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## Racial Classifications in Higher Education Admissions Before and After *SFFA*

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# RACIAL CLASSIFICATIONS IN HIGHER EDUCATION ADMISSIONS BEFORE AND AFTER *SFFA*

David E. Bernstein\*

## ABSTRACT

*Hundreds of law review articles have discussed the legality of affirmative action programs. Virtually all of them begin with the implicit assumption that the racial classifications used in these programs are legitimate and uncontroversial (an assumption I challenge in my 2022 book, Classified: The Untold Story of Racial Classifications In America). That assumption has been undermined by Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (“SFFA”).*

*Chief Justice Roberts, writing for a 6–3 majority, asserted that the underlying classifications are “imprecise in many ways” and “opaque.” He quoted Justice Gorsuch’s concurring opinion, which criticized the classifications for relying on “incoherent” and “irrational” stereotypes. Using these classifications in admissions decisions, Chief Justice Roberts concluded, is inherently illegal because they are so arbitrary that using them could not be a narrowly tailored means to serve the universities’ asserted compelling interest in educational diversity.*

*This Article focuses on the evolution of, and judicial reaction to, racial classifications in cases involving university affirmative action programs. The classifications initially included preferences for African-Americans plus an idiosyncratic collection of other groups. For example, in the DeFunis case, preferences were given to Mexican-Americans and Filipinos, but not to other Hispanic or Asian-Americans. By the early 2000s, however, all universities were using the racial and ethnic classifications established by the federal government in 1978 via Statistical Directive No. 15.*

*Meanwhile, while lower courts sometimes raised important issues with regard to the scope and definition of the classifications used by universities, this issue played only a tangential role in relevant Supreme Court decisions until SFFA. Following SFFA, institutions seeking to classify people by race and ethnicity are going to need to show a much closer match between the classifications and the “compelling” interests they are pursuing than they needed to before SFFA. Without good reason that they can defend in court,*

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they will not be able to utilize broad Directive 15 classifications such as “Asian-American” or “Hispanic” to combine people of wildly varied physiognomies, national origins, and cultural backgrounds.

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## I. INTRODUCTION

HUNDREDS of law review articles have discussed the legality of affirmative action programs. Virtually all of them begin with the implicit assumption that the racial classifications used in these programs are legitimate and uncontroversial. That assumption has been undermined by *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*.<sup>1</sup> As was widely expected, in *SFFA*, the Supreme Court held that Harvard’s and the University of North Carolina’s (UNC) use of racial preferences in admissions decisions was unlawful.<sup>2</sup> More surprisingly, Chief Justice John Roberts’s majority opinion also launched an unprecedented attack on the underlying racial classification scheme used by the defendants, other universities, and many other private and governmental entities.<sup>3</sup>

Harvard and UNC relied on racial and ethnic classifications that the U.S. government promulgated in the late 1970s.<sup>4</sup> The universities classified students as ethnically Hispanic or not, and then by race—Asian-American, Black, Native Hawaiian/Pacific Islander, Native American, or White.<sup>5</sup> The schools then gave an admissions preference to members of the

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

2. *Id.* at 230.

3. *See id.* at 230–31.

4. *See id.* at 215–16; Directive No. 15. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).

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

“underrepresented” groups, i.e., all applicants besides those classified as Asian-Americans or non-Hispanic Whites.<sup>6</sup>

Chief Justice Roberts, writing for a 6–3 majority, asserted that the underlying classifications were “imprecise in many ways” and “opaque.”<sup>7</sup> He quoted Justice Gorsuch’s concurring opinion, which criticized the classifications for relying on “incoherent” and “irrational” stereotypes.<sup>8</sup> Using these classifications in admissions decisions, Chief Justice Roberts concluded, was inherently illegal because they were so arbitrary that using them could not be a narrowly tailored means to serve the universities’ asserted compelling interest in educational diversity.<sup>9</sup>

As has been explained elsewhere,<sup>10</sup> Chief Justice Roberts’s condemnation of the modern American racial classification system has important implications well beyond affirmative action in universities. Chief Justice Roberts’s opinion calls into grave legal doubt the standard classifications used to prefer members of minority groups in other contexts.<sup>11</sup>

This Article, however, focuses on the evolution of, and the judicial reaction to, racial classifications in cases involving university affirmative action programs. As we shall see, the scope and definition of the classifications issue played only a tangential role in relevant Supreme Court decisions until *SFFA*.

## II. *DEFUNIS V. ODEGAARD*

*DeFunis v. Odegaard*<sup>12</sup> involved a challenge brought in 1971 to the University of Washington Law School’s “special admissions” program. This program reserved 15–20% of the school’s admissions slots to students whose “dominant” ethnic origin was Black, Chicano, American-Indian, or Filipino.<sup>13</sup> Plaintiff Marco DeFunis, who belonged to none of the preferred groups, argued that giving a preference to members of these racial groups was unlawful racial discrimination against other applicants.<sup>14</sup> The Court ultimately dismissed the case as moot.<sup>15</sup> DeFunis, the Court noted, had been admitted to the law school under a lower court order and was about to graduate.<sup>16</sup>

Justice William O. Douglas, dissenting, flagged the classification issue that largely remained dormant in Supreme Court opinions until *SFFA*.<sup>17</sup> Justice Douglas suggested that the Court lacked authority and competence

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6. *See id.* at 216–18.

7. *Id.* at 216–17.

8. *Id.* at 216 (citing *id.* at 291–92 (Gorsuch, J., concurring)).

9. *See id.* at 216–17.

10. *See* David E. Bernstein, *Students for Fair Admissions and the End of Racial Classification as We Know It*, 2023 CATO SUP. CT. REV. 143, 163 (2023).

11. *See id.* at 163–66.

12. *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1974).

13. *See id.* at 347 (Douglas, J., dissenting).

14. *Id.* at 314.

15. *Id.* at 319–20.

16. *Id.* at 314–16.

17. *See id.* at 338 (Douglas, J., dissenting).

to permit state universities to single out certain groups for preferences, and that might mean that racial preferences were unconstitutional.<sup>18</sup> Justice Douglas opined that approving preferences given to any specific group would lead to a morass.<sup>19</sup> “Once the Court sanctioned racial preferences such as these,” he cautioned, “it could not then wash its hands of the matter.”<sup>20</sup>

Justice Douglas wondered aloud whether the University of Washington was permitted to give a preference only to a subgroup of Asian-Americans, Filipinos.<sup>21</sup> If so, Justice Douglas mused, may a different university entirely exclude Asian-Americans from its preference scheme?<sup>22</sup> And if a university gave preferences to Japanese- and Chinese-Americans in addition to Filipinos, “then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.”<sup>23</sup>

Justice Douglas did not raise the point, but *DeFunis*’s own background showed the difficulty and complexity of deciding which groups should receive preferences and how those groups should be defined. During oral argument, a Justice asked *DeFunis*’s attorney “[w]hat kind of an American” *DeFunis* was.<sup>24</sup> *DeFunis*’s attorney responded that *DeFunis* was a Sephardic Jew.<sup>25</sup> *DeFunis*’s immigrant grandparents spoke Ladino, the Spanish dialect of Sephardic Jews, and spoke little English.<sup>26</sup> Since 1978, federal regulations have defined Hispanic as “[of] Spanish culture or origin.”<sup>27</sup> The Common Application for college, when asking if a student identifies as Hispanic, specifically lists “Spain” as an eligible country of origin within that classification.<sup>28</sup> At least one administrative agency has found that Sephardic ancestry qualifies an individual as Hispanic.<sup>29</sup>

The University of Washington Law School, however, gave preferences only to “Chicanos” and not to “Hispanics” writ large.<sup>30</sup> The Hispanic classification was invented by the government several years after the Court

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18. *See id.* at 336–39.

