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Data's Demise and the Rhetoric of *SFFA*

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DATA'S DEMISE AND THE RHETORIC OF *SFFA*

Shakira D. Pleasant*

ABSTRACT

The Supreme Court's holding that Harvard College's and the University of North Carolina's (UNC) "admissions systems" are invalid under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 was an anticipated result. The Court's 2016 decision in Fisher v. University of Texas at Austin (Fisher II), left some speculation that race-conscious admissions could eventually be struck down by the Court; however, Fisher II also offered some guidance for future litigants to address challenges. Colleges and universities needed to use data to "scrutinize the fairness of their admissions programs" to satisfy the burden strict scrutiny and narrow tailoring impose.

Despite previously touting the importance of data, the current Justices of the Supreme Court disregarded the data presented by both Harvard and UNC. Furthermore, the Court ignored stare decisis by discounting the diversity rationale enshrined by Justice Powell in Regents of the University of California v. Bakke. Since the Supreme Court's decision on June 29, 2023, scholars and parties to the case have opined about the decision's impact. Several writings focus on the majority opinion written by Chief Justice John Roberts. Others highlight the dissents written by Justices Sonia Sotomayor and Ketanji Brown-Jackson, but few focus on the concurring opinions.

This Article focuses on stare decisis and the data presented by Harvard and UNC in the case. It also posits that rhetoric has been used to falsely frame inclusion practices as racial preferences. As such, this Article explores the origins of rhetoric to evaluate Justice Thomas's colorblind perspective of the United States Constitution, and more specifically, the Fourteenth Amendment. Finally, this Article conducts a deeper examination of the approach highlighted by Justice Thomas in his concurring opinion.

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INTRODUCTION

The combined decision in *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina* (collectively *SFFA*)¹ was probably not shocking to most. Throughout the discourse in the months preceding the decision, many observers, lawyers, and scholars (including myself) predicted that the ruling would favor the petitioner, Students for Fair Admissions (*SFFA*).²

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

2. See generally Shakira D. Pleasant, *A Black Man May Eliminate Race-Conscious Admissions in the United States*, 103 B.U. L. REV. ONLINE 147, 147 (2023); Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 238 (2022); Robert S. Chang, *Asian Americans, Dog Whistles, and the Psychological Wages of "Honorary" Whiteness*, 103 B.U. L. REV. ONLINE 136, 137 (2023); Matthew Patrick Shaw, *The Perils of Asian-American Erasure*, 103 B.U. L. REV. ONLINE 140, 143 (2023); Vinay Harpalani,

In a short piece that I authored, *A Black Man May Eliminate Race-Conscious Admissions in the United States*, I made two predictions.³ First, Justice Thomas would author the majority opinion in *SFFA*.⁴ Second, a decision prohibiting race-conscious admissions would align with Justice Thomas's ideals.⁵

The first prediction was incorrect. Chief Justice Roberts wrote the forty-one-page majority opinion.⁶ But the second prediction was accurate and inspired this Article. Justice Thomas wrote a fifty-eight-page concurrence.⁷

Judicial opinions grounded in *stare decisis* shape the law, and are a central part of the legal profession. Before *SFFA*, *Fisher v. University of Texas at Austin* was the most recent case addressing race-conscious admissions in higher education.⁸ Fisher, a White female legacy applicant, was denied admission to the University of Texas at Austin (UT).⁹ The issue Fisher initially raised was “[w]hether [the] Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter v. Bollinger*,¹⁰ 539 U.S. 306 (2003), permit the University of Texas at Austin’s use of race in undergraduate admissions decisions.”¹¹ When her case was reheard by the Court in 2016, Fisher asked, “[w]hether the Fifth Circuit’s re-endorsement of the University of Texas at Austin’s use of racial preferences in undergraduate admissions decisions can be sustained under this Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including [*Fisher I*].”¹² Despite Fisher’s arguments, the Court upheld UT’s race-conscious admissions program.¹³ But, the *Fisher II* opinion was clear—data would be required if another admissions case was elevated to the Supreme Court.¹⁴

From the Devine Gift to the Devil's Bargains: Asian Americans in the Ideology of White Supremacy, 103 B.U. L. REV. ONLINE 151, 154 (2023).

3. See Pleasant, *supra* note 2, at 148.

4. *Id.*

5. *Id.* Here, the term “ideal[s]” is used as a noun. Merriam-Webster Online Dictionary defines ideal as “an ultimate object or aim of endeavor.” *Ideal*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/ideal> [<https://perma.cc/54DY-PVMV>].

6. See *SFFA*, 600 U.S. at 190–231.

7. See *id.* at 231–87 (Thomas, J., concurring).

8. The Supreme Court issued two opinions in the Fisher case—once in 2013 and again in 2016. The 2013 case is known as *Fisher I*. See *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297 (2013). The 2016 case is known as *Fisher II*. See *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365 (2016).

9. See Mollie Reilly, *5 Things to Know About the Woman Whose Case Could End Affirmative Action as We Know It*, HUFFPOST (Dec. 16, 2015, 4:46 PM), https://www.huffpost.com/entry/abigail-fisher-5-things-to-know_n_56719717e4b0dfd4bcc026a4 [<https://perma.cc/DWD9-6PLU>] (“‘I dreamt of going to UT ever since the second grade,’ [Fisher] said in a 2012 video released by her legal team. ‘My dad went there, my sister went there and tons of friends and family. And it was a tradition I wanted to continue.’”).

10. *Grutter v. Bollinger* was a preeminent affirmative action case preceding *Fisher I* and *Fisher II*.

11. See Docket No. 11-345, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/11-345.htm> [<https://perma.cc/DNN3-2449>] (Question Presented in *Fisher I*).

12. See Docket No. 14-981, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-981.htm> [<https://perma.cc/5KLV-AKNR>] (Question Presented in *Fisher II*).

13. *Fisher II*, 579 U.S. at 376.

14. See *id.* at 388.

Heeding the evidentiary warning from *Fisher II*, Harvard and UNC presented lots of data during the district court trials in the *SFFA* case.¹⁵ Yet, the data and *stare decisis* were not enough. In the Supreme Court's majority opinion, Chief Justice Roberts solidified what was alluded to during the *SFFA* oral arguments¹⁶—the sunset provision (or the end point for the use of race in admissions) that was articulated by Justice O'Connor in *Grutter v. Bollinger* was going to be applied.¹⁷ While the majority opinion did not expressly state that it was overruling *Grutter*, it foreclosed higher education institutions from asserting the compelling interest articulated in *Fisher*, *Grutter*, and *Bakke*¹⁸ in the future.¹⁹

Proponents of race-conscious admissions suspected the Supreme Court would inevitably reject its prior opinions that upheld such practices,²⁰ especially when it seems the current Justices have thrown *stare decisis* out the window in some cases.²¹ To justify the Court's reasoning in *SFFA*, Chief Justice Roberts characterized Justice Powell's opinion in *Bakke* as one "written for himself alone" and that "none of [the six opinions in *Bakke*] commanded a majority of the Court."²² In essence, he intimated that Justice Powell's opinion should never have been binding precedent because it was an anomaly. The justification in the *SFFA* case is disturbing and problematic because it seems to be a part of a strategic goal. Professor Kimberly West-Faulcon has written about the trojan horse, or the strategy employed to dismantle race-conscious admissions.²³ The strategy has been effective, and masterfully curated.

15. See, e.g., *Students for Fair Admission, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 145–46 (D. Mass. 2019); *Students for Fair Admission, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 588–90 (M.D.N.C. 2021).

16. See Transcript of Oral Argument at 80–81, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 U.S. 181 (2023) (No. 21-707); Transcript of Oral Argument at 39–40, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199) [hereinafter *Harvard Oral Argument Transcript*].

17. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 212–13 (2023). The sunset provision is a reference to Justice O'Connor's aspirational timeline to cease using race in college and university admissions. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003):

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. *We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.* (emphasis added) (internal citation omitted).

18. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

19. See *SFFA*, 600 U.S. at 213–14.

20. See ANTHONY P. CARNEVALE, ZACHARY MABEL & KATHRYN PELTIER CAMBELL, GEO. UNIV. CTR. ON EDUC. AND THE WORKFORCE, RACE-CONSCIOUS AFFIRMATIVE ACTION: WHAT'S NEXT 1–16 (2023), https://cew.georgetown.edu/wp-content/uploads/cew-race_conscious_affirmative_action-fr.pdf [<https://perma.cc/8H5G-3UJG>].

21. See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

22. *Id.* at 208.

23. See Kimberly West-Faulcon, *Symposium: Surprisingly, Facts Rule the Day in Fisher II*, SCOTUSBLOG (June 24, 2016, 9:47 AM), <https://www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii> [<https://perma.cc/3DHW-MDB7>].

