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Roberts Rules of (Dis)Order: Doctrinal Doublespeak on Affirmative Action and Stare Decisis

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ROBERTS RULES OF (DIS)ORDER: DOCTRINAL DOUBLESPEAK ON AFFIRMATIVE ACTION AND STARE DECISIS

Vinay Harpalani*

ABSTRACT

In this Article, I argue that Chief Justice John Roberts engaged in doublespeak in his SFFA v. Harvard/UNC majority opinion. He essentially overruled Grutter v. Bollinger (2003) but did not admit doing so, and even structured the SFFA opinion as if he was following Grutter’s precedent. My Article considers why Chief Justice Roberts engaged in this “stealth overruling” of Grutter and exposes his doctrinal sleight of hand in doing so. I first consider how Chief Justice Roberts may have been concerned about the Court’s legitimacy in the wake of its ruling in Dobbs v. Jackson Women’s Health Organization (2022)—where it explicitly overruled Roe v. Wade (1973) and Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)—and how that might have influenced his approach to SFFA. Subsequently, I show how throughout the SFFA majority opinion, Chief Justice Roberts either misrepresented Grutter or exploited ambiguities and inconsistencies in Grutter’s doctrine to serve his agenda. I examine the SFFA majority’s treatment of various issues related to the constitutionality of race-conscious admissions policies. These include the compelling interest in diversity, deference to universities on defining their educational missions, the incidental burden of race-conscious policies on certain groups, the use of racial categories, “logical” and arbitrary endpoints for race-conscious admissions, the so-called essay loophole, and the possible military exception. The conclusion considers the consequences of SFFA’s stealth overruling of Grutter: the controversies it could lead to, and its potential impact on the Court’s legitimacy—another matter laden with ironic twists.

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INTRODUCTION: DOUBLESPEAK AND DISORDER

AFFIRMATIVE action is dead.¹ The Supreme Court killed it.² Chief Justice John Roberts’s consolidated majority opinion in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina (SFFA)*³ essentially overruled *Grutter v. Bollinger*⁴—the key precedent which upheld race-conscious admissions policies at the University of Michigan Law School.⁵ *Grutter* laid out the

1. Cf. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 181 (Walter Kaufman trans., Vintage Books ed. 1974) (1882); FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 6 (Thomas Common trans., 1909) (1883) (positing that “God is dead”). Broadly speaking, the term “affirmative action” refers to a range of policies and initiatives that involve “an active effort (as through legislation) to improve the employment or educational opportunities of members of minority groups or women.” *Affirmative Action*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/affirmative%20action> [<https://perma.cc/J72P-MGQJ>]. More narrowly, “affirmative action” is used to mean race-conscious admissions policies. Here, I use “affirmative action” in its narrower sense—as a term synonymous with race-conscious admissions policies.

2. Cf. NIETZSCHE, *THE GAY SCIENCE*, *supra* note 1, at 181 (positing that “God is dead” and that “we have killed him”). *But see* Jonathan P. Feingold, *Affirmative Action After SFFA*, 48 J. COLL. & U.L. 239, 241 (2024) (arguing that “contrary to headlines, *SFFA* did not ‘end affirmative action,’” and that “popular opinion has entrenched a narrative that overstates what is, as a formal matter, a surprisingly narrow opinion”); Reginald C. Oh, *What the Supreme Court Really Did to Affirmative Action*, WASH. MONTHLY (July 20, 2023), <https://washingtonmonthly.com/2023/07/20/what-the-supreme-court-really-did-to-affirmative-action> [<https://perma.cc/QGR4-XTHQ>] (arguing that “affirmative action is not dead” after *SFFA*).

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

4. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

5. *Id.* at 342–44. *But see* Oh, *supra* note 2:

[T]o proclaim that Roberts overruled precedent on affirmative action, held that diversity is no longer a compelling interest, and categorically banned the use of race in higher education admissions[] . . . is an incorrect reading of Roberts’s opinion.

A better reading leads to the conclusion that *Grutter v. Bollinger*, a 2003 case upholding race in admissions, is still good law, diversity remains a compelling interest, and the narrow use of race, albeit in limited circumstances, continues to be permissible.

blueprint for universities to implement affirmative action in university admissions, but universities know it is no longer good law. Their admissions processes and diversity initiatives are in disorder; many of them are considering whether admissions reviewers should even be able to see the check box where applicants can reveal their race.⁶ However, nowhere in his *SFFA* majority opinion did Chief Justice Roberts say that the Court was overruling *Grutter*. Instead, it was an exercise in doublespeak.⁷ If you read the *SFFA* majority opinion, you might well think that the Court applied the *Grutter* decision to Harvard and the University of North Carolina at Chapel Hill's (UNC) admissions policies and that it struck those policies down under its own *Grutter* precedent.⁸

SFFA was a stark contrast from the Court's abortion ruling during its prior term.⁹ Not only did Justice Samuel Alito's majority opinion in *Dobbs v. Jackson Women's Health Organization* state explicitly that it was overruling *Roe v. Wade*¹⁰ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹¹ but it also devoted much attention to explaining why the Court deliberately discarded these precedents.¹² The *Dobbs* majority also

6. See, e.g., Pericles Lewis & Jeremiah Quinlan, *An Update on Yale College's Response to the Supreme Court Ruling on Race in Admissions*, YALE COLL. (Sept. 7, 2023), <https://yale-college.yale.edu/get-know-yale-college/office-dean/messages-dean/update-yale-colleges-response-supreme-court-ruling> [<https://perma.cc/75H2-6F22>] ("Reviewers will not have access to applicants' self-identified race and/or ethnicity, and admissions officers involved in selection will not have access to aggregate data on the racial or ethnic composition of the pool of applicants or admitted students."). See also generally Anemona Hartocollis, *Colleges Will Be Able to Hide a Student's Race on Admissions Applications*, N.Y. TIMES (May 26, 2023), <https://www.nytimes.com/2023/05/26/us/college-admissions-race-common-app.html> [<https://perma.cc/ZP9T-9WHA>] (noting that "the Common App has made a pre-emptive move on what is known as the 'race box'" and that "colleges will be able to hide the information in those boxes from their own admissions teams").

7. See WILLIAM LUTZ, *DOUBLESPEAK 1* (2015 ed.) ("Doublespeak is language that . . . makes the bad seem good, the negative appear positive, the unpleasant appear attractive or at least tolerable. Doublespeak is language that avoids or shifts responsibility, language that is at variance with its real or purported meaning."); see also Jonathon Reinhardt & Anuj Gupta, *Doublespeak: A Language Power Technique*, UNIV. OF ARIZ., <https://opentextbooks.library.arizona.edu/doublespeak/chapter/doublespeak> [<https://perma.cc/ZFR4-EYDE>]. The idea of "doublespeak" derives from George Orwell's doublethink: "the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them." GEORGE ORWELL, 1984, at 203–04 (Houghton Mifflin Harcourt publ'g, 1983) (1949). Although Reginald Oh has a different view of Chief Justice Roberts's *SFFA* majority opinion than I do, he seems to share my sense of irony when he describes the opinion as "deceptively clear." See Oh, *supra* note 2.

8. See, e.g., Bill Watson, *Did the Court in SFFA overrule Grutter?*, 99 NOTRE DAME L. REV. REFLECTION 113, 131 (2024) ("The majority in *SFFA* relied heavily on *Grutter* as authority and so implied that *Grutter* supported concluding that Harvard's and UNC's admissions programs were unlawful—when, in fact, the sum of *Grutter*'s holdings required the opposite conclusion.").

9. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

10. *Roe*, 410 U.S. 113.

11. *Casey*, 505 U.S. 833.

12. *Dobbs*, 597 U.S. at 292 ("We therefore hold that the Constitution does not confer a right to abortion. *Roe* and *Casey* must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."); see *id.* at 263–91 (explaining at length criteria for overruling precedent and why they were applicable to *Roe* and *Casey*).

included general discussion of stare decisis, relating its ruling to instances where the Supreme Court overruled prior cases.¹³

In his *Dobbs* concurrence, Chief Justice Roberts stated he would not have overruled *Roe* and *Casey*.¹⁴ However, the Chief Justice's *SFFA* majority opinion was silent on the issue of stare decisis, even as it silently voided just about every aspect of *Grutter*.¹⁵ Chief Justice Roberts's efforts to dance around stare decisis were not lost on the other Justices, but there were quite different views among them. In spite of their disagreement on almost everything else, Justice Clarence Thomas's concurrence and Justice Sonia Sotomayor's dissent agreed that the Court had overruled *Grutter* without saying so.¹⁶ On the other hand, Justice Brett Kavanaugh—who is often a “centrist” on this very conservative Court—took the opposite view. Justice Kavanaugh joined the *SFFA* majority opinion in full but then devoted much of his concurrence to arguing that *SFFA* was completely consistent with *Grutter*.¹⁷

Informed commentators were also divided on the issue. Citing the work of Barry Friedman,¹⁸ Bill Watson described *SFFA* as a “stealth overruling” of *Grutter*—a ruling where the majority deliberately concealed that they were casting aside precedent.¹⁹ He noted that the *SFFA* majority did not point out any relevant differences between the University of Michigan Law School admissions policy upheld in *Grutter* and the Harvard and UNC admissions policies which the Court struck down in *SFFA*.²⁰

But Jeffrey Lehman, who was Dean of the University of Michigan Law School when *Grutter* was litigated, saw things differently.²¹ Lehman stated pointedly that:

13. *Id.* at 263–68, 293–300.

14. *Id.* at 357 (Roberts, C.J., concurring) (“In my respectful view, the sound exercise of that discretion should have led the Court to resolve the case on the narrower grounds set forth above, rather than overruling *Roe* and *Casey* entirely.”).

15. The only reference to stare decisis in the *SFFA* majority opinion was a critique of the dissents laden with irony; Chief Justice Roberts contends that the dissenting opinions by Justice Sonia Sotomayor and Justice Ketanji Brown Jackson “surely cannot claim the mantle of *stare decisis*.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 227 (2023).

16. *Compare id.* at 287 (Thomas, J., concurring) (“The Court’s opinion [in *SFFA*] rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”), *with id.* at 342 (Sotomayor, J., dissenting) (noting that “[a]s Justice Thomas puts it, ‘*Grutter* is, for all intents and purposes, overruled’” (quoting Justice Thomas’s *SFFA* concurrence)).

17. *See id.* at 311–17; *see discussion infra* Part III.D.

18. Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 *Geo. L.J.* 1, 15 (2010) (defining “stealth overruling” and noting that its “hallmark . . . is that the justices are perfectly aware that they are overruling but hide the fact that they are doing so”).

19. *See Watson, supra* note 8, at 17 (arguing that “[i]f ever there was an example of stealth overruling, *SFFA* is it”). For more refined discussion of the concept of stealth overruling, *see id.*; Friedman, *supra* note 18, at 15–16.