19. *See id.*

20. *Id.* at 338.

21. *See id.* at 338–39.

22. *See id.*

23. *Id.* at 340.

24. Oral Argument at 15:03, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235), <https://www.oyez.org/cases/1973/73-235> [<https://perma.cc/MF7V-DHNT>].

25. *Id.*

26. Personal Communication with Ariela *DeFunis*, Marco *DeFunis*’s Daughter (June 7, 2021).

27. Directive No. 15. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).

28. *See* COMMON APP, <https://www.commonapp.org> [<https://perma.cc/DDR9-P5EE>] (link leads to the Common App website; creating an account is necessary to see the information referenced).

29. *See In re Rothschild-Lynn Legal & Fin. Servs.*, SBA No. MSBE-94-10-13-46, 1995 WL 542398, at \*3 (Apr. 12, 1995) (accepting Sephardic ancestry as qualifying an individual for Hispanic status).

30. *See DeFunis*, 416 U.S. at 320 (Douglas, J., dissenting).

dismissed *DeFunis*.<sup>31</sup> Had DeFunis applied to law school in 1981 instead of 1971, he might have been considered an underrepresented Hispanic student and received an admissions preference.<sup>32</sup> Instead, he was perceived as a White student who was suing to invalidate preferences limited to Blacks, Chicanos, and Filipinos.

### III. REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE

*Regents of the University of California v. Bakke*<sup>33</sup> was the next case challenging affirmative action preferences in higher education to reach the Supreme Court. After being rejected from the University of California, Davis (UC Davis) Medical School, Alan Bakke, classified as a White man, challenged the legality of the medical school's minority quota.<sup>34</sup> The quota reserved sixteen out of one hundred places in the entering medical school class for minority students.<sup>35</sup> The school defined the pool of minorities as Black, Mexican-American, American-Indian, and Asian-American applicants.<sup>36</sup>

#### A. RAISING THE CLASSIFICATION ISSUE IN *BAKKE*

The classification issue was brought to the Court's attention by an amicus brief filed on behalf of the Polish American Congress (PAC).<sup>37</sup> For a decade, Polish- and Italian-American groups had been lobbying for consideration of their constituents as minorities potentially eligible for affirmative action preferences.<sup>38</sup> They received significant support from Congress, but bureaucrats, including university bureaucrats, resisted.<sup>39</sup>

PAC analogized Polish- and Italian-Americans, not eligible for ethnic admissions preferences at UC Davis Medical School, to Mexican-Americans, who were eligible.<sup>40</sup> All three were groups of predominately Catholic immigrants, primarily from rural parts of their ancestral homelands, who had been subjected to significant discrimination because of

31. See DAVID E. BERNSTEIN, CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA 29 (2022).

32. The following colloquy occurred at oral argument in *DeFunis*:

Justice Stewart: Since there were no personal interviews, I suppose if Mr. DeFunis had circled one of these [minority categories], he wouldn't have given—

Mr. Diamond [DeFunis's attorney]: We wouldn't be here today.

Justice Stewart: He'd be—he would've been [admitted].

Mr. Diamond: We wouldn't have any problem, none.

Oral Argument, *supra* note 24, at 14:37.

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

34. *Id.* at 276–78.

35. *Id.* at 279.

36. *Id.* at 274.

37. See Brief of the Polish American Congress et al. as Amici Curiae, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187975, at \*5–7.

38. See BERNSTEIN, *supra* note 31, at 60–63.

39. See *id.* at 60–61.

40. See *id.* at 71–72.

their ethnicity.<sup>41</sup> Like Mexican-Americans, many Italian-Americans, especially the majority who were of Sicilian background, faced discrimination in part based on their relatively dark complexions.<sup>42</sup> Both groups had relatively low educational attainment and were poorly represented in the upper echelons of American corporations.<sup>43</sup> The brief questioned why affirmative action at UC Davis's medical school based on ethnicity should be limited to Mexican-Americans and not similarly situated ethnic groups.<sup>44</sup>

One Italian-American student had already taken his effort to secure minority status to the court.<sup>45</sup> In the mid-1970s, Philip DiLeo sued the University of Colorado Law School, demanding that his application be included with minority applicants in the school's "Special Academic Assistance Program" (SAAP).<sup>46</sup> DiLeo claimed that he had suffered economic and social disadvantage because he grew up in New York's Little Italy to poor, uneducated parents and had attended "slum schools."<sup>47</sup> DiLeo applied for admission to the law school through the SAAP for the entering classes of 1973 and 1974.<sup>48</sup> The law school rejected his applications because it limited SAAP eligibility to African-Americans, Native Americans, Mexican-Americans, and Puerto Ricans.<sup>49</sup> The Colorado Supreme Court dismissed the case because DiLeo had failed to show that the law school would have admitted him but-for SAAP's existence.<sup>50</sup> A dissenting justice argued that "when the Law School designates a minority group, the members of which it wishes to prefer, it may not designate that group by reference to its racial characteristics."<sup>51</sup> Therefore, the dissent concluded, because the University of Colorado Law School excluded DiLeo from consideration due to his race, the SAAP program was unconstitutional.<sup>52</sup>

Italian-Americans meanwhile secured minority status at the City University of New York (CUNY).<sup>53</sup> Italian-American faculty had been subjected to decades of documented discrimination at CUNY.<sup>54</sup> When such discrimination ended in the 1970s, CUNY faced a budget crisis.<sup>55</sup> To avoid undermining its affirmative action program for designated minorities, CUNY protected Black and Hispanic professors from layoffs.<sup>56</sup> The burden of these layoffs therefore fell disproportionately on recently hired

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41. *See id.* at 60.

42. *See id.* at 64.

43. *See id.* at 64-67.

44. *See* Brief of the Polish American Congress, *supra* note 37, at \*10-11.

45. *See* DiLeo v. Bd. of Regents of Univ. of Colo., 590 P.2d 486 (Colo. 1978); *see also* BERNSTEIN, *supra* note 31, at 66 (summarizing the DiLeo case).

46. DiLeo, 590 P.2d at 486-87.

47. *Id.* at 488.

48. *Id.* at 487.

49. *See id.*

50. *See id.* at 489.

51. *Id.* at 492 (Erickson, J., dissenting).

52. *See id.*

53. *See* BERNSTEIN, *supra* note 31, at 67.

54. *See id.*

55. *See id.*

56. *Id.*



Italian-Americans.<sup>57</sup> This resulted in an uproar, which, with the backing of major political figures in New York, ended with “Italian American” being recognized as an affirmative action classification at CUNY.<sup>58</sup>

#### B. THE SUPREME COURT’S OPINIONS IN *BAKKE*

In *Bakke*, four Justices argued that UC Davis’s program was barred by Title VI of the 1964 Civil Rights Act, which bans racial discrimination by federally funded universities.<sup>59</sup> Four other Justices argued that UC Davis’s minority quota was lawful under both Title VI and the Fourteenth Amendment’s Equal Protection Clause as an appropriate means of redressing the historical exclusion of minorities, especially Black Americans, from educational and other opportunities.<sup>60</sup>

Justice Powell, casting the deciding fifth vote, concluded that racial quotas are illegal.<sup>61</sup> Even without quotas, universities may not use race in admissions either to compensate for past historical injustices or to remedy present-day inequalities.<sup>62</sup> Justice Powell concluded that universities may, however, use race as a plus factor in admissions to increase “diversity” in the class.<sup>63</sup> Justice Powell expressed skepticism of the racial classifications UC Davis used, albeit in a footnote:

[T]he University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American-Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians [over ten percent of the students, much higher than their share of the state population] admitted through the regular admissions process.<sup>64</sup>

Justice Powell also cited Justice Douglas’s objection in *DeFunis* to quotas for “selected minority groups” to redress injustice as “fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment.”<sup>65</sup> Justice Powell, in other words, thought universities should have leeway to consider all aspects of students’ backgrounds,

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57. *Id.*

58. *Id.*

59. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408–09 (1978) (Stevens, Stewart & Rehnquist, JJ., Burger, C.J., concurring in the judgment in part and dissenting in part).

