deceptions are too numerous to unpack here;<sup>218</sup> however, three defining propositions in his concurrence illustrate the depths of his constitutional deception. He crafts a post-racial redemption story, a postmodern recreation of Reconstruction so that post-racialism is the normative principle underpinning the Constitution and legislation

213. *SFFA*, 600 U.S. at 318–84 (Sotomayor, J., dissenting); *see id.* at 334 ("Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgement of inequality.").

214. *Id.* at 384–411 (Jackson, J., dissenting).

215. *Id.* at 231–87 (Thomas, J., concurring).

216. *See* STEPHEN BREYER, *READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, NOT TEXTUALISM* 10–11 (2024) (rejecting textualism as malleable and result-driven and arguing for pragmatic constitutionalism: "A good pragmatic decision must take account, to the extent practical, of the way in which a proposed decision will affect a host of related legal rules, practices, habits, institutions, as well as certain moral principles and practices, including the practical consequences of the decision . . ."); *see generally* SAMUEL A. MARCOSSON, *ORIGINAL SIN: CLARENCE THOMAS AND THE FAILURE OF THE CONSTITUTIONAL CONSERVATIVES* (2002).

217. *SFFA*, 600 U.S. at 232 (Thomas, J., concurring).

218. *See id.* at 233–47 (whitewashing the history of Reconstruction and the Fourteenth Amendment by foregrounding white normativity to diminish the significance of race); *id.* at 247–52 (arguing that the Fourteenth Amendment, which did not mention race, was a formalistic equality document and did not embrace the anti-subordination principle—this post-racial denial erases the race-conscious purpose that is the foundation of Reconstruction and blithely ignoring the significance of the Civil War); *id.* at 246–52 (rejecting the anti-subordination principle of the Fourteenth Amendment); *id.* at 258–71 (constitutionalizing and signaling far Right rhetoric against "elites" who want to create classroom "aesthetics" based on race); *id.* at 268–70 (embracing the stagnant mismatch theory that presumes that students of color are in over their heads academically in elite academic institutions); *id.* at 271–74 (exploiting the stigmatization rationale which means that Justice Thomas assumes that whiteness is the baseline for merit and those who are afforded the privilege of inclusion should "measure" up to the standard set by the very systems structured to exclude them).

enacted pursuant to it by Congress; he embraces formalistic equality by importing culture war rhetoric into his analysis of race; and, perhaps most devastatingly, he lends “authenticity” to the Court’s post-racial deception by appropriating the Black experience to discredit diversity. Justice Thomas has come full circle from his confirmation hearing where he acknowledged the history of race and racism<sup>219</sup> to secure his ascendance to the Court and now he conveniently denies that that history ever existed. Hypocrisy is an animating feature of his post-racial deception.

While Chief Justice Roberts’s majority opinion reinterprets *Brown* and guts the diversity principle, thereby overruling *Bakke* and its progeny *sub silentio*,<sup>220</sup> Justice Thomas’s concurrence radically distorts Reconstruction history by excising race and transplanting a universalist rendering of the Second Founding.<sup>221</sup> Under this reading, slavery, the Civil War, and the evolving and adapting systems of oppression over generations are discrete events on the road to a post-racial society christened by *Brown* which miraculously absolved the Court’s previous racial transgressions.<sup>222</sup>

Justice Thomas’s concurrence erases the anti-subordination principle from the Fourteenth Amendment and constructs a post-racial general citizenship amendment. He advances the post-racial deception that the Fourteenth Amendment is a post-racial citizenship document rather than a transformative Reconstruction Amendment eradicating caste-based oppression and according full citizenship in the putative multi-racial democracy.

### 1. *The Post-Racial Redemption Story: An Affirming Deception*

Justice Thomas’s concurrence begins with this analytical pledge:

I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court’s *Grutter* jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under

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219. See Michael J. Gerhardt, *Divided Justice: A Commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969, 982–83 (1992):

His characterization . . . of the hearing as “a high-tech lynching for uppity blacks” was shockingly hypocritical . . . Justice Thomas spent much of his professional life criticizing other African-Americans for blaming the ills that befell them on racism rather than their own shortcomings. He even denounced his sister by invoking the stereotype of a “welfare queen,” although he had her sit behind him during his confirmation testimony.

(citations omitted).

220. See *supra* Part III.A.1.c. Justice Thomas, on the other hand, was more explicit. See *SFFA*, 600 U.S. at 232 (Thomas, J., concurring):

I wrote separately in *Grutter*, explaining that the use of race in higher education admissions decisions—regardless of whether intended to help or hurt—violates the Fourteenth Amendment . . . I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. Today, and despite a lengthy interregnum, the Constitution prevails.

(internal citations omitted).

221. See *SFFA*, 600 U.S. at 233–47 (Thomas, J., concurring).

222. See *id.* at 231–32 (casually noting the “ebb[] and flow[]” of the Court’s commitment to equality and concluding that the Court finally corrected course in *Brown*).

the Constitution; and to emphasize the pernicious effects of all such discrimination.<sup>223</sup>

He fails to keep it. The only thing “original” in Justice Thomas’s concurrence is his suspension of reality to construct a post-racial society unmoored from its constitutional history—his concurrence is a postmodern Redemption story where he excises race from every aspect of our constitutional history, diminishes the salience of the badges and incidents of slavery, and embraces the subordinating rhetoric and tropes of entrenched white privilege. Indeed, Justice Thomas gives authenticity to Chief Justice Roberts’s post-racial deception—his race serves as a proxy for this deception and makes it legitimate because he is speaking as a Black man.<sup>224</sup>

Evoking originalism and employing literal textualism, Justice Thomas notes the fact the Fourteenth Amendment is colorblind because there is no mention of race in it.<sup>225</sup> This novel conflation—that no literal reference to race formalizes neutrality—blinks reality and sets the stage for post-racial deceptions that know no bounds.<sup>226</sup> Of course, there was no mention of race in the Fourteenth Amendment because *everyone* knew why it was enacted, along with the Thirteenth and Fifteenth Amendments: to include the newly emancipated slaves into a multi-racial democratic polity.<sup>227</sup> There was a Civil War, and the Reconstruction Amendments formed the Second Founding, a new multi-racial democracy. The sad thing is that, in our constitutional history, we are still debating this foundational bedrock to our democracy 156 years later. The Court has fostered historical amnesia through its denial of the salience of race—the Court has always been post-racial.<sup>228</sup> Justice Thomas’s concurrence is a graphic example of post-racial historicism:

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223. *Id.* at 232.