20. Watson, *supra* note 8, at 11 (“[N]one of the Court’s stated reasons for its decision identified a factual difference between *SFFA* and *Grutter*—none of them identified anything about Harvard’s or UNC’s admissions systems that made them different from Michigan Law’s admissions system and that warranted reaching a different legal conclusion than *Grutter* did.”).

21. *See Jeffrey S. Lehman, Don’t Misread SFFA v. Harvard, INSIDE HIGHER ED* (July 17, 2023), <https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion> [https://perma.cc/5CZQ-RZG9].

The decision in the *Students for Fair Admission* case did not overrule *Grutter*. Instead, the majority opinion declared that Harvard University and the University of North Carolina had policies that were meaningfully different from both Michigan's policy and the University of Texas policy that was upheld 10 years later in the *Fisher* case.²²

Lehman did acknowledge that “[i]t will not be easy to design affirmative action policies that comply with *SFFA*,” but suggested how universities might do so.²³ Jonathan Feingold²⁴ and Reginald Oh²⁵ had similar views to Lehman.

I agree with Watson that *SFFA* was a stealth overruling of *Grutter*. My Article considers why Chief Justice Roberts engaged in this stealth overruling and exposes his doctrinal sleight of hand in doing so. In this analysis, I also delve into the *SFFA* concurrences by Justices Neil Gorsuch and Brett Kavanaugh when doing so helps to illuminate certain points.

I first consider how concerns about the Court's legitimacy in the wake of *Dobbs* may have influenced Chief Justice Roberts and his decision not to be forthright about overruling *Grutter*. Subsequently, my Article illustrates how the *SFFA* majority at times misrepresented *Grutter*,²⁶ and at other times exploited ambiguities and inconsistencies in *Grutter*'s doctrine.²⁷ I examine the *SFFA* majority's treatment of a number of issues: the compelling interest in diversity, deference to universities on defining their educational missions, the incidental burden of race-conscious policies on certain groups, the use of racial categories, “logical” and arbitrary endpoints for race-conscious admissions, the so-called essay loophole, and the possible military exception. The conclusion discusses the consequences of *SFFA*'s

22. *Id.*

23. *Id.* (arguing that if universities want to use race-conscious admissions policies, they “must have a mission that includes preparing students to be effective members of a racially integrated society[,] . . . must have analyzed whether [they] need[] to take affirmative action to create a student body where students' preconceptions and stereotypes are broken down,” and if so, they “must have an admissions policy that clearly explains how an individual applicant's contribution to the breakdown of stereotypes might be a plus factor . . . [available to] applicants of any race[,] . . . must have a clear expiration date” determined by “a full good-faith review that measures how well stereotypes are being broken down and determines on that basis whether the policy should be revised,” and it “must operate as a racially integrated community where stereotypes are broken down through continuous intellectual engagement and respectful disagreement, where people are appreciated as individuals who have complex and multidimensional identities”).

24. See Feingold, *supra* note 2.

25. See Oh, *supra* note 2; *supra* note 5.

26. Other commentators have also criticized *SFFA*'s disingenuous treatment of precedent. See Watson, *supra* note 8, at 17–18 (contending that *SFFA*'s stealth overruling of *Grutter* “calls into doubt the justices' sincerity . . . suggests that the justices acted in bad faith[, and] . . . resulted in needless doctrinal confusion”); Angela Onwuachi-Willig, Comment, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 194 (2023) (arguing that “Chief Justice Roberts has forced a new understanding of what the Equal Protection Clause requires in the affirmative action landscape by revising history, precedent, and reality through omissions, misstatements, and untruths”).

27. See generally Vinay Harpalani, *The Double-Consciousness of Race-Consciousness and the Bermuda Triangle of University Admissions*, 17 U. PA. J. CON. L. 821 (2015) (discussing *Grutter*'s ambiguities and inconsistencies); Vinay Harpalani, *Secret Admissions*, 48 J. COLL. & U.L. 325 (2024).

stealth overruling of *Grutter*—the controversies it could lead to, along with its potential impact on the Court’s legitimacy—another matter laden with ironic twists.

I. THE *DOBBS*IAN DILEMMA

Chief Justice Roberts’s hostility towards race-conscious policies is well known. In his majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, which struck down a voluntary school desegregation plan, Chief Justice Roberts infamously wrote that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁸ Later in *Schuette v. Coalition to Defend Affirmative Action*,²⁹ when Justice Sotomayor seemed to take issue with that statement,³⁰ the Chief Justice suggested that race-conscious policies might create feelings of self-doubt among students of color.³¹ Chief Justice Roberts also authored the majority opinion in *Shelby County v. Holder*, striking down Section 4 of the Voting Rights Act of 1965.³² His commitment to “colorblind” constitutionalism is a central component of his conservative jurisprudence.³³

Moreover, although he did not want to do it in *Dobbs*, Chief Justice Roberts has supported overruling precedent in the past. In *Montejo v. Louisiana*, he voted with the majority to overrule *Michigan v. Jackson* on the Sixth Amendment right to counsel.³⁴ And in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, Chief Justice Roberts joined Justice Alito’s majority opinion which invalidated labor unions’ power to procure fees from public employees who were not union

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

29. *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291 (2014).

30. *Id.* at 380 (Sotomayor, J., dissenting) (“My colleagues are of the view that we should leave race out of the picture entirely and let the voters sort it out.” (citing *Parents Involved*, 551 U.S. at 748 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”))). Justice Sotomayor called the Chief Justice’s statement “a sentiment out of touch with reality.” *Id.* In her view, the “way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race.” *Id.* at 381.

31. *Id.* at 315 (Roberts, C.J., concurring) (arguing that it may be reasonable to “conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely . . . doubt [among students of color about whether they can succeed], and—if so—that the preferences do more harm than good”).

32. *Shelby Cnty. v. Holder*, 570 U.S. 529, 534–36 (2013).

33. See Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 203–05 (2008) (discussing Chief Justice Roberts’s use of *Brown v. Board of Education* to put forth the theory of “colorblind” constitutionalism); Jonathan Feingold, *Justice Roberts Chose Colorblindness Over the Constitution*, NEWSWEEK (June 29, 2023, 12:27 PM), <https://www.newsweek.com/justice-roberts-just-chose-colorblindness-over-constitution-opinion-1809984> [<https://perma.cc/7QCJ-6FRZ>] (contending that the *SFFA* majority opinion shows “a commitment to ‘colorblindness’” and that “[Chief] Justice Roberts likes to say that race should not matter”). For more on Chief Justice Roberts’s jurisprudence, see generally Kiel Brennan-Marquez, *The Philosophy and Jurisprudence of Chief Justice Roberts*, 2014 UTAH L. REV. 137. See also William Spruance, *Heckling the Umpire: John Roberts, Public Scrutiny, and the Court’s Legitimacy*, 19 GEO. J.L. & PUB. POL’Y 633 (2021); William Rhyne, *Chief Justice John Roberts and the Combination of Conservatism and Institutionalism*, 2023 U. ILL. L. REV. ONLINE 147; Eric J. Segall, *Chief Justice John Roberts: Institutional or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107 (2021).

34. See *Montejo v. Louisiana*, 556 U.S. 778, 780–81, 799 (2009).

members.³⁵ In doing so, he voted to overrule *Abood v. Detroit Board of Education*.³⁶ So given his clear disdain for race-conscious policies, why would the Chief Justice not want to say that his *SFFA* opinion was overruling the most prominent case that has upheld any race-conscious policy in this century?

Chief Justice Roberts's approach can be understood in the context of the Court's very explicit overruling of *Dobbs* in the prior term. William Rhyne notes that Chief Justice Roberts's jurisprudence has embodied a "combination of conservatism and institutionalism."³⁷ Rhyne describes Chief Justice Roberts as "a principal architect of modern conservative jurisprudence, as well as a jurist doing his level best to preserve the Court's public integrity."³⁸ It is often said that Chief Justice Roberts is particularly concerned about the legitimacy of the Court, as reflected in his own public comments.³⁹ But what does "legitimacy" mean? Citing Richard Fallon, William Spruance distinguishes between "sociological legitimacy"—defined "as an external concern for how the public views the legal system and its institutions"—and "legal legitimacy"—defined "as judges' use of generally accepted interpretive methods."⁴⁰ Spruance describes the Chief Justice's jurisprudence as "reflect[ing] the tension between these two forms of legitimacy."⁴¹

35. See *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

36. See *id.* For discussion of Chief Justice Roberts's approach to stare decisis, see Spruance, *supra* note 33, at 655–59.

37. Rhyne, *supra* note 33, at 147.

38. *Id.* at 149.

39. See Joel Rosenblatt, *John Roberts Decries Attacks on Supreme Court's "Legitimacy"*, BLOOMBERG L. (Sept. 10, 2022), <https://news.bloomberglaw.com/us-law-week/roberts-defends-high-court-against-attacks-on-its-legitimacy> [<https://perma.cc/3KCG-RG4A>] (noting that "Chief Justice John Roberts said he's concerned criticism of the Supreme Court over controversial decisions has veered into attacks on its legitimacy as an institution"); Associated Press, *Chief Justice John Roberts defends the Supreme Court—As People's Confidence Wavers*, NPR (Sept. 10, 2022, 11:05 AM), <https://www.npr.org/2022/09/10/1122205320/chief-justice-john-roberts-defends-the-supreme-court-as-peoples-confidence-waver> [<https://perma.cc/GU5F-Q74T>] ("When asked to reflect on the last year at the court in his first public appearance since the U.S. Supreme Court overturned *Roe v. Wade*, Roberts said Friday he was concerned that lately some critics of the court's controversial decisions have questioned the legitimacy of the court, which he said was a mistake.").

40. Spruance, *supra* note 33, at 635–36; see also RICHARD H. FALLON JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 21 (2018) (providing the definitions of sociological legitimacy and legal legitimacy utilized by Spruance).

41. Spruance, *supra* note 33, at 636. *But see* Segall, *supra* note 33, at 108 (challenging "[t]he prevailing wisdom inside and outside legal academia is that Chief Justice John G. Roberts, Jr., is first and foremost an institutionalist who . . . sometimes subsumes his personal preferences to the greater good of Supreme Court legitimacy over time"). Segall contends that "[t]his oft-told tale . . . is mostly fiction . . . [and that the] defining feature of Chief Justice Roberts'[s] jurisprudence is not his alleged institutionalism, but his judicial hubris." *Id.* Segall defines judicial hubris as the "judicial behavior that flouts convention, is overly aggressive, and substantially distorts prior law to reach policy outcomes sought by the judge." *Id.* Segall further asserts,

[Chief] Justice Roberts, across the spectrum of our most contested and controversial constitutional law questions, has led the Court to coerce both state and federal governments to abide by his personal preferences, whether or not positive legal sources supported those decisions and at times even when prior law quite clearly did not

Id.