The current Justices of the Supreme Court have made it evident that (1) data does not overcome strict scrutiny; and (2) race cannot be used, holistically or as a plus factor, in admissions.²⁴ Furthermore, Edward Blum—the man who financed *Fisher I* and *Fisher II*, and who is also the President of Students for Fair Admissions—is leveraging the *SFFA* opinion to attack military schools, other institutions of higher learning, and employers.²⁵

Considering the impact of the *SFFA* opinion, and how strategies about education and the law are being evaluated, three fundamental questions arise. First, how could the Supreme Court not explicitly overrule *Grutter*, but still ignore *stare decisis* when applying precedent cases? Second, how was rhetoric used to falsely frame the Equal Protection Clause as demanding colorblindness? Finally, how might Edward Blum's strategy to expand the *SFFA* opinion impact other industries besides higher education?

Part I of this Article describes the Court's opinions in race-conscious admissions cases that existed before *SFFA*. In Part II, the Article focuses on the origins of rhetoric and critiques of judicial opinions like Justice Thomas's concurring opinion in *SFFA*.

Finally, Part III assesses the larger persuasive strategy that is being applied in multiple industries following the current Court's June 29, 2023, decision in *SFFA*.

I. *STARE DECISIS* AND RACE-CONSCIOUS ADMISSIONS IN HIGHER EDUCATION

Black's Law Dictionary defines *stare decisis* as “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”²⁶ Precedent is defined as “[s]omething of the same type that has occurred or existed before,” or “[a]n action or official decision that can be used as support for later actions or

24. See *SFFA*, 600 U.S. at 223–24, 230–31.

25. Blum has sued the U.S. Naval Academy and Military Academy at West Point, sent emails to approximately 150 schools demanding compliance with the *SFFA* opinion, and sued big law firms like Morrison Forrester and Perkins Coie. See Verified Complaint, Students for Fair Admissions v. U.S. Naval Acad., No. 1:23-cv-02699 (D. Md. Oct. 5, 2023), ECF No. 1; Verified Complaint, Students for Fair Admissions v. U.S. Mil. Acad. at Westpoint, No. 7:23-cv-08262 (S.D.N.Y. Sept. 19, 2023), ECF No. 1; Michelle Amponsah, *Legal Experts Divided Over Whether Ed Blum's Letter to Schools Adheres to SCOTUS Affirmative Action Ruling*, HARV. CRIMSON (July 28, 2023), <https://www.thecrimson.com/article/2023/7/28/blum-letter-affirmative-action-compliance> [<https://perma.cc/9MT8-3NA2>]; Julian Mark, *Discrimination Lawsuit Dropped After Law Firm Opens Fellowship to All Students*, WASH. POST (Oct. 7, 2023, 10:15 AM), <https://www.washingtonpost.com/business/2023/10/06/morrison-foerster-edward-blum-dismissed> [<https://perma.cc/G4VP-429H>]; Julian Mark, *Edward Blum Group Drops Suit After Perkins Coie Expands Diversity Program*, WASH. POST (Oct 11, 2023, 9:37 PM), <https://www.washingtonpost.com/business/2023/10/11/perkins-coie-dei-fellowship> [<https://perma.cc/N3B9-MNYK>].

26. *Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019); see also WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 321 (Roger Cooley & Charles Ames eds., 3d ed. 1914) (“[W]hen a point or principle of law has been once officially decided or settled by the ruling of a competent court . . . , it will no longer be considered as open to examination or to a new ruling by the same tribunal, . . . unless it be for urgent reasons and in exceptional cases.”).

decisions; esp., a decided case that furnishes a basis for determining later cases involving similar facts or issues.”²⁷

As a law student, I learned about the concept of precedent and the doctrine of *stare decisis*. As a practicing attorney relying on precedent, the doctrine of *stare decisis* was the foundation of what it meant to be a lawyer, and that belief translated into my teaching of first-year law students in legal writing courses.

The Supreme Court of the United States has stated, “*Stare decisis* ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”²⁸ In *Gamble v. United States*, Justice Samuel Alito elaborated on *stare decisis* and said,

[I]t is also important to be right, especially on constitutional matters, where Congress cannot override our errors by ordinary legislation. But even in constitutional cases, a departure from precedent “demands special justification.” This means that something more than “ambiguous historical evidence” is required before we will “flatly overrule a number of major decisions of this Court.” And the strength of the case for adhering to such decisions grows in proportion to their “antiquity.”²⁹

Justice Alito, one of the current Justices of the Supreme Court, explicitly stated that a departure from precedent demands “special justification.” Below, the progeny of Supreme Court precedent supporting the holistic use of race in admissions spans more than forty years; that is, until the *SFFA* opinion.

A. *BAKKE*: THE CASE THAT CREATED THE STUDENT
BODY DIVERSITY STANDARD BY USING HARVARD’S
ADMISSIONS PROGRAM AS THE BEST PRACTICE MODEL

In *Bakke*, the Supreme Court of the United States determined that it was unconstitutional for the University of California, Davis, Medical School (Medical School) to use a special admission program that set aside 16 of 100 seats (i.e., a quota) in the entering class for students of color.³⁰ In the plurality opinion, Justice Powell noted, “The guarantees of the Fourteenth Amendment extend to all persons.”³¹ He further elaborated,

27. *Precedent*, BLACK’S LAW DICTIONARY (11th ed. 2019).

28. *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

29. *Id.* (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *Welch v. Texas Dep’t of Highways and Pub. Transp.*, 483 U.S. 468, 479 (1987); *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009)).

30. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275, 288 n.26, 319 (1978) (Powell, J., announcing the judgment of the Court) (referencing *Bakke*’s definition of “quota” as “a requirement that must be met but can never be exceeded, regardless of the quality of the minority applicants”).

31. *Id.* at 289.

It is settled beyond question that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.” . . . The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.³²

The Medical School asserted four reasons as to why they were compliant with the narrow tailoring prong of strict scrutiny.³³ They were: (1) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (2) “countering the effects of societal discrimination”; (3) “increasing the number of physicians who will practice in communities currently underserved”; and (4) “obtaining the educational benefits that flow from an ethnically diverse student body.”³⁴ Justice Powell rejected all but one of the reasons; the reason that was accepted as being “a constitutionally permissible goal for an institution of higher education” was the fourth reason—obtaining an ethnically diverse student body.³⁵ However, he qualified the permissible goal by noting that “[e]thnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”³⁶

In both his opinion and the appendix of the case, Justice Powell extensively explained how Harvard College “expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups.”³⁷ He further noted that “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file, yet it [would] not insulate the individual from comparison with all other candidates for the available seats.”³⁸ An admissions program that considered race, but still treated “each applicant as an individual in the admissions process,” would pass constitutional muster; a set-aside quota would not.³⁹

B. *GRUTTER*: THE FIRST CASE SINCE *BAKKE* TO DIRECTLY ADDRESS THE USE OF RACE IN ADMISSIONS IN HIGHER EDUCATION

In 2003, the Court held in *Grutter* that using race as a factor in admissions decisions was narrowly tailored and thus permissible under the Equal Protection Clause of the Fourteenth Amendment.⁴⁰ Before *Grutter*,

32. *Id.* at 289–90 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Justice Powell discussed the Court’s use of strict scrutiny when race (i.e., a suspect classification) is part of the legal issue. He noted, “The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” *Id.* at 291.

33. *See id.* at 306.

34. *Id.*

35. *Id.* at 311–12.

36. *Id.* at 314.

37. *Id.* at 316; *see also id.* at 321 (Appendix to Opinion of Powell, J.) (“In practice, this new definition of diversity has meant that race has been a factor in some admission decisions.”).

38. *Id.* at 317.

39. *Id.* at 318–20.

40. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

Bakke—a 1978 case—was the first case addressing the use of race in admissions in higher education.⁴¹

Grutter was important precedent for several reasons. First, *Grutter* resolved a circuit split between the Fifth Circuit and the Ninth Circuit holding that using race as a factor in higher education admissions was constitutionally permissible.⁴² The circuit split existed because *Bakke* culminated in a plurality opinion from the Supreme Court of the United States.⁴³ In resolving the circuit split, the Court deemed that Justice Powell's rationale in *Bakke* was binding.⁴⁴ Second, the Court explicitly stated, "More important, for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."⁴⁵

Third, in *Grutter*, the University of Michigan Law School provided data in support of its holistic race-conscious admissions program.⁴⁶ After review, the Court upheld the constitutionality of its actions.⁴⁷ The assessment of data in *Grutter* was germane to the Court's holding that "the Law School's race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."⁴⁸ Unquestionably, *Grutter* followed the Court's precedent and adhered to the doctrine of *stare decisis*.

41. *Id.* at 328 ("Nor, since *Bakke*, have we directly addressed the use of race in the context of public higher education. Today, we hold that the Law School has a compelling interest in attaining a diverse student body."); see generally *Bakke*, 438 U.S. at 311–12. Both *Grutter* and *Bakke* concerned admissions to a public institution's professional school; *Grutter*—a White woman—was denied admissions to the University of Michigan Law School, and *Bakke*—a White man—was denied admissions to the University of California, Davis, Medical School. *Grutter*, 539 U.S. at 316; *Bakke*, 438 U.S. at 276.