60. *See id.* at 324–26 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

61. *See id.* at 307 (Powell, J., announcing the judgment of the Court).

62. *See id.* at 308–10.

63. *Id.* at 317–18. Not surprisingly, the diversity rationale came under attack from those who advocate affirmative action preferences for “social justice” reasons. *See, e.g.*, RICHARD T. FORD, *RACIAL CULTURE* 59–61 (2005); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1224–25 (1991); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 425–26, 450–52 (2014); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 953 (2001).

64. *Bakke*, 438 U.S. at 309 n.45 (Powell, J., announcing the judgment of the Court).

65. *Id.* at 297 n.37 (alteration in original).



including their ethnicity, without favoring specific groups.<sup>66</sup> Justice Powell was influenced by an amicus brief filed by Harvard University.<sup>67</sup> The brief purported to describe why and how Harvard used diversity considerations in admissions.<sup>68</sup> This description was tendentious and concealed two important facts.

First, Harvard failed to acknowledge that it initially adopted its “holistic” applicant review process to limit the percentage of Jews in its class.<sup>69</sup> Second, Harvard’s amicus brief inaccurately described the university’s admissions policy.<sup>70</sup> Harvard did not use various sorts of ethnic diversity as a mere “tip” between otherwise closely matched applicants.<sup>71</sup> Harvard instead had a firm quota for Black applicants in place and no formal preferences for any other group.<sup>72</sup> Nor did Harvard have a formal preference for rural “farm boys,” a category Harvard’s brief mentioned that had especially piqued Justice Powell’s interest.<sup>73</sup>

*Bakke* is often portrayed as pitting admissions preferences for African-Americans against the claims of White students.<sup>74</sup> Yet from 1971, when UC Davis’s quota program began, through 1974, when the *Bakke* litigation started, only one-third of the students admitted via the quota were African-American.<sup>75</sup> Almost half of the quota slots went to Mexican-Americans.<sup>76</sup>

One reason that *Bakke* has been viewed through a White/Black prism is the influence of Justice Thurgood Marshall’s emphatic dissent. Justice Marshall, arguing that UC Davis’s quota should be upheld, focused exclusively on the benefits Black Americans received from the quota.<sup>77</sup> Marshall’s opinion begins,

I do not agree that petitioner’s admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy

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66. *See id.* at 317.

67. *See id.* at 316–17.

68. *See id.* at 321 (App. to Opinion of Powell, J.).

69. *See* Joint Appendix Vol. II of IV at 785–86, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199); JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 172–73 (2005).

70. *See* Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 *CARDOZO L. REV.* 379, 382 n.13, 407 (1979).

71. *See id.*

72. *See id.* at 382 n.13.

73. *See* Jesse Merriam, *Beyond the Law: A Four-Step Explanation of Why Affirmative Action is Here to Stay*, 48 *OHIO N.U. L. REV.* 95, 140–41 (2021).

74. *See, e.g.,* Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 *CORNELL L. REV.* 463, 465 (2005).

75. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978) (Powell, J., announcing the judgment of the Court).

76. *Id.*

77. *See id.* at 400–01 (Marshall, J., dissenting).

of discrimination, I cannot believe that this same Constitution stands as a barrier.<sup>78</sup>

Justice Marshall did not explain how his argument justified the two-thirds of quota slots given to non-Black members of designated minority groups. In any event, Justice Powell's deciding vote in *Bakke* established that enhancing the "diversity" of a school's student body is generally the only permissible rationale for racial preferences in higher-education admissions.<sup>79</sup> Yet the way colleges later used race in admissions did not match the putative diversity objective.

Justice Powell seemed to think that universities may consider any applicant's race and ethnicity if it would contribute to a school's "diversity."<sup>80</sup> There is no indication that he believed it was permissible to limit this consideration to specific racial and ethnic classifications. Justice Brennan's dissenting opinion, by contrast, argued that once preferences were permitted, the choice of beneficiaries of those preferences should be subject only to the very forgiving rational basis test.<sup>81</sup>

When *Bakke* was decided, universities varied considerably regarding how they divided their applicants demographically and what groups were considered minorities. For example, as we have seen, the University of Washington Law School (UW) and the UC Davis Medical School gave preferences to Mexican-Americans, but not other Latinos.<sup>82</sup> UW gave preferences to Filipinos, but not to other Asian-Americans, while at UC Davis, all Asian-Americans were eligible for quota slots.<sup>83</sup> University of Colorado Law School, meanwhile, included African-Americans, Native Americans, Mexican-Americans, and Puerto Ricans in its affirmative action program, but left out Asian-Americans entirely.<sup>84</sup>

After *Bakke*, universities used Justice Powell's diversity rationale to favor what later became known as "underrepresented" minority groups: African-Americans, Hispanics, and Native Americans.<sup>85</sup> In keeping with

78. *Id.* at 387.

79. *See id.* at 311–12 (Powell, J., announcing the judgment of the Court).

80. *See id.*

81. *See id.* at 356–60 (Brennan, J., dissenting).

82. *See id.* at 274–76 (Powell, J., announcing the judgment of the Court); *DeFunis v. Odegaard*, 416 U.S. 312, 320–21, 323 (1974).

83. *See DeFunis*, 416 U.S. at 320–21, 323; *Bakke*, 438 U.S. at 274–76.

84. *See DiLeo v. Bd. of Regents of Univ. of Colo.*, 590 P.2d 486 (Colo. 1978).

85. In the early years of affirmative action in higher education, Asian-Americans, or at least subgroups of Asian-Americans, sometimes benefited from preferences as with the UC Davis Medical School program. *See Bakke*, 438 U.S. at 274–76. This quickly dissipated on the West Coast, where Chinese- and Japanese-Americans were already well-represented at selective schools. By 1978, twenty-two percent of undergraduates at UC Berkeley were Asian-American. Eloise Salholz, Shawn Doherty & De Tran, *Do Colleges Set Asian Quotas?*, *NEWSWEEK*, Feb. 9, 1987, at 60. Mild affirmative action preferences for Asian-American applications in East Coast schools eventually gave way to concerns about "too many" Asians, as the population of Asian-American students at selective schools gradually soared, first in STEM majors and fields, then more generally. *See id.* In 1987, an anonymous Brown University admissions officer told a reporter that Brown had a 20% ceiling on how many minority students it would accept, and that this ceiling came at the expense of Asian-Americans, who were deemed a lower priority than Black and Hispanic applicants. *Id.* In 1990, the U.S. Department of Education's Office of Civil Rights found that Asian-Americans were admitted

Justice Brennan's reasoning, but not Justice Powell's, the Supreme Court deferred to the universities regarding how they classified their applicants and chose which classifications received preferences, that is, until *SFFA*.<sup>86</sup>