224. This is a perversion of the storytelling tenet of Critical Race Theory. *See, e.g.*, Powell, *supra* note 104, at 827–30; *id.* at 829–30 (“Just as the Fourteenth Amendment has been inverted to protect white privilege rather than historically subjugated African-Americans, so too has Critical Race Theory.”); Michael deHaven Newsom, *Clarence Thomas, Victim? Perhaps, and Victimizer? Yes—A Study in Social and Racial Alienation from African-Americans*, 48 ST. LOUIS U.L.J. 327, 328 (2004) (suggesting that “[Justice] Thomas’s victimizing alienation is perfectly suited for a high court bent, unfortunately, on maintaining white hegemony”); *see generally* A. Leon Higginbotham, Jr., *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. PA. L. REV. 1005 (1992).

225. *SFFA*, 600 U.S. at 233 (Thomas, J., concurring) (“[T]he Fourteenth Amendment—ensures racial equality with no textual reference to race whatsoever.”).

226. *See supra* note 216 and accompanying text.

227. *See* Brando Simeo Starkey, *Inconsistent Originalism and the Need for Equal Protection Reinvigoration*, 4 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 1, 16 (2012) (“Even before the Fourteenth Amendment was enacted, Congress contemplated legislation designed solely to benefit Blacks.”); *id.* at 16 n.104 (citing Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755 (1985)).

228. The 6–3 majority and the concurrences reference race (and racism) only to neutralize it so that its existence is meaningless because it has been pre-determined that race unconstitutionally predominates in the admissions process to the disadvantage of white (and Asian-American) applicants. *See SFFA*, 600 U.S. at 287 (Gorsuch, J., concurring) (concurring in Justice Thomas’s opinion and writing separately to demonstrate how Harvard violated Title VI); *id.* at 307 (noting that the Court “ends university exceptionalism” and returns the Equal Protection Clause to its colorblind mandate); *id.* at 311, 317 (Kavanaugh, J., concurring) (discussing how twenty-five years is a generational limit for race-conscious admissions

Post-racial historicism references the Court's attempt to neutralize race while simultaneously transcending it. The Court plays a central role in constructing the narrative of racial progress in this country, and it has done so in a manner that either ignores history or substantively revises it, all in the name of moving beyond race.<sup>229</sup>

This is a futile task given America's history of subordination of oppressed peoples and the persistence and adaptability of systemic racism.

Justice Thomas advances a contrived notion of originalism—he is selectively faithful to the original meaning of the text of the Constitution, as a matter of doctrinal and interpretive convenience, in the service of post-racial constitutionalism.<sup>230</sup> The analytical, historical, and doctrinal fallacy of originalism is that its authenticity is based on divining the intentions of the Framers who could not (and would not) conceive of a multiracial democracy.<sup>231</sup> That is the purpose of the Second Founding. The Constitution had to be amended three times to make democracy a reality for the newly emancipated slaves;<sup>232</sup> it was their race that excluded them from the polity, and the race-conscious Reconstruction Amendments made them free, broke the racial caste of their subordination, and enfranchised them as full-fledged American citizens. The constitutional imperative of the Second Founding remains unfulfilled. Justice Thomas's concurrence revised this history based on his contorted conception of post-racialism.

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notwithstanding the fact that “racial discrimination still occurs and the effects of past racial discrimination still persist”).

229. POWELL, *supra* note 1, at 12.

230. For example, Justice Thomas's tortured reading of the legislative history of the Civil Rights Act of 1866 leads him to conclude that “while the 1866 Act used the rights of ‘white citizens’ as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens ‘of every race and color’ and providing the same rights to all.” *SFFA*, 600 U.S. at 235 (Thomas, J., concurring). This argument is extraordinary in its duplicity because white citizens did not need the civil rights enacted by the Act, they were *already* free citizens with full access to all avenues of society; whiteness was used as a benchmark because white normativity determined who was included (or not) in society—the Act ensured that the rights of the Black freedman and the white man were the *same*. See Julian Mark, *A Law That Helped End Slavery is Now a Weapon to End Affirmative Action*, WASH. POST (Nov. 6, 2023, 7:00 AM), <https://www.washingtonpost.com/business/2023/11/06/civil-rights-act-1866-dei-affirmative-action> [<https://perma.cc/S4DY-GHYW>]. Both were citizens in the new multiracial democracy. Justice Thomas's interpretation causes a peculiar erasure—white citizens are the benchmark while Black citizens are subsumed in the universality of absolute equality. This rank formalism is a defining feature of Justice Thomas's “originalism” and is completely contradicted by the Act's legislative purpose:

The Civil Rights Act of 1866, aimed directly at the evil of the Black Codes, . . . barred state discrimination against the freed slaves in the enjoyment of a limited set of basic rights: the right “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property.”

Patrick J. Kelley, *An Alternative Originalist Opinion for Brown v. Board of Education*, 20 S. ILL. U.L.J. 75, 84 (1995) (citation omitted).