42. *Grutter*, 539 U.S. at 322; compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), with *Smith v. Univ. of Wash., L. Sch.*, 233 F.3d 1188 (9th Cir. 2000). Notably, the Court denied a petition for writ of certiorari in *Hopwood*. See *Texas v. Hopwood*, 518 U.S. 1033, 1033 (1996):

Whether it is constitutional for a public college or graduate school to use race or national origin as a factor in its admissions process is an issue of great national importance. The petition before us, however, does not challenge the lower courts' judgments that the particular admissions procedure used by the University of Texas Law School in 1992 was unconstitutional.

(Ginsburg, J., respecting denial of the petition for a writ of certiorari).

43. A "plurality opinion" is "[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion." *Plurality Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019); *contra Majority Opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019) (A "majority opinion" is "by more than half the judges considering a given case.").

44. See *Grutter*, 539 U.S. at 322–23 (the Court noted there were "six separate opinions [in *Bakke*], none of which commanded a majority of the Court"); *Bakke*, 438 U.S. at 320 (Powell, J., announcing the judgment of the Court):

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

(emphasis added).

45. *Grutter*, 539 U.S. at 325 (emphasis added).

46. See *id.* at 330.

47. See *id.* at 335–40.

48. *Id.* at 337. The Court noted that "there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body, and

C. *FISHER II*: A CASE THAT ADHERED TO *STARE DECISIS*
BY RELYING ON *GRUTTER*

There is precedent for race-conscious admissions cases, also referred to as affirmative action cases.⁴⁹ Before the Court decided *SFFA*—the consolidated cases of Students for Fair Admissions against Harvard and UNC—in June 2023, its previous decision involving race-conscious admissions in higher education was *Fisher II*, which was decided in 2016.⁵⁰

The majority opinion in *Fisher II*, a 4–3 decision, held that the University of Texas at Austin (UT) should “continue to use *this data* to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.”⁵¹ UT needed to do these things to sustain a narrowly tailored and constitutionally permissible admissions program.⁵²

Ultimately, *Fisher II*, adhering to the doctrine of *stare decisis*, validated UT’s use of a race-conscious admissions program as a means of obtaining “the educational benefits that flow from student body diversity.”⁵³

D. *SFFA v. HARVARD AND UNC*: THE CASES THAT LACKED
SPECIAL JUSTIFICATION TO SUPPORT A DEPARTURE FROM
STARE DECISIS

There is precedent for using data in challenges to a college or university’s holistic use of race in its admissions program. Harvard’s trial lasted fifteen days, and more than thirty witnesses presented evidence including empirical data.⁵⁴ During the trial, Harvard first presented data about its

between numbers and providing a reasonable environment for those students admitted.” *Id.* at 336 (quoting *Bakke*, 438 U.S. at 323). The Court also held, “We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions.” *Id.* at 337. In so finding, the Court distinguished the admissions plan in *Gratz v. Bollinger*, 539 U.S. 244 (2003), where there were predetermined points awarded based on race, and contrasted that with the admissions plan in *Grutter* where “the Law School’s admissions policy ‘is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’” *Id.* (quoting *Bakke*, 438 U.S. at 317).

49. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365 (2016); see Vinay Harpalani, “*With All Deliberate Speed*”: *The Ironic Demise of (and Hope for) Affirmative Action*, 76 SMU L. REV. F. 91, 91 n.1 (2023) (defining affirmative action).

50. In *SFFA*’s certiorari petitions, they asked the Court to “overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?” Question Presented, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 18 (2023) (No. 19-2005).

51. *Fisher II*, 579 U.S. at 387 (emphasis added). “This data” that Justice Kennedy referenced in the majority opinion was statistical demographic data showing stagnated enrollment of “minority students” from 1996 to 2002. *See id.* at 383. Also, there was anecdotal (or qualitative) data where students reported experiencing “feelings of loneliness and isolation.” *See id.*

52. *See id.* at 388.

53. *Id.* at 381 (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 310 (2013)).

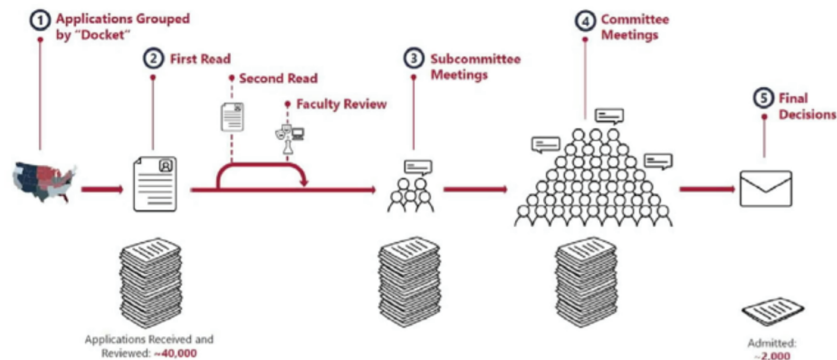
54. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard)*, 397 F. Supp. 3d 126, 132 (D. Mass. 2019), *rev’d*, 600 U.S. 181 (2023); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 198 (2023).

outreach efforts to diversify its student body.⁵⁵ These efforts included: generating a search list of about 100,000 students that was purchased from the administrators of the ACT, PSAT, and SAT; in-person and alumni-engaged recruitment of students from the search list; and student recruitment based on socioeconomic status via Harvard's Underrepresented Minority Recruitment Program (UMRP).⁵⁶ Notwithstanding these efforts, African-American and Latinx students still applied to Harvard at lesser rates despite accounting for 30% of the U.S. population.⁵⁷

Second, Harvard documented every step of its selective admissions process. The life cycle of the application process includes: (1) completing the application form; (2) interviewing with alumnae or admissions staff; (3) completing a first review of the application file, which includes reading recommendations and admissions letters from students in the same geographic area(s); and (4) a second review of the application file if warranted.⁵⁸ Throughout the admissions cycle, Harvard reviewed data about the demographics of the entering class and compared that demographic data to prior years to determine if any trends existed.⁵⁹ It clarified that,

Although there [were] no quotas for subcategories of admitted students, [Harvard explained that] if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group.⁶⁰

Application Review Process [DD1 at 4].⁶¹



55. See *Harvard*, 397 F. Supp. 3d at 134–36; *SFFA*, 600 U.S. at 296–97 (Gorsuch, J., concurring).

56. See *Harvard*, 397 F. Supp. 3d at 135–36. Harvard's Financial Aid Initiative (HFAI) provides full funding for students whose families make \$65,000 or less per year. *Id.*

57. *Id.* at 135.

58. See *id.* at 136–45.

59. *Id.* at 145. Harvard reviewed “one-pagers” that contain “statistics on applications and admission rates by gender, geography, academic interest, legacy status, financial aid circumstances, citizenship status, racial or ethnic group, and on recruited athlete status and applicants flagged as disadvantaged.” *Id.*

60. *Id.* at 146.

61. *Id.* at 145.

According to the record, students apply to Harvard using the Common Application or Universal College Application.⁶² The Common Application and Universal College Application streamlined the admissions process.⁶³ They are available through third-party websites that give student applicants access to more than 1,000 colleges and universities and allow them to upload all their admissions materials such as transcripts and letters of recommendation.⁶⁴

Like the questionnaire that individuals complete for the United States Census Bureau, Harvard's admissions application gives students the option to list their race.⁶⁵ "If applicants disclose their racial identities [on the application form], Harvard may take race into account, regardless of whether applicants write about that aspect of their backgrounds or otherwise indicate that it is an important component of who they are."⁶⁶

In addition to the application data, Harvard presented statistical evidence through Professor David Card.⁶⁷ Professor Card's statistical model(s) included data regarding athletic recruits; legacies; Dean's interest list applicants, who are typically related to major donors; and children of faculty and staff (ALDCs).⁶⁸ ALDCs annually comprise about 30% of Harvard's incoming class.⁶⁹ Ultimately, the district court agreed with Professor Card's model and held that its admissions program was constitutional.⁷⁰

The University of North Carolina's (UNC) trial lasted eight days.⁷¹ Per the trial court record, UNC's commitment to diversity is long-standing.⁷²

62. *Id.* at 136; *see generally* First-Year Application, COMMON APP, <https://commonapp.my.salesforce.com/sfc/p/#d0000000eEna/a/8X0000011Kec/6Nvr8vFdPtCv7wG3772egRNoGs4NZ9ZO5CL3OgvUpQ8> [<https://perma.cc/8UAG-2JQX>]; First-Year Admissions Application, UNIVERSAL COLL. APP., <https://www.universalcollegeapp.com/documents/uca-main.pdf> [<https://perma.cc/MF5W-E7LX>].

63. *See generally* *What are the Common, Coalition, Common Black College, and Universal College Applications?*, BIG FUTURE, <https://bigfuture.collegeboard.org/help-center/what-are-common-coalition-common-black-college-and-universal-college-applications> [<https://perma.cc/557N-GYJX>].