#### IV. THE RISE OF THE DIRECTIVE 15 CLASSIFICATIONS

University racial classifications gradually became standardized thanks to the establishment, in the late 1970s, of official federal government rules for racial and ethnic classification.<sup>87</sup> Modern racial classifications began in the 1950s, when the federal government began enforcing anti-discrimination rules against federal contractors.<sup>88</sup> The government needed a mechanism to ensure compliance by monitoring who the contractors were hiring.<sup>89</sup>

This need intensified after the civil rights revolution of the 1960s.<sup>90</sup> Although civil rights protections apply not just to race but also to national origin, religion, and more, official government classification norms gradually were limited to major groups that were deemed to be non-White.<sup>91</sup> This was in part because African-Americans, understood to be a racial minority, were the paradigmatic group that faced discrimination, and civil rights groups representing their interests objected to diverting resources to protect "white ethnic[s]" or religious minorities.<sup>92</sup>

Also, classification in those days was based mainly on visual identification.<sup>93</sup> It was relatively easy to identify who was Black or Asian-American and report those individuals when sending off paperwork to the government.<sup>94</sup> Figuring out who was, say, Catholic or Italian-American would have been much more of a challenge.<sup>95</sup>

As government agencies increasingly collected data on race, they used different criteria to delineate the relevant groups. For example, various government agencies classified Americans of Spanish-speaking heritage

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to Harvard at a "significantly lower" rate than were Whites with similar credentials. See Joint Appendix Vol. III of IV at 1374–77, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (No. 20-1199).

86. See *Bakke*, 438 U.S. at 356, 362–63 (Brennan, J., dissenting).

87. See, e.g., Directive No. 15. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).

88. See BERNSTEIN, *supra* note 31, at 8–10.

89. See *id.*

90. See *id.* at 8–11.

91. See *id.* at 10–11.

92. See *id.* at 9.

93. See *id.* at 10–11.

94. See *id.*

95. "Mexican American" also presented a challenge as Mexican-Americans are usually of mixed heritage and have a wide range of appearances. "Anthony Frederick, Vice President of Universal Studios, complained to Congress, 'I couldn't tell you a Mexican American if I were to look at him. We are not permitted to ask a person his nationality, his national origin, in [California], and we don't, and you cannot tell by surname.'" *Id.* at 11 (alteration in original) (quoting *Hearings Before the United States Equal Employment Opportunity Commission on Utilization of Minority and Women Workers in Certain Major Industries* 130 (1969)). Assumedly, only people who "looked Mexican," whatever that meant to the identifier, were counted.

in a variety of ways.<sup>96</sup> Some government agencies classified all European-descended Americans as White.<sup>97</sup> Other agencies had an “all other minorities” classification to include European-American ethnic groups that historically faced discrimination, such as Portuguese-Americans in New England or Cajuns in Louisiana.<sup>98</sup> Some agencies classified Filipinos and South Asians as Asian-Americans, and some limited the classification to East Asians.<sup>99</sup>

The Office of Management and Budget (OMB) enacted Statistical Directive No. 15 in 1977 to create uniform classifications so that data could be efficiently shared and compared across agencies.<sup>100</sup> Directive 15 created the familiar classifications we know today. These classifications ironically were very similar to the racist classifications of the past. For example, African-Americans were defined as individuals with origins in one of the Black racial groups of Africa, essentially recreating a one-drop rule.<sup>101</sup> The borderline for the Asian-American classification was the western border of Pakistan, the same as where it was set by court decisions and laws in the 1920s.<sup>102</sup>

The 1977 classification scheme has barely changed in the ensuing forty-six years.<sup>103</sup> But two major developments should have, but did not, lead to a fundamental reassessment of the classifications. The first major development is increased American ethnic diversity. Thanks to immigration and intermarriage, the non-White American population is far more diverse than it was in 1977.<sup>104</sup> The classifications were always problematic in combining disparate groups into single classifications. For example, Directive 15 classified people with origins in 60% or so of the world’s population

96. Some agencies counted all people of Spanish-speaking heritage, while some counted only certain subgroups, such as Mexican-Americans or Chicanos. *See* BERNSTEIN, *supra* note 31, at 29–57. Among the broad classifications used were Latino, Spanish-language household, Spanish surname, Spanish heritage, and Hispano. *See id.*

97. *See id.* at 14–15.

98. *See id.*

99. *See id.* at 4, 19, 22.

100. *See* Directive No. 15. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978). Given the importance of these regulations to American law and culture, their development by the OMB can be seen as a very significant example of administrative constitutionalism. *See, e.g.*, David E. Bernstein, “Administrative Constitutionalism: Considering the Role of Agency Decisionmaking in American Constitutional Development,” 38 Soc. PHIL. & POL’Y 109 (2021); David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic’s Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381 (2019).

101. *See* Directive No. 15. Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. at 19,269.

102. *See id.*; *United States v. Thind*, 261 U.S. 204, 215 (1923); Immigration Act of 1924, Pub. L. No. 139 § 26, 43 Stat. 153, 167.

103. One significant change to the classification scheme has been the division of the original Asian-American/Pacific Islander group into two groups, Asian-Americans and Native Hawaiian/Pacific Islanders. *See* Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,786 (Oct. 30, 1997). Another is that an amended definition allows Latinos to check the Native American box. *See id.* at 58,789. Beyond that, since 1997 classification rules allow individuals to check off more than one racial box, whereas originally checking only one was permitted. *See id.* at 58,786.

104. *See, e.g.*, Jennifer Lee & Frank D. Bean, *America’s Changing Color Lines: Immigration, Race/Ethnicity, and Multiracial Identification*, 30 ANN. REV. SOCIO. 221, 221 (2004).

into the singular Asian-American category.<sup>105</sup> The Directive also created a White pseudo-race out of all European, North-African, and Middle-Eastern ethnic groups.<sup>106</sup>

The classifications are mutually inconsistent. American-Indian is defined by cultural affinity, Black by race, Asian by geography, and Hispanic by culture/language.<sup>107</sup> Nevertheless, as of 1977, the classifications arguably were good enough to monitor compliance with anti-discrimination laws, their primary purpose.

The 1970 Census showed that the U.S. was approximately 12% African-American, 82% non-Hispanic White, 5% Hispanic (and Hispanics were generally considered White).<sup>108</sup> The remaining less-than-one-percent were Asian-Americans and Pacific Islanders (AAPI) or American-Indian.<sup>109</sup> Given the cultural norm that anyone with any discernable African descent was considered Black, and the small population of other nonwhite minorities, the classifications seemed largely unproblematic to their authors.<sup>110</sup> Today, by contrast, Hispanics are almost 20% of the population, Asian-Americans around 6%, and there has been significant immigration from the Caribbean, Africa, and the Middle East.<sup>111</sup> Moreover, there is tremendous diversity within each of these categories.<sup>112</sup> Directive 15 classifications are therefore increasingly incoherent.

The second major development that should have led to the reconsideration of Directive 15 classifications is that the classifications have been used much more widely than originally anticipated. When the relevant regulations were published in the Federal Register, the OMB warned that the classifications were for statistical purposes only.<sup>113</sup> The classifications were

105. See Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. at 19,269.

106. See *id.*

107. BERNSTEIN, *supra* note 31, at 18–19; David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 179–80 (2021).

108. See BERNSTEIN, *supra* note 31, at 38.

109. U.S. CENSUS BUREAU, 1970 CENSUS OF POPULATION, SUPPLEMENTARY REPORT: RACE OF THE POPULATION OF THE UNITED STATES, BY STATES: 1970 (1972), <https://www.census.gov/library/publications/1972/dec/pc-s1-11.html> [<https://perma.cc/U88S-QAXH>].

