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Students for Fair Admissions v. Universities for Division, Exclusion, and Inequity: The Petitions, the Arguments, and the Decision

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STUDENTS FOR FAIR ADMISSIONS V.
UNIVERSITIES FOR DIVISION, EXCLUSION,
AND INEQUITY: THE PETITIONS, THE
ARGUMENTS, AND THE DECISION

*Josh Blackman**

ABSTRACT

Students for Fair Admissions v. Harvard (SFFA) will be studied by law students for generations, in much the same way that Bakke and Grutter were studied before. But there is much more to SFFA than the final decisions about Harvard University and the University of North Carolina will reveal. This Article, published for a symposium by the SMU Law Review, focuses on three stages of the litigation: the petitions, the oral arguments, and the decision. Part I recounts the complex procedural history, which began in federal courts in Massachusetts and North Carolina. The Harvard case reached the Supreme Court first, while the UNC case lingered in district court. The Supreme Court called for the views of the Solicitor General. By doing so, the Court could punt the case to the following term, which allowed the UNC case to catch up, and Justice Breyer's replacement to be confirmed. Both cases would be argued on October 31, 2022.

Part II parses the questions asked by all nine Justices during oral argument. Chief Justice Roberts signaled up front that he would rule against the universities. Justice Thomas repeated his charge that arguments in favor of racial preferences mirror the arguments made by segregationists. Justice Alito worried about discrimination against Asian-American applicants. Justice Sotomayor focused on the detailed findings of the trial courts. Justice Kagan questioned whether SFFA would favor universities with few or no racial minorities on campus. Justice Gorsuch looked to Title VI of the Civil Rights Act of 1964. Justice Kavanaugh suggested preferences could be reserved for the descendants of slaves. Justice Barrett inquired about the expiration date of Grutter. And Justice Jackson recounted how the Reconstruction Congress used racial preferences for the freedmen.

Finally, Part III breaks down four aspects of the Court's decision. SFFA eliminated the "educational benefits" rationale for affirmative action. Chief Justice Roberts continues to take inconsistent positions in similar cases during the same term. Justice Kavanaugh continues to follow the lead of Chief

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Justice Roberts in leading cases, including SFFA. And I defend Justice Jackson's likely involvement in the Harvard case, notwithstanding her recusal.

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INTRODUCTION

In June 2023, the Supreme Court decided *Students for Fair Admissions v. Harvard*.¹ This case held that any purported benefits from a diverse class are not enough, by themselves, to justify the use of racial classifications.² This decision effectively overruled *Grutter v. Bollinger*.³ Moreover, the Court held that this analysis applies to *both* the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.⁴

The *SMU Law Review* graciously invited me to submit a symposium entry on this landmark case. Here, I provide some thoughts on three aspects of the case: the petitions, the oral arguments, and the decision.

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

2. *Id.* at 230–31.

3. *See id.* at 211 (citing *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)).

4. *Id.* at 287 (Gorsuch, J., concurring).

I. THE PETITIONS

Students for Fair Admissions (SFFA) was an organization founded, in part, to challenge the legality of affirmative action policies at universities.⁵ SFFA challenged the affirmative action policies at Harvard University (a private institution) and the University of North Carolina (a public institution).⁶ Both cases included claims under Title VI of the Civil Rights Act of 1964, which prohibits discrimination in higher education.⁷ The UNC case also included a claim under the Equal Protection Clause of the Fourteenth Amendment.⁸ This part will recount how the petitions for writs of certiorari were filed in these cases and how they finally made their way to the Supreme Court's conference.

A. STRATEGIC CVSG

In most regards, the Supreme Court is a reactive institution. It can only decide the cases that are brought to it by litigants. Still, the Supreme Court has substantial authority over a case once it is filed. Much attention is paid to *how* the Court resolves cases. For example, does the Court decide a case after briefing and oral argument on the merits docket? Or does the Court issue a summary decision without the benefit of oral argument on the emergency docket? Less attention is paid to *when* the Court resolves the case. *Students for Fair Admissions (SFFA)* demonstrates the Court's power to control the timing of a case.

Students for Fair Admissions filed its petition for a writ of certiorari in February 2021.⁹ The case was distributed for the conference on June 10, 2021.¹⁰ Had the Court granted certiorari on *SFFA* in June 2021, the case would have been argued during the October 2021 term, with a resolution by June of 2022. But the October 2021 term was already jam-packed. At the time, *Dobbs v. Jackson Women's Health Organization*¹¹ and *New York State Rifle & Pistol Ass'n v. Bruen*,¹² among other blockbusters, were already on the Court's docket. Those cases would be argued in the fall of 2021.¹³ But the Court would not grant the *SFFA* petition right away.

5. *See id.* at 197.

6. *Id.*

7. *Id.*; 42 U.S.C. § 2000d.

8. *SFFA*, 600 U.S. at 197.

9. Petition for Writ of Certiorari at 44, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199).

10. *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>].

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

12. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

13. *Docket No. 19-1392*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-1392.html> [<https://perma.cc/74M4-SL8B>]; *Docket No. 20-843*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-843.html> [<https://perma.cc/2EN3-RD3M>].

Rather, on June 14, 2021, the Court called for the views of the Solicitor General.¹⁴ This process is known by its acronym, CVSG.¹⁵ The CVSG made it very unlikely for the case to be heard during the October 2021 term. From a legal perspective, it made sense for the Court to obtain the Solicitor General's views on the proper interpretation of Title VI of the Civil Rights Act of 1964. But from a pragmatic perspective, the CVSG could have obviated the need for the Court to resolve landmark cases on abortion, guns, and affirmative action during the same term. The CVSG can serve as something of a punt—a dilatory tactic by the Court to space out its docket.¹⁶ And that punt also gives the Solicitor General some discretion over when the case is argued.

As a result of the CVSG, the ball was placed in the Solicitor General's court. Or to be more precise, at the time, Elizabeth Prelogar was the *acting* Solicitor General. There was no time frame in which she was required to reply. Perhaps the biggest factor is the Case Distribution Schedule, a little-known document that the Court releases each term.¹⁷ Generally, the Supreme Court will only consider petitions for certiorari at a conference.¹⁸ These conferences are usually scheduled for Fridays between September and June.¹⁹ In order for a petition to be considered at a conference, the briefing must be distributed to the Justices by a certain date. The Case Distribution Schedule includes those two dates: if a petition is distributed by one date, it will be conferenced at another date. There is usually an unwritten cutoff date. If a petition is granted at the first—or maybe second—conference in January, it will be argued during the current term. If a petition is granted afterwards, it will be argued during the following term. This rule is not hard-and-fast, but it generally holds.²⁰

In 2022, the first and second conferences in January were on January 7 and 14, respectively.²¹ For the January 7, 2022, conference, the earliest distribution date was December 1, and the latest distribution date was

14. *Docket No. 20-1199*, *supra* note 10.

15. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 242 (2009).

16. See Josh Blackman, *Four Types of Supreme Court Punts*, VOLOKH CONSPIRACY (Dec. 12, 2021, 9:00 AM), <https://reason.com/volokh/2020/12/21/four-types-of-supreme-court-punts> [<https://perma.cc/9LE7-G4RZ>].

17. See *Case Distribution Schedule*, SUP. CT. OF THE U.S. <https://www.supremecourt.gov/casedistribution/casedistributionschedule.aspx> [<https://perma.cc/L874-Y9DS>].

18. See *Distributed for Conference at the Supreme Court of the United States*, COUNS. PRESS (Oct. 25, 2012), https://www.counselpress.com/page_blog_single.cfm?bid=11 [<https://perma.cc/NFD2-4W57>].

19. See *id.*

20. See, e.g., Josh Blackman, *The NY Times on "Running Out the Clock on Obama Immigration Plan," and #SCOTUS Timing*, JOSHBLACKMAN.COM (Oct. 13, 2015), <https://josh-blackman.com/blog/2015/10/13/the-ny-times-on-running-out-the-clock-on-obama-immigration-plan-and-scotus-timing> [<https://perma.cc/W934-TKLA>].

21. SUP. CT. OF THE U.S., *CASE DISTRIBUTION SCHEDULE—OCTOBER TERM 2021*, <https://www.supremecourt.gov/casedistribution/casedistributionschedule2021.pdf> [<https://perma.cc/PQH2-D7HD>].

January 3.²² The Solicitor General filed her brief on December 8.²³ The government told the Court that *Grutter* should not be overruled.²⁴ The brief explained that “*Grutter’s* interpretation of equal-protection principles is correct, and all traditional *stare decisis* factors—including the substantial reliance interests of colleges and universities around the Nation—strongly support adhering to *Grutter*.”²⁵

By filing on December 8, the Solicitor General guaranteed that the case could be distributed for the January 7 conference. This timing ensured that the petition could be considered with sufficient time to grant it and that the case would be argued during the October 2021 term. Indeed, the case was distributed for the January 7 conference.²⁶ But there was no guarantee the Court would move with alacrity. Rather, at the time, I speculated that the Court, if it were so inclined, could relist the case a few times to kick it past the January 14 conference.²⁷

As I predicted, no action was taken on January 7, and the case was relisted and distributed again for the January 14 conference.²⁸ No action was taken on the January 14 conference.²⁹ The case was listed a second time for the January 21 conference.³⁰ At that conference, the Court granted certiorari for *SFFA*. The Court announced its grant on January 24, 2022.³¹ By that point, it was too late to schedule the case for the October 2021 term. A case granted just three days earlier—on January 21, 2022—was argued the last day of the term.³² Instead, *SFFA* would be kicked to the October 2022 term.

22. *Id.*

23. *Docket No. 20-1199, supra* note 10.

24. Brief for the United States as Amicus Curiae at 9, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199).

25. *Id.*

26. *Docket No. 20-1199, supra* note 10.

27. See Josh Blackman, *SG Files Brief in Harvard Affirmative Action Case, Teeing the Case for Review This Term*, VOLOKH CONSPIRACY (Dec. 8, 2021, 5:47 PM), <https://reason.com/volokh/2021/12/08/sg-files-brief-in-harvard-affirmative-action-case-teeing-the-case-for-review-this-term> [<https://perma.cc/4VY4-ZHLN>];

Will the Justices want to grant now? I mean, with guns and abortion on the docket, why not add affirmative action? And don’t forget the emergency redistricting litigation that may trickle up before the midterms. This term will simply get more insane. If history is any guide, the Court relisted *Dobbs* umpteen times. A few relists would put this the Harvard case safely into next term.

28. *Docket No. 20-1199, supra* note 10.