64. *See id.*; COMMON APP, *supra* note 62; UNIVERSAL COLL. APP., *supra* note 62.

65. *Harvard*, 397 F. Supp. 3d at 137:

Applicants may, but are not required to, identify their race in their application by discussing their racial or ethnic identity in their personal statement or essays or by checking the box on the application form for one or more preset racial groups (*e.g.* American Indian or Alaskan Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or White) and may also select or indicate a subcategory of these groups.

(*emphasis added*); *cf. also* 2020 Census Questionnaire, U.S. DEP'T OF COM., https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire-english_DI-Q1.pdf [<https://perma.cc/X92X-6G74>].

66. *Harvard*, 397 F. Supp. 3d at 137.

67. *Id.* at 158–59.

68. *See id.* at 159–60.

69. *Id.* at 159.

70. *Id.* at 160.

71. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 588 (M.D.N.C. 2021), *rev'd sub nom.* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023). The trial addressed Counts I and II only; the Court addressed the issue of race being used as more than a plus factor, and the availability of race-neutral alternatives. *See id.*

72. *See id.* at 588–94.

UNC conducted a university-wide diversity assessment that included both qualitative and quantitative data.⁷³ Its findings noted that “diversity” mattered at the institution, especially considering its history of exclusion.⁷⁴

To measure its progress toward achieving diversity, UNC collected “descriptive data of the student population.”⁷⁵ The University also created the Educational Benefits of Diversity Working Group and an inventory of assessments related to the educational benefits of diversity.⁷⁶ Notwithstanding its efforts, a UNC representative testified that it had “challenges” admitting and enrolling African-American men, Latinx students, and Native-American students.⁷⁷

Even though Harvard and UNC meticulously presented data showing their efforts to admit a diverse student body were narrowly tailored to their objectives and the lower courts found their actions constitutional, the current Justices did not adhere to *stare decisis* in *SFFA*.⁷⁸ In the *SFFA* decision, the Supreme Court did not identify any special justifications, and Article III of the Constitution does not afford the right to disregard precedent.⁷⁹ So how can the current Justices of the Supreme Court treat *stare decisis* as if it is a flexible doctrine? If the Court’s prior opinions and the Constitution support adhering to *stare decisis*, maybe the reason for the Court’s departure from the doctrine lies in the origins of rhetoric—a centuries-old tradition that is a cornerstone of legal communication.

II. THE RHETORIC OF A COLORBLIND CONSTITUTION

The interpretation of the Constitution and the use of rhetoric in *SFFA* requires more interrogation. As such, Part II contains a brief overview of the origins of rhetoric, as well as the different rhetorical disciplines that exist within a legal context. Within legal education, rhetoric is comprised of many disciplines; these include “classical rhetoric,” “modern rhetoric,”

73. *See id.* at 592–94.

74. *See id.* at 590.

75. *Id.* at 591. This data has been disaggregated among other things by race, gender, first-generation status, and four-year graduation rates. *See id.* at 591–92.

76. *See id.* at 592.

77. *Id.* at 593.

78. *Cf. The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/constitutional.aspx> [<https://perma.cc/KL5V-XFMW>] (“*When the Supreme Court rules on a constitutional issue, that judgment is virtually final; its decisions can be altered only by the rarely used procedure of constitutional amendment or by a new ruling of the Court.* However, when the Court interprets a statute, new legislative action can be taken.” (emphasis added)).

79. *Id.*:

While the function of judicial review is not explicitly provided in the Constitution, it had been anticipated before the adoption of that document . . .

[Alexander] Hamilton had written that through the practice of judicial review the Court ensured that the will of the whole people, as expressed in their Constitution, would be supreme over the will of a legislature, whose statutes might express only the temporary will of part of the people. And [James] Madison had written that constitutional interpretation must be left to the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process.

“contrastive rhetoric,” “comparative legal rhetoric,”⁸⁰ or “critical and comparative legal rhetoric.”⁸¹ Further, because “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,”⁸² this Part also discusses the Supreme Court’s interpretation of the Fourteenth Amendment.

A. BRIEF OVERVIEW OF RHETORIC

Rhetoric was created during the era of the ancient Greek and Roman empires.⁸³ For example, classical (or traditional) rhetoric is often described by its appeals to credibility, reason or logic, and emotion—ethos,⁸⁴ logos,⁸⁵ and pathos.⁸⁶ In actuality, these “appeals” are part of a broader set of principles of persuasion.⁸⁷ Modern (or contemporary) rhetoric primarily focuses on the audience.⁸⁸

Contrastive rhetoric studies “patterns of text and discourse in different languages” which may “vary in structure and in cultural background.”⁸⁹ Consider the ways in which language is organized or how it is “put

80. The term “comparative legal rhetoric” was coined by Professor Lucy Jewel. See Lucille A. Jewel, *Comparative Legal Rhetoric*, 110 KY. L.J. 107, 118 (2021–22).

81. This is not an exhaustive list.

82. *Gutter v. Bollinger*, 539 U.S. 306, 327 (2003).

83. Rhetoricians and legal scholars alike have cited to Aristotle when discussing rhetoric, but there are other rhetoricians that preceded and followed him. See Michael Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage*, 8 S. CAL. INTERDIS. L.J. 613, 615–16 (1999); see also STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 472 (1989).

84. Ethos is all about credibility. In law, one of the reasons we cite authority to support our assertions is so the reader will find our arguments trustworthy or credible. See Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMM’N & RHETORIC: JALWD 99, 106–07 (2017).

85. A philosophy major or anyone who completed the logic games on the Law School Admission Test is familiar with logos; it is an appeal to logic or reason and used as a form of deductive reasoning. See *id.* at 102–04; see also Melissa Weresh, *Morality, Trust, and Illusion: Ethos as Relationship*, 9 LEGAL COMM’N & RHETORIC: JALWD 229, 232 (2012).

86. Pathos employs appeals to emotion and feelings; think about the plot in a movie or play that resonated with you on an emotional level or made certain memories flood your mind and body. See S. M. Halloran, *On the End of Rhetoric, Classical and Modern*, 36 COLL. ENG. 621, 621–31 (1975); see also Fraley, *supra* note 84, at 104–06.

87. See Kristin K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 325 (2011) (“There are three types of persuasive speech based on the nature of the audience to which it is addressed: political, ceremonial, and legal argument. Each is the product of the same five canons or principles of composition: invention, arrangement, style, memory, and delivery . . .”) The appeals of logos, ethos, and pathos are a subset of the principle of invention. *Id.*

88. See, e.g., Andrea A. Lunsford & Lisa S. Ede, *Classical Rhetoric, Modern Rhetoric, and Contemporary Discourse Studies*, 1 WRITTEN COMM’N 78, 79, 83 (1984); see generally Ruth Anne Robbins, *An Introduction to This Volume and to Applied Legal Storytelling*, 14 J. LEGAL WRITING INST. 1 (2008); Kathryn M. Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305 (2010); WAYNE SCHIESS, *WRITING FOR THE LEGAL AUDIENCE* (2d ed. 2014).

89. Diane B. Kraft, *Contrastive Analysis and Contrastive Rhetoric in the Legal Writing Classroom*, 49 N.M. L. REV. 35, 39 (2019) (quoting Nils Erik Enkvist, *Why We Need Contrastive Rhetoric*, 4 ALTERNATION, no. 1, 1997, at 188); see generally Jill J. Ramsfield, *Is “Logic” Culturally Based? A Contrastive International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (1997).

together . . . to affect an audience.”⁹⁰ Cultural expectations and norms are also rhetorical.⁹¹

Comparative legal rhetoric is a synthesis of “legal rhetoric, comparative law, comparative rhetoric, contrastive rhetoric, diasporic rhetoric, and comparative cognitive psychology.”⁹² It “should be approached as a dynamic discipline for the comparative study of how legal meanings are produced by judicial actors (judges) as well as other actors in the legal system.”⁹³ Finally, critical rhetoric establishes “the importance of rhetoric in non-Platonic terms” thereby promoting constant reflection and introspection of the ways rhetoric has been taught, and how it actually should be implemented.⁹⁴

Notwithstanding its many references, most legal scholars could agree that “[r]hetoric is the art of persuasion, whether orally or in writing. It includes all aspects of methodologies of argument, including grammar, invention, narrative, syllogism, analogy, metaphor, arrangement, and style, among others.”⁹⁵ To evaluate the current Justices’ reasoning in *SFFA*, this section uses a rhetorical lens to examine the Fourteenth Amendment, the Petitioner’s brief, and the opinion in *SFFA*.