In his *Dobbs* concurrence, Chief Justice Roberts made an explicit appeal to legal legitimacy: the “simple yet fundamental principle of judicial restraint.”⁴² He made it clear that he would not have overruled *Roe* and would have decided the case on much narrower grounds.⁴³ Explaining his reasoning, the Chief Justice noted that:

If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more . . . Surely we should adhere closely to principles of judicial restraint here, where the broader path the Court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of *stare decisis*. The Court’s . . . dramatic and consequential ruling is unnecessary to decide the case before us.⁴⁴

One year later, the *SFFA* majority did abrogate race-conscious admissions policies which had “not only [been] previously recognized [by the Court], but also expressly reaffirmed [by] applying the doctrine of *stare decisis*.”⁴⁵ But of course, it would not serve Chief Justice Roberts’s desire for legal legitimacy to admit that.⁴⁶

Sociological legitimacy also comes into play here. Overturning precedent may also erode public perception of the Court as an objective, neutral body as opposed to a political entity just like Congress or the Executive. *Dobbs* especially dealt with an issue that has been highly politicized for decades—probably more than any other issue the Court has ruled on in the last half-century.⁴⁷ *Roe v. Wade* was a forty-nine-year-old precedent that was a mainstay in public discourse—one of the few Supreme Court rulings that the public at large knew.⁴⁸ Terms such as “pro-choice” and “pro-life”

42. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring).

43. *Id.* at 357 (“The Court’s decision to overrule *Roe* and *Casey* is a serious jolt to the legal system—regardless of how you view those cases. A narrower decision . . . would be markedly less unsettling, and nothing more is needed to decide this case.”).

44. *Id.* at 348–49.

45. *But cf. id.*

46. It is also possible that Chief Justice Roberts needed to placate Justice Kavanaugh, who insisted that *SFFA* was not overruling *Grutter*. See discussion *infra* Part III.D. But Justice Kavanaugh’s vote was not necessary to overrule *Grutter* explicitly. *SFFA* was a 6–3 ruling in the UNC case and 6–2 in the Harvard case because Justice Ketanji Brown Jackson recused herself from the latter. *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 384 n.* (2023) (Jackson, J., dissenting) (“Justice JACKSON did not participate in the consideration or decision of [*SFFA v. Harvard*], and issues this opinion with respect to [*SFFA v. UNC*].”). Nevertheless, Chief Justice Roberts may still have wanted to garner Justice Kavanaugh’s extra vote to bring more legitimacy to his majority opinion.

47. I would argue that the last Supreme Court case that galvanized the public more than *Roe* was *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), which held that racial segregation in public schools violated the Fourteenth Amendment’s Equal Protection Clause.

48. *Brown* and *Roe* are two of the very few Supreme Court cases of the twentieth century for which a layperson in the United States, with no legal training, might know the basic holding. Perhaps the only other such case of the last 100 years might be *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966) (“[I]f a person in [police] custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the *right to remain silent*.” (emphasis added)). In *Dickerson v. United States*, 530 U.S. 428, 443 (2000), then-Chief Justice William Rehnquist wrote for a 7–2 majority which upheld this right, noting that

are widely understood by the public as denoting different positions on a woman's right to terminate her pregnancy. Since 1980, opposition to abortion rights has been part of the Republican Party's platform.⁴⁹ And overruling *Roe* itself has long been a stated political goal and promise of many Republican candidates across the nation.⁵⁰

Consequently, many observers believe that *Dobbs* significantly damaged the Court's public image. According to the 2022 General Social Survey, public confidence in the Court plummeted "to its lowest point in at least 50 years in 2022 in the wake of the *Dobbs* decision."⁵¹ Other surveys indicated a similar drop in the Court's image.⁵² Additionally, the Court's overruling of *Roe* had a tangible, political impact on the 2022 midterm elections, to the detriment of Republicans.⁵³ The "red wave"—the expected gains for Republicans—did not happen, and polling indicated that this was at least

"*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." Nevertheless, ten years later, Chief Justice Roberts voted to severely curb *Miranda* when he joined Justice Anthony Kennedy's majority opinion in *Berghuis v. Thompkins*, 560 U.S. 370, 388–89 (2010), which held that criminal suspects who are aware of *Miranda* rights must invoke them in an unambiguous manner. Barry Friedman examines *Miranda* as a case that has been subject to stealth overruling. See generally Friedman, *supra* note 18.

49. See, e.g., Kevin DeYoung, *Republican Party Platforms on Abortion*, GOSPEL COAL. BLOG (Sept. 4, 2012), <https://www.thegospelcoalition.org/blogs/kevin-deyoung/republican-party-platforms-on-abortion> [<https://perma.cc/3A95-KXNM>].

50. See, e.g., Mark Berman, *Trump Promised Judges Who Would Overturn Roe v. Wade*, WASH. POST (Mar. 21, 2017, 9:02 AM), <https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/trump-promised-judges-who-would-overturn-roe-v-wade> [<https://perma.cc/MM7N-NVGJ>]:

President Trump . . . vowed during the campaign to nominate a judge who would help overturn *Roe v. Wade*, the landmark 1973 abortion-rights decision. During the final presidential debate, Trump was asked if he wanted to see the Supreme Court overturn that decision . . . [He responded,] "[T]hat'll happen automatically, in my opinion, because I am putting pro-life justices on the court."

51. Mark Sherman & Emily Swanson, *Trust in Supreme Court Fell to Lowest Point in 50 Years After Abortion Decision, Poll Shows*, AP NEWS (May 17, 2023, 2:05 PM), <https://apnews.com/article/supreme-court-poll-abortion-confidence-declining-0ff738589bd7815bf0eab804baa5f3d1> [<https://perma.cc/X4PC-M83C>].

52. See, e.g., Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP NEWS (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> [<https://perma.cc/8U9U-EC7F>] (noting that "[t]he judicial branch's current tarnished image [in 2022] contrasts with trust levels exceeding two-thirds in most years in Gallup's trend that began in 1972"). All of this also happened after the unauthorized early release of the *Dobbs* draft opinion in May 2022, well over a month before the opinion was released. See Robert Barnes & Mike DeBonis, *Supreme Court is Ready to Strike Down Roe v. Wade, Leaked Draft Shows*, WASH. POST (May 3, 2022, 10:15 AM), <https://www.washingtonpost.com/politics/2022/05/02/roe-v-wade-supreme-court-draft-politico> [<https://perma.cc/8ZWF-EW9G>].

53. See generally Andrew Prokop, *Why the Red Wave Didn't Come*, VOX (Nov. 9, 2022, 8:31 PM), <https://www.vox.com/policy-and-politics/23448972/midterms-results-democrats-senate-red-wave> [<https://perma.cc/KM98-QHYG>].

in part because of *Dobbs*.⁵⁴ Since the ruling, voters have opted to protect abortion access even in some conservative states.⁵⁵

Chief Justice Roberts was certainly keen to these kinds of developments in the fall of 2022, when the Court heard the *SFFA* oral arguments, and through the spring of 2023 as they considered the case. While his disdain for race-conscious policies remained unfettered, he may well have considered the consequences of overruling precedent on another highly politicized issue like affirmative action. While the Court was considering *SFFA*, how did Chief Justice Roberts decide to deal with this *Dobbsian* dilemma?⁵⁶ As Watson put it, it was through the stealth overruling of *Grutter*.⁵⁷

II. WHAT COMPELLING INTEREST?

SFFA's stealth overruling of *Grutter* was laden with irony. Chief Justice Roberts actually structured the *SFFA* majority opinion as if he was adhering to the principles developed not just in *Grutter*, but in *Grutter*'s predecessor *Regents of the University of California v. Bakke*,⁵⁸ and in *Grutter*'s

54. *See id.*:

Through the first half of 2022, polls and special election results indicated Democrats were on track for . . . midterm bruising. Then the Supreme Court's *Dobbs* decision happened . . . The decision—and Democratic messaging and advertising heavily focused on it—appears to have mobilized Democratic base voters who'd otherwise tune out for the midterms and convinced swing voters that Republicans have moved the country too far to the right.

See also Elena Schneider & Holly Otterbein, 'THE Central Issue': How the Fall of Roe v. Wade Shook the 2022 Election, POLITICO (Dec. 19, 2022, 4:30 AM), <https://www.politico.com/news/2022/12/19/dobbs-2022-election-abortion-00074426> [<https://perma.cc/8D2M-MWWV>]; Amy Walter, *The Impact of Abortion on 2022 and Beyond*, COOK POL. REP. (Mar. 16, 2023), <https://www.cookpolitical.com/analysis/national/national-politics/impact-abortion-2022-and-beyond> [<https://perma.cc/F2L7-JLEB>]; Tamara Keith, *One Year After the Dobbs Ruling, Abortion Has Changed the Political Landscape*, NPR (June 23, 2023, 5:00 AM), <https://www.npr.org/2023/06/23/1183830459/one-year-after-the-dobbs-ruling-abortion-has-changed-the-political-landscape> [<https://perma.cc/M7JR-N7XS>].

55. *See* Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/Z6P6-G6YT>]; Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, PBS NEWS (Nov. 7, 2023, 9:13 PM), <https://www.pbs.org/newshour/politics/ohio-voters-enshrine-abortion-access-in-constitution-in-latest-win-for-reproductive-rights> [<https://perma.cc/S6H2-9XBZ>].

56. *Cf.* THOMAS HOBBS, LEVIATHAN (A. R. Waller ed., 1904) (1651). Georg Sørensen describes the Hobbesian dilemma as a tension between anarchy and state power. Georg Sørensen, *Development as a Hobbesian Dilemma*, 17 THIRD WORLD Q. 903, 903 (1996) ("The state needs coercive power—a monopoly over the means of violence—in order to protect the population. But with coercive power at hand the state is not only a source of protection of the population; it is also a source of threat.").

57. *See supra* note 19 and accompanying text.

58. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287–320 (1978) (Powell, J., announcing the judgment of the Court) (upholding the educational benefits of diversity as a compelling interest that could justify use of race as an individual plus factor in admissions). The Supreme Court had punted on its first opportunity to rule on affirmative action in *Defunis v. Odegaard*. 416 U.S. 312, 319–20 (1974). This district court ordered Plaintiff Marco Defunis admitted to the University of Washington School of Law after he filed suit challenging the law school's race-conscious admissions policy. *Id.* at 314–15. By the time the case got to the Supreme Court, Defunis's graduation was imminent, and the Court declared it to

descendant cases *Fisher I*⁵⁹ and *Fisher II*.⁶⁰ All of these cases upheld race-conscious admissions policies, and most of Chief Justice Roberts’s citations to them were favorable, as if he was following them, even as he picked apart their precedent piece by piece. We see this first in the majority’s treatment of the compelling interest in diversity.