29. *Id.*

30. *Id.*; see generally Amy Howe, *Court Will Take Up Five New Cases, Including Lawsuit From Football Coach Who Wanted to Pray on the Field*, SCOTUSBLOG (Jan. 14, 2022, 8:08 PM), <https://www.scotusblog.com/2022/01/court-will-take-up-five-new-cases-including-lawsuit-from-football-coach-who-wanted-to-pray-on-the-field> [<https://perma.cc/NSR9-VMZF>]; John Elwood, *Revenge of the Rescheduled Cases: Congressional Proxy Voting, the Ministerial Exception, and More*, SCOTUSBLOG (Jan. 20, 2022, 5:01 PM), <https://www.scotusblog.com/2022/01/revenge-of-the-rescheduled-cases-congressional-proxy-voting-the-ministerial-exception-and-more> [<https://perma.cc/E5AD-VG4V>].

31. *Docket No. 20-1199, supra* note 10.

32. *Docket No. 21-429*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-429.html> [<https://perma.cc/NXQ2-AKUM>].

In recent years, the Court has customarily relisted a case once before granting certiorari.³³ It is not clear what a second relist accomplished here. All of the briefs had been pending for months while the CVSG was out, and the Solicitor General (as could be expected) urged the Court to keep *Grutter* in place. No surprises there. The cynic in me speculates that the Court relisted the case one more time to provide enough cushion to kick the case ahead and avoid deciding abortion, guns, *and* affirmative action in the same term. Moreover, *Dobbs* would (in hindsight) modify the Court's approach to stare decisis.³⁴ It would be far simpler to use the new *Dobbs* standard to deal with *Grutter*. But one can never know for sure why the Court does what it does.

B. CONSOLIDATING AND UNCONSOLIDATING *SFFA*

Students for Fair Admissions challenged the affirmative action policies at two universities. First, SFFA sued Harvard University, a private institution, alleging a violation of Title VI of the Civil Rights Act of 1964.³⁵ Second, SFFA sued the University of North Carolina, a public institution, alleging a violation of the Equal Protection Clause of the Fourteenth Amendment, as well as Title VI.³⁶ The *Harvard* case moved through the federal district court and the court of appeals quickly. However, the North Carolina federal district court took several years to resolve the case. Indeed, although both cases were filed in November 2014,³⁷ the Middle District of North Carolina did not issue a decision until October 18, 2021.³⁸ By that point, SFFA's petition in the *Harvard* case was already pending before the Supreme Court.³⁹

Rather than appealing the North Carolina case to the Fourth Circuit Court of Appeals, SFFA took a different path. On November 21, 2021, Students for Fair Admissions filed a petition for certiorari before judgment in the North Carolina case.⁴⁰ SFFA also filed a motion to expedite the proceedings.⁴¹ The Court set the deadline for UNC's brief on December 20, 2021.⁴² And, as perhaps you could anticipate, the case was also distributed

33. See Ralph Mayrell & John Elwood, *The Statistics of Relists Over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022, 4:14 PM), <https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same> [https://perma.cc/PV3A-7UAAU].

34. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263–90 (2022).

35. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 197 (2023).

36. *Id.*

37. *Id.*

38. *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F.Supp.3d. 580 (M.D.N.C. 2021).

39. See *Docket No. 20-1199*, *supra* note 10.

40. *Petition for a Writ of Certiorari Before Judgment, Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (No. 21-707).

41. *Motion to Expedite Briefing of the Petition for a Writ of Certiorari Before Judgment, Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (No. 21-707).

42. *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].

for the January 7, 2021, conference.⁴³ It was relisted twice and granted on January 24, 2022—the same day as the Harvard petition.⁴⁴

On January 24, 2022, the Court consolidated the *Harvard* and *UNC* cases.⁴⁵ The Court often consolidates cases that present related issues. Both of these cases presented challenges under Title VI of the Civil Rights Act of 1964.⁴⁶ This statute prohibits racial discrimination by educational institutions that accept federal funds.⁴⁷ The *UNC* case, however, included an additional claim: that the public institution's affirmative action policy violated the Equal Protection Clause of the Fourteenth Amendment.⁴⁸ That consolidation would change soon enough.

Three days later, on January 27, 2022, Justice Stephen Breyer announced his intent to step down from the Supreme Court.⁴⁹ Rumors of Justice Breyer's retirement had swirled for some time. And President Biden had promised that his first Supreme Court appointee would be a Black woman.⁵⁰ Was the Court's decision to punt the affirmative action case until the next term, in part, to allow Justice Breyer's successor—who would not be a white man—to handle the affirmative action case? One can never know for sure why the Court does what it does.

About one month later, on February 25, 2022, President Biden nominated Judge Ketanji Brown Jackson to replace Justice Breyer.⁵¹ Jackson had served for many years on the District Court for the District of Columbia, and briefly on the D.C. Circuit Court of Appeals.⁵² But most relevant for our purposes, Jackson served on the Harvard University Board of Overseers.⁵³ This affiliation would create the risk of recusal for Justice Jackson.

In February 2023, I attended then-Judge Jackson's confirmation hearings.⁵⁴ Most of the proceedings were utterly unmemorable. Perhaps the only important revelation came when Senator Ted Cruz of Texas asked if

43. *Id.*

44. *Id.*

45. *Id.*; *Docket No. 20-1199, supra* note 10.

46. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 197 (2023).

47. 42 U.S.C. § 2000d.

48. *See SFFA*, 600 U.S. at 197.

49. *Remarks by President Biden on the Retirement of Supreme Court Justice Stephen Breyer*, WHITE HOUSE (Jan. 27, 2022, 12:36 PM), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/27/remarks-by-president-biden-on-the-retirement-of-supreme-court-justice-stephen-breyer> [<https://perma.cc/ZZ4X-BFVE>].

50. *Id.*

51. *President Biden Nominates Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, WHITE HOUSE (Feb. 25, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/25/president-biden-nominates-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court> [<https://perma.cc/B76Q-C867>].

52. *Id.*

53. Isabella B. Cho, *Harvard Alum Ketanji Brown Jackson '92 Confirmed to Supreme Court*, HARV. CRIMSON (Apr. 8, 2022), <https://www.thecrimson.com/article/2022/4/8/ketanji-brown-jackson-confirmed-to-scotus> [<https://perma.cc/EM7V-9JPW>].

54. *See* Josh Blackman, *From Judge Jackson's Confirmation Hearing*, VOLOKH CONSPIRACY (Mar. 23, 2022, 10:43 PM), <https://reason.com/volokh/2022/03/23/from-judge-jacksons-confirmation-hearing> [<https://perma.cc/RNR4-X6YR>].

Jackson would recuse from *Students for Fair Admission v. Harvard*.⁵⁵ “That is my plan, senator,” she said.⁵⁶ Up to that point, the *Harvard* and *UNC* cases were consolidated.

On July 22, 2022, after Justice Jackson had been confirmed, the Supreme Court unconsolidated the *Harvard* case from the *UNC* case.⁵⁷ Why? Presumably to allow Justice Jackson to at least participate in the *UNC* case. And to be clear, the eight Justices decided to do so on their own motion.⁵⁸ No party made this request. I suspect the Court was working on a general assumption that a full bench should be present where possible. On the lower courts, a panel could have just drawn another judge at random. But on the Supreme Court, there are no substitutes.

Oral arguments were set for Halloween 2022.⁵⁹

II. THE ARGUMENTS

On October 31, 2022, the Supreme Court heard oral arguments in the affirmative action cases.⁶⁰ The *Harvard* argument was scheduled for seventy minutes, but stretched for nearly two hours.⁶¹ Cameron T. Norris argued on behalf of SFFA, Seth P. Waxman represented Harvard University, and Solicitor General Elizabeth Prelogar represented the United States.⁶² The *UNC* case was scheduled for 95 minutes, but it stretched for nearly three hours!⁶³ Patrick Strawbridge represented SFFA.⁶⁴ Ryan Y. Park, Solicitor General of North Carolina, represented UNC.⁶⁵ David G. Hinojosa represented several students.⁶⁶ And Solicitor General Prelogar once again represented the United States.⁶⁷ The Court heard the *UNC* case first so that Justice Jackson could participate, then excuse herself from the bench.⁶⁸

55. James Romoser, *Jackson Says She'll Recuse Herself From Case Challenging Affirmative Action at Harvard*, SCOTUSBLOG (Mar. 23, 2022, 11:42 PM), <https://www.scotusblog.com/2022/03/jackson-says-shell-recuse-herself-from-case-challenging-affirmative-action-at-harvard> [<https://perma.cc/4PZF-2PKN>].

56. *Id.*

57. Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (Jul. 22, 2022, 6:43 PM), <https://www.scotusblog.com/2022/07/court-will-hear-affirmative-action-challenges-separately-allowing-jackson-to-participate-in-unc-case> [<https://perma.cc/8CAY-D2NF>].

58. *Docket No. 20-1199*, *supra* note 10.

59. *Id.*; *Docket No. 21-707*, *supra* note 42.

60. *Docket No. 20-1199*, *supra* note 10; *Docket No. 21-707*, *supra* note 42.

61. See Oral Argument, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199) [hereinafter *Harvard Oral Argument Audio*], <https://www.oyez.org/cases/2022/20-1199> [<https://perma.cc/8TR3-V4ND>].

62. *Docket No. 20-1199*, *supra* note 10.

63. See Oral Argument, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 U.S. 181 (2023) (No. 21-707) [hereinafter *UNC Oral Argument Audio*], <https://www.oyez.org/cases/2022/21-707> [<https://perma.cc/87BS-573L>].

64. *Docket No. 21-707*, *supra* note 42.

65. *Id.*

66. *Id.*

67. *Id.*

68. Transcript of Oral Argument at 1, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 U.S. 181 (2023) (No. 21-707) [hereinafter *UNC Oral Argument Transcript*].

Part II of this Article will recount my reactions to the questions each Justice asked during oral argument. I will also reflect on these reactions with the benefit of hindsight—knowing now how each Justice ultimately voted.

A. CHIEF JUSTICE ROBERTS

I often pay careful attention to Chief Justice Roberts’s questions for the conservative side. He often throws them a curveball and signals some alternate saving construction he might adopt. But there was no trickery from Chief Justice Roberts here. He came to play. Early on, Patrick Strawbridge, counsel for SFFA, raised a hypothetical about an Asian-American student who discusses his heritage in an application essay.⁶⁹ There was some cross-talk with Justice Sotomayor and Justice Kagan, but the Chief Justice pushed through. He said the that Asian student was “not [a] very savvy applicant.”⁷⁰ Chief Justice Roberts continued, “the one thing his essay is going to show is that he’s Asian American, and those are the people who are discriminated against.”⁷¹ The universities vigorously contested this premise, but the Chief Justice stated this point without any equivocation.