231. See generally Erwin Chemerinsky, *Even the Founders Didn't Believe in Originalism*, ATLANTIC (Sept. 6, 2022), <https://www.theatlantic.com/ideas/archive/2022/09/supreme-court-originalism-constitution-framers-judicial-review/671334> [<https://perma.cc/LAV7-CR95>].

232. See generally Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

## 2. Formalistic Equality and Post-Racial Distortions

After advancing a complete and unbridled distortion of the Fourteenth Amendment and its statutory enforcement legislation, Justice Thomas posits a theory of formalistic equality that rejects the anti-subordination principle,<sup>233</sup> constitutionalizes formalistic equality,<sup>234</sup> and rationalizes this wholesale reordering of constitutional principles through post-racial denial and a claim of white innocence.<sup>235</sup>

Relying upon his flawed history of constitutional colorblindness, Justice Thomas concludes that,

Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an “antisubordination” view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. Such a theory lacks any basis in the original meaning of the Fourteenth Amendment.<sup>236</sup>

Because of the conflation of state-mandated racial oppression and the positive use of race, as one of many factors, as constitutionally noxious, Justice Thomas concludes that the Fourteenth Amendment is colorblind because it applies to the concept of equal citizenship (so, for example, the 1865 Freedmen’s Bureau Act applies to freed slaves and white refugees)<sup>237</sup>—there are no distinctions based on race because “we must adhere to the promise of equality under the law declared by the Declaration of Independence and codified by the Fourteenth Amendment.”<sup>238</sup> Justice Thomas, of course, never fully acknowledges *why* the Fourteenth Amendment was codified. And when he does tacitly acknowledge it, African-Americans are only acknowledged so that they can be erased.<sup>239</sup>

As further evidence of his universalist post-racialism, Justice Thomas presents a similar version of the post-racial linear history provided in Chief Justice Roberts’s majority opinion,<sup>240</sup> but here a direct connection is made to the Second Founding as securing “equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding.”<sup>241</sup> This natural rights reading of the Declaration

233. *SFFA*, 600 U.S. at 246–47 (Thomas, concurring).

234. *Id.* at 263.

235. *Id.* at 273–74.

236. *Id.* at 246–47.

237. *Id.* at 247.

238. *Id.* at 266. This “history” resonates with the one told in the former President’s 1776 Commission. See THE PRESIDENT’S ADVISORY 1776 COMM’N, THE 1776 REPORT (2021); *contra* Eric Petterson, *The (White) Washing of American History*, 17 FLA. A & M U. L. REV. 1, 10–11 (2022) (critiquing the valorizing of the Founders and the emphasis on racism as a historical relic and noting that “[t]he report was widely criticized by historians for lacking intellectual rigor, whitewashing American history, appropriating Black leaders”). It is odd that Justice Thomas would locate his post-racial narrative of equality here—America is a nation built on contradictions.

239. See *SFFA*, 600 U.S. at 232–35 (Thomas, J., concurring).

240. See *supra* Part III.A.

241. *SFFA*, 600 U.S. at 263 (Thomas, J., concurring).



of Independence<sup>242</sup> is particularly appealing to Justice Thomas because it is neutral and post-racial but unrooted in the constitutional reality of Reconstruction. His concurrence is analytically fabulistic.<sup>243</sup>

To rationalize these post-racial distortions, Justice Thomas offers the neutralizing rhetoric of post-racial denial—he completely ignores any evidence of structural inequality (structuralism)<sup>244</sup> and instead embraces white innocence from America’s original sin:

Today’s 17-year-olds, after all, did not live through the Jim Crow era, enact or enforce segregation laws, or take any action to oppress or enslave the victims of the past. Whatever their skin color, today’s youth simply are not responsible for instituting the segregation of the 20th century, and they do not shoulder the moral debts of their ancestors. Our Nation should not punish today’s youth for the sins of the past.<sup>245</sup>

Yet another post-racial deception: of course, 17-year-olds are not responsible for Jim Crow segregation (they can barely drive, cannot vote, and are not agents of the state); neither, for that matter, are they responsible for the Court’s most recent decisions eviscerating anti-discrimination law.<sup>246</sup> But hopefully Justice Thomas’s proverbial 17-year-olds, on the brink of their college careers, have read the 1619 Project<sup>247</sup> or at least understand the historically accurate version of Reconstruction<sup>248</sup> being taught in their high school classes (and even this is a high hope in these fraught times).<sup>249</sup>

It is a natural rhetorical progression, then, that after invoking white innocence, Justice Thomas assumes the role of the Black proxy to legitimize his warped view of race, racism, and American society.

### 3. *The Black Proxy*<sup>250</sup> and Post-Racial Deception

Another alarming feature of Justice Thomas’s concurrence is its deeply personal and disparaging tenor towards his fellow Supreme Court jurist

242. See *id.* (“Thus, in Lincoln’s view, ‘the natural rights enumerated in the Declaration of Independence’ extended to blacks as his ‘equal,’ and ‘the equal of every living man.’” (quoting THE LINCOLN-DOUGLAS DEBATES 285 (Harold Holzer ed., 1993))).

243. See Adam Serwer, *The Most Baffling Argument a Supreme Court Justice Has Ever Made*, ATLANTIC (July 7, 2023), <https://www.theatlantic.com/ideas/archive/2023/07/freedmen-race-neutral-supreme-court-affirmative-action-clarence-thomas/674641> [https://perma.cc/2W67-USBL].

244. See KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 147–49 (2019).

245. *FFA*, 600 U.S. at 274 (Thomas, J., concurring).