110. See David A. Hollinger, *The One Drop Rule & the One Hate Rule*, 134 DAEDALUS J. AM. ACAD. ARTS & SCI. 18, 18–19 (2005).

111. See William H. Frey, *The Nation is Diversifying Even Faster than Predicted According to New Census Data*, BROOKINGS (July 1, 2020), <https://www.brookings.edu/articles/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted> [<https://perma.cc/6WDS-CQHR>]; Jane Lorenzi & Jeanne Batalova, *Caribbean Immigrants in the United States*, MIGRATION POL'Y INST. (July 7, 2022), <https://www.migrationpolicy.org/article/caribbean-immigrants-united-states> [<https://perma.cc/C8E5-TSM6>]; AM. IMMIGR. COUNCIL, *AFRICAN IMMIGRANTS IN THE UNITED STATES: A DEMOGRAPHIC OVERVIEW* (2012), [https://www.americanimmigrationcouncil.org/sites/default/files/research/african\\_immigrants\\_in\\_america\\_a\\_demographic\\_overview.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/african_immigrants_in_america_a_demographic_overview.pdf) [<https://perma.cc/WYJ4-8CDA>]; Laura Harjanto & Jeanne Batalova, *Middle Eastern and North African Immigrants in the United States*, MIGRATION POL'Y INST. (Jan. 13, 2022), <https://www.migrationpolicy.org/article/middle-eastern-and-north-african-immigrants-united-states> [<https://perma.cc/VCD7-PXVZ>].

112. See Frey, *supra* note 111; Lorenzi & Batalova, *supra* note 111; AM. IMMIGR. COUNCIL, *supra* note 111; Harjanto & Batalova, *supra* note 111.

113. See Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,260, 19,269 (May 4, 1978).



not scientific or anthropological in nature and were not to be used to determine eligibility for government programs.<sup>114</sup> Despite those caveats, the classifications have become ubiquitous, even in scientific research.<sup>115</sup>

Universities eventually converged on using the Directive 15 classifications to manage diversity in admissions.<sup>116</sup> Yet no university has ever explained, in litigation or otherwise, why a diversity of students from these specific statistical categories are appropriate proxies for “diversity” at large.<sup>117</sup>

For decades, there was one hangover from the pre-*Bakke* regime. Before Statistical Directive 15 became law, many universities had limited preferences for what we now call Hispanics to Mexican-Americans and sometimes Puerto Ricans.<sup>118</sup> Those were the groups of Spanish-speaking origin that were seen as most in need of remedial assistance to compensate for the consequences of racial discrimination.<sup>119</sup> For over two decades after Directive 15 came into effect, some universities continued to tabulate one or both groups separately from other Hispanics.<sup>120</sup> Released in 1994, the first “Common Application” (Common App), which allowed students to apply to many schools with one application, had separate boxes for “Hispanic, Latino (including Puerto Rican)” and “Mexican, Mexican American.”<sup>121</sup> The latter box remained on the Common App through at least 2000–2001.<sup>122</sup>

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114. *See id.*

115. *See* BERNSTEIN, *supra* note 31, at 141.

116. Bernstein, *supra* note 10, at 145.

117. *See id.* at 147. Many assume that universities use the Directive 15 classifications because the Office of Civil Rights at the Department of Education requires them to use those classifications to gather data about applicants. *See id.* at 145–47; David Bernstein, *Diversity by Diktat: An Obscure 1977 OMB Memo Forms the Basis for Today's Affirmative-Action Programs*, SCOTUSBLOG (Oct. 26, 2022), <https://www.scotusblog.com/2022/10/diversity-by-diktat-an-obscure-1977-omb-memo-forms-the-basis-for-todays-affirmative-action-programs> [<https://perma.cc/HM4D-MAKK>]. But there is no rule requiring universities to gather racial data on applicants, much less specifically to use the Directive 15 classifications to do so. *See* Bernstein, *supra* note 10, at 147.

118. *See* Bernstein, *supra* note 10, at 147.

119. *See* BERNSTEIN, *supra* note 31, at 8–10. As noted previously, through the early 1970s, racial classification of individuals was a matter of institutional guesses rather than self-identification. *See id.* at 10–11. For example, a federal contractor needing to report how many minority employees it had would have its human resources staff takes its best guess as to the racial identity of its employees. *See id.* at 8–11. Civil rights groups opposed asking employees to identify themselves, and it was considered at best rude and sometimes illegal under state law to do so. *See id.* at 10–11. From the early 1970s on, the norm shifted to self-identification. *See id.* at 20. One consequence of this shift is that the standard for who of Spanish-speaking heritage qualified as a minority shifted from those having a Latino accent, who “looked” Latino, or perhaps had a Spanish last name to anyone who identified himself as “Hispanic.” *See id.* at 19–20. This included, among other people, Hispanics of entirely European descent who would historically have been considered White like other Americans of European descent. *See id.*

120. *See* David E. Bernstein, *Why Does the Supreme Court Refer to Preferences for Hispanics/Latinos as “Racial Preferences”?*, VOLOKH CONSPIRACY (June 24, 2022, 5:27 PM), <https://reason.com/volokh/2022/01/24/why-does-the-supreme-court-refer-to-preferences-for-hispanics-latinos-as-racial-preferences> [<https://perma.cc/T9MF-S755>].

121. A copy of the 1994–1995 Common Application is on file with the author.

122. A copy of the 2000–2001 Common Application is on file with the author.

Perhaps surprisingly, there was very little litigation over affirmative action preferences in higher education in the two decades after *Bakke*. In 1994, the Center for Individual Rights brought a case against the University of Texas Law School (UT), styled as *Hopwood v. Texas*.<sup>123</sup> Plaintiff Cheryl Hopwood challenged the law school's admissions preferences, which were limited to Black Americans and Mexican-Americans.<sup>124</sup> The Fifth Circuit Court of Appeals ruled in Hopwood's favor.<sup>125</sup> The question of which specific groups received the university's preferences and how those groups were defined played no direct role in the majority holding.

However, Judge Wiener, concurring, argued that UT's racial preferences were not narrowly tailored to achieve diversity because the law school did not give preferences to "non-Mexican Hispanic Americans, Asian Americans, and Native Americans."<sup>126</sup> By "targeting exclusively blacks and Mexican Americans," UT's preferences more closely resembled "a set aside or quota system for those two disadvantaged minorities than it does an academic admissions program narrowly tailored to achieve true diversity."<sup>127</sup> The Supreme Court declined to hear the law school's appeal.<sup>128</sup>

#### V. *GRUTTER V. BOLLINGER*

Racial preferences in higher education came back to the Supreme Court in 2003, in *Gratz v. Bollinger*<sup>129</sup> and *Grutter v. Bollinger*.<sup>130</sup> *Gratz* challenged the undergraduate admissions policies at the University of Michigan.<sup>131</sup> On a 150-point scale, the university gave Black, Hispanic, and Native American applicants a 20-point bonus.<sup>132</sup> A 6–3 majority held that this policy was unconstitutional because it gave the same bonus to all applicants from the relevant groups, without regard to their individualized circumstances.<sup>133</sup> The policy therefore violated Justice Powell's demand in *Bakke* that race only be considered as part of a holistic review of an applicant's file.<sup>134</sup>

By contrast, University of Michigan's law school, the subject of the lawsuit in *Grutter*, purported to do a holistic review of each applicant's file.<sup>135</sup> In that context, the law school gave a preference to "African-Americans, Hispanics and Native Americans" as "groups which have been historically discriminated against" and "who without this commitment might not be represented in our student body in meaningful numbers."<sup>136</sup> The law

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123. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

124. *See id.* at 934, 937–38.