Chief Justice Roberts repeatedly faulted the universities for failing to set an end date for their affirmative action programs. “I don’t see how you can say that the program will ever end,” Chief Justice Roberts said.⁷² He added that under the university’s position, race would not “stop mattering at some particular point.”⁷³ Rather, the university was “always going to have to look at race because” in their view, “race matters to give [them] the necessary diversity.”⁷⁴ To use a crass analogy, “racial preferences today, racial preferences tomorrow, racial preferences forever.”⁷⁵

B. JUSTICE THOMAS

Justice Thomas often asks questions to help him draft a separate writing. In *SFFA*, he inquired several times if the advocates could provide a definition of “diversity.” Justice Thomas asked the North Carolina Solicitor General, “I’ve heard the word ‘diversity’ quite a few times, and I don’t have a clue what it means.”⁷⁶ He confessed, “It seems to mean everything for everyone.”⁷⁷ As this longtime academic can attest, the word “diversity”

69. *See id.* at 28.

70. *Id.* at 29.

71. *Id.*

72. *Id.* at 83.

73. *Id.*

74. *Id.*

75. Radio Diaries, “*Segregation Forever*: A Fiery Pledge Forgiven, But Not Forgotten,” NPR (Jan. 10, 2013, 5:09 PM), <https://www.npr.org/2013/01/14/169080969/segregation-forever-a-fiery-pledge-forgiven-but-not-forgotten> [https://perma.cc/2Z49-XTCH] (“Most Americans—what they know about [Alabama Governor] George Wallace is, ‘Segregation today, segregation tomorrow, segregation forever,’ [Dan] Carter says. ‘That line is so iconic, so important. And George Wallace was on the wrong side of history.’”).

76. UNC Oral Argument Transcript, *supra* note 68, at 71.

77. *Id.*

means whatever you want it to mean—except for ideological diversity, which is not important.

Justice Thomas repeated his charge from *Grutter* and *Fisher II* that the arguments in favor of racial preferences mirror the arguments made by segregationists.⁷⁸ He charged that he did not “put much stock” in the university’s position because he had “heard similar arguments in favor of segregation too.”⁷⁹

C. JUSTICE ALITO

Justice Alito asked about the lines drawn between different types of Asian applicants. (This line of questioning was developed in Professor David Bernstein’s amicus brief, prepared by Cory Liu.)⁸⁰ Justice Alito inquired, “what similarity does a family background [of] the person from Afghanistan have with somebody whose family’s background is [from] . . . Japan?”⁸¹ Would both of these applicants be considered Asian? Ryan Park, the North Carolina Solicitor General, had no response. He could only repeat, on loop, that each student is considered as an individual based on a holistic analysis.⁸² Justice Alito fired back, somewhat irritated, “why do you have them check a box that [says] ‘I’m Asian?’”⁸³ Justice Alito asked, “What do you learn from the mere checking of the box?”⁸⁴ Park replied that the answer “depends on the individual circumstances of that person.”⁸⁵ Justice Alito cut him off: “you don’t need the boxes at all!”⁸⁶

Justice Alito pursued a similar line of questioning about self-reporting. What if a person has a single Black grandparent, great-grandparent, great-great-grandparent, and so on?⁸⁷ Justice Alito also seemed to invoke a hypothetical based on Senator Elizabeth Warren’s self-professed Native American heritage. He asked about an applicant whose “family lore” tells of a Native American ancestry.⁸⁸ The lawyer for UNC could not reply, as

78. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 389 (2016) (Thomas, J., dissenting); see also *Grutter v. Bollinger*, 539 U.S. 306, 365–66 (2003) (Thomas, J., concurring in part and dissenting in part).

79. UNC Oral Argument Transcript, *supra* note 68, at 74.

80. See Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner at 8, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199).

81. UNC Oral Argument Transcript, *supra* note 68, at 95.

82. See *id.* at 95–96.

83. *Id.* at 96.

84. *Id.*

85. *Id.*

86. *Id.*

87. See *id.* at 98.

88. *Id.* at 99; see also Lucy Madison, *Warren Explains Minority Listing, Talks of Grandfather’s “High Cheekbones”*, CBS NEWS (May 3, 2012, 3:10 PM), <https://www.cbsnews.com/news/warren-explains-minority-listing-talks-of-grandfathers-high-cheekbones> [https://perma.cc/P7YA-SZP2];

“No, as I said, these are my family stories. I have lived in a family that has talked about Native Americans, talked about tribes since I had been a little girl,” [Warren] said. “I still have a picture on my mantel and it is a picture my mother had before that—a picture of my grandfather. And my Aunt Bea has walked by that picture at least a 1,000 times remarked that he—her father, my

none of these claims are verified. All information submitted by applicants is self-reported.⁸⁹

D. JUSTICE SOTOMAYOR

According to author Joan Biskupic, Justice Sotomayor was able to flip the votes in *Fisher I* by circulating a vigorous dissent.⁹⁰ (Ultimately, she published the “race matters” discussion in her *Schuette* dissent.⁹¹) That strategy may have worked when Justice Kennedy was the swing vote, but it would not work on the current Court. There were not five votes for her position. Instead, during oral argument, Justice Sotomayor focused a lot of her attention on the district court record and the nuts-and-bolts of writing a majority opinion. Justice Sotomayor, at several junctures, repeated that race was not a “determinative” factor:

- “But isn’t that what this plan in UNC already does? Race is never the *determinative* factor. That was a finding by the district court.”⁹²
- “If race is only one among many factors, how can you ever prove, given that the district court found against you, that it’s ever a *determinative* factor?”⁹³
- “And we’re doing all this because race is one factor among many that is never solely *determinative*, correct?”⁹⁴

Justice Sotomayor’s colloquy with Solicitor General Prelogar was fairly one-sided.⁹⁵ I counted about ten consecutive questions to which Solicitor General Prelogar simply responded “That’s correct” or “I agree” or “Yes.”⁹⁶

Justice Sotomayor also suggested that there is still *de jure* segregation today. She said, “we certainly have *de jure* segregation. Races are treated very differently in our society in terms of their access to opportunity.”⁹⁷ A moment later, Justice Alito interjected: “Are you aware of *de jure*

Papaw—had high cheek bones like all of the Indians do. Because that is how she saw it and your mother got those same great cheek bones and I didn’t. She [thought that] was the bad deal she had gotten in life.”

89. UNC Oral Argument Transcript, *supra* note 68, at 99.

90. See JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200–01 (2014); see also Nina Totenberg, *How Justice Sotomayor Is “Busting” the Supreme Court’s Steady Rhythms*, NPR (Oct. 7, 2014, 5:03 AM), <https://www.npr.org/2014/10/07/353515075/how-justice-sotomayor-is-busting-the-supreme-courts-steady-rhythms> [<https://perma.cc/AZA5-SAWG>].

91. *Schuette v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 337–92 (2014) (Sotomayor, J., dissenting).

92. UNC Oral Argument Transcript, *supra* note 68, at 16–17 (emphasis added).

93. *Id.* at 17 (emphasis added).

94. *Id.* at 156 (emphasis added).

95. See *id.* at 154–56.

96. See *id.*

97. Transcript of Oral Argument at 20, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199) [hereinafter Harvard Oral Argument Transcript].

segregation today?”⁹⁸ Cam Norris, lawyer for SFFA in the *Harvard* case, said there was not.⁹⁹ Justice Sotomayor interrupted:

It’s not clear that there’s segregation between— there are large swaths of the country with residential segregation, there are large numbers of schools in our country that have people of just one race, there are school districts that have only kids of one race and not multiple races or not white people. *De jure* to me means places are segregated. The causes may be different, but places are segregated in our country.¹⁰⁰

I do not think that is what *de jure* means. She is describing *de facto* segregation.¹⁰¹

Throughout the arguments, the Chief Justice seemed annoyed by how Justice Sotomayor was cutting off the lawyers and not letting them answer questions. For example, Justice Sotomayor asked Mr. Strawbridge to explain how a model worked.¹⁰² Strawbridge replied, “I think I disagree with that for a couple reasons.”¹⁰³ Justice Sotomayor interrupted, and began “Well the district court —.”¹⁰⁴ The Chief Justice cut her off and spoke to Strawbridge, “Why don’t you tell us what the reasons are.”¹⁰⁵ After Strawbridge finished, Chief Justice Roberts turned to the seriatim questioning and said, “You’ll be able to return to Justice Sotomayor in just a moment.”¹⁰⁶ There were no questions from Justices Roberts, Thomas, or Alito, so Justice Sotomayor continued her colloquy.¹⁰⁷ After Seth Waxman’s argument concluded, the Chief Justice thanked him, and was about to begin the seriatim questioning. Justice Sotomayor jumped in.¹⁰⁸ Chief Justice Roberts pushed back and began his round. Chief Justice Roberts told Justice Sotomayor, “We’ll get to you in a moment.”¹⁰⁹ This pattern repeated throughout the argument.

E. JUSTICE KAGAN

Justice Kagan, in my view, is the most effective questioner on the Court. And she repeatedly pushed counsel for SFFA to draw a limiting principle: would they favor racial preferences if race-conscious policies yielded zero minority students. I think SFFA had to hold the line, and say *no*.

Justice Kagan asked if “it really wouldn’t matter if there was a precipitous decline in minority admissions, African American, Hispanic, one or

98. *Id.* at 21.

99. *Id.*

100. *Id.*

101. See *De Facto Segregation*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/de_facto_segregation [<https://perma.cc/6FFW-WK2B>] (“[A] situation in which legislation did not overtly segregate students by race, but nevertheless school segregation continued.”).

102. UNC Oral Argument Transcript, *supra* note 68, at 48.

103. *Id.* at 49.

104. *Id.*

105. *Id.*

106. *Id.*

107. See *id.* at 49–50.

108. Harvard Oral Argument Transcript, *supra* note 97, at 61.

109. *Id.*

the other.”¹¹⁰ Justice Kagan pushed, would it just be “too bad”?¹¹¹ Strawbridge pushed backed at the question and predicted the numbers were not “going to fall through the floor.”¹¹² Justice Kagan acknowledged that possibility but stated that under the “logic” of SFFA’s position, the actual outcome “really doesn’t matter.”¹¹³

Later, Justice Kagan repeated that racial diversity really did not matter for SFFA. This point was “very explicit” in SFFA’s brief: “it just doesn’t matter if our institutions look like America.”¹¹⁴ Justice Kagan also dismissed SFFA’s argument that universities would have more latitude to use gender-conscious measures than race-conscious measures. (The former would be subject to intermediate scrutiny while the latter would be subject to strict scrutiny.) Justice Kagan said that approach “would be peculiar.”¹¹⁵ She charged, “white men get the thumb on the scale, but people who have been kicked in the teeth by our society for centuries do not?”¹¹⁶ Strawbridge replied that “white men could not get a thumb on the scale.”¹¹⁷ Justice Kagan asked, “Men could?”¹¹⁸ Strawbridge replied, “But not white men.”¹¹⁹ Justice Kagan dismissed that claim. “Oh. Uh-huh.”¹²⁰ I would wager that Justice Kagan rolled her eyes at this juncture.