A. DISPLACING DIVERSITY

As a prelude to his analysis, Chief Justice Roberts delves into the history of the Fourteenth Amendment’s Equal Protection Clause⁶¹ and then provides the definition of strict scrutiny:

Under [the strict scrutiny] standard we ask, first, whether the racial classification is used to “further compelling governmental interests.” [citing *Grutter*, 539 U.S. at 326]. Second, if so, we ask whether the government’s use of race is “narrowly tailored”—meaning “necessary”—to achieve that interest. [citing *Fisher I*, 570 U.S. at 311–312].⁶²

The Chief Justice thus actually cites to *Grutter* and *Fisher I* for the standard of review that the Court will apply in the *SFFA* cases.⁶³ He then lays out *Bakke* and *Grutter*’s articulation of the compelling interest in the educational benefits of diversity.⁶⁴ He never states that *Grutter* was wrong in recognizing this compelling interest. He goes on to list the benefits of diversity touted by Harvard and UNC, which covered both educational goals on campus and long-term societal goals.⁶⁵ The former included “promoting robust exchange of ideas,” “producing new knowledge stemming from diverse outlooks,” “enhancing . . . cross-racial understanding,” and “breaking down stereotypes.”⁶⁶ The latter involved “training future leaders in the public and private sectors,” getting students ready for “an increasingly

be moot. *Id.* at 319–20. Four years later, in *Bakke*, the Court was split 4–1–4, and no other Justice joined Justice Powell’s opinion. *See Bakke*, 438 U.S. at 268–69. Nevertheless, *Bakke* was viewed as the controlling opinion prior to *Grutter*. *See Grutter*, 539 U.S. at 323 (“Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies.”). The *Grutter* majority brought five votes to the major points in Justice Powell’s opinion. *Id.* at 325 (noting that the majority opinion “endorse[s] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions”). The basic holding of *Grutter* was upheld in *Fisher I* and *Fisher II*. *See Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 303 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 387–88 (2016).

59. *Fisher I*, 570 U.S. at 297 (remanding case for proper application of strict scrutiny).

60. *Fisher II*, 579 U.S. at 387–88 (upholding University of Texas at Austin’s race-conscious admissions policy).

61. *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 201–06 (2023).

62. *Id.* at 206–07.

63. *Id.*

64. *See id.* at 209–11.

65. *See id.* at 214.

66. *Id.*

pluralistic society,” “better educating its students through diversity,” and “preparing engaged and productive citizens and leaders.”⁶⁷

At that point, Chief Justice Roberts switches course. While the *SFFA* majority said that these were “commendable goals,” it emphasized that courts had no clear way of measuring any of them or understanding when they had been sufficiently fulfilled.⁶⁸ Chief Justice Roberts opined that “the interests [Harvard and UNC] view as compelling cannot be subjected to meaningful judicial review.”⁶⁹

Of course, these same interests—or very similar ones—were subjected to “meaningful judicial review” in *Bakke*, *Grutter*, and *Fisher II*. Harvard’s admissions policy itself was the model for the compelling interest in diversity recognized by Justice Lewis Powell in his *Bakke* opinion,⁷⁰ and then adopted by the *Grutter* majority.⁷¹ And the main issue in *Fisher II* was essentially the measurement of the educational benefits of diversity.⁷² The Court had to determine whether the University of Texas at Austin (UTA) had attained sufficient racial diversity by admitting students by class rank alone,⁷³ via Texas’s Top Ten Percent Law.⁷⁴ The Court ultimately ruled for UTA, finding that it had measured the educational benefits of diversity from the Top Ten Percent plan sufficiently and found them to be inadequate.⁷⁵

67. *Id.*

68. *Id.*

69. *Id.*

70. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–18 (1978) (Powell, J., announcing the judgment of the Court) (describing Harvard’s admissions policy and use of race within it).

71. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (noting that majority opinion “endorse[s] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions”).

72. *See Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 380 (2016):

As the University [of Texas at Austin] examines . . . data, it should remain mindful that diversity takes many forms Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.

See also Shakira D. Pleasant, *Fisher’s Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 818 (2019) (“The holding in *Fisher II* unquestionably outlined the Court’s expectation that [universities] collect, scrutinize, and utilize data to evaluate and refine [the] race-conscious admissions process.”).

73. *See Fisher II*, 579 U.S. at 378 (“The Court thus cannot know how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review.”). *See also* Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463 (2012).

74. TEX. EDUC. CODE ANN. §51.803 (West 2015).

75. *See Fisher II*, 579 U.S. at 386:

Even if, as a matter of raw numbers, minority enrollment would increase under [admission via class rank alone], petitioner would be hard pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would

Thus, both *Grutter* and *Fisher II* held that the universities in question had sufficiently defined and measured their diversity-related goals and used race-conscious policies in a narrowly tailored manner to achieve them.

After ignoring this precedent, the Chief Justice's *SFFA* majority opinion then went on to ask:

Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient [benefits of diversity] . . . [T]he question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve[?]

....

... The interests that respondents seek, though plainly worthy, are incapable of being weighed against the interests of the general public.⁷⁶

Here, I agree with the Court that it is quite difficult to devise standards to measure whether a university has attained sufficient educational benefits of diversity. In one of my prior articles, written shortly after the Court's ruling in *Fisher I*, I argued that "the compelling interest in diversity also lacks an intuitive 'ceiling'—a limit on amount of diversity for which race-conscious policies are allowable."⁷⁷ Because *Bakke* and *Grutter* prohibited specific numerical targets for racial diversity,⁷⁸ universities had to put forth goals that are much harder to define and measure, such as "critical mass" of underrepresented students, "meaningful representation," and sufficient "educational benefits of diversity."⁷⁹

exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.

76. *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 214–15 (2023).

77. Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 778 (2015).

78. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("As Justice Powell made clear in *Bakke* . . . universities cannot establish quotas for members of certain racial groups . . .").

79. "Critical mass" was defined in several different ways in *Grutter*. See *id.* at 316 ("By enrolling a 'critical mass' of [underrepresented] minority students, the Law School seeks to 'ensure their ability to make unique contributions to the character of the Law School.'" (alteration in original)); *id.* at 318 ("[A] critical mass of underrepresented minority students would . . . realize the educational benefits of a diverse student body . . . [but not] any particular number or percentage of underrepresented minority students."); *id.* ("[C]ritical mass' means 'meaningful numbers' or 'meaningful representation,' which . . . mean[s] a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."); *id.* at 318–19 ("The current Dean of the Law School, Jeffrey Lehman . . . indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race."). Additionally, the Court noted that with "a critical mass of underrepresented minority students . . . racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 319–20. See also Harpalani,

But the complexity of devising standards for meaningful judicial review is hardly unique to diversity. Such complexity is present in many areas of law that courts adjudicate routinely, applying standards that have gradually developed through common law or other means.⁸⁰ And Harvard's and UNC's definition and measurement of diversity-related goals was at least as refined as that of the University of Michigan Law School in *Grutter*⁸¹ or UTA in *Fisher*.⁸² Chief Justice Roberts never addressed whether the educational benefits of diversity can still be considered a compelling interest. But if they can't be measured, it doesn't matter.⁸³

B. DENYING DEFERENCE

The *SFFA* majority discarded another aspect of *Grutter* by nullifying the Court's "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."⁸⁴ The late Justice Sandra Day O'Connor's majority opinion in *Grutter* highlighted judicial deference to "complex educational judgments in an area that lies primarily within the expertise of the university."⁸⁵ This included the "educational judgment that such diversity is essential to [an institution's] educational mission,"⁸⁶ and the *Grutter* majority noted that "'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"⁸⁷ The issue of deference was also key in the *Fisher* litigation. In *Fisher I*, the Court reiterated in a 7–1 opinion:

"[T]he educational benefits that flow from student body diversity," that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision [T]he

supra note 77, at 782–87 (describing "critical mass" as a "critical mess" and discussing difficulties in measuring it).

80. There is still considerable debate on how to apply elementary legal concepts such as the reasonable person standard in tort law. See generally Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012); Ashley M. Votruba, *Will the Real Reasonable Person Please Stand Up? Using Psychology to Better Understand How Juries Interpret and Apply the Reasonable Person Standard*, 45 ARIZ. ST. L.J. 703 (2013).

81. See Watson, *supra* note 8, at 123 (noting that in *SFFA* "the Court did not, nor could it, identify any difference between these benefits and the benefits that Michigan Law sought to achieve in *Grutter*").

82. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 388–89 (2016) (upholding University of Texas at Austin race-conscious admissions policy).

83. Jonathan Feingold has posited that a "more quantifiable diversity" rationale might still be permissible after *SFFA*. See Feingold, *supra* note 2, at 256–57:

Some have suggested that formalities aside, *SFFA* killed the diversity rationale and *Grutter*. As a practical matter, this might be true—that is, for this Supreme Court, no set of facts could save a race-based admissions policy designed to promote racial diversity. But if one takes Chief Justice Roberts at his word, a different conclusion is warranted: the diversity rationale remains available; Harvard and UNC just missed the mark.

84. *Grutter*, 539 U.S. at 328.

85. *Id.*

86. *Id.*

87. *Id.* at 329 (citation omitted).

[lower courts] were correct in finding that *Grutter* calls for deference to the University's conclusion, "based on its experience and expertise," that a diverse student body would serve its educational goals.⁸⁸

Fisher II added:

A university is in large part defined by those intangible "qualities which are incapable of objective measurement but which make for greatness." Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.⁸⁹

But the *SFFA* majority was in denial about the principle of deference. Chief Justice Roberts snarkily opined, "Universities may define their missions as they see fit. The Constitution defines ours."⁹⁰ Rather than "[c]onsiderable deference" to universities in "defining . . . intangible characteristics, like student body diversity,"⁹¹ the *SFFA* majority required universities using race-conscious policies to have "an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review."⁹² It held that Harvard's and UNC's race-conscious admissions policies "[did] not satisfy that standard,"⁹³ even though two lower courts reviewed each of their policies and provided long opinions upholding them.⁹⁴ And the majority did so matter-of-factly, as if it were following rather than disregarding precedent.

III. NARROWING NARROW TAILORING

Since the *SFFA* majority concluded Harvard's and UNC's diversity-related goals were too vague to measure or review, there was no need for it to delve into narrow tailoring—the means to attain these goals. It already followed from the majority's conclusion that the universities' "admissions programs fail to articulate a meaningful connection between the means they employ and the [immeasurable] goals they pursue."⁹⁵ In 2003, the Court had been clear about the basics of narrow tailoring, when it distinguished between *Grutter* and *Gratz*. While *Grutter* upheld the University of Michigan Law School's use of race as part of a flexible, holistic admissions process with individualized review,⁹⁶ *Gratz* struck down the University of Michigan College of Literature, Science, and the Arts's admissions

88. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310–11 (2013) (internal citations omitted).

89. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 388 (2016) (internal citation omitted).

90. *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 217 (2023).

91. *Fisher II*, 579 U.S. at 388.

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

93. *Id.* at 218.

94. *See id.* at 198.

95. *Id.* at 215.

96. *See Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003).

policy which awarded a fixed number of points based on race.⁹⁷ Justice O'Connor's *Grutter* majority opinion discussed many other narrow tailoring requirements in detail.⁹⁸ For all of these reasons, the *SFFA* majority opinion did not have to say anything about narrow tailoring, except if it wanted to further gut *Grutter*.