125. *See id.* at 934.

126. *Id.* at 966 (Wiener, J., concurring).

127. *Id.*

128. *Univ. of Tex. v. Hopwood*, 518 U.S. 1033 (1996).

129. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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

131. *Gratz*, 539 U.S. at 249–50.

132. *See id.* at 254–55.

133. *See id.* at 273.

134. *See id.* at 271–73.

135. *Grutter*, 539 U.S. at 337.

136. *Id.* at 316.



school's published materials sometimes indicated that the Hispanic preference was limited to "Mexican American[s]" and "Puerto Rican[s] . . . raised on the U.S. mainland."<sup>137</sup>

The district court ruled against the law school, in part because it "failed to offer a principled explanation as to why it has singled out these particular groups for special attention."<sup>138</sup> "[O]ther groups have also been subjected to discrimination," the court continued, "such as Arabs and southern and eastern Europeans to name but a few, yet the court heard nothing to suggest that the law school has concerned itself as to whether members of these groups are represented 'in meaningful numbers.'"<sup>139</sup>

If the law school's goal was to enhance diversity, it made no sense to "singl[e] out Mexican Americans but, by implication, exclud[e] from special consideration Hispanics who originate from countries other than Mexico."<sup>140</sup> Nor was it logical to limit the Puerto Rican classification to mainland Puerto Ricans.<sup>141</sup> "This haphazard selection of certain races," the court concluded, "is a far cry from the 'close fit' between the means and the ends that the Constitution demands."<sup>142</sup>

The Sixth Circuit reversed.<sup>143</sup> The court rejected the district court's objection to the groups that the law school targeted for preferences.<sup>144</sup> The Harvard plan relied upon by Justice Powell in *Bakke*, the court noted, "specifically identified 'blacks and Chicanos and other minority students' among the under-represented groups that Harvard sought to enroll through its admissions policy."<sup>145</sup> A law school's focus on "African-Americans, Hispanics and Native Americans," therefore, was kosher.<sup>146</sup>

The court also found that "some degree of deference must be accorded to the educational judgment of the Law School in its determination of which groups to target."<sup>147</sup> The court did not explain how this deference was consistent with a legal standard of "strict scrutiny," requiring that racial classifications be narrowly tailored to achieve a compelling interest.<sup>148</sup> Nor did the court explain what "educational judgment" led the law school to select the classifications it used; nor could it, given that the law school had not provided evidence of any such judgment. The Sixth Circuit panel also did not address the district court's finding that the law school favored only some Hispanics.

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137. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (citation omitted).

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.*

142. *Id.*

143. *Grutter v. Bollinger*, 288 F.3d 732, 735 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003).

144. *See id.* at 751.

145. *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 322 (1978) (App. to Opinion of Powell, J.)).

146. *Id.*

147. *Id.*

148. *See id.* at 741, 750–51.

Judge Danny Boggs, dissenting, argued that the law school's preferences were not narrowly tailored to achieve diversity.<sup>149</sup> He noted that under law school policy, "ten under-represented-minority students, each a child of two-parent lawyer families," add "diversity."<sup>150</sup> But ten "children whose parents are Chinese merchants, Japanese farmers, white steel workers, or any combinations of the above are all considered to be part of a homogeneous (and 'over-represented') mass."<sup>151</sup> Judge Boggs added that a "child with one parent of Chinese ancestry and one of Chilean would find that his level of 'diversity' depends" on whether the law school deems him to be Chinese or Hispanic.<sup>152</sup>

Judge Boggs then decried the arbitrary nature of the classifications. "The Nazi Nuremberg laws made the fatal decision turn on the number of Jewish grandparents. 'Hispanic' background may, I suppose, depend on which side of a pass in the Pyrenees your great-grandfather came from."<sup>153</sup>

The law school, Judge Boggs continued, treated minority status as "all or nothing."<sup>154</sup> Judge Boggs argued that individuals of mixed heritage are likely to have significantly different experiences regarding how they relate to their ethnicity than are their peers of a single ethnic background.<sup>155</sup> Yet the law school gave the same amount of diversity credit to someone who was fully of a particular ethnicity as to someone else who was, perhaps, "one-quarter."<sup>156</sup> But the alternative, "to apply boldly a system of half- or quarter-credit for assigned status," Judge Boggs added, "would reveal the racist nature of the system to a degree from which even its proponents would shrink."<sup>157</sup> Judge Boggs concluded, "even if we give full force to Justice Powell's discussion of 'the virtues of diversity,' the Law School's program provides the linguistic term, but not the substance."<sup>158</sup>

On appeal to the Supreme Court, a 5–4 majority upheld the law school's admissions policies.<sup>159</sup> Justice O'Connor, writing for the majority, adopted Justice Powell's diversity rationale.<sup>160</sup> Universities may engage in the limited use of race as part of an admissions process that uses a holistic evaluation of each applicant.<sup>161</sup> Justice O'Connor implicitly assumed that the classifications the law school used were proper. For example, she implicitly assumed that it made sense to treat "Hispanics" as a unitary "underrepresented" group, and "Asians" as a unitary non-underrepresented group.<sup>162</sup> Like the Sixth Circuit majority, Justice O'Connor ignored the district

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149. *Id.* at 776, 789 (Boggs, J., dissenting).

150. *Id.* at 792.

151. *Id.*

152. *Id.*

153. *Id.* at 793.

154. *Id.*

155. *Id.*

156. *See id.*

157. *Id.*

158. *Id.*

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

160. *Id.* at 325.

161. *See id.* at 334.

162. *See id.* at 316, 319.

court's finding that the law school itself parsed the Hispanic classification into subgroups. Instead, she simply alluded to the law school's general preference for Hispanics.<sup>163</sup>

In dissent, Justice Kennedy recounted testimony by a former University of Michigan Law School admissions dean regarding the difficulties he had in defining the relevant classifications to the faculty's satisfaction.<sup>164</sup> The ex-dean offered the example of a faculty debate regarding whether Cuban-Americans "should be counted as Hispanics: One professor objected because Cubans were Republicans."<sup>165</sup> That was the only attention paid by the Justices in *Grutter* to whether the classifications the law school used were narrowly tailored to achieve diversity.

## VI. FISHER V. UNIVERSITY OF TEXAS

As affirmative action became increasingly entrenched in the United States, the country grew increasingly racially and ethnically diverse. Hispanics overtook African-Americans as the largest group eligible for affirmative action preferences, and the fast-growing population of Asian-Americans increasingly faced what appeared to be soft ceiling quotas on university admission because they were "overrepresented."<sup>166</sup> Thanks to high rates of interracial marriage, a growing percentage of self-identified minority students had only partial minority heritage.<sup>167</sup> The African-American student population at elite schools was increasingly composed of first- and second-generation immigrants from Africa and the Caribbean, not descendants of American slaves.<sup>168</sup> Public debate nevertheless remained stagnant, with a

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163. See *id.* at 316. The upshot of *Grutter*, including the lower court opinions, was that universities recognized that they are on much firmer legal ground if they give preferences to all Hispanics, including Hispanics from countries like Spain, Chile, and Argentina with primarily European populations and cultures, than if they pick and choose among them. Limiting the preferences to groups that had historically faced significant discrimination in the U.S. might suggest that the university was acting from forbidden remedial motives banned by the Supreme Court, rather than seeking "diversity" among the broad Directive 15 categories implicitly approved of by the Supreme Court.