Justice Kagan also charged SFFA with ignoring the original meaning of the Fourteenth Amendment. She observed that there was “very little discussion of what originalism suggests” on both sides of the briefing.¹²¹ She inquired, “what would a committed originalist think about the kind of race-consciousness that’s at issue here?”¹²² Justice Jackson would ask many questions about original meaning during oral argument, but her ultimate dissent did not even broach the topic.

Justice Kagan tried to broaden the case beyond higher education. She explained that many institutions need to rely on racial preferences to achieve their diversity goals.¹²³ During a colloquy with Cam Norris, Justice Kagan asked about judges who hire law clerks based, at least in part, on race. She inquired whether a judge who wants “to have a diverse set of clerks” could think about diversity “in making clerkship decisions.”¹²⁴ Norris responded that judges can be aware of a prospective clerk’s race but cannot use race to distinguish between candidates.¹²⁵ Mere “knowledge of

110. UNC Oral Argument Transcript, *supra* note 68, at 36.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 38.

115. *Id.* at 52.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 160.

122. *Id.* at 160–61.

123. See Harvard Oral Argument Transcript, *supra* note 97, at 27–30.

124. *Id.* at 28.

125. *Id.* at 28–29.

race is not the violation,” but “using it as a factor to distinguish” would be prohibited.¹²⁶

But that was not what Justice Kagan was asking about. Instead, Justice Kagan was asking if a judge could hire a minority law clerk to signal to the broader public that minority attorneys can succeed as federal law clerk. “[O]ver the years, people will look at [the judge’s hiring] and they’ll say: There are Asian Americans there, there are Hispanics there, there are African Americans there, as well as there are whites there.”¹²⁷ In other words, the public will perceive that the judge is hiring minority law clerks—for lack of better words, *virtue signaling*.

Solicitor General Elizabeth Prelogar made a similar point during oral argument. She lamented the fact that very few women argue before the Supreme Court.¹²⁸ She worried that the lack of female advocates could “cause people to wonder whether the path to leadership is open.”¹²⁹ That is, people would look at the Supreme Court oral argument calendar and see women are not adequately represented.¹³⁰ She offered this “common sense example.”¹³¹ In other words, if there are not women arguing before the Court, fewer women may strive to become Supreme Court advocates. “I think it would be reasonable for a woman to look at that [calendar] and wonder, is that a path that’s open to me, to be a Supreme Court advocate?”¹³² She questioned if “private clients [would be] willing to hire women to argue their Supreme Court cases . . . [w]hen there is that kind of gross disparity in representation.”¹³³ Prelogar then modified Justice Kagan’s hypothetical question: “could the Supreme Court, when appointing attorneys to argue as *amicus curiae*, ‘think about’ race and gender?”¹³⁴ Further, “Could the Circuit Justice who makes that appointment select a minority advocate so the ‘people will look at that decision,’ and think that minority lawyers can argue before the Supreme Court?”¹³⁵ This hypothetical is not so fanciful.¹³⁶ In *Martin v. Blessing*, Justice Alito observed that district court judges “ensure that the lawyers staffed on [class action] case[s] fairly reflect the class composition in terms of relevant race and gender metrics.”¹³⁷ This practice is extremely common.¹³⁸

Cam Norris acknowledged that Justice Kagan’s proposal was an “admirable goal.”¹³⁹ But a judge could not “implement that goal by putting a

126. *Id.* at 28.

127. *Id.* at 28–29.

128. UNC Oral Argument Transcript, *supra* note 68, at 171.

129. *Id.*

130. *See id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Josh Blackman, *Justice Kagan Asks About Racial Preferences for Law Clerk Hiring, VOLOKH CONSPIRACY* (Nov. 1, 2022, 5:10 PM), <https://reason.com/volokh/2022/11/01/justice-kagan-asks-about-racial-preferences-for-law-clerk-hiring> [<https://perma.cc/MA83-H8RS>].

135. *Id.*

136. *Id.*

137. *Martin v. Blessing*, 571 U.S. 1040, 1041 (2013).

138. Blackman, *supra* note 134.

139. Harvard Oral Argument Transcript, *supra* note 97, at 29.

thumb on the scale against Asian applicants or giving a big preference to black and Hispanic applicants.”¹⁴⁰ Rather, a judge would “need to treat people equally based on race just as [the Justices of the Supreme Court are] not going to hold [Norris’s] race against [him] in judging the quality of [his] arguments.”¹⁴¹ Judges cannot “tell[] people that [they] didn’t get the clerkship because of [their] race.”¹⁴²

F. JUSTICE GORSUCH

Justice Gorsuch focused at some length on Title VI of the Civil Rights Act of 1964. He asked whether Justice Stevens erred in *Regents of University of California v. Bakke*,¹⁴³ finding that the quota system violated the Civil Rights Act of 1964.¹⁴⁴ The Solicitor General countered that the word “discrimination” in Title VI was “ambiguous.”¹⁴⁵ In response, Justice Gorsuch asked about his decision in *Bostock v. Clayton County*.¹⁴⁶ That decision did not find the word “discrimination” as “ambiguous.”¹⁴⁷ Justice Gorsuch asked, “Why should we find it ambiguous now?”¹⁴⁸ He added, “Were we wrong in *Bostock*?”¹⁴⁹ Solicitor General Prelogar certainly was not going to say *Bostock* was wrong. The government argued that the word “discriminate” in Title VII was ambiguous, but the word “discriminate” was not ambiguous in Title VI.¹⁵⁰

Justice Gorsuch also referenced the “veritable cottage industry” of coaches who “are encouraging Asian applicants to avoid and beat ‘Asian quotas.’”¹⁵¹ Experts de-Asian-ify their resumes.¹⁵² The Solicitor General was *shocked, shocked* (!) to find that there were allegations of bias against Asian-American students.¹⁵³ Justice Gorsuch also referenced Harvard’s history of discrimination against Jewish applicants.¹⁵⁴ Seth Waxman of course vigorously repudiated those policies but insisted that history is not relevant to the present case.¹⁵⁵

G. JUSTICE KAVANAUGH

Justice Kavanaugh has a habit. He often writes concurrences that purport to narrow a conservative majority opinion, but in the process, he

140. *Id.*

141. *Id.*

142. *Id.*

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

144. *See* UNC Oral Argument Transcript, *supra* note 68, at 162–63.

145. *Id.* at 163.

146. *See id.* at 163–64 (referring to *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020)).

147. *Id.*

148. *Id.* at 163.

149. *Id.*

150. *Id.* at 164.

151. *Id.* at 164–65.

152. *See id.* at 165.

153. *See id.*

154. Harvard Oral Argument Transcript, *supra* note 97, at 50.

155. *Id.* at 50–51.

reaches out to decide difficult legal questions that were not briefed.¹⁵⁶ For example, in *Dobbs*, he decided that states could not restrict a woman's right to travel to another state to obtain an abortion.¹⁵⁷ And in *Bruen*, he lent his imprimatur to a law that requires a mental health check to obtain a carry license.¹⁵⁸ Neither of these issues were presented, yet in an act of anti-modesty, Justice Kavanaugh thought best to decide them.¹⁵⁹

Justice Kavanaugh's very first question in the *UNC* case signaled what limiting principle he might adopt—or more precisely, “three race-neutral alternatives . . . [would] lead to the highest number of African American students.”¹⁶⁰ Justice Kavanaugh did not get a chance at that juncture to list his three alternatives, but they would come soon enough. Later, Justice Kavanaugh teased out two “race-neutral” alternatives that are in the record: “socioeconomic” plans and “top 10%” plans.¹⁶¹ Justice Sotomayor countered that neither policy is actually race-neutral; she said these purportedly race-neutral approaches are “subterfuges to reaching some sort of diversity in race.”¹⁶² But these plans are not “race-neutral.” Justice Ginsburg made a similar point about the top 10% plan in her *Fisher I* dissent.¹⁶³

Justice Kavanaugh then floated the third “race-neutral” approach to Mr. Strawbridge: “What if a college says we're going to give a plus to descendants of slaves?”¹⁶⁴ Would that plan be “race-neutral or not?”¹⁶⁵ Justice Kavanaugh asked the same question of Mr. Norris during the *Harvard* oral argument: “So today a benefit to descendants of slaves would not be race-based, correct?”¹⁶⁶ Norris replied, “I think that's incorrect, Justice Kavanaugh.”¹⁶⁷

Justice Kavanaugh's position veers very close to an argument for reparations to descendants of slaves. Rather than permitting preferences for all under-represented minorities, only a single class of students would stand to benefit. Justice Kavanaugh's position would create internecine DEI strife on campuses nationwide. Hispanics, American Indians, and other groups would be left out. The technicolor intersectional pyramid would become a monochromatic obelisk, with only one racial beneficiary. Justice Scalia

156. See generally Josh Blackman, *The Kavanaugh Concurrence Is the New Kennedy Concurrence*, VOLOKH CONSPIRACY (June 28, 2022, 1:04 PM), <https://reason.com/volokh/2022/06/28/the-kavanaugh-concurrence-is-the-new-kennedy-concurrence> [https://perma.cc/8SFV-A63H].

157. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring); Josh Blackman, *The Kavanaugh Concurrences in Bruen and Dobbs*, VOLOKH CONSPIRACY (June 28, 2022, 2:34 PM), <https://reason.com/volokh/2022/06/28/the-kavanaugh-concurrences-in-bruen-and-dobbs> [https://perma.cc/2CLT-NRMD].

158. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 80 (2022) (Kavanaugh, J., concurring); Blackman, *supra* note 157.

159. See Blackman, *supra* note 157.

160. *UNC* Oral Argument Transcript, *supra* note 68, at 15.

161. *Id.* at 44.

162. *Harvard* Oral Argument Transcript, *supra* note 97, at 37.

163. *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 334–35 (2013) (Ginsburg, J., dissenting).

164. *UNC* Oral Argument Transcript, *supra* note 68, at 44.

165. *Id.*

166. *Harvard* Oral Argument Transcript, *supra* note 97, at 15.