But in spite of Chief Justice Roberts's earlier pronouncement that "[i]f it is not necessary to decide more to dispose of a case, then it is necessary not to decide more,"⁹⁹ narrow tailoring is where his opinion most starkly overruled precedent. It did so even though universities' ability to use race-conscious admissions policies had—to use Chief Justice Roberts's own words in his *Dobbs* concurrence—"not only previously recognized [by the Court], but also expressly reaffirmed applying the doctrine of stare decisis."¹⁰⁰ And once again, Chief Justice Roberts never admitted that the *SFFA* majority was overturning anything.

A. TAKE UP THE ASIAN AMERICAN BURDEN¹⁰¹

Among its narrow tailoring requirements,¹⁰² *Grutter* held that "[t]o be narrowly tailored, a race-conscious admissions program must not 'unduly burden individuals who are not members of the favored racial and ethnic groups.'"¹⁰³ Justice O'Connor's majority opinion was critiqued by scholars because it did not provide guidance about the meaning of "unduly burden." For example, Ian Ayres and Sydney Foster noted that *Grutter* did not "offer a theory for where the line should be drawn between programs that weight race too heavily and those that do not."¹⁰⁴ Nevertheless, *Grutter* obviously implied that race could be afforded some weight and that some level of burden on some racial/ethnic groups was permissible.¹⁰⁵

97. See *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

98. See *Grutter*, 539 U.S. at 333 ("The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989))); *id.* at 339:

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.

See *id.* at 341 ("Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group.").

99. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring).

100. *Id.* at 349.

101. Cf. Rudyard Kipling, *The White Man's Burden*, KIPLING SOC'Y (1899), https://www.kiplingsociety.co.uk/poem/poems_burden.htm [<https://perma.cc/T7R7-N5D6>] (repeatedly urging readers to "[t]ake up the White Man's burden").

102. See *supra* note 98 and accompanying text.

103. *Grutter*, 539 U.S. at 341 (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630 (1990)).

104. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 558 (2007). See also Harpalani, *supra* note 77, at 808 (discussing allowable weight of race in admissions process).

105. See Vinay Harpalani, Response, *The Need for an Asian American Supreme Court Justice*, 137 HARV. L. REV. F. 23, 35 (2023) (noting that "[a]s Justice Sotomayor pointed out,

But in the *SFFA* majority opinion, Chief Justice Roberts disposed of *Grutter*'s “must not ‘unduly burden’” standard and replaced it with a *must not burden at all* standard. He stated that “[c]ollege admissions are zero-sum” because any consideration that raises the proportion of admitted students from one group will reduce the proportion of admitted students from another group,¹⁰⁶ and one basis for the *SFFA* majority’s ruling was that Harvard’s race-conscious policy “overall results in fewer Asian American[s] . . . being admitted” than would be admitted if Harvard did not use a race-conscious admissions policy.¹⁰⁷ The *SFFA* majority thus erased even the small burden that *Grutter* allowed for race-conscious admissions. Under its logic, any use of race would be prohibited because it creates an incidental burden—however small—on whichever groups decrease in proportion because of the policy.¹⁰⁸ But once again, the majority did not admit it was overruling *Grutter*.

B. ERASING RACE ITSELF

The *SFFA* majority also introduced a new dimension to narrow tailoring: the questioning of “opaque racial categories”¹⁰⁹ that it contended are

in *Grutter* and *Fisher I* and *II*, the Court affirmed race-conscious policies that had . . . [an] effect on the percentages of different groups”); see also *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 349 n.28 (2023) (Sotomayor, J., dissenting) (“[A]bsent the consideration of race, [Asian American] representation would increase from 24% to 27%[.] . . . [S]uch an impact from the use of race . . . is consistent with the impact that this Court’s precedents have tolerated.” (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 191 n.29 (1st Cir. 2020))).

Generally, the burden of race-conscious admissions policies on any group has been relatively small. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002):

[T]he perceived unfairness [of affirmative action] is more exaggerated than real. The perception is a distortion of statistical truth, premised on an error in logic. There is strong evidence . . . that minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action. But that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action.

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

107. *Id.*

108. See Harpalani, *Secret Admissions*, *supra* note 27, at 327:

[I]n his *SFFA* majority opinion, Chief Justice Roberts changed that last narrow tailoring requirement in a way that precludes any use of race: he essentially transformed no “undue burden” into no burden at all. The Chief Justice stated that “[c]ollege admissions are zero-sum” because percentages add up to one hundred: an advantage that increases the proportion of admitted students from one group will necessarily decrease the proportion of admitted students from another group. The Court ruled in favor of [the Plaintiffs] in part because “Harvard’s [race-conscious policy] overall results in fewer Asian Americans . . . being admitted” than would be admitted absent use of race. Any use of race at all creates such a “burden” on some group. Thus, *SFFA* nullified even the narrow parameters laid out in *Grutter*.

109. *SFFA*, 600 U.S. at 217. Justice Anthony Kennedy’s majority opinion in *Fisher II* did consider potential problems with racial categories, but did not question whether they were necessary. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 380 (2016) (“Formalistic racial classifications *may* sometimes fail to capture diversity in all of its dimensions and,

“themselves imprecise in many ways.”¹¹⁰ Chief Justice Roberts notes the following racial categories that universities use: “(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American.”¹¹¹ He contends that some categories, such as “Asian,” are “plainly overbroad” while others, such as “Hispanic,” are arbitrary or undefined.¹¹² But criticizing the use of particular racial categories (which can be a valid critique) was just the start. Chief Justice Roberts bizarrely goes on to claim that race-conscious admission policies—the very thing *Grutter* approved of—allow “the very thing that *Grutter* foreswore: stereotyping.”¹¹³ He refers to “the pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer,’”¹¹⁴ without himself having encountered the truly pernicious stereotypes that people of color live through on a daily basis.¹¹⁵ Further, his opinion misleads by stating that “some students may obtain preferences on the basis of race alone”¹¹⁶ based on Harvard and UNC’s belief “that there is an inherent benefit in race *qua* race—in race for race’s sake.”¹¹⁷ *Grutter* was clear that race could not be considered alone, for its own sake, but rather in conjunction with “all factors that may contribute to student body diversity.”¹¹⁸

Justice Gorsuch parrots the majority’s critique in his concurrence. He focuses on the racial categories in the Common Application¹¹⁹: “American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White.”¹²⁰ Although he concedes that “[a]pplicants can write in further details if they choose,”¹²¹ Gorsuch essentially restates the Chief Justice’s contention that some of the categories are overbroad:

Take the “Asian” category. It sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world’s population. This agglomeration of so many peoples paves over countless differences in “language,” “culture,” and historical

when used in a divisive manner, *could* undermine the educational benefits the University values.” (emphasis added).

110. *SFFA*, 600 U.S. at 216.

111. *Id.*

112. *Id.*

113. *Id.* at 220.

114. *Id.* (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J., announcing the judgment of the Court)).

115. See Onwuachi-Willig, *supra* note 26, at 211 (noting “the Chief Justice’s failure to recognize the built-in advantages that . . . white students are not burdened by the negative social meanings and stereotypes that get attached to being Black or Latinx”).

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

117. *Id.*

118. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

119. The Common Application allows applicants to simultaneously apply to “more than 1,000 schools, including some colleges outside the U.S.” Cole Claybourn, *The Common App: Everything You Need to Know*, U.S. NEWS & WORLD REP. (Sept. 18, 2023), <https://www.usnews.com/education/best-colleges/articles/common-app> [<https://perma.cc/2B3U-Q2FN>]. See also COMMON APP, <https://www.commonapp.org> [perma.cc/59BS-ZRK2].

120. *SFFA*, 600 U.S. at 291 (Gorsuch, J., concurring).

121. *Id.*

experience. It does so even though few would suggest that all such persons share “similar backgrounds and similar ideas and experiences.”¹²²

Justice Gorsuch contends that racial categories are based on “incoherent” and “irrational” stereotypes.¹²³

Now I do believe that using the term “Asian” alone to refer to Asian Americans is problematic.¹²⁴ It conflates people in Asian countries with those of us who were born and raised in the United States and thus reinforces the stereotype of us as perpetual foreigners.¹²⁵ However, Justice Gorsuch himself ironically reinforces this same stereotype. He assumes that language, cultural, and historical factors from our ancestral homelands—sometimes a generation or several generations removed—trump our common experiences in the United States.¹²⁶ As I have noted, “Whether of East Asian or South Asian ancestry, most Asian Americans do speak the same language—English. We grew up speaking it, and we grew up with people assuming we couldn’t speak it.”¹²⁷

Sometimes it is better to have more broader categories, while at other times more specific racial and ethnic classifications are necessary. Both the commonalities and the differences in racialized experiences of people of color can be important, depending on the context. And universities themselves are in the best position to determine when their diversity-related goals are best fulfilled by considering Asian Americans as a whole and when those goals are better served by differentiating between sub-groups.¹²⁸

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

123. *Id.* at 291–92.

124. See Vinay Harpalani, *Can “Asians” Truly Be Americans?*, 27 WASH. & LEE J.C.R. & Soc. JUST. 559, 584–88 (2021):

[U]se of “Asian” to refer to Asian Americans is questionable for several reasons.

... “Asian” by itself reinforces the perpetual-foreigner stereotype. The “American” part is especially important for a group that has long been considered foreign and un-American.

....

... [T]he singular label “Asian” also lumps together almost . . . more than one half of the world’s population.

....

... [A]t its root, “Asian” is a Western construct that promotes fetishization—a label of foreignness and exoticism, similar to “Oriental.” How we label people affects how we view and treat them . . . As long as Asian Americans are thought of simply as “Asians,” we will never truly be seen as Americans.

125. *Id.* at 585:

Failure to distinguish between natives of Asian countries, recent immigrants to the United States, and Asian Americans who were born in the United States obscures important differences in everyday experiences. Second-generation Asian Americans are raised in different cultural environments than natives of our ancestral nations or even immigrants from those nations who come to the United States as adults. And generational conflicts over career choice, dating, and other issues are well known in Asian American families that include both adult immigrants and second-generation Asian American children. Referring to Asian Americans as simply “Asian” obscures all of these important differences.

126. See Harpalani, *supra* note 105, at 39–40.

127. *Id.* at 40.

128. *Id.* at 41–42.

That was part of the reason for judicial deference to universities on such matters.¹²⁹

C. A NOT SO LOGICAL END POINT

The *SFFA* majority also hammered away at the major doctrinal inconsistency within *Grutter*: that there was “no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”¹³⁰ The problem here is that diversity is not like a national security emergency or a specifically tailored remedy, both of which are compelling interests that will pass eventually.¹³¹ There is no foreseeable time in the future when the educational benefits of diversity will cease to be compelling.¹³² *Grutter* missed this point and treated diversity like a targeted remedial interest.¹³³

As I have argued, the logical end point for race-conscious admissions does not stem from diversity-related goals themselves, but from racial disparities on academic criteria.¹³⁴ Universities needed to use race-conscious admissions to compensate for differences on grades and test scores between

129. *Id.* at 42.