164. See *id.* at 393 (Kennedy, J., dissenting).

165. *Id.*

166. Media reports of perceived discrimination against Asian-Americans in admissions began to appear in the 1980s. See, e.g., Salholz, Doherty & Tran, *supra* note 85, at 60. In the early 2000s, data began to appear that backed up this perception. See Thomas J. Espenshade, Chang Y. Chung & Joan L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 Soc. Sci. Q. 1422, 1444 (2004); see also Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 Soc. Sci. Q. 293, 293–99 (2005); David R. Colburn, Charles E. Young & Victor M. Yellen, *Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era*, 4 INTERACTIONS: UCLA J. EDUC. & INFO. STUD. 1, 4, 10–12 (2008); Daniel E. Slotnick, *Do Asian-Americans Face Bias in Admissions at Elite Colleges?*, N.Y. TIMES (Feb. 8, 2012, 1:43 PM), <http://thechoice.blogs.nytimes.com/2012/02/08/do-asian-americans-face-bias-in-admissions-at-elite-colleges> [<https://perma.cc/3EYA-EPDY>] (citing a study showing that holding other variables equal, Asian-American applicants needed SAT scores 140 points higher than White applicants to be admitted to elite colleges).

167. See, e.g., Lee & Bean, *supra* note 104, at 221.

168. See Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), <https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html> [<https://perma.cc/GC2J-5AUD>].

continued focus on whether affirmative action preferences were justified by a combination of long-standing White privilege and subordination of African-Americans going back to slavery.<sup>169</sup>

The next case challenging affirmative action preferences, *Fisher v. University of Texas*,<sup>170</sup> had the potential to disrupt the debate over the constitutionality of affirmative action. *Fisher* marked the first affirmative action case to reach the Supreme Court in which those most affected by the defendant's preferences were not Blacks and Whites, but Hispanics and Asians.<sup>171</sup>

In compliance with *Hopwood*,<sup>172</sup> the University of Texas (UT) had temporarily stopped giving preferences to minority students.<sup>173</sup> In the final year of the university's race-neutral admissions system, African-American and (mostly) Hispanic students constituted a total 21.4% of the entering freshman class.<sup>174</sup> Asian-Americans were 17.9% of the class.<sup>175</sup>

After *Grutter* made *Hopwood*'s ban on racial preferences moot, UT added a race-conscious element to its admissions policy.<sup>176</sup> The university argued that it had a compelling interest in diversity within individual programs within the university, and even within individual classes. The university contended that it needed to use racial preferences to achieve this diversity.<sup>177</sup>

Non-Hispanic Whites were "overrepresented" by approximately 30% at UT, but Asian-Americans were "overrepresented" by about 400–500% relative to their share of the state's population.<sup>178</sup> Bringing the school's demographics more in line with state demographics, as UT sought to do, would come disproportionately at the expense of Asian-American applicants.<sup>179</sup>

Texas's position, then, was that a state university can and should favor Hispanic "descendants of Spanish conquistadors or Italian immigrants to Argentina" over an "Asian American[]" who was "a dark-skinned child

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169. For example, books such as RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2015), and MELVIN I. UROFSKY, *THE AFFIRMATIVE ACTION PUZZLE: A LIVING HISTORY FROM RECONSTRUCTION TO TODAY* (2020), treat Hispanic participation in affirmative action as at best an afterthought. Yet by the time the authors were writing their books, likely more Hispanics than African-Americans were benefiting from affirmative action. In *SFFA*, Justice Thomas noted the same dynamic in Justice Jackson's dissent: "While articulating her black and white world (literally), Justice Jackson ignores the experiences of other immigrant groups (like Asians) and white communities that have faced historic barriers." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 282–83 (2023) (Thomas, J., concurring) (internal citation omitted).

170. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013).

171. David Bernstein, *Online Fisher Symposium: Affirmative Action After Fisher—Back to the Future?*, SCOTUSBLOG (Sep. 6, 2012, 3:54 PM), <https://www.scotusblog.com/2012/09/online-fisher-symposium-affirmative-action-after-fisher-back-to-the-future> [<https://perma.cc/H22Z-B22R>].

172. See generally *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

173. See *Fisher*, 570 U.S. at 304.

174. See *id.* at 305.

175. Bernstein, *supra* note 171.

176. *Fisher*, 570 U.S. at 305.

177. See *id.* at 305–06.

178. See Bernstein, *supra* note 171.

179. *Id.*

of Vietnamese boat people.”<sup>180</sup> Indeed, the latter might find himself disfavored relative to the child of wealthy, White cattle ranchers or tech entrepreneurs.<sup>181</sup>

None of this, however, made it into the Court’s opinion. The Court had seemed poised to overrule the court below and invalidate UT’s racial preferences. Instead, it issued a compromise that received seven votes, with only Justice Ginsburg dissenting (and Justice Kagan recused).<sup>182</sup> The thrust of the opinion is that before a university may use racial preferences to achieve a “diverse” class, it has the “burden of demonstrating . . . that available, workable race-neutral alternatives do not suffice.”<sup>183</sup>

The Court found that rather than engaging in that “searching examination,” the Fifth Circuit had simply presumed that UT had acted in “good faith.”<sup>184</sup> The Court therefore remanded the case for reconsideration.<sup>185</sup> Justice Thomas concurred, but added that he would have overruled *Grutter* and declared the preferences at issue to be unconstitutional.<sup>186</sup>

Meanwhile, after *Grutter*, Michigan voters passed a state referendum banning the use of race by the government in state university admissions and elsewhere.<sup>187</sup> This led to a lawsuit claiming, counterintuitively, that banning government use of race violated the Equal Protection Clause.<sup>188</sup> Unsurprisingly,<sup>189</sup> the Court rejected this claim.<sup>190</sup> But the case presented Justice Sotomayor with an opportunity to publish the dissent she had been prepared to release if *Fisher* had declared racial preferences in university admissions to be unconstitutional.<sup>191</sup>

The theme of Justice Sotomayor’s dissent was that “race matters.”<sup>192</sup> However, she “gerrymander[ed] the word race itself in a way convenient to her purposes, using it to include Hispanics (who, as official forms remind us, ‘can be of any race,’) while breathing not one word about Asian-Americans.”<sup>193</sup> As I wrote, “It’s bizarre to treat Hispanics but not Asians

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180. *See id.*

181. *See id.*

182. *Fisher*, 570 U.S. at 299.

183. *Id.* at 312.

184. *Id.*

185. *Id.* at 314.

186. *See id.* at 315 (Thomas, J., concurring).

187. *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 298–99 (2014).

188. *See id.* at 300–01.

189. *See, e.g.*, David E. Bernstein, *Schuetz v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 N.Y.U. J.L. & LIBERTY 210, 212 (2013).

190. *See Schuetz*, 572 U.S. at 314.

191. *See id.* at 337–92 (Sotomayor, J., dissenting).

192. *See id.* at 380–81.