B. BRIEF OVERVIEW OF THE FOURTEENTH AMENDMENT AND ITS COLORBLIND APPLICATION

According to the U.S. National Archives, the Fourteenth Amendment “extended liberties and rights granted by the Bill of Rights to formerly enslaved people.”⁹⁶ In cases addressing the interpretation of the Equal

90. See Kraft, *supra* note 89, at 39; see also Anne Bliss, *Rhetorical Structures for Multilingual and Multicultural Students*, in *CONTRASTIVE RHETORIC REVISITED AND REDEFINED* 13, 13–17 (Clayann Gilliam Panetta ed., 2001).

91. See Kathryn Stanchi, *The Unending Conversation: Gut Renovations, Comparative Legal Rhetoric and the Ongoing Critique of Deductive Reasoning*, 5 *STETSON L. REV. F.* 1, 2, 8–9 (2022) (referencing African diasporic and non-Western rhetorical styles being used to rewrite briefs or even judicial opinions).

92. Jewel, *supra* note 80, at 118; see generally Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 *MD. L. REV.* 663 (2017); Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 *J. LEGAL WRITING INST.* 3, 5 (2010).

93. Jewel, *supra* note 80, at 115; see also Frédéric G. Sourgens, *Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration*, 8 *PEPP. DISP. RESOL. L.J.* 1, 2–3 (2007) (describing comparative law as having three functions: (1) to achieve a deeper, academic, understanding of the law; (2) using a scientific model to identify deficits in the law or science and mend them; and (3) to address transactional terms in contracts like choice of law).

94. Lolita B. Innis, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 *ST. JOHN’S J. LEGAL COMMENT.* 649, 662 (2010).

95. Fraley, *supra* note 84, at 99.

96. *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT’L ARCHIVES (Jan. 12, 2024), <https://www.archives.gov/milestone-documents/14th-amendment> [<https://perma.cc/TYV7-D7KU>]; see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (“Our Nation was founded on the principle that ‘all Men are created equal.’ Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery.”).

Protection Clause of the Fourteenth Amendment, the following text is analyzed:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.*⁹⁷

The process leading to the passage and ratification of the Fourteenth Amendment is well-documented in case law decided by the Supreme Court.⁹⁸ In *Bakke*, for example, some Justices regarded the Fourteenth Amendment as the “embodiment in the Constitution of our abiding belief in human equality.”⁹⁹ Still, what was “equal” in the law was dependent on the Supreme Court. Approximately fifty years after its ratification, the Court’s interpretation of the Equal Protection Clause of the Fourteenth Amendment “turned [it] against those [to] whom it was intended to set free, condemning them to a ‘separate but equal’ status before the law.”¹⁰⁰ More than fifty years after *Plessy*, the Court ruled “separate but equal” was “inherently unequal and forbidden under [the] Constitution.”¹⁰¹

The rhetoric that the Constitution is colorblind is not a new legal argument.¹⁰² Excerpts of Justice Harlan’s dissenting opinion in *Plessy v. Ferguson* have been heralded as offering proof that the Equal Protection Clause of the Fourteenth Amendment must be analyzed irrespective of an individual’s race or national origin.¹⁰³ However, Justice Harlan’s full quote, which was taken out of context in the *SFFA* majority opinion¹⁰⁴ and concurring opinion(s),¹⁰⁵ states,

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law,

97. U.S. CONST. amend. XIV, § 1 (emphasis added).

98. See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 201–06 (2023); *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003); *Bakke*, 438 U.S. at 284–87 (Powell, J., announcing the judgment of the Court).

99. *Bakke*, 438 U.S. at 326 (Brennan, J., concurring in the judgment in part and dissenting in part).

100. See *id.*; see also *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896).

101. *Bakke*, 438 U.S. at 327 (citing *Brown v. Bd. of Educ.* (Brown I), 347 U.S. 483 (1954)); see also *Brown v. Bd. of Educ.* (Brown II), 349 U.S. 294 (1955).

102. See, e.g., Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 992–93, 1046–47 (2007); Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211, 211–14, 232 (2010).

103. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772–73 (2007) (Thomas, J., concurring). The quote from Justice Harlan stated, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

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

105. See, e.g., *id.* at 231–32 (Thomas, J., concurring).

there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.¹⁰⁶

Justice Powell's words are paralyzing. Though allegedly our Constitution is colorblind before the law, the white race is dominant. Context matters.

Decades later, the relationship between race, equality, and dominance is still haunting. Thus it is no surprise that Justice O'Connor said, "Context matters when reviewing race-based governmental action under the Equal Protection Clause."¹⁰⁷ Indeed it does. Context is equally important when using comparative legal rhetoric as a framework because the discipline studies the rhetoric of judicial opinions.¹⁰⁸ It also studies the rhetoric of the lawyers who make arguments to the Court as those arguments create "legal meanings that [can] become entrenched in the collective . . . mind."¹⁰⁹

C. THE RHETORIC OF THE PETITIONER IN *SFFA*

Students for Fair Admissions,¹¹⁰ the petitioner in both the Harvard and UNC cases consolidated in *SFFA*, filed their Harvard and UNC petitions for writ of certiorari with the Supreme Court on February 25, 2021 and November 11, 2021 respectively.¹¹¹ The current Court granted the petitions on January 24, 2022 and consolidated the cases.¹¹² Both petitions raised two questions, but it is the first question that is most relevant to this Article.¹¹³ The question presented in both petitions was, "Should this Court overrule

106. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (emphasis added).

107. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

108. *See Jewel*, *supra* note 80, at 115.

109. *Id.*

110. Student for Fair Admissions is a non-profit 501(c)(3) organization, and they asserted that Asian-American members of the organization had a cause of action because they were denied admission to Harvard and UNC. *See SFFA*, 600 U.S. at 197; *id.* at 343 n.22 (Sotomayor, J., dissenting).

111. *Docket No. 20-1199*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1199.html> [<https://perma.cc/9BCA-32EV>]; *Docket No. 21-707*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-707.html> [<https://perma.cc/2PCW-VBK7>].

112. *Docket No. 20-1199*, *supra* note 111; *Docket No. 21-707*, *supra* note 111. In the UNC case, the District Court had issued its final judgment after trial, but there was no appellate review of that order. The current Court granted the petition pursuant to Supreme Court Rule 11. *See* U.S. SUP. CT. R. 11; 28 U.S.C. § 2101(e); *see also* *Petition for Writ of Certiorari Before Judgment, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (No. 21-707) [hereinafter UNC Petition].

113. In the Harvard case, the petitioner's questions presented were as follows:

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?

Grutter v. Bollinger, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?”¹¹⁴

Many rhetorical devices were used throughout the petitions for certiorari. But for this section, only the petitions’ introductions will be discussed. In the introductions, the parties relied on the canon of invention and appealed to the reason of Chief Justice Roberts and Justice Thomas.

At the beginning of the petitions, before addressing their primary argument, the petitioner quoted a single sentence from Chief Justice Roberts’s opinion in *League of United Latin American Citizens v. Perry*.¹¹⁵ The sentence stated, “It is a sordid business, this divvying us up by race.”¹¹⁶ The larger paragraph, however, that was inclusive of this one sentence was artfully omitted.¹¹⁷ To provide full context, Chief Justice Roberts’s words are below:

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district, in the face of factual findings that the district is an effective majority-minority district. *It is a sordid business, this divvying us up by race.* When a State’s plan already provides the maximum possible number of majority-minority effective opportunity districts, and the minority enjoys effective political power in the area well in excess of its proportion of the population, I would conclude that the courts have no further role to play in rejiggering the district lines under § 2.¹¹⁸

As has been repeatedly cautioned, context matters. For context, the *Perry* case consisted of four consolidated Texas voting rights cases that asserted a deprivation of individual rights under the First Amendment and Equal

2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

Petition for Writ of Certiorari at i, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023) (No. 20-1199) [hereinafter Harvard Petition]. In the UNC case, the petitioner’s questions presented were as follows:

1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?
2. Can a university reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?

UNC Petition, *supra* note 112, at i.

114. Harvard Petition, *supra* note 113, at i; UNC Petition, *supra* note 112, at i.

115. The language quoted was the same in both petitions. See Harvard Petition, *supra* note 113, at 2; UNC Petition, *supra* note 112, at 2; see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

116. *Perry*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

117. See *id.*

118. *Id.* (emphasis added and omitted).