130. *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003).

131. See Harpalani, *supra* note 77, at 775–77. In *Bakke*, Justice Powell rejected broadly remedying societal discrimination as a compelling interest because it is “ageless in its reach into the past.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., announcing the judgment of the Court). Similarly, I have written that “diversity is ageless in its reach into the future.” Harpalani, *supra* note 77, at 776.

132. See Harpalani, *supra* note 77, at 775–77; see also Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75, 110 (2012) (“It is both logical and reasonable to presume that remedies entail finite goals. It is less logical and not altogether clear that the aspirational goals of diversity are as finite or circumscribed.”).

133. See Ronald J. Krotoszynski Jr., *The Argot of Equality: On the Importance of Disentangling “Diversity” and “Remediation” as Justifications for Race-Conscious Government Action*, 87 WASH. U.L. REV. 907, 935–37 (2010):

If diversity is generally a good thing and, in any case, often demonstrably correlates positively to enhanced results, there should not be any need to sunset diversity programs.

....

... [O]nce a governmental entity has remediated the present effects of past discrimination, there would be no need for further remedial efforts. What we see, then, is that the Supreme Court [in *Grutter*] itself tends to revert into a remedial mindset even when, in theory, discussing a diversity program.

We should expect that at some discrete time in the future efforts to remediate past discrimination, unlike diversity programs, will have some natural stopping point: when the contemporary effects of the past discrimination have been completely negated, when the contemporary effects of the past discrimination are so attenuated that nothing is left to remediate, or some combination of the two. On the other hand, diversity programs should in theory be relevant so long as we believe that pluralism is relevant to the excellence and success

134. Harpalani, *supra* note 77, at 811:

[T]he most significant reason that most universities use race-conscious admissions policies—because of differences on academic admissions criteria between minority and non-minority applicants. The “logical end point” of race-conscious admissions will occur when these differences no longer exist: at that point, universities will not need to use race as an admissions plus factor to essentially compensate for these differences.

groups.¹³⁵ Only when such disparities are eliminated—through racial equity measures—would there be no need to use race.¹³⁶ Any end point before that time is not “logical.”

But Harvard and UNC did not argue this, and Chief Justice Roberts was able to assert that they did not proffer a “logical end point” for race-conscious admissions.¹³⁷ On this issue, I also agree with him. The end point issue came up repeatedly at the *SFFA* oral arguments.¹³⁸ Harvard Counsel Seth Waxman noted many steps that Harvard was taking to reach the end point, including outreach programs, financial aid improvements, elimination of early admissions, and other race-neutral measures to increase diversity.¹³⁹ But he could not say how Harvard will know that it has reached that end point. Solicitor General Elizabeth Prelogar, arguing for the Biden Administration in support of the universities, listed ways that they could determine if race-conscious policies were still necessary.¹⁴⁰ These included looking at graduation and dropout rates, surveying student experiences with diversity, and tracking student demographics.¹⁴¹ But she also did not specify how these measures would show that universities no longer needed to use race-conscious admissions policies. And neither Waxman nor Prelogar could give any specific or even general timetable for the phase-out of race-conscious admissions.

In her *Grutter* majority opinion, Justice O’Connor seemed to recognize implicitly that the elimination of academic disparities by race was the key to ending race-conscious admissions policies: “[T]he number of minority applicants with high grades and test scores has indeed increased [since Justice Powell’s *Bakke* opinion in 1978]. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹⁴² But while Justice O’Connor was correct with the first sentence and its eventual implications, it is her second sentence—the twenty-five-year expectation—that created the most controversy and came most into play in *SFFA*.

135. *Id.*; see also *Grutter*, 539 U.S. at 318 (noting that University of Michigan Law School Director of Admissions Erica Munzel stated, “a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores”).

136. See Harpalani, *supra* note 77, at 811.

137. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 221 (2023).

138. See Vinay Harpalani, “*With All Deliberate Speed*”: *The Ironic Demise of (and Hope for) Affirmative Action*, 76 SMU L. REV. F. 91, 102–105 (2023).

139. See Transcript of Oral Argument at 78–85, *Students for Fair Admissions v. President and Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2022) (No. 20-1199) [hereinafter Harvard Oral Argument Transcript].

140. See Transcript of Oral Argument at 170–72, *Students for Fair Admissions v. President and Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2022) (No. 21-707) [hereinafter UNC Oral Argument Transcript].

141. *Id.*

142. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (internal citation omitted).

D. AN EVEN MORE ILLOGICAL END POINT

Justice O'Connor's twenty-five-year timeline was speculative and aspirational, and even she later acknowledged that it was not legally binding.¹⁴³ All of the parties also rejected it. SFFA argued that the Court did not need to wait until 2028 to strike down race-conscious admissions. Conversely, the universities and their supporters (student intervenors and the Biden Administration) contended that race-conscious admissions policies could go on beyond 2028.¹⁴⁴

But because no "logical end point" was in sight, the *SFFA* majority did incorporate this arbitrary twenty-five-year end point. Chief Justice Roberts noted that Justice O'Connor's "expectation was oversold," but it still offered that "the high school applicants that Harvard and UNC will evaluate this fall using their race-based admissions systems are expected to graduate in 2028—25 years after *Grutter* was decided."¹⁴⁵ Strangely, Chief Justice Roberts seemed to give a nod to the aspirational timeline even as he eschewed it.

Even more strange was Justice Kavanaugh's invocation of the twenty-five-year timeline, which fueled his insistence that the majority opinion was "consistent with and follows from the Court's equal protection precedents."¹⁴⁶ Justice Kavanaugh proclaimed that "the Court's pronouncement of a 25-year period—as both an extension of *and* an outer limit to race-based affirmative action in higher education—formed an important part of the carefully constructed *Grutter* decision."¹⁴⁷ He made much of the fact that several opinions in *Grutter* mentioned the timeline,¹⁴⁸ rendering invalid "any suggestion that the Court's reference to it was insignificant or not carefully considered."¹⁴⁹ Justice Kavanaugh thus used Justice O'Connor's aspirational statement as a binding upper limit for the end point, in spite of Justice O'Connor's own rejection of it as such.¹⁵⁰ Arbitrary and non-binding as it was, the twenty-five-year timeline framed Justice Kavanaugh's opinion that *SFFA* was consistent with *Grutter*. He seemed to imply that while race-conscious admissions policies were okay in 2003,¹⁵¹

143. See Sandra Day O'Connor & Stewart J. Schwab, *Affirmative Action in Higher Education Over the Next Twenty-Five Years: A Need for Study and Action*, in *THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA* 58, 62 (David L. Featherman, Martin Hall & Marvin Krislov eds., 2010) ("That 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative action program in 2028.").

144. See Harvard Oral Argument Transcript, *supra* note 139, at 3–5, 40–42, 85, 94–96; UNC Oral Argument Transcript, *supra* note 140, at 69–71, 116–17, 143–44.

145. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 224–25 (2023).

146. *Id.* at 311 (Kavanaugh, J., concurring).

147. *Id.* at 317.

148. See *id.* at 312–13.

149. *Id.* at 315.

150. See O'Connor & Schwab, *supra* note 143, at 62.

151. *SFFA*, 600 U.S. at 315 (Kavanaugh, J., concurring) ("The *Grutter* Court rejected . . . arguments for ending race-based affirmative action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation.").

the time for universities to suddenly stop using them is now—even though it has not been twenty-five years since *Grutter*. Moreover, Justice Kavanaugh coupled this view with expressed empathy for Justice Sotomayor’s and Justice Jackson’s dissents.¹⁵² He wanted “[t]o be clear [that] . . . racial discrimination still occurs and the effects of past racial discrimination still persist.”¹⁵³ But it was also clear that at least in *SFFA*, he was not willing to do anything about this.

IV. “EXCEPTIONS” TO ROBERTS’S RULES

While Chief Justice Roberts’s opinion silently obliterated precedent, there were two different exceptions, one could argue, to the stealth overruling of *Grutter*. First, in yet another odd twist, the *SFFA* majority did allow race to come into the admissions process indirectly. Chief Justice Roberts stated that although universities cannot consider an applicant’s race directly, they can consider racial experiences that come through in the application, such as in applicants’ essays and personal statements.¹⁵⁴ Second, the Chief Justice dropped a footnote in the majority opinion suggesting that the *SFFA* ruling might not apply to the military academies.¹⁵⁵ Both deal with points in *Grutter*. In contrast with just about everything else I have considered, they are consistent with its holding. For that reason, and because they raise other interesting points, I consider the two “exceptions”—even though I don’t think either one will have much impact.¹⁵⁶

152. *See id.* at 316 (“Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON disagree with the Court’s decision. I respect their views. They thoroughly recount the horrific history of slavery and Jim Crow in America, as well as the continuing effects of that history on African Americans today.” (internal citation omitted)).

153. *Id.* at 317.

154. *Id.* at 230–31.

155. *Id.* at 213 n.4:

The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation’s military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.

156. Another possible exception, not noted by the Supreme Court in *SFFA*, could be for Native Americans with a tribal affiliation—a political classification rather than a racial classification. *See Oh, supra* note 2. The Court has not ruled on this issue, although it came up this past term in *Halaand v. Brackeen*, 599 U.S. 255 (2023)—particularly in Justice Kavanaugh’s concurrence. *See id.* at 333–34:

[T]he Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings.

In my view, the equal protection issue is serious. Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child’s race—even if the placement is otherwise determined to be in the child’s best interests. And a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent’s race. Those scenarios raise significant questions under bedrock equal protection principles and this Court’s precedents. Courts, including ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing

(Kavanaugh, J., concurring) (internal citations omitted).

A. THE ESSAY “LOOPHOLE”

According to the *SFFA* majority, “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.”¹⁵⁷ This is not new. *Grutter* stated that “[a]ll applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”¹⁵⁸ But Chief Justice Roberts went on to note that “universities may not simply establish through application essays or other means the regime we hold unlawful today ‘The Constitution deals with substance, not shadows’”¹⁵⁹ The Chief Justice did not say whether he was referring to the *Grutter* “regime” here. Some observers viewed this as a “loophole,” arguing that the “story” about race, rather than the “race box,” will still be quite significant.¹⁶⁰ Institutions even rewrote their essay questions to facilitate applicants’ discussion of their racial experiences.¹⁶¹

However, in her dissent, Justice Sotomayor called the essay loophole a “false promise” and “nothing but an attempt to put lipstick on a pig.”¹⁶² I have my doubts also. Universities will be expected to consider all facets of the application in the same way for all applicants. They will have to give the same weight to a White student’s discussion of challenges and experiences (including racial experiences) as they do to a student of color’s discussion of their experiences. The *SFFA* majority deemed that consideration of salient individual characteristics is permitted, but not racial group

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

158. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

159. *SFFA*, 600 U.S. at 230 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

160. See, e.g., Jordan Weissmann, *How John Roberts Remade the College Application Essay*, SEMAFOR (June 29, 2023, 8:41 PM), <https://www.semafor.com/article/06/29/2023/supreme-court-affirmative-action-decision-essays> [<https://perma.cc/Y8BV-RXFG>] (“‘It’s a huge loophole,’ Brian Taylor, managing partner at Ivy Coach, told Semafor. ‘Will the Common App likely ban the race box on applications? Yes. But colleges are going to find ways around that race box. It’s going to be more about the story.’”).

