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## Race Preferences, Diversity, and *Students for Fair Admissions: A New Day, a New Clarity*

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# RACE PREFERENCES, DIVERSITY, AND STUDENTS FOR FAIR ADMISSIONS: A NEW DAY, A NEW CLARITY

Maimon Schwarzschild\* & Gail Heriot\*\*

## ABSTRACT

*This Article traces the legal path to the Supreme Court’s decision in Students for Fair Admissions v. Harvard and the University of North Carolina (2023), from the famous Bakke case in 1978 to the Grutter decision twenty-five years later. It reviews the shifting fortunes of the “diversity” rationale for racial preferences in higher education and assesses the widening—rather than narrowing—gulf between the Court’s majority and the dissenting Justices on the issue of racial preferences.*

*After half a century of closely contested Supreme Court decisions, some of them seeming to point in opposing directions, others relying on fragmented pluralities among the Justices, the Court, by a 6–3 majority, has now set out a clear resolution. The Court struck down the Harvard and UNC admissions policies, which like those at many selective colleges and universities, applied different standards—often dramatically different standards—depending on the race or ethnicity of the applicant. Racial preferences by government or government-funded bodies are now under a strong presumption of illegality, notwithstanding claims that they are benign. Such preferences in higher education—and implicitly in other areas—will be very difficult or impossible to defend from here on in light of the Court’s decision.*

*However sharp the disagreement between the majority and dissenting Justices, perhaps all sides in the country at large have reason to be grateful for the clarity of the Supreme Court’s decision. It is to be hoped that the decision will lead to better policies in higher education and elsewhere, and to less division on the basis of race and identity in American life.*

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## I. INTRODUCTION

As the Supreme Court’s 2022 term drew to a close in June 2023, the Court issued its decision in the higher-education affirmative action admissions cases, *Students for Fair Admissions against both Harvard and the University of North Carolina (UNC)*.<sup>1</sup> Harvard, a private university that receives federal funds, is subject to the prohibition of discrimination by race or national origin under Title VI of the Civil Rights Act of 1964 (Title VI); UNC is a state university and, as such, is bound by the Fourteenth Amendment to the Constitution as well as by Title VI.<sup>2</sup> The majority of the Court proceeded on the basis that the requirements of Title VI and the Fourteenth Amendment are the same in a discrimination case.<sup>3</sup>

Both Harvard and UNC incorporated racial and ethnic preferences in their admissions decisions. Harvard “[t]ook] an applicant’s race into account” at virtually every stage of its admissions process.<sup>4</sup> Similarly, UNC granted “significant” admissions preferences based on race and ethnic origin.<sup>5</sup> In other words, like many selective colleges and universities, Harvard and UNC applied different standards—often dramatically different standards—to admissions applicants depending on the race and ethnicity of the applicant.

By a 6–3 majority, the Court held that such racially discriminatory affirmative action admissions, by public or publicly funded institutions, are unconstitutional or illegal.<sup>6</sup> The Supreme Court’s sharply divided encounters with race-preferential affirmative action go back at least to the famous *Bakke* case, decided in 1978.<sup>7</sup> In that case, four Justices voted that such racial preferences were illegally discriminatory; four voted that they were legal under limited circumstances to remedy the effects of past societal discrimination; and Justice Lewis Powell, writing for himself alone, held that “diversity,” for purposes of improving a college or university’s academic experience, might sometimes justify these preferences, although other possible justifications, such as trying to remedy past societal discrimination,

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

2. See 42 U.S.C. § 2000(d) *et seq.*; U.S. CONST. amend. XIV, § 1.

3. See *SFFA*, 600 U.S. at 198; *but see id.* at 310 (Gorsuch, J., concurring) (“Title VI bears independent force beyond the Equal Protection Clause.”).

4. See *id.* at 194–95.

5. See *id.* at 195–97.

6. *Id.* at 230.

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

would not.<sup>8</sup> Justice Powell held, at least in principle, to the well-established “strict scrutiny” standard for racial discrimination, which requires that any such discrimination must be “narrowly tailored” to a “compelling state interest” to be constitutional.<sup>9</sup> In any other context, it is practically always unconstitutional for the government to treat people differently on the basis of their race.