Protection Clause of the Fourteenth Amendment.¹¹⁹ In a subsequent voting rights case, *Shelby County v. Holder*, Chief Justice Roberts wrote the Court's majority opinion.¹²⁰ Also, one of Edward Blum's non-profit organizations financed the litigation in *Shelby County*, and he is the President of Students for Fair Admissions.¹²¹

The petitions' introductions also quoted Justice Thomas's concurring opinion from *Fisher I*.¹²² The quote states, "[E]very time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."¹²³ However, the language that was artfully omitted from Justice Thomas's *Fisher I* quote fully reads, "I write separately to explain that I would overrule *Grutter v. Bollinger* and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."¹²⁴

Most damning to the role of context, when the petitioner's quote is placed in context, is that the *Fisher I* language is simply quoting Justice Thomas's opinion in *Grutter*.¹²⁵ In *Grutter*, Justice Thomas said plainly, "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."¹²⁶

119. See *id.* at 409–10 (majority opinion).

120. See *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013). It may be coincidental, or not, but in *Shelby County*, Chief Justice Roberts explicitly declared, "Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2. *We issue no holding on § 5 itself, only on the coverage formula.*" *Id.* at 557 (emphasis added). Chief Justice Roberts further stated that "Congress may draft another formula based on current conditions"; however, Congress has repeatedly tried unsuccessfully to pass legislation since 2013. *Id.*; see generally R. SAM GARRETT, CONG. RSCH. SERV., R47520, THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND 24 (2023). The effect of this case resulted in widespread voter suppression. See *How Shelby County v. Holder Broke Democracy*, NAACP LEGAL DEF. FUND, <https://www.naacpldf.org/shelby-county-v-holder-impact> [<https://perma.cc/49DA-UCA7>]. Thus, even though the Chief Justice did not explicitly state a holding, the implicit impact of the opinion was palpable.

121. See *About Us*, PROJECT ON FAIR REPRESENTATION, <https://projectonfairrepresentation.org/about-us> [<https://perma.cc/RWY7-WPZC>]; *About*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/about> [<https://perma.cc/F5MY-9CHA>]; *Edward J. Blum*, FEDERALIST SOC'Y, <https://fedsoc.org/contributors/edward-blum> [<https://perma.cc/6WTF-CR42>].

122. See Harvard Petition, *supra* note 113, at 2; UNC Petition, *supra* note 112, at 2; see also *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 316 (2013) (Thomas, J., concurring) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

123. *Fisher I*, 570 U.S. at 316 (Thomas, J., concurring) (quoting *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part)).

124. *Id.* at 315 (internal citation omitted).

125. See *id.* at 316.

126. *Id.* at 353 (Thomas, J., concurring in part and dissenting in part).

D. THE RHETORIC OF THE MAJORITY OPINION

Chief Justice John Roberts wrote the Court's forty-one-page majority opinion in *SFFA*.¹²⁷ The first six pages of the opinion used the rhetorical device of storytelling (or narrative) to describe the parties in the case.¹²⁸ Part III of Chief Justice Roberts's opinion also employed storytelling, but here the Chief Justice also shared his perspective on the origins of the Fourteenth Amendment and the Court's opinions interpreting the Equal Protection Clause of the Fourteenth Amendment.¹²⁹

As Chief Justice Roberts completed the section detailing case precedent, he made the following statement: "Eliminating racial discrimination means eliminating all of it."¹³⁰ To support the statement, he quoted language from *Yick Wo*¹³¹ and *Bakke*¹³² to affirm his perception that the Equal Protection Clause can only be applied "without regard to any differences of race"¹³³ and it "cannot mean one thing when applied to one individual and something else when applied to a person of another color."¹³⁴

In the following pages he guided the reader through a strict scrutiny analysis on how to eliminate racial discrimination.¹³⁵ To pass constitutional

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

128. Chief Justice Roberts briefly described the founding of Harvard and the University of North Carolina, as well as their admissions processes. *See id.* at 192–98. He also narrated the procedural history of the case. *See id.* at 198.

129. *See id.* at 201–08.

130. *Id.* at 206.

131. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Equal Protection Clause applies "without regard to any differences of race, of color, or of nationality").

132. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978) (Powell, J., announcing the judgment of the Court) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

133. *SFFA*, 600 U.S. at 206 (quoting *Yick Wo*, 118 U.S. at 369). For context, at the time that *Yick Wo* was decided, the Chinese Exclusion Act of 1882 prevented the Petitioner from being recognized as a U.S. citizen. *See generally Chinese Exclusion Act (1882)*, NAT'L ARCHIVES (Jan. 17, 2023), <https://www.archives.gov/milestone-documents/chinese-exclusion-act> [https://perma.cc/V7KA-UZR7]. Accordingly, the Court stated the following:

The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that "all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

Yick Wo, 118 U.S. at 369 (emphasis added).

134. *See SFFA*, 600 U.S. at 206 (quoting *Bakke*, 438 U.S. at 289–90 (Powell, J., announcing the judgment of the Court)).

135. *See id.* at 206–07.

muster, the use of race classifications must “further compelling governmental interests”¹³⁶ and be “narrowly tailored” or necessary to achieve that interest.¹³⁷ The Chief Justice cited *Fisher I* as support for the narrow tailoring prong even though *Fisher I* was remanded to the lower court(s) and *Fisher II* was the final decision in the case.¹³⁸ *Fisher II* affirmed that seeking a diverse student body was a compelling government interest and the data that the university collected at that time was narrowly tailored to achieve its stated interest.¹³⁹

The rhetoric used in the next sections is fascinating as Chief Justice Roberts discussed *Bakke* and *Grutter*.¹⁴⁰ During the discussion of *Bakke*, Chief Justice Roberts noted, “In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke.”¹⁴¹ “No other Member of the Court joined Justice Powell’s opinion.”¹⁴²

During the discussion of *Grutter*, the Chief Justice echoed Justice O’Connor’s concern as to whether Justice Powell’s opinion was “binding precedent.”¹⁴³ He then aptly noted that *Grutter* resolved any uncertainty by explicitly endorsing “Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”¹⁴⁴ Finally, Chief Justice Roberts made sure to express that, “[a]t some point, the Court held, [the race-based admissions programs] must end.”¹⁴⁵

While the majority opinion is a total of forty-one pages, the first twenty-three pages use rhetoric to support the reasons why the Court found that Harvard and UNC’s admissions programs were not constitutional.¹⁴⁶ In the remaining nineteen pages, Chief Justice Roberts systematically negated

136. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). *Grutter* is cited for the proposition that a racial classification must further compelling governmental interests. As previously noted, *Grutter* explicitly adopted Justice Powell’s reasoning from *Bakke* and held that a university’s interest in admitting a diverse student body was a compelling interest. *See Grutter*, 539 U.S. at 323–24 (citing *Bakke*, 438 U.S. at 311).

137. *SFFA*, 600 U.S. at 207 (citing *Fisher v. University of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 311–12 (2013)).

138. *See id.*; *see also Fisher v. University of Tex. at Austin* (*Fisher II*), 579 U.S. 365, 376, 388–89 (2016).

139. *See Fisher II*, 579 U.S. at 382, 388.

140. *See SFFA*, 600 U.S. at 208–13.

141. *Id.* at 208.

142. *Id.* at 210. One of the rhetorical persuasive appeals is the appeal to credibility (i.e., ethos). *See Fraley, supra* note 84, at 106–07. A reading of this sentence, in particular, could lead an uninformed or novice reader to wonder whether Justice Powell’s opinion was credible since “no other Member of the Court joined [his] opinion.” *See id.*; *see also Plurality Opinion, supra* note 43 (defining the phrase “plurality opinion”).

143. *See SFFA*, 600 U.S. at 211 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)).

144. *Id.* (quoting *Grutter*, 539 U.S. at 325).

145. *Id.* at 212 (citing *Grutter*, 539 U.S. at 342); *see also Grutter*, 539 U.S. at 343 (“It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

146. *See SFFA*, 600 U.S. at 190–213.

the rationale that student body diversity is a compelling governmental interest.¹⁴⁷ And despite the extensive data provided by Harvard and UNC showing that the means to achieve a diverse student body were narrowly tailored, Chief Justice Roberts held “the interests [Harvard and UNC] view as compelling cannot be subjected to meaningful judicial review.”¹⁴⁸

E. THE RHETORIC OF JUSTICE THOMAS’S CONCURRING OPINION

Justice Clarence Thomas wrote a fifty-eight-page concurrence.¹⁴⁹ Similar to the majority opinion, Justice Thomas began by depicting the circumstances surrounding the passage and ratification of the Fourteenth Amendment.¹⁵⁰

In his concurring opinion,¹⁵¹ Justice Thomas acknowledges “[t]he Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to . . . the equal protection of the laws.”¹⁵² He detailed the legislative actions leading up to the drafting and ratification of the Fourteenth Amendment, and described how proponents of the amendment “repeatedly affirmed their view of equal citizenship and the racial equality that flows from it.”¹⁵³ Yet, unsubtly, Justice Thomas emphasized that the Fourteenth Amendment “ensures racial equality *with no textual reference to race whatsoever*.”¹⁵⁴

147. *See id.* at 214–31. The majority opinion did not strike down the diversity rationale as it relates to the military. *See id.* at 213 n.4. However, as will be discussed later, Edward Blum has sued the U.S. Naval Academy and Military Academy at West Point. *See* Hassan Kanu, *Affirmative-Action Foe’s Military Lawsuits Are Flawed, But Does That Matter?*, REUTERS (Oct. 26, 2023, 12:00 PM), <https://www.reuters.com/legal/government/column-affirmative-action-foes-military-lawsuits-are-flawed-does-that-matter-2023-10-26> [<https://perma.cc/BB2C-DVWH>].