246. See generally POWELL, *supra* note 1.

247. NIKOLE HANNAH-JONES & THE NEW YORK TIMES MAGAZINE, THE 1619 PROJECT: A NEW ORIGIN STORY (2021).

248. See, e.g., JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (2d ed. 1994).

249. See Olivia B. Waxman, *A New Report Finds That 45 States Are “Failing” to Teach Students About the Period That Shaped Race Relations After the Civil War*, TIME (Jan. 12, 2022, 8:08 AM), <https://time.com/6128421/teaching-reconstruction-study> [https://perma.cc/EE3Y-QJ9N].

250. See Powell, *supra* note 10, at 129–31 (discussing the role of the Black proxy as in service of white privilege by dismissing the existence of structural inequality and instead focusing on neutrality, liberal individualism, and racism as a rare aberration in an otherwise open society); John Blake, *Here’s Why Many Black People Despise Clarence Thomas. (It’s Not Because He’s a Conservative.)*, CNN POL. (Sept. 11, 2023, 6:00 AM), <https://www.cnn.com>.

and colleague, Justice Jackson.<sup>251</sup> Her dissent is a constitutional landmark in its scope and eloquence, and it is the first comprehensive structural inequality dissent in the Court's 234-year history<sup>252</sup>—this is a compelling argument itself for diversity. Nevertheless, Justice Thomas rejects diversity and substantive inclusion in stark terms, espousing post-racial liberal individualism<sup>253</sup>:

Justice JACKSON has a different view. Rather than focusing on individuals as individuals, her dissent focuses on the historical subjugation of black Americans, invoking statistical racial gaps to argue in favor of defining and categorizing individuals by their race. As she sees things, we are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today. The panacea, she counsels, is to unquestionably accede to the view of elite experts and reallocate society's riches by racial means as necessary to “level the playing field,” all as judged by racial metrics.<sup>254</sup>

Justice Thomas's vaunted color-blindness obscures his view of reality—he rejects the statistical evidence of the present-day effects of past discrimination (the badges and incidents of slavery) as “constitutionally irrelevant”<sup>255</sup> all to privilege a post-racial world where “[p]eople discriminate against one another for a whole host of reasons.”<sup>256</sup> Sadly, this sounds like the old social convention rationale for the color-line that Justice Thomas so confidently claims was shattered by *Brown*.<sup>257</sup> And to make matters worse, Justice Thomas trots out the rhetoric of the Right rife with the politically charged

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com/2023/09/11/politics/clarence-thomas-black-people-blake-cec/index.html [https://perma.cc/65NV-JZ5Y].

251. See *SFFA*, 600 U.S. at 278 (Thomas, J., concurring). This is the first time in the Court's history that two African-Americans—Justice Thomas, a hardline Conservative who proclaims to be an originalist and textualist, and Justice Jackson, the Court's newest member, joining the liberal three-Justice bloc (along with Justices Sotomayor and Kagan)—are on the Court simultaneously with four women (with Justice Barrett joining the six-Justice Conservative supermajority). See *Who Are the Justices on the US Supreme Court?*, BBC NEWS (Feb. 8, 2024), <https://www.bbc.com/news/magazine-33103973> [https://perma.cc/M2ZA-L98M].

252. See *SFFA*, 600 U.S. at 384–411 (Jackson, J., dissenting); *id.* at 385 (“Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented ‘intergenerational transmission of inequality’ that still plagues our citizenry.” (citation omitted)).

253. See Cedric Merlin Powell, *Harvesting New Conceptions of Equality: Opportunity, Results, and Neutrality*, 31 ST. LOUIS U. PUB. L. REV. 255, 297 (2012):

Applying a literal and formalistic conception of equality, rooted in the anti-differentiation principle, the Court has consistently advanced liberal individualism and neutrality. Race is viewed skeptically and can only be used to eradicate the persistent vestiges of discrimination in two narrow instances: to promote diversity in higher education and to remedy clearly identifiable discrimination by a discriminatory perpetrator. All other forms of discrimination are either “de facto” or “amorphous” and cannot be remedied by the use of race.

254. *SFFA*, 600 U.S. at 278 (Thomas, J., concurring) (internal citation omitted).

255. *Id.*

256. *Id.*

257. See *id.* at 265–66 (“The Court today reaffirms the rule, stating that, following *Brown*, ‘[t]he time for making distinctions based on race had passed.’” (citation omitted)).

tropes of elites<sup>258</sup> imposing a racialized view of society that threatens the very fabric of democracy. This story is turned inside out.

Referring to Justice Jackson's dissent as her "race-infused world view,"<sup>259</sup> Justice Thomas promotes his *original* constitutional history that traces a straight line from the Declaration of Independence, a cursory mention of the Civil War, and the enactment of the Fourteenth Amendment as the realization of true natural "liberty" for *all* citizens as it "codifies" the Declaration of Independence.<sup>260</sup> Thus, he concludes,

Yet Justice JACKSON would replace the second Founders' vision with an organizing principle based on race. In fact, on her view, almost all of life's outcomes may be unhesitatingly ascribed to race. This is so, she writes, because of statistical disparities among different racial groups. Even if some whites have a lower household net worth than some blacks, what matters to Justice JACKSON is that the *average* white household has more wealth than the *average* black household.<sup>261</sup>

Justice Thomas's crabbed conception of discrimination is a common theme in the Court's post-racial constitutionalism and based on these post-racial propositions which are deceptive in the meanings that they convey: the Constitution is neutral; formalistic equality is the touchstone of the Fourteenth Amendment (there is no anti-subordination principle); statistics are constitutionally irrelevant (societal discrimination is circumstantially relevant, but irremediable); and discrimination against whites will be presumed whenever a reverse discrimination claim is alleged (and this presumption is buttressed by the purported injury to Asian-Americans). Thus, it is quite telling that Justice Thomas foregrounds the "injury" to whites while simply ignoring Justice Jackson's salient point about the present-day effects of past discrimination on Blacks.<sup>262</sup> But, indeed, this is the role of the Black proxy to diminish the significance of race and to emphasize liberal individualism as the touchstone of race in a post-racial America, so even the "bad old days" were not really that bad because there is no evidence of any type of yesteryear discrimination that is cognizable to the Court.<sup>263</sup> So, Justice Thomas concludes with a personal statement to legitimize his role as the Black proxy and discount the significant statistical evidence presented by Justice Jackson in her dissent:

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258. These post-racial tropes have a deceptive appeal for Conservatives who believe that people of color are displacing them, so rhetoric like that used by Justice Thomas in his concurrence legitimizes, privileges, and advances white supremacy by signaling that the Court agrees with them that: the Constitution is colorblind, and people of color should not get racial benefits, *id.* at 231–47; diversity has no educational benefit, *id.* at 253–56; educational institutions are only interested in the "aesthetic goals" of racial proportionality, *id.* at 259–71; and the "purported beneficiaries" of the racial windfalls inherent in affirmative action are undeserving, mismatched, and stigmatized, *id.* at 268–71.

259. *Id.* at 280.

260. *See id.* at 266.

261. *Id.* at 279 (internal citations omitted).

262. *See, e.g., id.* at 397–98 (Jackson, J., dissenting).

263. *See supra* notes 80–81, 122 and accompanying text.

This lore is not and has never been true. Even in the segregated South where I grew up, individuals were not the sum of their skin color. Then as now, not all disparities are based on race; not all people are racist; and not all differences between individuals are ascribable to race. Put simply, “the fact of abstract categories of wealth statistics is not the same as the fact of a given set of flesh-and-blood human beings.”<sup>264</sup>

The irony in this statement is palpable. The reference to “lore” transforms systemic racism into a set of common traditions that can be embraced or dismissed depending on who is conveying the history. Justice Thomas’s post-racial deception (concurrency) is a postmodern Redemption Story,<sup>265</sup> it shares all the rhetorical hallmarks of the same stories deployed to rewrite the racist history of subjugation after the Civil War. “Redemption, then and now, seeks restoration of white supremacy through fraud, cruelty, and state-sanctioned violence.”<sup>266</sup> This fraud resonates in Justice Thomas’s concurrency, his dismissive reference to a comprehensive history of caste-based oppression as “lore” is indicative of the Roberts Court’s post-racial deception.<sup>267</sup>

It is paradoxical that Asian-American voices are virtually silent in the Court’s post-racial narrative<sup>268</sup>—they are used as post-racial proxies underscoring their value as the embodiment of the Model Minority—Justice Thomas fills the role of the Black proxy for the maintenance of white supremacy articulating the entire catalogue of whiteness tropes<sup>269</sup> that reify white privilege and Black subordination. Because of his strict adherence to liberal individualism, the concept of “intergenerational transmission of inequality”<sup>270</sup> is foreign to him. In fact, as the Black proxy, it is his role to

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264. *SFFA*, 600 U.S. at 279 (Thomas, J., concurring) (quoting THOMAS SOWELL, *WEALTH, POVERTY AND POLITICS* 333 (2016)).

265. See JOSEPH, *supra* note 7, at 139 (discussing the racial redemption narrative and concluding the following):

It expertly trafficked in the same white nationalism, resentment, and racism that helped to destabilize the promise of Black citizenship during the First Reconstruction. And it reflected the enduring political, legal, and narrative power of a Lost Cause ideology that portrayed the Civil War as a reasonable effort by southerners to defend their personal honor.

266. *Id.* at 146.

267. “Our nation’s relative ineffectiveness in eradicating systemic racism and white supremacy can be explained largely as a result of the myths and lies that have been embraced—paradoxically, across racial, class, and partisan divides.” *Id.* at 224.

268. See generally Harpalani, *supra* note 57. The Court constructs its own narrative by engaging in doctrinal doublespeak, overruling *Grutter* without saying it. See generally Vinay Harpalani, *Roberts Rules of (Dis)Order: Doctrinal Doublespeak on Affirmative Action and Stare Decisis*, 77 SMU L. REV. 61 (2024).

269. See *SFFA*, 600 U.S. at 267 (Thomas, J., concurring) (“Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories.” (citation omitted)); *id.* at 277 (“Racialism simply cannot be undone by different or more racialism.”); *id.* at 280, 283 (chiding the dissent of Justice Jackson as a “race-infused world view,” and querying, “How . . . would Justice JACKSON explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color?”). The fallacy of Justice Thomas’s arguments privilege the stereotypical rhetoric of the Model Minority and the underlying presumption that *any* incremental gains by Blacks and other people of color are constitutionally noxious.

270. *Id.* at 385 (Jackson, J., dissenting) (citation omitted).

deny the existence of structural inequality. Justice Thomas's concurrence rejects the anti-subordination principle which is the constitutional cornerstone of the Fourteenth Amendment, and there is no conceptualization of structural inequality because "any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant . . . . People discriminate against one another for a whole host of reasons."<sup>271</sup> This disaggregation—where discrimination is disconnected from state action and is merely "societal discrimination"—is a hallmark of liberal individualism and forcefully rejected in Justice Sotomayor's principal dissent and Justice Jackson's substantive, complementary dissent.<sup>272</sup>

The personification of Justice Thomas's role as Black proxy is his hollow expression of empathy about the "social and economic ravages which have befallen my race and all who suffer discrimination,"<sup>273</sup> concluding his concurrence with, "I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law."<sup>274</sup> If Justice Thomas were truly an originalist, he would quote Frederick Douglass in his concurrence, but Mr. Douglass's interpretation of the Declaration of Independence<sup>275</sup> is at odds with his post-racial deception of universal citizenship open to all (if America's history of racial subordination is ignored).