167. *Id.*

emphatically rejected this approach in *Adarand Constructors, Inc. v. Peña*: “Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.”¹⁶⁸

Critically, unlike with *Grutter*, which had a quarter-century expiration date,¹⁶⁹ there would be no stopping point to Justice Kavanaugh’s position, as people could trace their lineage back to slaves in perpetuity. Justice Kavanaugh speculated that if “the benefit for former slaves is not race-based . . . then the benefit for descendants of former slaves is also not race-based.”¹⁷⁰ Norris replied that this position was “not correct.”¹⁷¹ He stated, “there’s a difference between the former slaves themselves getting a benefit versus generations later.”¹⁷² Under the Court’s precedents, a “classification on the basis of ancestry . . . is still problematic.”¹⁷³

This gerrymandered alternative would ensure that universities could continue to use racial preferences for most black applicants indefinitely. Is it legal? Mr. Strawbridge replied that the slavery bonus would just be a “pure proxy for race.”¹⁷⁴ Fortunately, this position did not make it into Justice Kavanaugh’s concurrence. It benefits no one to make up arguments that none of the parties presented in landmark constitutional law decisions.

H. JUSTICE BARRETT

In *The New York Times*, Professor Justin Driver suggested that Justice Barrett’s two children adopted from Haiti may affect her views on affirmative action.¹⁷⁵ He wrote:

Justice Barrett may also be less reflexively hostile to affirmative action than is widely assumed. Is it at least possible that her experience adopting and raising two Black children has made her more intimately attuned to the ugly persistence of racial discrimination than some of her colleagues? Although this notion may initially sound reductive, sophisticated empirical scholarship has demonstrated that judges who have daughters are more receptive to women’s rights claims than judges who have only sons. It would hardly be astonishing if a similar, perhaps subconscious, dynamic applied to jurists with Black children and claims of racial justice. In fact, Prof. Maya Sen of Harvard, one of the authors of the study on judges and their children, said in an interview that adopting a child may affect a jurist’s worldview.¹⁷⁶

168. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

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

170. Harvard Oral Argument Transcript, *supra* note 97, at 16.

171. *Id.*

172. *Id.*

173. *Id.*

174. UNC Oral Argument Transcript, *supra* note 68, at 45.

175. Justin Driver, *Think Affirmative Action Is Dead? Think Again.*, N.Y. TIMES (Oct. 26, 2022), <https://www.nytimes.com/2022/10/26/opinion/supreme-court-case-for-affirmative-action.html> [<https://perma.cc/2H7Y-Z897>].

176. *Id.*

Prior to *SFFA*, Justice Barrett was never called upon to decide any cases involving racial preferences. And, based on my research, her legal scholarship did not touch on this issue. But Justice Barrett did talk about race during her confirmation hearing.¹⁷⁷ She recalled how she discussed George Floyd's death with her children.

“Senator, as you might imagine, given that I have two Black children, that was very, very personal for my family,” Barrett told Senate Minority Whip Dick Durbin (D-Ill.), who had asked whether she had seen the video. The judge explained that while her husband had taken her sons on a camping trip that weekend, she and Vivian “wept together in my room” as outrage over Floyd's death mushroomed and consumed the country. Barrett noted that Floyd's death and the ensuing unrest were also difficult for her 10-year-old daughter, Juliette, who is white. “I had to try to explain some of this to them,” she told the committee. “I mean my children—to this point in their lives—have had the benefit of growing up in a cocoon where they have not yet experienced hatred or violence. And for Vivian to understand that there would be a risk to her brother or the son she might have one day of that kind of brutality has been an ongoing conversation.”¹⁷⁸

I flagged this record in 2021 after Justice Barrett voted to grant, vacate, and remand a George-Floyd-like case.¹⁷⁹ At the time, I wrote, “Justices are not automatons. These sorts of issues can have a bearing on their rulings. Indeed, I'm not sure that Justice Barrett will vote with the Court's conservative on affirmative action. The 3-3-3 Court is still forming.”¹⁸⁰ Driver seemed to echo my point.

Moreover, Justice Barrett was an academic for a decade.¹⁸¹ Diversity and inclusion touch every facet of our profession. Justice Barrett served on the Notre Dame Admissions Committee from 2003–2006.¹⁸² No doubt she gained some insights into how racial preferences operate in higher education. (I served on the Admissions Committee once, and only once, due to my views on affirmative action.)

Justice Barrett's views on *SFFA* may have been affected by her personal experiences. I did not presume she would line up with Justice Clarence Thomas. Now is it proper for me and Driver to draw these inferences? To be sure, we are not acting on any inside information, other than Justice Barrett's public statements and her well-publicized personal story. But much of what Supreme Court pundits do is amateur psychoanalysis. We take bits

177. See Caitlin Oprysko, *Barrett Says George Floyd Killing Was “Very, Very Personal” for Her Family*, POLITICO (Oct. 13, 2020, 12:19 PM), <https://www.politico.com/news/2020/10/13/barrett-george-floyd-killing-was-personal-for-family-429196> [<https://perma.cc/4C52-JLF8>].

178. *Id.*

179. See Josh Blackman, *The 3-3-3 Court GVRs George-Floyd-Like Case After Chauvin Sentencing*, VOLOKH CONSPIRACY (June 28, 2021, 3:57 PM), <https://reason.com/volokh/2021/06/28/the-3-3-3-court-gvrs-george-floyd-like-case-after-chauvin-sentencing> [<https://perma.cc/SF7V-D22J>].

180. *Id.*

181. U.S. SENATE COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES 1–2 (Amy Coney Barrett Questionnaire for Nomination to the Seventh Circuit).

182. *Id.* at 6.

and pieces of data that we know and use that information to make predictions about how a Justice will decide a case. That process can also be retrospective as well. We take bits and pieces of data that we know to explain why a Justice decided a case the way she did. Short of having a sit-down with a Justice, or reviewing her papers, we are stuck with the written opinion. To fill this void, punditry speculates. Take it for what you paid.

During oral argument, Justice Barrett seemed more settled than I had expected. Her questions were thoughtful, but all seemed to lean towards SFFA. For example, she clarified that SFFA did not object to applicants discussing their race in an “experiential” personal statement.¹⁸³ Justices Sotomayor and Jackson seemed to suggest that SFFA was even opposed to considering race in the personal statement. Still, SFFA’s position did put a lot of weight on the essay.

Justice Barrett worried that overruling *Grutter* would “put[] a lot of pressure on the essay writing and the holistic review process.”¹⁸⁴ And reviews of this essay could lead to “viewpoint discrimination.”¹⁸⁵ Or at non-religiously-affiliated colleges, there could be “free exercise claims.”¹⁸⁶ For example, Harvard could restrict the number of Jews, Christians, and Muslims “in a classroom.”¹⁸⁷ Mr. Strawbridge responded that *Grutter* did not identify campus diversity as a compelling interest.¹⁸⁸ Rather, the interest was limited to the educational benefits from diversity in the classroom.¹⁸⁹

Critically, Justice Barrett repeated the admonitions from *Grutter* that racial preferences were “so potentially dangerous” and “must have a logical end point.”¹⁹⁰ Justice Barrett echoed a question from Justice Alito: “when does it end?”¹⁹¹ The lawyer for UNC bobbed and weaved about the end point. Barrett interrupted him: “how do you know when you’re done?”¹⁹² Justice Barrett asked about what the state would say in 2040.¹⁹³ Would UNC “still defend[] it like this is just indefinite, [like] it’s going to keep going on?”¹⁹⁴ There was no satisfying answer to that question. Racial preferences today, racial preferences tomorrow, racial preferences forever.

I. JUSTICE JACKSON

Justice Jackson, serving in her first term on the Court, advanced two primary lines of questions. First, she raised a novel argument concerning standing.¹⁹⁵ UNC asserted that SFFA was not a traditional member group,

183. UNC Oral Argument Transcript, *supra* note 68, at 24–25.

184. *Id.* at 60.

185. *Id.*

186. *Id.*

187. *Id.* at 60–61.

188. *See id.* at 61.

189. *See id.* at 60.

190. *Id.* at 80.

191. *Id.*

192. *Id.* at 81.

193. *Id.* at 109.

194. *Id.*

195. *See, e.g., id.* at 18.

or at least it did not have any actual members when the litigation began.¹⁹⁶ Thus, the university argued, the organization did not have associational standing.¹⁹⁷ Justice Jackson further suggested that the SFFA could not show an injury in fact.¹⁹⁸ Why? Because, according to the district court, there was no finding that Asian-American students were harmed by the admissions policy.¹⁹⁹ She repeated this point at least five times in very similar terms: that a person's race did not *automatically* lead to their admission, and race was not *determinative*.

- “No one’s *automatically* getting in because race is being used.”²⁰⁰
- “And even if you check the box, I’m an African American, I’m a Latino, and all the other things, I live in this place, et cetera, et cetera, even if you check that box, in North Carolina’s system, do you get a point *automatically* for having checked that box?”²⁰¹
- “And is anybody who did check the box—are they *automatically* entered or admitted into the university as a result?”²⁰²
- “Minorities don’t *automatically* get a boost under this system, so it’s hard to know whether anyone’s being disadvantaged from the mere fact that a minority could get a boost in this environment, right?”²⁰³
- “But, when you have a situation like this in which you’re talking about a holistic review, other people are getting pluses in the system, no one’s *automatically* getting a plus in the system”²⁰⁴

Much has been written about how much Justice Jackson talks during oral argument.²⁰⁵ I think the more-relevant metric is how often she repeats herself and makes the same points over and over again.

Patrick Strawbridge, counsel for SFFA, responded that an injury was found in *Grutter*, even though race was used in a holistic fashion. He explained, “*Grutter* establishes that a holistic admissions process doesn’t make the injury go away.”²⁰⁶ Justice Jackson’s argument seems undermined by *Grutter*.²⁰⁷ Indeed, Justice Jackson countered that SFFA argued that

196. Brief by University Respondents at 23–24, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 U.S. 181 (2023) (No. 21-707).

197. *Id.*

198. See UNC Oral Argument Transcript, *supra* note 68, at 18.

199. See *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 667 (M.D.N.C. 2021).

200. UNC Oral Argument Transcript, *supra* note 68, at 20 (emphasis added).

201. *Id.* at 113–14 (emphasis added).

202. *Id.* at 114 (emphasis added).

203. *Id.* at 142 (emphasis added).

204. *Id.* at 176 (emphasis added).

205. See, e.g., Adam Feldman, *Passing the Oral Argument Torch*, EMPIRICAL SCOTUS (Nov. 15, 2023), <https://empiricalscotus.com/2023/11/15/passing-the-oral-argument-torch> [<https://perma.cc/C28B-WWC9>] (“Justice Jackson’s lengthy word counts do not stem from the lengthiest utterances in each case. Rather, Jackson has consistent protracted utterances that are far longer than those of her colleagues.”).

206. UNC Oral Argument Transcript, *supra* note 68, at 20.

207. See generally *Grutter v. Bollinger*, 539 U.S. 306, 336–43 (2003).

“*Grutter* needs to be overruled.”²⁰⁸ Therefore, she said, the Court could not use *Grutter* “as the basis for standing.”²⁰⁹ This conclusion did not follow. SFFA did not want to overrule the standing analysis from *Grutter*. In the written decision, none of the Justices hinted that SFFA did not have an injury in fact.