148. *SFFA*, 600 U.S. at 214; *see also id.* at 216 (deeming the racial categories that were relied upon as “imprecise” and “plainly overbroad”). However, similar categories are used by the U.S. Census and other Federal government agencies. *See id.* at 367 (Sotomayor, J., dissenting); *see generally* *Our Censuses*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/censuses.html> [<https://perma.cc/8WBL-37Z8>] (noting that the Census is used to distribute funds and assistance to states and localities, to determine where to build schools and homes, and to reapportion the number of Congressional representatives).

149. *See SFFA*, 600 U.S. at 231–87 (Thomas, J., concurring).

150. *See id.* at 231–52.

151. A concurring opinion is a separate written opinion that explains why a jurist who voted for the majority opinion may have different reasoning for their vote or the decision. *See Concurrence*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 29 (1969):

Though the judges of appellate courts do not feel obligated to explain their judicial votes in full by disclosing in every case the extent to which they agree or disagree with each thought expressed in the court’s opinion, it is nevertheless common practice to express differences of opinion . . . through concurring opinions . . . They give notice of the possibility of change by expressing minority views that may become majority views in the future for a variety of reasons—among them, . . . changing personnel of the court. Coincidentally, they reduce the force of the majority opinion as precedent, increasing the likelihood that the rule there stated will be abandoned at some time in the future.

152. *SFFA*, 600 U.S. at 231 (Thomas, J., concurring).

153. *Id.* at 233.

154. *Id.*

To further his point, Justice Thomas quotes Justice Harlan's haunting words in *Plessy v. Ferguson*: "[O]ur Constitution is colorblind."¹⁵⁵ However, Justice Thomas failed to include context. Contrary to Justice Thomas's branding of the Fourteenth Amendment as blind and arguably objective, Justice Harlan actually addressed both the explicit and implicit language in the Louisiana law at issue.¹⁵⁶ Justice Harlan stated:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.¹⁵⁷

The law at issue in *Plessy* had "no textual reference to race whatsoever," and yet, it was well-known that the law had everything to do with race.¹⁵⁸ Likewise, just because the Fourteenth Amendment does not include a textual reference to race does not mean that race was not implicit in both its passage and ratification.¹⁵⁹ In law, context is important.

In his *SFFA* concurring opinion, Justice Thomas frames the Court's precedent as "largely adher[ing] to the Fourteenth Amendment's demand for colorblind laws."¹⁶⁰ He has made this argument numerous times before,¹⁶¹ and there is even evidence as to why he may feel this way in his memoir.¹⁶² But, as illustrated by the above examples, Justice Thomas's framing is not the only way to interpret the law.¹⁶³ In fact, Justice Thomas's statement that "[b]oth experience and logic . . . vindicated the Constitution's colorblind

155. *Id.* (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

156. *See Plessy*, 163 U.S. at 556–57 (Harlan, J., dissenting).

157. *Id.* (emphasis added).

158. *See id.* at 559.

159. *See SFFA*, 600 U.S. at 233 (Thomas, J., concurring).

160. *SFFA*, 600 U.S. at 252 (Thomas, J., concurring).

161. Race-conscious admissions have been referred to as "racial preference." *See id.* at 214–15 (majority opinion). While Justice Thomas does not explicitly use the words "racial preference" in *SFFA*, cases like *Fisher II*, *Grutter*, and *Bakke* did not adhere to or promote colorblindness. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 570 U.S. 297, 317–18, 328 (2013) (Thomas, J., concurring); *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 579 U.S. 365, 389 (2016) (Thomas, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 351, 378 (2003) (Thomas, J., concurring in part and dissenting in part); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

162. *See CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR* 56–57, 104–08 (2007).

163. *See SFFA*, 600 U.S. at 357 (Sotomayor, J., dissenting); *see also id.* at 385 (Jackson, J., dissenting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting).

rule and confirmed that the universities' new narrative cannot stand"¹⁶⁴ can be contradicted by the Supreme Court's precedent.

In sum, rhetoric can be a powerful tool. It can give meaning to language that can become so widespread and distorted that the full context of what was actually said gets diminished. As scholars and advocates look to the future, we should critically evaluate the *SFFA* decision and how it may be used to further a strategic agenda beyond higher education.

III. WHAT'S NEXT? BLUM'S STRATEGY TO EXPAND *SFFA*'S NARROW HOLDING

Stare decisis dictates how the Supreme Court should treat prior cases. But like a game of chess, rhetoric can be used strategically in judicial opinions to reach a specific outcome, and the result in *SFFA* appears to be part of a larger strategic effort to eliminate race-conscious processes.¹⁶⁵

Edward Blum (Blum) leads three 501(c)(3) organizations¹⁶⁶ that have missions to counteract industries where racist systemic practices have tried to be eradicated. Blum is the Director of Project on Fair Representation,¹⁶⁷ President of Students for Fair Admissions,¹⁶⁸ and is affiliated with American Alliance for Equal Rights.¹⁶⁹ Since the *SFFA* decision, Blum has taken

164. *SFFA*, 600 U.S. at 261 (Thomas, J., concurring).

165. Since *SFFA*, Students for Fair Admissions has sued the United States Military Academy at West Point and the United States Naval Academy. See, e.g., Julian Hayter, *Edward Blum's Crusade Against Affirmative Action Used Legal Strategy of Civil Rights Activists*, ARK. ADVOC. (Dec. 4, 2023, 5:03 PM), <https://arkansasadvocate.com/2023/12/04/edward-blums-crusade-against-affirmative-action-used-legal-strategy-of-civil-rights-activists> [<https://perma.cc/KN5V-2Q7Y>]; cf. also Harvard Oral Argument Transcript, *supra* note 16, at 38 (referring to universities as "the pipeline for leadership in our society"). The litigation is ongoing. See *Students for Fair Admissions v. U.S. Mil. Acad. at W. Point*, No. 23-cv-08262, 2024 WL 36026, at *14 (S.D.N.Y. Jan. 3, 2024) (order denying SFFA's motion for a preliminary injunction); *Students for Fair Admissions v. U.S. Naval Acad.*, No. 23-2699, 2023 WL 8806668, at *16 (D. Md. Dec. 20, 2023) (same).

166. See *About Us*, *supra* note 121; *About*, *supra* note 121; *About Us*, AM. ALL. FOR EQUAL RTS., <https://americanallianceforequalrights.org/about> [<https://perma.cc/LRS2-JJLD>]. The tax code status is important to note because all the organizations that Edward Blum directs can receive tax-deductible donations to finance their strategic initiatives. See *Exemption Requirements 501(c)(3) Organizations*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations> [<https://perma.cc/QT3V-JVE4>].

167. See *About Us*, PROJECT ON FAIR REPRESENTATION, *supra* note 121; see also *Project on Fair Representation*, INFLUENCEWATCH, <https://www.influencewatch.org/non-profit/project-on-fair-representation> [<https://perma.cc/PE82-LM7A>] (noting efforts concerning COVID-19 treatments and the Oregon Health and Science University).

168. See *About*, STUDENTS FOR FAIR ADMISSIONS, *supra* note 121; see also *Students for Fair Admissions (SFFA)*, INFLUENCEWATCH, <https://www.influencewatch.org/non-profit/students-for-fair-admissions-sffa> [<https://perma.cc/UWM3-SBCA>] (listing SFFA's 2019 budget and revenue as exceeding one million dollars).

169. See *American Alliance for Equal Rights Files Lawsuit Against Perkins Coie LLP and Morrison & Foerster LLP Alleging Discriminatory Diversity Fellowships*, AM. ALL. FOR EQUAL RTS. (Sept. 14, 2023), <https://americanallianceforequalrights.org/american-alliance-for-equal-rights-files-lawsuit-against-perkins-coie-llp-and-morrison-foerster-llp-alleging-discriminatory-diversity-fellowships> [<https://perma.cc/PJ4Y-4WL6>]; Nate Raymond, *Conservative Activist Uses Civil War-Era Law to Challenge US Corporate Diversity*, REUTERS (Sept. 25, 2023, 7:19 PM), <https://www.reuters.com/sustainability/society-equity/conservative-activist-uses-civil-war-era-law-challenge-us-corporate-diversity-2023-09-25> [<https://perma.cc/...>].

steps vis-à-vis each organization to expand the Supreme Court's holding in *SFFA* into the areas of finance, employment, voting rights, and more institutions of higher learning.