The responses to Justice Thomas's Black proxy rhetorical concurrence are forceful affirmations of anti-discrimination law, the history of oppression and struggle, and the continuing effects of the badges and incidents of slavery.<sup>276</sup>

### C. JUSTICE SOTOMAYOR'S DISSENT: THE ANTI-SUBORDINATION PRINCIPLE

Justice Sotomayor pinpoints the essence of the Court's post-racial deception:

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271. *Id.* at 278 (Thomas, J., concurring).

272. *See id.* at 358 (Sotomayor, J., dissenting); *id.* at 385 (Jackson, J., dissenting).

273. *Id.* at 287 (Thomas, J., concurring).

274. *Id.*

275. *See* Frederick Douglass, *What to the Slave is the Fourth of July? An Address, in* FREDERICK DOUGLASS: SPEECHES & WRITINGS 166, 166–67 (David W. Blight ed., 2022).

276. *See, e.g.,* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 474–75 (2018) (noting that it has been suggested that the Thirteenth Amendment could support race-conscious affirmative action: "This claim is particularly compelling in the case of African Americans. Nobody doubts that the Amendment was enacted first and foremost to secure freedom for the former slaves, their descendants, and others branded with the original badge of American chattel slavery: blackness."); Brencé D. Pernell, *The Thirteenth Amendment and Equal Educational Opportunity*, 39 YALE L. & POL'Y REV. 420 (2021) (critiquing neutrality and advancing a structuralist argument for dismantling the present-day effects of past discrimination); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007) (defining the badges and incidents of slavery under the Thirteenth Amendment and applying it to present day barriers to substantive equality).

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, but is also grounded in the illusion that racial inequality was a problem of a different generation . . . . Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgement of inequality.<sup>277</sup>

In a panoramic and compelling dissent spanning the race-conscious Reconstruction Amendments to its statutory mandates,<sup>278</sup> to *Brown*,<sup>279</sup> to the Court's modern-day race-conscious diversity jurisprudence,<sup>280</sup> Justice Sotomayor reclaims the anti-subordination principle and offers an explicit acknowledgement of systemic racism, contrary to the post-racial Roberts Court.<sup>281</sup> Her principal dissent explodes the post-racial deceptions of the Roberts Court. She locates the sites of white supremacy within Harvard<sup>282</sup> and UNC.<sup>283</sup> Indeed, the *positive* remedial efforts of both institutions to dismantle the edifice of structural inequality within them, should be embraced based on past precedent.<sup>284</sup> Chief Justice Roberts pretends that binding precedent does not exist by overruling it without mentioning it.<sup>285</sup>

And most importantly, Justice Sotomayor conclusively demonstrates that there was *no* injury to Asian-American or white student applicants,<sup>286</sup> so it is deceptive to pretend that there was one to preserve the inherent interlocking advantages of white privilege<sup>287</sup>:

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277. *SFFA*, 600 U.S. at 333–34 (Sotomayor, J., dissenting) (internal citation omitted).

278. *Id.* at 319–27 (discussing Civil War and transformational Reconstruction).

279. *See id.* at 327–31 (noting the constitutional significance of *Brown* and condemning *SFFA* as a “hollow, race-ignorant” decision (citation omitted)).

280. *Id.* at 331–33 (emphasizing the doctrinal legacy of *Brown* to *Fisher* as authorizing the limited use of race).

281. *See id.* at 336–37 (“Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources . . . . Put simply, society remains ‘inherently unequal.’ Racial inequality runs deep to this very day.” (internal citation omitted)).

282. *Id.* at 337, 339–41 (chronicling the “sordid legacies of racial exclusion” at Harvard and UNC: including profiting from slavery; fostering racist eugenics; exclusion of women; and statues, buildings, and other monuments to white supremacy).

283. *Id.* at 338–39 (noting that UNC was a “bastion of white supremacy” and the current manifestations of subjugation).

284. There is a documented history of discrimination with present-day effects which should satisfy the requirement of identifiable discrimination. *See id.* at 337–41.

285. *See supra* note 268 and accompanying text.

286. *SFFA*, 600 U.S. at 374 (Sotomayor, J., dissenting) (“[A]fter assessing the credibility of fact witnesses and considering extensive documentary evidence and expert testimony, the courts below found ‘no discrimination against Asian Americans.’” (citation omitted)). The real “injury,” is to white privilege:

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

*Id.* at 360–61 (alteration in original) (citation omitted).

287. *See id.* at 336; *see generally* ROITHMAYR, *supra* note 125; Robert L. Fread, *The Codification of White Privilege*, 4 HOWARD HUM. & C.R. L. REV. 1 (2020) (rejecting the denial of



Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black Students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system. Underrepresented minorities are less likely to have parents with postsecondary education who may be familiar with the college application process . . . . All of these interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions.<sup>288</sup>

This makes *SFFA* even more devastating in its impact and reach—the Roberts Court is poised to dismantle anti-discrimination law because it views it as superfluous, “overrul[ing] decades of precedent and impos[ing] a superficial rule of race blindness on the Nation . . . . The majority’s vision of neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored.”<sup>289</sup>

Joining Justice Sotomayor’s dissent “without qualification”<sup>290</sup> and rebutting the post-racial conception of “fairness” proffered by Students for Fair Admissions,<sup>291</sup> Justice Jackson delivers a canonical dissent which integrates history, evidence of structural inequality, and a clear articulation of how race functions in American society, restoring the contextual analysis ripped from longstanding precedent. Significantly, she vividly illustrates how the present-day effects of past discrimination impact not only college admissions, but the lives of people of color in a deceptively post-racial society where the Constitution is “‘colorblind’ *sometimes*, when the Court so chooses.”<sup>292</sup> And the choice *always* favors white supremacy and the structures, systems, and policies that reify it.