Justice Jackson’s second line of questioning was much more powerful. If SFFA prevailed here, universities would be able to consider applicants on the basis of everything *but* race. Justice Jackson suggested that the university could fairly consider certain points in a white student’s application but could not consider similar points in a black student’s application. The University, she said, could “take into account and value all of the other background and personal characteristics of other applicants, but they can’t value race.”²¹⁰ This disparate treatment, Justice Jackson said, could “caus[e] more of an equal protection problem than it’s actually solving.”²¹¹

Justice Jackson raised hypotheticals about two different applicants to UNC. The first applicant explains that his family has been in North Carolina “since before the Civil War,” would be the “fifth generation” to graduate from UNC, and “want[s] to honor [his] family’s legacy by going to [UNC].”²¹² The second applicant has also been in North Carolina since before the Civil War, but his ancestors “were slaves and never had a chance to attend this venerable institution.”²¹³ The second applicant also wants to “honor [his] family legacy by going to [UNC].”²¹⁴ Justice Jackson observed a distinction: “The first applicant would be able to have his family background considered and valued by the institution . . . while the second one wouldn’t be able to because his story is in many ways bound up with his race and with the race of his ancestors.”²¹⁵ Justice Jackson asked if this disparate treatment would itself amount to “an equal protection violation.”²¹⁶

Strawbridge replied that universities would have to review the applications in a race-neutral fashion, so there would not be a violation of the Fourteenth Amendment. He said, “nothing stops UNC from honoring those who have overcome slavery or recognizing its past contribution to racial segregation.”²¹⁷ However, Strawbridge countered that history is not a “basis to make decisions about admission of students who are born in 2003[.]”²¹⁸ This response also effectively replies to Justice Kavanaugh’s proposal.²¹⁹

208. UNC Oral Argument Transcript, *supra* note 68, at 20.

209. *Id.* at 20–21.

210. *Id.* at 64.

211. *Id.*

212. *Id.* at 65.

213. *Id.*

214. *Id.*

215. *Id.* at 66.

216. *Id.*

217. *Id.* at 68.

218. *Id.*

219. *See supra* Part II.G.

III. THE DECISION

SFFA did not formally overrule *Grutter* or *Fisher II*. But the *Harvard* and *UNC* cases instantly altered the legal landscape for the use of racial preferences in higher education, and perhaps in other contexts. Part III of this Article will highlight four elements of the *SFFA* decision. First, even with *Grutter* still formally on the books, the Court eliminated the “educational benefits” rationale for affirmative action. Still, the Court allowed universities to consider “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”²²⁰ It remains to be seen if this exemption swallows the rule. Second, Chief Justice Roberts continues to take inconsistent positions in similar cases during the same term. For example, in *Allen v. Milligan*, a Voting Rights Act case, Chief Justice Roberts stood by precedent from the Burger Court, and deferred to Congress’s views about racial discrimination. By contrast, *SFFA* effectively overruled precedent from the Burger Court, and rejected Congress’s findings about racial discrimination. Can these decisions even be reconciled? Third, Justice Kavanaugh continues to follow the lead of Chief Justice Roberts in leading cases, including *SFFA* and *Milligan*. Fourth, although Justice Jackson formally recused from the *Harvard* case, she likely had some involvement in the deliberations of that decision. I close with a qualified defense of her actions in *SFFA*.

A. SAY FAREWELL TO THE “EDUCATIONAL BENEFITS” RATIONALE FOR AFFIRMATIVE ACTION

For nearly five decades, affirmative action was sustained on the concurrence of Justice Lewis Powell.²²¹ The key vote in *Bakke* thought that a diverse student body could improve learning on campus.²²² Ultimately, *Grutter* adopted Justice Powell’s rationale and held that universities have a *compelling* interest to pursue the educational benefits that flow from a diverse student body.²²³ That simple premise spawned an entire institution around “diversity.” Universities were forced to frame every decision they took in terms of using “diversity” as a way to help students learn. Of course, the *real* justification for affirmative action could be found in Justice Marshall’s *Bakke* opinion.²²⁴ He grounded racial preferences for black students (and not other races) in the centuries of oppression, slavery, segregation, and discrimination.²²⁵ Indeed, the “educational benefits” approach tokenized minority students as curiosities for white students to learn from. Advocates for affirmative action had to grit their teeth to stay in the good graces of old white folk like Justices Powell and O’Connor. Indeed, it is

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

221. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–324 (1978) (Powell, J., announcing the judgment of the Court).

222. *Id.* at 311–12.

223. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

224. *Bakke*, 438 U.S. at 387 (Marshall, J., dissenting).

225. *Id.* at 368–69 (Brennan, J., concurring in the judgment in part and dissenting in part).

not even clear that the liberal Warren Court would have favored Justice Powell's rationale.²²⁶

SFFA did not formally reverse *Grutter*—though I agree with Justice Thomas that the precedent is all but overruled.²²⁷ (The Chief Justice made similar moves in *Dobbs* and *SFFA*: purport to follow precedents when in fact he rewrote them.²²⁸) Still, the “educational benefits” rationale seems to have been nullified. Harvard identifies several specific educational benefits it was pursuing:

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) “training future leaders in the public and private sectors”; (2) preparing graduates to “adapt to an increasingly pluralistic society”; (3) “better educating its students through diversity”; and (4) “producing new knowledge stemming from diverse outlooks.”²²⁹

The Court easily found those rationales were not sufficient:

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately “train[ed]”; whether the exchange of ideas is “robust”; or whether “new knowledge” is being developed?²³⁰

Of course, the shortcomings of the “diversity rationale” were apparent in *Fisher II* and *Grutter*.²³¹ Nothing has changed. But Justices O’Connor, Kennedy, and other “judges of wisdom” chose to defer to the universities.²³²

226. See Alan M. Dershowitz, *Earl Warren and Affirmative Action*, WALL ST. J. (July 11, 2023, 5:25 PM), <https://www.wsj.com/articles/earl-warren-and-affirmative-action-liberal-race-equal-protection-b2d69c2c> [<https://perma.cc/C92D-ANSF>] (“I was a clerk in 1963–64 for Justice Arthur Goldberg, a liberal member of the liberal Warren court. Almost 60 years later, the conservative Roberts court held that racial preferences in college admissions violate the Equal Protection Clause of the 14th Amendment. I believe the Warren court would have reached the same conclusion.”).

227. *Students for Fair Admissions, Inc. v. President & Fellows Harvard Coll. (SFFA)*, 600 U.S. 181, 287 (2023) (Thomas, J., concurring).

228. See Josh Blackman, *I Anticipated Chief Justice Roberts’s Lonely, Failed Saving Construction of Roe*, VOLOKH CONSPIRACY (June 28, 2022, 8:30 AM), <https://reason.com/volokh/2022/06/28/i-anticipated-chief-justice-roberts-lonely-failed-saving-construction-of-ro> [<https://perma.cc/T49R-KXWL>].

229. *SFFA*, 600 U.S. at 214.

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

231. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 389 (2016) (Thomas, J., dissenting); see also *Grutter v. Bollinger*, 539 U.S. 306, 365–66 (2003) (Thomas, J., concurring in part and dissenting in part).

232. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 417 (2022) (Breyer, Kagan & Sotomayor, JJ., jointly dissenting) (referring to Justices O’Connor, Kennedy, and Souter as “judges of wisdom”); Josh Blackman, *The “Judges of Wisdom” and the “Mystical Aphorisms of the Fortune Cookie”*, VOLOKH CONSPIRACY (June 27, 2022, 5:43 PM), <https://reason.com/volokh/2022/06/27/the-judges-of-wisdom-and-the-mystical-aphorisms-of-the-fortune-cookie> [<https://perma.cc/E6TX-W97N>]. Justice Kagan continued the theme, writing that Justice O’Connor “judged with wisdom.” *Statements from the Supreme Court Regarding the Death of Retired Associate Justice Sandra Day O’Connor*, SUP. CT. OF THE U.S. (Dec. 1, 2023),

After *SFFA*, are there any actual educational benefits that flow from diversity, which could be considered an articulable compelling interest? I do not think so. The remainder of the Chief Justice's opinion barely mentions "educational benefits." The buzz words to end all buzz words are no longer so buzzy. Justice Powell's concurrence is dead. Justice O'Connor's majority opinion is irrelevant.

It was to be expected that the majority would discard the "educational benefits" rationale. But I was surprised at how little that rationale featured in the dissents. Justices Sotomayor and Jackson wrote at length about white supremacy, institutional racism, and other reasons to justify affirmative action.²³³ But the purported benefits that can be obtained in the classroom were not on center stage. The phrase "educational benefits" appears only five times in Justice Sotomayor's dissent,²³⁴ and zero times in Justice Jackson's dissent. Indeed, as Chief Justice Roberts pointed out, Justice Sotomayor cited Justice Powell "barely once," while Justice Jackson "ignores Justice Powell altogether."²³⁵ Rather, the dissenters rely almost exclusively on Justice Marshall's dissent.

Under well-settled law, the universities have not invoked any sort of "remedial" interest—that is, affirmative action was needed to remedy the university's own past discrimination.²³⁶ To the contrary, the dissenters adopted the en vogue theory that our society is plagued by structural racism and the Fourteenth Amendment must be interpreted to remedy that oppression. Chief Justice Roberts observed that "there is a reason" the dissenters have to rely on Justice Marshall's dissent because they "surely cannot claim the mantle of *stare decisis*."²³⁷

Going forward, academia can drop the "educational benefits" charade. But if not "educational benefits," then what compelling interest would suffice? The more I read the Chief Justice's opinion, the more I conclude that no interest would suffice. Instead, admissions officers will have to go beyond trying to satisfy strict scrutiny. They will focus on this paragraph, and this paragraph alone, to consider race indirectly through the only means allowed:

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly

https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_12-01-23b [<https://perma.cc/SS9L-4PNG>].

233. See, e.g., *SFFA*, 600 U.S. at 338–42 (Sotomayor, J., dissenting); *id.* at 393–98 (Jackson, J., dissenting).

234. *Id.* at 331, 333, 357 n.33, 358, 371 (Sotomayor, J., dissenting).

235. *Id.* at 227.

236. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

237. *SFFA*, 600 U.S. at 227.

cannot be done indirectly. The Constitution deals with substance, not shadows,” and the prohibition against racial discrimination is “levelled at the thing, not the name.” 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.²³⁸

In any event, we can finally say farewell to the “educational benefits” rationale. You will not be missed.