161. See, e.g., Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your “Identity”*, N.Y. TIMES (Aug. 18, 2023), <https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html> [<https://perma.cc/U39R-APTY>]:

A review of the essay prompts used this year by more than two dozen highly selective colleges reveals that schools are using words and phrases like “identity” and “life experience,” and are probing aspects of a student’s upbringing and background that have, in the words of a Harvard prompt, “shaped who you are.” That’s a big change from last year, when the questions were a little dutiful, a little humdrum—asking about books read, summers spent, volunteering done.

See also Sharon Bernstein, *US Colleges Refashion Student Essay Prompts After Ban on Affirmative Action*, REUTERS (Aug. 1, 2023, 6:28 AM), <https://www.reuters.com/world/us/us-colleges-refashion-student-essay-prompts-after-ban-affirmative-action-2023-08-01> [<https://perma.cc/4V6G-ABXC>] (noting that “students applying to Emory University in Atlanta this fall will get new essay prompts aimed at teasing out details about their cultural backgrounds”).

162. *SFFA*, 600 U.S. at 363 (Sotomayor, J., dissenting).

membership.¹⁶³ Plaintiffs in *Bakke*, *Grutter*, and *SFFA* all made their cases in large part through statistical analyses of racial disparities in grades and standardized test scores between admitted White/Asian American applicants and admitted applicants from underrepresented racial groups.¹⁶⁴ If such racial disparities continue to exist at a significant level, courts may deem that the universities in question are using racial group membership and perhaps discerning it through essays or other means.¹⁶⁵

Nevertheless, telling the difference between individual characteristics related to racial experiences and racial group membership itself is by no means straightforward. As I have noted:

[T]he distinction between the admissions regime that the *SFFA* majority endorses and the one it outlaws is far from clear If universities continue to use holistic review, what is to stop them from using not just essays that discuss race, but also race itself discerned from those essays?¹⁶⁶

163. *See id.* at 230–31:

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.

Angela Onwuachi-Willig retorts that “the manner in which the Chief Justice spoke about how schools could consider the impact of race on an applicant’s life exposes . . . his perspectives on race, his belief in traditional definitions of merit as race neutral, and his view of racism as aberrational and presenting neither structural nor individual advantages to white people.” Onwuachi-Willig, *supra* note 26, at 212.

164. *See* Harpalani, *Secret Admissions*, *supra* note 27, at 359–60 nn. 216–18, 221 and accompanying text (discussing how plaintiffs in various affirmative action cases employed racial disparities on academic criteria to make their arguments and giving some reports of magnitude of these disparities).

165. For a more extensive discussion of this possibility and universities’ responses to it, *see id.* at 360–65. I recently contended that universities may engage in “the ‘de-quantification’ of admissions,” whereby they reduce the use of quantifiable criteria such as standardized admissions tests, in part to mitigate lawsuits. *Id.* at 362. However, in 2024, several highly selective universities including Yale, Brown, and Dartmouth all announced that they would reinstate the use of standardized admissions tests, after having suspended their use during the COVID-19 pandemic. *See* Hannah Natanson & Susan Svrluga, *The SAT is Coming Back at Some Colleges. It's Stressing Everyone Out.*, WASH. POST (Mar. 18, 2024, 8:00 AM), <https://www.washingtonpost.com/education/2024/03/18/sat-test-policies-confuse-students/> [<https://perma.cc/LK2N-CPRB>]. The issue has divided selective institutions of higher education. *See id.* Perhaps the future of standardized admissions testing is not as bleak as I had suggested.

166. Harpalani, *Secret Admissions*, *supra* note 27, at 352. Justice Ruth Bader Ginsburg foreshadowed this possibility in her *Gratz* dissent. *See Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting):

One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through adoption of affirmative action plans Without recourse to such plans, institutions of higher education may resort to camouflage. For example, schools may encourage applicants to write of their cultural traditions in the essays they submit, or to indicate whether English is their second language.

Cf. also Harpalani, *supra* note 77, at 800 (“A holistic admissions plan inherently considers race, even if there is no explicit ‘plus’ factor allowed, because race can come into play through other holistic factors that are considered.”); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146 (2008) (positing “the question of whether race

In states where race-conscious policies were banned long ago, universities have been accused of using race in a surreptitious and illegal manner.¹⁶⁷ Such accusations are bound to arise again.¹⁶⁸ Channeling Justice Antonin Scalia's dissent in *Grutter* from two decades ago, Chief Justice Roberts's essay loophole seems "perversely designed to prolong the controversy."¹⁶⁹

B. ARMING THE ARMED FORCES

While essays will likely not circumvent the Court's proscription of race-conscious admissions, the military exception could have an impact, albeit in a very limited domain. Chief Justice Roberts's opinion simply stated in a footnote that "in light of the potentially distinct interests that military academies may present," the Court was not considering whether the *SFFA* holding applied to them.¹⁷⁰ The military exception also harks back to the *Grutter* majority, which cited the military as one reason why race-conscious admissions policies were necessary.¹⁷¹ Justice O'Connor's majority opinion noted that high-ranking retired military leaders determined, based on a lifetime of experience, that,

[A] "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." . . . "[T]he military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting."¹⁷²

can in fact be eliminated from admissions processes"); Daniel N. Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 L. & Soc. INQUIRY 985, 1015 (2007) ("[T]he line between race-based and race-blind policy making can be quite blurry . . .").

167. See, e.g., TIM GROSECLOSE, REPORT ON SUSPECTED MALFEASANCE IN UCLA ADMISSIONS AND THE ACCOMPANYING COVER-UP (2008); RICHARD SANDER, THE CONSIDERATION OF RACE IN UCLA UNDERGRADUATE ADMISSIONS (2012). See also Scott Jaschik, *Is "Holistic" Admissions a Cover for Helping Black Applicants?*, INSIDE HIGHER ED (Sept. 1, 2008), <https://www.insidehighered.com/news/2008/09/02/holistic-admissions-cover-helping-black-applicants> [<https://perma.cc/KBD4-JY65>]; Alexia Boyarsky, *Findings by Law Professor Suggest That UCLA Admissions May Be Violating Prop 209*, DAILY BRUIN (Oct. 23, 2012), <http://dailybruin.com/2012/10/23/findings-by-law-professor-suggest-that-ucla-admissions-may-be-violating-prop-209> [<https://perma.cc/H9EJ-EW7S>].

168. See Harpalani, *Secret Admissions*, *supra* note 27, at 352, 360–63.

169. See *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part).

170. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 213 n.4 (2023).

171. See *Grutter*, 539 U.S. at 330–31.

172. *Id.* at 331 (internal citations omitted). The *Grutter* majority favorably cited the amicus brief of retired military leaders who supported affirmative action. See Joe R. Reeder, *Military Amicus Brief Cited in Supreme Court's Decision in the University of Michigan Case*, *Grutter v. Bollinger*, GREENBERG TRAURIG (June 27, 2003), <https://www.gtlaw.com/en/news/2003/6/military-amicus-brief-cited-in-supreme-courts-decision-in-the-university-of> [<https://perma.cc/4YAU-9YCC>].

But the military exception was really a nod to Solicitor General Elizabeth Prelogar. Prelogar astutely made diversity in the military a prominent part of her oral argument.¹⁷³ She highlighted the “distinctive interests” in diversity that the military possessed,¹⁷⁴ such as national security.¹⁷⁵ In clever fashion, Prelogar not only discussed diversity at the military academies, but also tied the military to civilian institutions of higher learning. She noted that because “more officers come from [Reserve Officer Training Corps] programs”¹⁷⁶ at universities, it is important “to protect and preserve space for universities to also achieve the educational benefits of diversity and provide the paths to leadership that inhere in those programs as well.”¹⁷⁷

Although the Justices did not buy this linkage between military interests and civilian universities, I was not surprised that they did hold out the possibility of an exception for the military academies. At oral argument, Chief Justice Roberts asked Prelogar whether it “might make sense for us not to decide the service academy issue in this case?”¹⁷⁸—to which Prelogar responded that she “would certainly ask the Court to take account of those distinctive interests and . . . to recognize the compelling interest and the critical national security interests.”¹⁷⁹ This was essentially the position that the Court took.¹⁸⁰ Justice Samuel Alito also noted that Prelogar’s argument “about the military is something that we have to take very seriously . . . [because she] represent[s] the entire executive branch, including the military.”¹⁸¹ And Justice Kagan also remarked that Prelogar “made a very convincing case on behalf of the military.”¹⁸²

Nevertheless, the possible military exception has already been challenged in court, at both the U.S. Military Academy¹⁸³ and the U.S. Naval Academy.¹⁸⁴ And as I have noted before, the Supreme Court here just showed its

173. See UNC Oral Argument Transcript, *supra* note 140, at 144–53, 155–56, 169–70.

174. *Id.* at 149.

175. *Id.* at 144, 149, 153.

176. *Id.* at 150.

177. *Id.*

178. *Id.* at 149.

179. *Id.*

180. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 213 n.4 (2023).

181. UNC Oral Argument Transcript, *supra* note 140, at 152.

182. *Id.* at 160.

183. See *Anemona Hartocollis, Anti-Affirmative Action Group Sues West Point Over Admissions Policy*, N.Y. TIMES (Sept. 19, 2023), <https://www.nytimes.com/2023/09/19/us/affirmative-action-west-point.html> [<https://perma.cc/NBC6-8W2K>]. On January 3, 2024, Judge Philip Halpern of the U.S. District Court for the Southern District of New York denied a motion to enjoin the U.S. Military Academy’s use of race-conscious admissions policies. See *Students for Fair Admissions v. U.S. Mil. Acad. at W. Point*, No. 23-cv-08262, 2024 U.S. Dist. LEXIS 2222, at *4 (S.D.N.Y. Jan. 3, 2024). On February 2, 2024, the U.S. Supreme Court also declined an emergency application to enjoin the U.S. Military Academy from using such policies, noting that “record before this Court is underdeveloped, and this order should not be construed as expressing any view on the merits of the constitutional question.” *Docket No. 23A696*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23a696.html> [<https://perma.cc/B9BE-WDJN>].