#### D. JUSTICE JACKSON’S DISSENT<sup>293</sup>: THE NEW STRUCTURALISM<sup>294</sup>

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces “colorblindness for all” by legal fiat. But deeming race irrelevant in law does not make it so in life.<sup>295</sup>

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white privilege and positing that white privilege is codified—a direct attack on the Court’s post-racial deception).

288. *SFFA*, 600 U.S. at 335–36 (Sotomayor, J., dissenting).

289. *Id.* at 383–84.

290. *Id.* at 385 (Jackson, J., dissenting).

291. *See id.* (“Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented ‘intergenerational transmission of inequality’ that still plagues out citizenry.” (citation omitted))

292. *Id.* at 357 (Sotomayor, J., dissenting).

293. Justice Jackson took no part in the consideration of the Harvard case. *Id.* at 231.

294. *See* Anders Walker, *Freedom and Prison: Putting Structuralism Back into Structural Inequality*, 57 U. LOUISVILLE L. REV. 89, 89 (2018) (noting that structuralism is a rejection of liberal individualism: “racism manifests itself not only in individual attitudes and stereotypes, but also in the basic structure of society [structural inequality]” (quoting MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 184 (2012))).

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

Coming after the concurring Black proxy opinion of Justice Thomas and Justice Sotomayor's dissent reclaiming the anti-subordination principle in the Fourteenth Amendment, Justice Jackson's stinging metaphor is a powerful retort to Justice Thomas's post-racial deception. She centers race as the defining feature in American life—and it is.<sup>296</sup>

Rejecting the post-racial deception of colorblindness and stating that “[o]ur country has *never* been colorblind,”<sup>297</sup> Justice Jackson distills the legacy of American racism and how it adapts, evolves, and realigns to perpetuate subordination,<sup>298</sup> which results in the “intergenerational transmission of inequality.”<sup>299</sup>

As the name of the claimants suggest, the core presumption of their reverse-discrimination claim is that it is “*unfair* for a college’s admissions process to consider race as one factor in a holistic review of its applicants.”<sup>300</sup>

Rejecting this formalistic fairness argument, Justice Jackson offers a comprehensive and wide-ranging discussion of structural inequality in all its societal and structural manifestations; indeed, her dissent is a jurisprudential race audit<sup>301</sup> canvassing the deeply rooted vestiges of the legacy of slavery. Justice Jackson illuminates the analytical paucity, flawed reasoning, and deceptiveness of Chief Justice Roberts’s majority opinion and Justice Thomas’s libertarian post-racial history of Reconstruction.

Justice Jackson’s dissent is compelling because she tracks structural inequality—the intergenerational transmission of inequality and locked-in white privilege—through the narrative stories of John, a white would-be-seventh-generation graduate of UNC, and James, a would-be-first-generation Black applicant to UNC.<sup>302</sup> She offers a graphic illustration of the “[g]ulf-sized race-based gaps” that exist between whites and Blacks—while the colorline has been erased, it has not been crossed in relation to “health, wealth, and well-being of Americans.”<sup>303</sup>

Dismantling Justice Thomas’s postmodern Redemption tale of libertarian values “codified” in the Fourteenth Amendment, Justice Jackson weaves the narrative power of the intergenerational transmission of subordination with the relevancy and saliency of structural inequality by referencing the following: how “[e]ven after this Second Founding . . . opponents insisted that vindicating equality in this manner slighted White Americans”;<sup>304</sup> the retreat from Reconstruction and the rise of states’ rights with the Court

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296. See Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 144 (2020) (noting “a persistent feature of American society: the predetermination of opportunity and treatment on the basis of race”).

297. *SFFA*, 600 U.S. at 385 (Jackson, J., dissenting) (emphasis added).

298. See *id.* at 384 (“Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through generations.”).

299. *Id.* at 385 (citation omitted).

300. *Id.*; see *supra* notes 23, 66, 123–125, 291 and accompanying text.

301. See generally R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011).

302. *Id.* at 385–86, 396–98 (Jackson, J., dissenting).

303. *Id.* at 384.

304. *Id.* at 387.

“facilitating” this retrenchment;<sup>305</sup> the Court’s active engagement in invalidating the first generation of Civil Rights legislation;<sup>306</sup> the expansion of the badges and incidents of slavery through sharecropping and vagrancy laws criminalizing Black movement;<sup>307</sup> the emergence of Jim Crow;<sup>308</sup> and the modern federal government’s perpetuation of an invisible, albeit more impenetrable, colorline excluding Blacks from neighborhoods through zoning laws and mortgages through redlining;<sup>309</sup> and the fact that, throughout history to the present day, “government policies affirmatively operated . . . to dole out preferences to those who, if nothing else, were not Black.”<sup>310</sup> This is how the Courts picks “winners” and “losers” on the basis of race.<sup>311</sup> And the narratives of John (the white applicant) and James (the Black applicant) bear this out.<sup>312</sup>

Societal discrimination is a post-racial deception because it conveys the false premise that while discrimination exists, it is irremediable in the absence of a discriminatory perpetrator. But, as Justice Jackson notes, this blinks reality because the Court focuses on liberal individualism—the Constitution protects individuals, not racial groups—rather than the reality of systemic racism. The focus under the Thirteenth Amendment should be the eradication of the badges and incidents of slavery; under the Fourteenth Amendment, dismantling subordination in all avenues of society; and, under the Fifteenth Amendment, securing meaningful, undiluted participation through the vote in our polity. Justice Jackson’s dissent points to the fact that societal discrimination, rather than being an acknowledged fact of mere circumstantial relevance, could be an evidentiary presumption<sup>313</sup> to establish remediable discrimination.<sup>314</sup>

Indeed, there is not only evidence of intergenerational transmission of inequality, but both Harvard and UNC have documented histories of racial oppression which are *directly* traceable to the exclusion of Black and Brown students.<sup>315</sup> *This is the injury that must be remedied*, not the Court’s makeweight invention of an injury to white and Asian-American students. This is the core of the Court’s post-racial deception.