Finally, *SFFA* is consistent with a broader trend: the Supreme Court continues to move away from the rigid tiers of scrutiny, as well as their antecedent parts. Specifically, the Court no longer seems interested in defining what a compelling interest is. For example, in *303 Creative v. Elenis*, the Court did not even address the point.²³⁹ (I filed an *amicus* brief arguing that no such compelling interest exists to force a website designer to make a custom-made website.)²⁴⁰ Indeed, one reason to not overrule *Employment Division v. Smith*²⁴¹ is that the Court would have to return to the compelling interest test.²⁴²

B. ROBERTS – CREDITOR, DEBTOR

In June 2023, Chief Justice Roberts cast two important cases about race. In *Allen v. Milligan*, a Voting Rights Act case, Chief Justice Roberts deferred extensively to Congress’s findings concerning racial discrimination, and he stood by precedent from the Burger Court.²⁴³ By contrast, in *SFFA*, he did not even consider what Congress had to say about racial discrimination, and effectively overruled precedent from the Burger Court.²⁴⁴ These seem like opinions from two different Justices.

How do we reconcile *Milligan* and *SFFA*? Perhaps one explanation might be some sort of balance. The Chief Justice cast one vote that supports progressives on race and one vote that opposed progressives on race. According to this view, the Supreme Court is like a bank of legitimacy.

238. *Id.* at 230–31 (alteration in original) (emphasis added) (emphasis omitted) (internal citations omitted).

239. See *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

240. Brief for Jewish Coalition Religious Liberty as Amicus Curiae in Support of Petitioners at 6, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (No. 21-476).

241. *Emp. Div. v. Smith*, 494 U.S. 872 (1990).

242. See Josh Blackman, *Justice Kavanaugh Is Not Going to Lay a Hand on Employment Division v. Smith*, VOLOKH CONSPIRACY (Mar. 26, 2022, 6:38 PM), <https://reason.com/volokh/2022/03/26/justice-kavanaugh-is-not-going-lay-a-hand-on-employment-division-v-smith> [<https://perma.cc/SJ8Z-KRW9>].

243. *Allen v. Milligan*, 599 U.S. 1, 38–39 (2023).

244. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 243 (2023) (Thomas, J., concurring); cf. *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533–34 (2022); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 231 (2022).

Make a deposit in *Milligan*, make a withdrawal in *SFFA*, and end up with a balanced register.²⁴⁵ The Chief Justice gets to serve as the creditor and the debtor. This analogy brings to mind Justice Scalia's observation from *Adarand Constructors v. Peña*:

Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution *there can be no such thing as either a creditor or a debtor race*. That concept is alien to the Constitution's focus upon the individual, and its rejection of dispositions based on race, or based on blood. To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.²⁴⁶

One final note on Chief Justice Roberts's approach to stare decisis: In recent years, the Supreme Court has overruled several precedents. However, the Court has largely left in place the seminal doctrine from the Warren Court. Instead, the Justices have clawed back at decisions from the Burger Court. *Roe v. Wade*²⁴⁷ was overruled by *Dobbs*,²⁴⁸ but *Griswold v. Connecticut*²⁴⁹ remains safe.²⁵⁰ *Lemon v. Kurtzman*²⁵¹ is gone,²⁵² but *Engel v. Vitale* abides.²⁵³ *Rucho v. Common Cause*²⁵⁴ overruled *Davis v. Bandemer*,²⁵⁵ but *Baker v. Carr* survives.²⁵⁶ *Janus*²⁵⁷ overruled *Abood*²⁵⁸ but did not disturb *Railway Employees' Department v. Hanson*.²⁵⁹ *Franchise Tax Board of California v. Hyatt*²⁶⁰ overruled *Nevada v. Hall*.²⁶¹ *Knick v. Township of Scott*²⁶² overruled *Williamson County*.²⁶³ *SFFA* has effectively overruled

245. See Josh Blackman, *Foreword: SCOTUS After Scalia*, 11 N.Y.U. J.L. & LIBERTY 48, 104 (2017) (“The institutional theory views the Court as something like a checkbook: the Court can take a big withdrawal once in a while, so long it makes regular deposits. Indeed, Roberts has adopted such a fiduciary approach to judging.”).

246. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (emphasis added) (internal citations omitted).

247. *Roe v. Wade*, 410 U.S. 113 (1973).

248. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022).

249. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

250. See *Dobbs*, 597 U.S. at 262.

251. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

252. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).

253. *Engel v. Vitale*, 370 U.S. 421 (1962); see *Kennedy*, 597 U.S. at 545–46 (Sotomayor, J., dissenting).

254. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

255. *Davis v. Bandemer*, 478 U.S. 109 (1986).

256. *Baker v. Carr*, 369 U.S. 186 (1962); see *Rucho*, 139 S. Ct. 2484.

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

258. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977); *Janus*, 138 S. Ct. at 2479.

259. *Ry. Emps. Dep't v. Hanson*, 351 U.S. 225 (1956); see *Janus*, 138 S. Ct. at 2479–81.

260. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019).

261. *Nevada v. Hall*, 440 U.S. 410 (1979); *Hyatt*, 139 S. Ct. at 1492.

262. *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019).

263. *Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985); *Knick*, 139 S. Ct. at 2167.

Grutter.²⁶⁴ That same term, the Court also effectively overruled *TWA v. Hardison*²⁶⁵ in *Groff v. DeJoy*.²⁶⁶

C. KAVANAUGH THE FOLLOWER

What about Justice Kavanaugh? Along with the Chief, he was the only other Justice who was in the majority in *both* the VRA case and the affirmative action cases. Moreover, his concurrences in both cases were quite similar. In *Milligan*, he wrote that “race-based redistricting cannot extend indefinitely into the future.”²⁶⁷ And in *SFFA*, he wrote that race-based affirmative action cannot extend indefinitely into the future.²⁶⁸ Sounds familiar.

Justice Kavanaugh has now completed his fifth term on the Court. And he votes with the Chief Justice in about 95% of the cases.²⁶⁹ In the 1990s, Justice Thomas was accused of being a follower of Justice Scalia.²⁷⁰ But Justice Scalia admitted that he was often pushed to the right by Justice Thomas.²⁷¹ With regard to Chief Justice Roberts and Justice Kavanaugh, who is leading and who is following? By all accounts, the Chief is in the lead, and Justice Kavanaugh is following. One metric: Justice Kavanaugh wrote very, very little during the October 2022 term on his own. According to Empirical SCOTUS, “In terms of total word counts for opinions this term, Justice Thomas wrote the most and Justice Kavanaugh wrote the least.”²⁷² He has very few separate writings where he stakes out his own position on the law. And I observed that Justice Kavanaugh’s majority opinions are short and under-argued.²⁷³

After five years on the bench, I struggle to think about what Justice Kavanaugh’s jurisprudential contributions are. I will still give him credit for his *Calvary Chapel* dissent,²⁷⁴ which presaged the framework in *Roman*

264. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 287 (2023) (Thomas, J., concurring).

265. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

266. *See Groff v. DeJoy*, 600 U.S. 447, 454 (2023).

267. *Allen v. Milligan*, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring).

268. *SFFA*, 600 U.S. at 314 (Kavanaugh, J., concurring).

269. Adam Feldman, *Where We Are at the End of the Supreme Court’s 2022 Term*, EMPIRICAL SCOTUS (July 12, 2023), <https://empiricalsctus.com/2023/07/12/where-we-are-at-the-end-of-the-supreme-courts-2022-term> [https://perma.cc/4GJZ-35E6].

270. Joan Biskupic, *After a Quiet Spell, Justice Thomas Finds Voice*, WASH. POST (May 24, 1999), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/thomas052499.htm> [https://perma.cc/C5BF-2ZNN].

271. *See* Anjali Sastry, *Scalia Talks Race, Homosexuality, Boredom*, ABC NEWS (Apr. 18, 2013), <https://abcnews.go.com/blogs/politics/2013/04/scalia-talks-race-homosexuality-boredom> [https://perma.cc/5XXW-L4L2].

272. Adam Feldman, *Another One Bites the Dust: End of 2022/2023 Supreme Court Term Statistics*, EMPIRICAL SCOTUS (June 30, 2023), <https://empiricalsctus.com/2023/06/30/another-one-bites-2022> [https://perma.cc/HZ34-S6N3].

273. *See* Josh Blackman, *Justice Kavanaugh’s Arrested Development*, VOLOKH CONSPIRACY (June 26, 2023, 1:14 AM), <https://reason.com/volokh/2023/06/26/justice-kavanaughs-arrested-development> [https://perma.cc/4DCD-HS89].

274. *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609–15 (2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief); *see also* Josh Blackman, *The Three Dissents in Calvary Chapel Dayton Valley v. Sisolak*, VOLOKH CONSPIRACY (July 25, 2023, 3:21 AM), <https://reason.com/volokh/2020/07/25/the-three-dissents-in-calvary-chapel-dayton-valley-v-sisolak> [https://perma.cc/26V6-P324].

Catholic Diocese.²⁷⁵ But beyond that opinion, I cannot think of much. When he does concur, he makes anodyne observations that assuage the left²⁷⁶ or balm the right.²⁷⁷ There is not much going on. And virtually no deep dive into the Constitution's original meaning. At most, he is a traditionalist—the Court should do what it has done before, unless it has done something *really* bad for too long, in which case it must do something marginally different.

Justice Kavanaugh was touted as the most qualified Supreme Court nominee in modern history.²⁷⁸ If true, what has he done with that experience? Justice Barrett, who had very little judicial experience, is making her mark on the major question doctrine, stare decisis, originalist litigation strategies, and a few other areas.²⁷⁹ Justice Gorsuch has very clear priorities with regard to Indian law and the administrative state.²⁸⁰ But what about Justice Kavanaugh? He rarely votes the “wrong” way. But his individual contributions are utterly forgettable. Which opinion of his will be included in a casebook and studied for generations to come? As an author of a casebook,²⁸¹ I cannot think of any.

D. JUSTICE JACKSON'S RECUSAL, REVISITED

In October, the *UNC* and *Harvard* cases were argued separately. The former proceeding stretched nearly three hours, with Justice Jackson participating.²⁸² The latter proceeding stretched another two hours, with Justice Jackson absent.²⁸³ At the time, I expected the Supreme Court to resolve the statutory issue in the *Harvard* case and the constitutional issue in the *UNC* case. Justice Jackson would be able to write something in the latter case, but not the former. Alas, that outcome was not meant to be.

275. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020); see also Josh Blackman, *The “Essential” Free Exercise Clause*, 44 HARV. J.L. & PUB. POL'Y 637 (2021).

276. See, e.g., Josh Blackman, *The Kavanaugh Concurrence When He Swings Left*, VOLOKH CONSPIRACY (June 19, 2023, 3:42 PM), <https://reason.com/volokh/2023/06/19/the-kavanaugh-concurrence-when-he-swings-left> [<https://perma.cc/Q526-6KVN>].