A. PROJECT ON FAIR REPRESENTATION

Project on Fair Representation (PFR) was founded in 2005 as “a not-for-profit legal defense foundation that is designed to support litigation that challenges racial and ethnic classifications and preferences in state and federal courts.”¹⁷⁰ Their mission is as follows:

[T]o facilitate pro bono legal representation to political subdivisions and individuals that wish to challenge government distinctions and preferences made on the basis of race and ethnicity. [They] will devote all . . . efforts to influencing jurisprudence, public policy, and public attitudes regarding race and ethnicity in six arenas: [Voting, Education (college and K-12), Contracting, Employment, Racial Quotas, and Racial Reparations.]¹⁷¹

Some of the cases that PFR has participated in as financier, amici, or named party include *Parents Involved in Community Schools v. Seattle Schools District No. 1*,¹⁷² *Abigail Fisher v. University of Texas*,¹⁷³ *Students for Fair Admissions v. Harvard College*,¹⁷⁴ and *Students for Fair Admissions v. University of North Carolina*.¹⁷⁵

cc/HYG8-2VQ4]; see also Christopher Brown, *Eleventh Circuit Blocks Venture Fund's Grants for Black Women*, BLOOMBERG L. (Oct. 2, 2023, 8:37 AM), <https://news.bloomberglaw.com/litigation/eleventh-circuit-blocks-venture-funds-grants-for-black-women> [https://perma.cc/M6U4-X4UD] (the plaintiffs in the case were White and Asian women).

170. PROJECT ON FAIR REPRESENTATION, <https://projectonfairrepresentation.org> [https://perma.cc/2N6H-Z888].

171. *Id.*

172. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 555 U.S. 701 (2007). PFR filed an amicus brief in this case. *Amicus Briefs*, PROJECT ON FAIR REPRESENTATION (Jan. 21, 2015), <https://projectonfairrepresentation.org/amicus-briefs> [https://perma.cc/8MJS-CKM4].

173. See *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297 (2013); *Fisher v. Univ. of Tex. at Austin* (Fisher II), 579 U.S. 365 (2016). PFR financed the *Fisher I* and *Fisher II* litigation. See *Abigail Fisher v. University of Texas*, PROJECT ON FAIR REPRESENTATION (Jan. 22, 2015), <https://projectonfairrepresentation.org/abigail-fisher-v-university-of-texas> [https://perma.cc/9KR3-QVNV].

174. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 600 U.S. 181 (2023). PFR was not a named party, but the case is listed on their website. See *Students for Fair Admissions, Inc. v. Harvard University*, PROJECT ON FAIR REPRESENTATION (Jan. 22, 2015), <https://projectonfairrepresentation.org/students-for-fair-admissions-v-harvard-university> [https://perma.cc/28D4-QVKR].

175. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *rev'd sub nom.* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181 (2023). PFR was not a named party, but the case is listed on their website. See *Students for Fair Admissions v. University of North Carolina-Chapel Hill*, PROJECT ON FAIR REPRESENTATION (Jan. 22, 2015), <https://projectonfairrepresentation.org/students-for-fair-admissions-v-university-of-north-carolina-chapel-hill> [https://perma.cc/FH6K-WS6F].

B. STUDENTS FOR FAIR ADMISSIONS

Students for Fair Admissions's website says it "is a nonprofit membership group of more than 20,000 students, parents, and others who believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional."¹⁷⁶ Its "mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement: *A student's race and ethnicity should not be factors that either harm or help that student gain admission to a competitive university.*"¹⁷⁷

After the loss in *Fisher II*, it was imperative to initiate litigation that would have a far-reaching impact. Strategically, it was not a coincidence that SFFA sued the oldest private¹⁷⁸ and public¹⁷⁹ universities in the nation, and then sought to consolidate the cases when seeking relief from the Supreme Court of the United States.¹⁸⁰

C. AMERICAN ALLIANCE FOR EQUAL RIGHTS

American Alliance for Equal Rights (AAER) "is a not-for-profit 501(c)(3) membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity."¹⁸¹ Following the *SFFA* decision on June 29, 2023, AAER filed lawsuits against two law firms: Morrison & Foerster and Perkins Coie.¹⁸² The lawsuits challenged the firms'

176. *About*, STUDENTS FOR FAIR ADMISSIONS, *supra* note 121.

177. *Id.*

178. "Founded in 1636, Harvard College has one of the most selective application processes in the country." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 600 U.S. 181, 192 (2023). At over 50 billion dollars, Harvard also has the largest endowment of all universities in the United States and has educated numerous leaders including at least twenty-two Justices of the United States Supreme Court. *See Sarah Wood, 15 National Universities With the Biggest Endowments*, U.S. NEWS & WORLD REP. (Oct. 2, 2023), <https://www.usnews.com/education/best-colleges/the-short-list-college/articles/10-universities-with-the-biggest-endowments> [<https://perma.cc/24VZ-HF5R>]; *see also Harvard Law School Alumni/ae Justices of the United States Supreme Court*, HARVARD L. SCH., <https://exhibits.law.harvard.edu/scotus-credit-page> [<https://perma.cc/6GVX-PM8K>] (list does not include Justice Ketanji Brown Jackson); Ilana Kowarski, *Where Supreme Court Justices Earned Law Degrees*, U.S. NEWS & WORLD REP. (Apr. 7, 2022), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/where-supreme-court-justices-earned-law-degrees> [<https://perma.cc/HEW7-DLUX>].

179. *SFFA*, 600 U.S. at 195 ("Founded shortly after the Constitution was ratified, the University of North Carolina (UNC) prides itself on being the 'nation's first public university.'" (citation omitted)).

180. The Court granted SFFA's request to consolidate the cases. *See Docket No. 20-1199*, *supra* note 111; *Docket No. 21-707*, *supra* note 111. However, when Justice Ketanji Brown Jackson was appointed to the Court, the cases were unconsolidated so that she could participate in the UNC case. *See Docket No. 20-1199*, *supra* note 111; *Docket No. 21-707*, *supra* note 111. During her confirmation hearing, she agreed to recuse herself from the Harvard case. *See Kayla Jimenez, What Justice Jackson's Recusal From Harvard Affirmative Action Case Means for Black Students*, USA TODAY (Feb. 28, 2023, 5:40 PM), <https://www.usatoday.com/story/news/education/2023/02/28/ketanji-brown-jackson-recusal-harvard-affirmative-action-case-supreme-court/11156381002> [<https://perma.cc/26VF-CAEV>].

181. *About Us*, AM. ALL. FOR EQUAL RTS., *supra* note 166.

182. *See American Alliance for Equal Rights Files Lawsuit Against Perkins Coie LLP and Morrison & Foerster LLP Alleging Discriminatory Diversity Fellowships*, *supra* note 169.

law student-focused diversity programs; just recently, AAER dropped both suits when both firms changed their diversity programs.¹⁸³ AAER also sued a venture capital firm dedicated to providing funding to Black women business owners; this lawsuit is still ongoing.¹⁸⁴

On balance, Blum's advocacy before the Supreme Court and his position in each of the above-mentioned organizations warrants an assessment of the interplay between power, race, and identity.¹⁸⁵ Though such assessment is outside the scope of this Article, a person's identity can inform their ideology and judicial opinions are written by people, therefore identity theory and performance should be explored.¹⁸⁶

IV. CONCLUSION

Stare decisis should have contributed to a *SFFA* decision that continued the holistic use of race in college and university admissions. But, instead, it appears that rhetoric was used to achieve a different result, and now the *SFFA* case appears poised to have far-reaching implications beyond higher education. Despite years of precedent, neither data, nor context seem to have mattered—though both were relevant.

183. Tatyana Monnay, *Perkins Coie DEI Suit Ended by Anti-Affirmative Action Group*, BLOOMBERG L. (Oct. 11, 2023, 12:53 PM), <https://news.bloomberglaw.com/business-and-practice/perkins-coie-dei-suit-dropped-by-anti-affirmative-action-group> [<https://perma.cc/W4E7-9J42>].

184. See Complaint, *Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC*, No. 1:23-cv-03424 (N.D. Ga. Aug. 2, 2022), ECF No. 1; see also *American Alliance for Equal Rights Files Lawsuit Challenging Venture Capital Firm's Race-Exclusive Policies*, AM. ALL. FOR EQUAL RTS. (Sept. 25, 2023), <https://americanallianceforequalrights.org/american-alliance-for-equal-rights-files-lawsuit-challenging-venture-capital-firms-race-exclusive-policies> [<https://perma.cc/P9KE-M38G>].

185. See generally Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577 (2018) (drawing on co-cultural theory, which describes how non-dominant cultures communicate in a dominant setting, as a framework for discussing the pressures marginalized groups feel to perform their identity in a predominantly White legal profession); Leslie P. Culver, *The Rise of Self Sidelining*, 39 WOMEN'S RTS. L. REP. 173 (2018) (examining the collision between impostor phenomenon and gender sidelining, which results in a false endorsement of inadequacy and leads women to self-sideline); Leslie P. Culver, *White Doors, Black Footsteps: Leveraging "White Privilege" to Benefit Law Students of Color*, 21 J. GENDER, RACE & JUST. 37 (2017) (examining the value of intercultural mentoring relationships between white law professors and law students of color in efforts to reduce ethnic bias against these students).

186. Leslie Patrice Culver, *(Un)Wicked Analytical Frameworks and the Cry for Identity*, 21 NEV. L.J. 655, 660 (2021) (“[I]dentity performance describes the way one acts out or presents the various characteristics of themselves in interactions with others.”).