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305. *Id.*

306. *Id.* at 387–88.

307. *Id.* 389–90.

308. *Id.*

309. *Id.* at 390–91; *see generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); RACIAL JUSTICE IN AMERICAN LAND USE (Craig Anthony Arnold, Cedric Merlin Powell, Laura Rothstein & Cate Fosl eds., forthcoming).

310. *SFFA*, 600 U.S. at 392 (Jackson, J., dissenting).

311. Of course, the Court’s post-racial deception reaches a different conclusion. *See id.* at 229 (majority opinion).

312. *See id.* at 396–98 (Jackson, J., dissenting).

313. *See generally* CHRISTOPHER MUELLER, LAIRD KIRKPATRICK & LIESA RICHTER, *EVIDENCE* (6th ed. 2018).

314. This could be an irrebuttable or rebuttable presumption, depending upon the scope and type of discrimination. It is beyond the scope of this Article to fully posit this theory. However, if strict scrutiny is intended to “smoke out” invidious discrimination, distinctions can be made between such discrimination and *positive* race-conscious remedial measures.

315. *See SFFA*, 600 U.S. at 337–40 (Sotomayor, J., dissenting).

To buttress its disintegrating legitimacy, the Court proffers a set of ostensibly neutral propositions which, in essence, preserve structural inequality:

1. The Court privileges reverse discrimination lawsuits with relaxed standing and pleading requirements, so that the interests of white (and Asian-American) students are foregrounded under an absolute fairness rationale rather than the anti-subordination principle;<sup>316</sup>
2. The Court will intervene whenever there is a substantive outcome that disrupts white privilege and expectation interests;<sup>317</sup>
3. Liberal individualism is the guiding principle for the Court's post-racial jurisprudence;<sup>318</sup>
4. The Court revises the history of Reconstruction and the Fourteenth Amendment, so it is read as a post-racial universal citizenship document rather than a constitutional amendment eradicating the racial subordination of African-Americans who were now full-fledged members of a multiracial polity (the historical myth);<sup>319</sup>
5. The compelling interest of diversity has been rejected because it is purportedly immeasurable and has reached its temporal limit—the discrimination here is any consideration of race that impacts the admissions interests of white and Asian-American students (the definitional myth);<sup>320</sup> and
6. Overruling forty-eight years of well-settled precedent *sub silentio*, gives the deceptive impression that the Court's fairness holding leaves some consideration of race intact but only if it is performed in a specific way (the rhetorical myth).<sup>321</sup>

These are post-racial deceptions under the guise of formalistic equality. Rhetorical Neutrality is the narrative framework to advance the Court's post-racial deception.

#### IV. CONCLUSION

Post-racial deceptions are disruptive, devastating in impact, and disconcerting because they ostensibly preserve fairness and the Court's vaunted legitimacy, but instead chill all positive race-conscious remedial efforts and initiatives to advance substantive equality through the diversity imperative. The Roberts Court's post-racial constitutionalism has undermined anti-discrimination law in virtually every area: school integration, affirmative action, Title VII, housing, and voting rights with the added effect of constitutionalizing its post-racial deception.

*SFFA* is the capstone of this post-racial jurisprudence. And it signals something much more ominous from the Court—the exercise of raw judicial power to preserve the racial hierarchy established by its own post-racial deception. Whites are tired of the work of diversity (if they were

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316. *See supra* Part III.A.

317. *See supra* Part III.A.

318. *See supra* Part III.A.

319. *See supra* Parts III.A–B; POWELL, *supra* note 1.

320. *See supra* Part III.A; POWELL, *supra* note 1.

321. *See supra* Part III.A; POWELL, *supra* note 1; JACK, *supra* note 209.

even committed initially), notwithstanding the fact that its limited utility enhanced their learning and employment experiences; it has been decided that “[t]wenty years later, no end is in sight”<sup>322</sup> for the use of race. Without referencing structural inequality or systemic racism, the Court deceptively espouses the claim that race-conscious remedies and invalid windfalls in a preferential system must be temporally limited. In other words, twenty-five years (or twenty)<sup>323</sup> is a sufficient outer limit for burdening the inherent interlocking advantages of white privilege.<sup>324</sup>

This deception rests on post-racial neutrality—most discrimination has been eliminated so referencing race would return us to a bygone era.<sup>325</sup> And therein lies the rub; we have never left. We should not be deceived by the doctrinal subterfuge that is the Court’s decision in *SFFA*. That means we should not interpret it beyond its *narrow* limits; it does *not* apply to DEI initiatives, scholarship and pipeline programs, minority women business programs, and anything else *outside* of higher education. Of course, these battles are now being waged, but these struggles should not chill efforts to embrace substantive equality in this—our Third Reconstruction (after the Second Founding). Our multiracial, pluralistic democracy depends on it. And it would be a fitting and forceful repudiation of the Roberts Court’s post-racial deception—a second rate diversity that prepares Black Americans “for success in the bunker, not the boardroom.”<sup>326</sup>

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322. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 213 (2023).

323. *See id.*

324. *See id.* at 384–411 (Jackson, J., dissenting) (unpacking the “intergenerational transmission of inequality” (citation omitted)); *see generally* ROITHMAYR, *supra* note 125.

325. *See* *Shelby Cnty. v. Holder*, 570 U.S. 529, 552 (2013) (“But history did not end in 1965.”).

326. *SFFA*, 600 U.S. at 411 (Jackson, J., dissenting).