184. See *Devan Cole, Anti-Affirmative Action Group Sues Naval Academy Over Race-Based Admissions Policies*, CNN (Oct. 5, 2023), <https://www.cnn.com/2023/10/05/politics/naval-academy-affirmative-action-lawsuit-supreme-court/index.html> [<https://perma.cc/>]

willingness “to uphold use of race when government power is at stake.”¹⁸⁵ The *SFFA* majority cited *Johnson v. California* as an instance where prison officials were allowed to segregate prisoners by race,¹⁸⁶ because of “imminent and serious risks to human safety in prisons, such as a race riot.”¹⁸⁷ And in her dissent, Justice Sotomayor referred to *United States v. Brignoni-Ponce*¹⁸⁸ and *United States v. Martinez-Fuerte*,¹⁸⁹ where the Court held respectively that “Mexican appearance” and “Mexican ancestry” could constitute “reasonable suspicion” to justify traffic stops by border patrol agents—essentially justifying racial profiling.¹⁹⁰ Justice Sotomayor critiqued the majority’s “indefensible reading of the Constitution”¹⁹¹—“that a person’s skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person’s individualized contributions to a diverse learning environment.”¹⁹² The Supreme Court has thus deemed that the government can consider race to ensure that the military, prison officials, and border patrol agents maintain power, but not to facilitate “the education of America’s citizenry.”¹⁹³

V. CONCLUSION: THE GHOSTS OF *GRUTTER*

SFFA’s stealth overruling of *Grutter* is the “worst kept secret” in higher education.¹⁹⁴ Chief Justice Roberts’s doublespeak on stare decisis resonated throughout the *SFFA* majority opinion. Right until the very end, where he stated the holding, Chief Justice Roberts kept signaling that *SFFA* was following precedent:

[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial

RG5U-2DPJ]. On December 20, 2023, Judge Richard Bennett of the U.S. District Court for the District of Maryland denied a motion to enjoin the U.S. Naval Academy’s use of race-conscious admissions policies. *Students for Fair Admissions v. U.S. Naval Acad.*, No. cv-23-2699, 2023 WL 8806668, at *1 (D. Md. Dec. 20, 2023).

185. Kristine Bowman, Kimberly Robinson & Vinay Harpalani, *Military Academies Can Still Consider Race in Admissions, but the Rest of the Nation’s Colleges and Universities Cannot, Court Rules*, CONVERSATION (June 30, 2023, 8:41 AM), <https://theconversation.com/military-academies-can-still-consider-race-in-admissions-but-the-rest-of-the-nations-colleges-and-universities-cannot-court-rules-205112> [<https://perma.cc/B9TX-2MWG>].

186. *Johnson v. California*, 543 U.S. 499 (2005).

187. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 207 (2023).

188. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

189. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

190. *See SFFA*, 600 U.S. at 354–55 (Sotomayor, J., dissenting).

191. *Id.* at 355.

192. *Id.*

193. Bowman, Robinson & Harpalani, *supra* note 185.

194. *Cf.* Harpalani, *Secret Admissions*, *supra* note 27, at 329 (“How exactly admissions decisions are made through holistic review is perhaps the ‘best kept secret’ in higher education.” (citing *DIAMOND D & THE PSYCHOTIC NEUROTICS*, *Best-Kept Secret, on STUNTS, BLUNTS & HIP HOP* (Chemistry Records 1992))).

stereotyping, and lack meaningful end points. *We have never permitted admissions programs to work in that way, and we will not do so today.*¹⁹⁵

And in biting irony, the Chief Justice mocked the dissents of Justices Sotomayor and Jackson by saying that they “surely cannot claim the mantle of *stare decisis*.”¹⁹⁶

Like *Dobbs*, *SFFA* was “a serious jolt” to higher education,¹⁹⁷ creating disorder at many universities.¹⁹⁸ The Court has left many open questions.¹⁹⁹ Although the basic *Grutter* framework is gone, are there any circumstances where diversity might be a compelling interest? Is it possible for universities to come up with “an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.”²⁰⁰ Even if so, would the Court allow any burden on any groups?²⁰¹ Would it allow the use of racial categories?²⁰² And will universities be accused of still using race as

195. *SFFA*, 600 U.S. at 230 (emphasis added).

196. *Id.* at 227.

197. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 357 (2022) (Roberts, C.J., concurring).

198. See, e.g., *supra* note 6 and accompanying text.

199. See Watson, *supra* note 8, at 132 (“[T]he Court’s stealth overruling of *Grutter* resulted in needless doctrinal confusion . . . [I]t remains unclear exactly which part or parts [of *Grutter*] the Court did overrule.”).

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

201. See David Bernstein, *Racial Classification in Higher Education Admissions Before and After SFFA*, 77 SMU L. REV. 263 (2024).

202. David Bernstein notes that in the past, “[t]he Supreme Court majority had generally just presumed that the underlying racial classifications themselves were sufficiently narrowly tailored . . . [But] [a]fter *SFFA*, that presumption no longer exists.” *Id.* at 284. Even before *SFFA*, some Justices had questioned racial classifications. The issue came up in the *Fisher I* oral argument. There, Chief Justice Roberts asked UTA Counsel Gregory Garre, “Should someone who is one-quarter Hispanic check the Hispanic box or some different box?” and, “Would it violate the honor code for someone who is one-eighth Hispanic and says, I identify as Hispanic, to check the Hispanic box?” Transcript of Oral Argument at 32–33, *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297 (2013). Justice Antonin Scalia also sarcastically asked Garre if “somebody walks in the room and looks them over to see who looks . . . Asian, who looks black, who looks Hispanic?” and, “[D]id they require everybody to check a box or they have somebody figure out, oh, this person looks 1/32nd Hispanic and that’s enough?” *Id.* at 34–35. Justice Anthony Kennedy’s majority opinion in *Fisher II* did consider potential problems with racial categories; however, it did not question if they were necessary. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 380 (2016) (“Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when used in a divisive manner, could undermine the educational benefits the University values.” (emphasis added)). I do tend to agree with Bernstein’s prediction that if higher education institutions or government entities treat individuals differently based on individual group membership, they will be subject to “new, onerous requirements[,] . . . [such as the] need to show a much closer match between the classifications they utilize and the ‘compelling’ interests they are pursuing.” Bernstein, *supra* note 201, at 284. Bernstein does not believe this will be required when racial classifications are used just “for data collection and analysis purposes.” *Id.* at 284. Regardless of how the doctrine develops, one can ask from both an empirical and a normative perspective why racial classifications are problematic in the former instance but okay in the latter. The reason for collecting and analyzing racial data is to use it when necessary to promote diversity or address inequity. Cf. Vinay Harpalani, *Theorizing Racial Ambiguity*, UNIV. OF PITT. CTR. FOR C.R. & RACIAL JUST. (Jan. 4, 2016), <https://www.civilrights.pitt.edu/theorizing-racial-ambiguity-professor-vinay-harpalani> [https://perma.cc/JBA8-BXBS] (noting that “Professor Blanche Cook pointed out . . . the major conundrum of modern Critical Race Theory: the necessity of articulating an anti-essentialist understanding that explains the

an admissions factor surreptitiously, based on applicants' essays and other sources?²⁰³ We will have to see.²⁰⁴

Additionally, will Chief Justice Roberts's stealth overruling of *Grutter* impact the Court's legitimacy? Bill Watson contends that:

The Court's failure to explain its overruling of *Grutter* calls into question the Justices' sincerity and good faith. It also injects needless confusion into the law, making it harder to comply with the Court's holdings and contributing to further litigation. And it undermines the impersonality of the Justices' decisionmaking and thereby risks further eroding the Court's perceived legitimacy.²⁰⁵

On one hand, I agree with Watson. For those who acknowledge the stealth overruling of *Grutter*, the legal and sociological legitimacy of the Court looks even more compromised. But in yet another ironic twist, the Chief Justice's doublespeak may have actually garnered more legitimacy for *SFFA*. The disorder it created has prompted affirmative action advocates to look for a silver lining. Consequently, advocates themselves have: (1) called *SFFA* "a surprisingly narrow opinion";²⁰⁶ (2) stated that "the *Students for Fair Admission* case did not overrule *Grutter*" because "Harvard University and the University of North Carolina had policies that were meaningfully different from both Michigan's policy and the University of Texas policy" that the Court had upheld earlier;²⁰⁷ (3) asserted that it is an "incorrect reading" of the Chief Justice's *SFFA* majority opinion to say that he "overruled precedent on affirmative action" because *Grutter* "is still good law";²⁰⁸ and (4) construed the essay loophole broadly, suggesting that universities can largely continue to do what *Grutter* allowed them to do.²⁰⁹

These statements — all by advocates of affirmative action — seem to imply that the *SFFA* majority opinion exercised the "simple yet fundamental principle of judicial restraint" which Chief Justice Roberts himself touted in his

malleability of race, but without diminishing its continuing significance . . . and show[ing] that race can be both changing and powerful").

203. See Harpalani, *Secret Admissions*, *supra* note 27, at 352; see also sources cited *supra* note 167.

204. Another issue that the Supreme Court did not address explicitly was Title VI of the Civil Rights Act of 1964, which applies to state and private actors. Although *SFFA* was a Title VI case, the Court's *SFFA* ruling held only that "the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause." *SFFA*, 600 U.S. at 230. In the past, the Court has strongly suggested that violations of Title VI are equivalent to violations of the Equal Protection Clause. See *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (noting "that § 601 [of Title VI] 'proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment'" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., announcing the judgment of the Court))). But Justice Neil Gorsuch opined in his *SFFA* concurrence that Title VI is more strict than the Equal Protection Clause and proscribes all racial classifications. See *SFFA*, 600 U.S. at 309 (Gorsuch, J., concurring) ("Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.").

205. Watson, *supra* note 8, at 135–36.

206. See Feingold, *supra* note 2, at 241.

207. See Lehman, *supra* note 21.

208. See Oh, *supra* note 2.

209. See, e.g., Weissmann, *supra* note 160.

Dobbs concurrence.²¹⁰ By minimizing how much the Chief Justice's *SFFA* majority opinion actually deviated from precedent, they serve to augment the legitimacy of the *SFFA* opinion and of the Court more generally. And ironically, the Chief Justice would not have been able to garner any such legitimacy-enhancing statements from affirmative action advocates if his opinion had more clearly and explicitly stated that the Court was overruling *Grutter*. By no means was Chief Justice Roberts ever going to win big praise from these advocates. But through his stealth overruling of *Grutter*, the Chief Justice did get some of them to argue that his *SFFA* opinion was far more restrained than it will be in practice.²¹¹

Nevertheless, although the reality is more sobering, I cannot blame my fellow affirmative action advocates for pushing forward. Two decades ago, when many of us were celebrating the victory for affirmative action won in *Grutter*, the late Professor Derrick Bell warned us that over the long haul, "civil rights victory" would be "hard to distinguish from defeat."²¹² The progress of people of color in America has often meant finding small victories in the midst of larger defeats. That has been the story of our resilience. Affirmative action is dead, but we will fight on to salvage its ghosts.

210. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring).

211. To be fair, Feingold, Oh, and Lehman all acknowledge that *SFFA* significantly limits how universities can pursue racial diversity through their admissions policies. See sources cited *supra* notes 2, 21. Yet, acknowledging this while framing *SFFA*'s holding as narrow itself seems like doublespeak.

212. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