277. See Josh Blackman, *Why Does Justice Kavanaugh Write Concurrences?*, VOLOKH CONSPIRACY (Jan. 27, 2023, 1:29 AM), <https://reason.com/volokh/2023/01/27/why-does-justice-kavanaugh-write-concurrences> [<https://perma.cc/8G9G-CYMR>].

278. See, e.g., Chuck Grassley, *Grassley on Judge Kavanaugh: The Most Qualified Supreme Court Nominee in Our Nation's History*, U.S. SENATE COMM. ON THE JUDICIARY (Oct. 5, 2018), <https://www.judiciary.senate.gov/grassley-on-judge-kavanaugh-the-most-qualified-supreme-court-nominee-in-our-nations-history> [<https://perma.cc/K5KN-8KWR>].

279. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 81 (2022) (Barrett, J., concurring); *Haaland v. Brackeen*, 599 U.S. 255 (2023); *Biden v. Nebraska*, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

280. See *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020); *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

281. RANDY E. BARNETT & JOSH BLACKMAN, *CONSTITUTIONAL LAW: CASES IN CONTEXT* (4th ed. 2022); RANDY E. BARNETT & JOSH BLACKMAN, *AN INTRODUCTION TO CONSTITUTIONAL LAW: 100 SUPREME COURT CASES EVERYONE SHOULD KNOW* (2d ed. 2022).

282. See *UNC Oral Argument Audio*, *supra* note 63.

283. See *Harvard Oral Argument Audio*, *supra* note 61.

The majority resolved the statutory and constitutional issues in a single opinion.²⁸⁴ *Gratz* stated that admission policies that violate the Equal Protection Clause also violate Title VI.²⁸⁵ (Justice Gorsuch is almost certainly correct that this statement from *Gratz* is in error.)²⁸⁶ And, Chief Justice Roberts observed, “no party ask[ed] us to reconsider” that statement from *Gratz*.²⁸⁷ Therefore, the Court would “evaluate Harvard’s admissions program under the standards of the Equal Protection Clause itself.”²⁸⁸ This conclusion in footnote 2 led to the jarring locution that Harvard violated the Fourteenth Amendment.²⁸⁹

Once the Court chose this path, there would no longer be two separate opinions. What was Justice Jackson to do? The very last page of the majority opinion states that Justice Jackson “took no part in the consideration or decision of the case in No. 20-1199” —that is, the *Harvard* case.²⁹⁰ Justice Sotomayor’s dissent included a similar footnote: “JUSTICE JACKSON did not participate in the consideration or decision of the case in No. 20-1199 and joins this opinion only as it applies to the case in No. 21-707” —that is, the *UNC* case.²⁹¹ Justice Jackson’s separate dissent included the same footnote.²⁹²

Ultimately, Justice Jackson’s eight colleagues all signed onto a statement that Justice Jackson “took no part in the consideration or decision of the case in No. 20-1199.”²⁹³ Can that statement possibly be true? To be sure, Justice Jackson did not participate in the *Harvard* oral argument. She almost certainly did not vote at conference in this case. And the separate opinion she wrote only referenced the facts at UNC and not at Harvard. But beyond those obvious points, the “recusal” becomes more complicated. In many places, Justice Jackson responded to the Chief Justice’s opinion concerning the *Harvard* case.²⁹⁴ I think it is a safe assumption that she reviewed the draft opinion in advance. Were those opinions redacted to remove any discussion of *Harvard*? Did she just skip over those pages? Were the memos circulated to the Justice Jackson chambers likewise redacted? Does anyone believe these prophylactic steps actually happened?

On the lower courts, recusal means a judge has no contact with a case. Zero. She does not even see draft opinions that are being circulated. But on the Supreme Court, the practice apparently is different. The question turns on what “consideration or decision” means. Does that mean a Justice is hermetically sealed from a case? Or are the rules looser in a big case? It is all too common to attack the Justices as ethically challenged, but here

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

285. *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003).

286. *See SFFA*, 600 U.S. at 305–06 (Gorsuch, J., concurring).

287. *Id.* at 198 n.2.

288. *Id.*

289. *Id.* at 230.

290. *Id.* at 231.

291. *Id.* at 317 n.*.

292. *Id.* at 384 n.*.

293. *Id.* at 231.

294. *See, e.g., id.* at 403–11.

we have a clear case where a Justice said she would recuse, all nine Justices agreed she “took no part in the consideration or decision of the case,” yet she obviously had at least *some* involvement.

Professor Richard Re expressed a similar skepticism:

These facts make it hard to deny that Jackson participated in the consideration of the Harvard case. Again, Jackson read a draft of the majority opinion in that case. She wrote an opinion criticizing the core reasoning of the majority’s draft. And the final version of the opinion for the Court in the case expressly responds to her objections.

....

Yet the fact that Jackson did not write explicitly about Harvard shows, at most, that she did not participate in *every aspect* of the Harvard case’s “consideration.” Her dissent addressed only the case’s core legal issues, rather than factual points. But both recusal principles and Jackson’s disclaimer promise something more—namely, withdrawal from the entire case.²⁹⁵

Re goes one step further and suggests that the Court had some sort of obligation to restructure the case so that Justice Jackson could fully participate, without any ruses: “The majority justices in particular should have arranged their work so as to maximize Justice Jackson’s valuable participation without jeopardizing or undermining her recusal. Their collective failure to do so has turned recusal into a farce.”²⁹⁶ I will defend Justice Jackson—or more precisely, the principle that the Supreme Court needs to follow different recusal rules than the lower courts.

First, implicit in Re’s comment is a premise: a bench of nine is extremely important—so important that the Justices unconsolidated the cases. This unusual step reflects how disruptive a short-handed bench can be in a high-profile case. But ultimately, the Court reconsolidated the cases, with Jackson still quasi-recused. Why is nine so important? Look no further than the period between Justice Scalia’s passing and Justice Gorsuch’s confirmation. In many of these disputes, the Court reached “compromises” that did not resolve pressing issues.²⁹⁷ Other cases were dumped 4-4.²⁹⁸ Chief Justice Rehnquist addressed the value of a nine-member bench when he declined to recuse in the *Microsoft* antitrust litigation.²⁹⁹ At the time, his son worked at a firm that represented the tech giant.

295. Richard Re, *Did Justice Jackson Actually Recuse from Students for Fair Admissions v. Harvard?*, RE’S JUDICATA (June 30, 2023, 2:17 PM), <https://richardresjudicata.wordpress.com/2023/06/30/did-justice-jackson-actually-recuse-from-students-for-fair-admissions-v-harvard> [<https://perma.cc/T9L6-DVFX>].

296. *Id.*

297. *See, e.g.*, *Zubik v. Burwell*, 578 U.S. 403 (2016); *see also* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241, 275–77 (2016).

298. *See, e.g.*, *United States v. Texas*, 579 U.S. 547 (2016); *Friedrichs v. Cal. Tchrs. Ass’n*, 578 U.S. 1 (2016); *see also* Josh Blackman, *supra* note 297, at 281–83.

299. *Microsoft Corp. v. United States*, 530 U.S. 1301, 1301–03 (2000) (Rehnquist, C.J., statement regarding his lack of recusal).

[B]y virtue of this Court’s position atop the Federal Judiciary, the impact of many of our decisions is often quite broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft’s exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. . . .

Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.³⁰⁰

The Court articulated the duty-to-sit premise in its Code of Conduct.³⁰¹

Second, does *anyone* honestly believe that Justice Jackson’s vote on this issue would be affected by her service on the Harvard Board of Overseers? The Justices have very strong views on legal questions. They are nominated in large part because of those views. Those priors probably weigh on their votes *far more* than any service at Harvard. If we take conflicts of interest seriously, a Justice’s deeply held views on affirmative action should favor recusal far more than service on a board that had some tangential connection to the university’s affirmative action policies. But if that were the rule, few high-profile cases could even muster a quorum.

Third, Justice Jackson presumably asked her colleagues for advice. Indeed, the other eight Justices would have to be personally familiar with the facts to state that Justice Jackson took no part in the “consideration or decision.” Again, a Justice could have objected to this statement, but no one did. I think it prudent that the Justices can rely on the advice of their other colleagues. And this co-counseling should likewise extend to concerns about other facets of legal ethics—including acceptance of gifts and reporting requirements.

Fourth, it would have been extremely problematic for Justice Jackson to seek advice from some other authority—whether lower court judges or some other body. The mere fact of seeking advice would have *necessarily* breached confidence. It would be impossible to counsel Justice Jackson unless she explained the specific dynamics of the Court’s private, internal deliberations. And we do not need to create the risk of more Supreme Court leaks. With regard to Justice Jackson, the Supreme Court’s internal ethics protocols worked exactly as they were designed.

300. *Id.* at 1302–03.

301. SUP. CT. OF THE U.S., CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 11 (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [<https://perma.cc/E83K-UT87>] (“This Canon’s recusal provisions thus differ from those in the lower court Code in that they: restate the Justices’ 1993 Statement of Recusal Policy; recognize the duty to sit and that the time-honored rule of necessity may override the rule of disqualification . . .”).

IV. CONCLUSION

Despite what academics might have predicted, *SFFA* was not an unpopular decision. An *ABC News* poll found that 52% of Americans approve of the decision, while only 32% disapprove.³⁰² And unlike *Dobbs*, this case has quickly settled in with the public.

Future litigation will likely turn on whether university admission offices try to cheat *SFFA*—or more precisely, whether they are caught cheating. Berkeley Law Dean Erwin Chemerinsky joked, “if ever I’m deposed, I’m going to deny I said this to you. When we do faculty hiring, we’re quite conscious that diversity is important to us, and we say diversity is important, it’s fine to say that.”³⁰³ Indeed, Dean Chemerinsky’s comments reflect another future front in litigation: the use of racial preferences in academic hiring. This area is also ripe for challenges. However, the difficulty is that few aspiring academics would risk their careers to bring such a suit. It will also be difficult to find professors who would sue their own faculties based on inside information.

I am grateful for the opportunity to offer some thoughts on this landmark decision.

302. Hanna Demissie, *Most Americans Approve of Supreme Court Decision Restricting Use of Race in College Admissions: Poll*, ABC NEWS (July 2, 2023, 8:00 AM), <https://abc-news.go.com/Politics/americans-approve-supreme-court-decision-restricting-race-college/story?id=100580375> [<https://perma.cc/C85H-JR5R>].

303. *Berkeley Law Dean Caught Telling Class He’d Lie in Deposition Now Says He was Joking*, COLLEGE FIX (July 14, 2023), <https://www.thecollegefix.com/berkeley-law-dean-caught-telling-class-hed-lie-in-deposition-now-says-he-was-joking> [<https://perma.cc/Z58W-K72W>].