193. Walter Olson, *Further Thoughts on Schuetz v. Coalition*, CATO INST. (Apr. 24, 2014, 1:13 PM), <http://www.cato.org/blog/further-thoughts-schuetz-v-coalition> [https://perma.cc/39F3-H42N]; *see also* Ilya Somin, *Asian-Americans, Affirmative Action, and the “Political Restructuring” Doctrine: Does the Doctrine Work When There Are Minority Groups on Both Sides of the Issue?*, WASH. POST: VOLOKH CONSPIRACY (Apr. 22, 2014, 10:26 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/22/asian-americans-affirmative-action-and-the-political-restructuring-doctrine-does-the-doctrine-work-when-there-are-minority-groups-on-both-sides-of-the-issue/> [https://perma.cc/TEV4-4V2K].

as a racial group. Hispanic Americans (like Americans in general) can be descended from Europeans, indigenous people, Africans, Asians, or any combination of those.”<sup>194</sup> “‘Race matters’ is an odd rallying cry from a justice [like Justice Sotomayor] who for all intents and purposes treats Asian Americans as indistinct from whites.”<sup>195</sup>

*Fisher* returned to the Supreme Court in 2016, after the Fifth Circuit once again upheld UT’s racial preference program.<sup>196</sup> Justice Kennedy, writing for a 4–3 majority, accepted the district court’s finding that race was only a “factor of a factor of a factor” in the holistic-review calculus.<sup>197</sup> Oddly, Justice Kennedy also relied on plaintiffs’ failure to cite “evidence to show racial groups other than African-Americans and Hispanics are *excluded* from benefitting from UT’s consideration of race in admissions.”<sup>198</sup> This was a very strange reversal of the burden of proof in a case purporting to apply strict scrutiny.

Justice Alito, dissenting, argued that UT illegally discriminated against Asian-American applicants.<sup>199</sup> “[B]oth the favored and the disfavored groups,” Justice Alito continued, “are broad and consist of students from enormously diverse backgrounds.”<sup>200</sup> For example, the “crude” and “overly simplistic” racial category of Asian-American cannot possibly capture how “individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population” would contribute to diversity on a college campus.<sup>201</sup>

Justice Alito pointed out that Justice Kennedy, author of the majority opinion, had previously criticized reliance on broad, crude racial classifications in other contexts.<sup>202</sup> In the *Parents Involved* case, Justice Kennedy wrote that a school district may not “classify every student on the basis of race and . . . assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.”<sup>203</sup>

In *Metro Broadcasting v. F.C.C.*, a case involving racial preferences for broadcasting licenses, Justice Kennedy stated that “the very attempt to define with precision a beneficiary’s qualifying racial characteristics is repugnant to our constitutional ideals.”<sup>204</sup> Justice Kennedy added that if the government “is to make a serious effort to define racial classes by criteria

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194. David E. Bernstein, “Reverse Carolene Products,” *The End of the Second Reconstruction, and Other Thoughts on Schuette v. Coalition to Defend Affirmative Action*, 2013–2014 CATO SUP. CT. REV. 261, 273 (2014); see also Bernstein, *supra* note 189, at 224.

195. Bernstein, *supra* note 194.

196. *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 376 (2016).

197. *Id.* at 375 (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

198. *Id.* (emphasis omitted).

199. See *id.* at 411–13 (Alito, J., dissenting).

200. *Id.* at 413.

201. *Id.* at 413–14.

202. See *id.* at 413.

203. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

204. *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting)).



that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935.”<sup>205</sup>

VII. *STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE*

As we have seen, before *SFFA* the legality of the racial and ethnic classifications used for affirmative action preferences in higher education had received significant attention in lower courts but very limited attention from the Supreme Court. Justice Alito raised the issue in his dissent in *Fisher v. University of Texas*, but the issue was otherwise largely dormant.<sup>206</sup>

In the *SFFA* litigation, the plaintiffs did not focus attention on the issue, and indeed barely noted it in their Supreme Court brief.<sup>207</sup> Out of over one hundred amicus briefs filed before the Court, only the amicus brief of Professor David E. Bernstein discussed the issue in detail.<sup>208</sup> Nevertheless, as noted in the beginning of this Article,<sup>209</sup> Chief Justice Roberts’s opinion for the Court launched a frontal attack on the classification scheme used by Harvard and UNC. By extension, Chief Justice Roberts called into legal question the use of the same classifications in other areas of American life.

Using these crude classifications, Chief Justice Roberts wrote, “undermines, instead of promotes” the universities’ stated goal of having a diverse class.<sup>210</sup> Chief Justice Roberts pointed out that Harvard and UNC preferred a class with 15% Mexican-Americans over one with 10% Latinos from a mixture of national backgrounds.<sup>211</sup> Even though students in the latter class have a more diverse set of backgrounds, the former class would have been credited with having more diversity solely because it had more members of the “arbitrary or undefined” Hispanic classification.<sup>212</sup>

The Asian-American classification is overinclusive, Chief Justice Roberts added.<sup>213</sup> It combines students of South and East Asian heritage into one group.<sup>214</sup> Chief Justice Roberts recounted that during oral argument, UNC’s counsel stated that he did not know what box applicants of Middle Eastern descent should check.<sup>215</sup> This further undermined the notion that UNC was pursuing a coherent version of diversity.<sup>216</sup> Justice Thomas and,

205. *Id.* (quoting *Fullilove*, 448 U.S. at 534 n.5).

206. *See supra* Section VI.

207. *See* Brief for Petitioner, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2918946.

208. *See* Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181 (2023) (Nos. 20-1199, 21-707), 2022 WL 2918957.

209. *See supra* notes 7–11 and accompanying text.

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

211. *Id.*

212. *See id.* at 216.

213. *See id.*

214. *Id.*

215. *Id.*

216. *See id.* at 216–17.



in much more detail, Justice Gorsuch, also harshly criticized the racial classification scheme the defendants used.<sup>217</sup>

Justice Sotomayor, dissenting, attacked the majority for questioning classifications developed by the government and relied upon by American institutions.<sup>218</sup> While the majority argued that the classifications were not narrowly tailored to achieve diversity, Justice Sotomayor suggested that the Court should have deferred to the university, given the classifications' widespread use in the United States.<sup>219</sup>

### VIII. CONCLUSION

One does not need to be a weatherman to know which way the wind is blowing. Including Justice Alito's dissent in *Fisher* and the opinions of Justices Gorsuch, Roberts, and Thomas in *SFFA*, four Justices have written opinions expressing hostility to using the Directive 15 classifications for affirmative action purposes. The other two "conservative" Justices have each joined at least one of these opinions.

The underlying test for using racial and ethnic preferences to prefer members of certain groups is that the entity using them must first show it is pursuing a compelling government interest. Next, it must show that the preferences are narrowly tailored to serve that interest. Until *SFFA*, the narrow tailoring prong was satisfied if there was no feasible race-neutral alternative. The Supreme Court majority had generally just presumed that the underlying racial classifications themselves were sufficiently narrowly tailored. After *SFFA*, that presumption no longer exists.

Justice Sotomayor exaggerated when she suggested in her *SFFA* dissent that the majority opinion may mean that government agencies can no longer use the familiar classifications for data collection and analysis purposes.<sup>220</sup> If, however, government agencies and universities choose to favor members of certain racial or ethnic groups, they must meet new, onerous requirements. The relevant entities are going to need to show a much closer match between the classifications they utilize and the "compelling" interests they are pursuing than they needed to before *SFFA*. Broad classifications like "Asian-American" or "Hispanic" combine people of wildly varied physiognomies, national origins, and cultural backgrounds. It is difficult to see how using such classifications will pass legal muster in future affirmative action and related litigation.

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217. See *id.* at 232, 253–56 (Thomas, J., concurring); *id.* at 290–94 (Gorsuch, J., concurring).

218. See *id.* at 318–19, 367 (Sotomayor, J., dissenting).

219. See *id.* at 367–68.

220. See *id.* at 367.