Twenty-five years later, in the 2003 *Grutter* decision, the Supreme Court adopted Justice Powell’s position in *Bakke*, albeit by a bare 5–4 majority, and upheld “race-conscious” admissions for purposes of “diversity,” explicitly deferring to the judgment of the University of Michigan Law School.<sup>10</sup> Nonetheless, the five Justices in the majority recognized that race-based government action is “dangerous,” no matter whom it purports to help.<sup>11</sup> It would therefore have to survive “strict scrutiny” to pass muster.<sup>12</sup> The decision emphasized that race-based admissions must have an end point in time, “expect[ing]” that they would “no longer be necessary” after a further twenty-five years.<sup>13</sup>

In June 2023, Chief Justice Roberts delivered the majority opinion in *SFFA*.<sup>14</sup> The majority decision concluded that race-based admissions preferences like those at Harvard and UNC fail strict scrutiny, even by the standards set out in the *Grutter* decision.<sup>15</sup> The usual justifications for race-based differential standards are too generalized and amorphous for the courts to assess them, or even to know when they have been achieved, hence precluding effective “strict scrutiny.”<sup>16</sup> Moreover, the race-based admissions systems at issue violated the twin constitutional requirements that they never operate as a “negative” and that they must not rely on racial stereotypes.<sup>17</sup> There are a limited number of places at selective universities, and for every applicant favored because of race, another—like the Asian-American applicants to Harvard—must be disfavored.<sup>18</sup> And using race as a proxy for human or intellectual “diversity” relies on racial stereotypes—the idea that people “think alike” because of their race.<sup>19</sup> Finally, there is no end in sight for “diversity” discrimination, despite the insistence, even by the bare majority of Justices who condoned it in *Grutter*, that it must not go on forever.<sup>20</sup>

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8. *See id.* at 269–72.

9. *See id.* at 289–91.

10. *Grutter v. Bollinger*, 539 U.S. 306, 328, 343–44 (2003).

11. *See id.* at 342.

12. *Id.* at 327.

13. *Id.* at 343.

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

15. *Id.* at 230.

16. *Id.* at 214.

17. *Id.* at 218–19.

18. *Id.* (“College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”).

19. *See id.* at 219–20.

20. *See id.* at 225.

Justice Thomas filed an extensive concurring opinion, fully endorsing Chief Justice Roberts's majority opinion, but adding a review of the original intent and meaning of the Fourteenth Amendment, namely, to forbid "all legal distinctions based on race or color."<sup>21</sup> Justice Thomas emphasized that the constitutional "strict scrutiny" standard for race discrimination is meant to be rigorous.<sup>22</sup> Hence, it would be anomalous to "defer" to the justifications asserted by parties, like Harvard or UNC, that discriminate in their admissions practices.<sup>23</sup> Justice Thomas also noted the strong evidence that racial preferences cause harm—even to their putative beneficiaries—by mismatching minority students to schools where their qualifications are well below average.<sup>24</sup> These students might have done well at schools where their qualifications were closer to the middle of the class, whereas, because of race-conscious admission, they are liable to struggle or do poorly where most of their classmates are better prepared academically and where the teaching is pitched accordingly. Justice Thomas concluded that widespread racial preferences tend to create "a quota- and caste-ridden society steeped in race-based discrimination" and the Court rightly, "for all intents and purposes," overruled *Grutter* and the Court's narrowly divided past endorsements of such preferences.<sup>25</sup>

Justice Gorsuch also filed a substantial concurring opinion, in which Justice Thomas joined, emphasizing that Title VI plainly requires that "a recipient of federal funds may never discriminate based on race, color, or national origin—period."<sup>26</sup> Whereas the Equal Protection Clause of the Fourteenth Amendment addresses all manner of government-drawn distinctions, so that the Court applies different degrees of judicial scrutiny for different kinds of classifications—strict scrutiny for racial discrimination, for example, but rational-basis review for more prosaic classifications—Title VI targets only the three prohibited forms of discrimination and prohibits them outright.<sup>27</sup> Justice Gorsuch fully joined the majority, however, agreeing that the Equal Protection Clause affords no "exceptionalism" for university admissions and that admissions practices like those of Harvard and UNC, driven "even in part" by race, cannot survive strict scrutiny under the Fourteenth Amendment.<sup>28</sup>

Justices Sotomayor and Jackson filed dissents, which Justice Kagan joined, rejecting essentially all the premises and conclusions of the majority and concurring opinions.<sup>29</sup>

It is noteworthy that not only was Justice Powell's "diversity" rationale in *Bakke* rejected in the majority and concurring opinions, but this rationale is barely mentioned in Justice Sotomayor's dissent among many other

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21. *Id.* at 233 (Thomas, J., concurring).

22. *See id.* at 256–58.

23. *Id.*

24. *Id.* at 269–70.

25. *Id.* at 260, 287.

26. *Id.* at 290 (Gorsuch, J., concurring).

27. *See id.* at 289.

28. *See id.* at 307–09.

29. *See id.* at 318–84 (Sotomayor, J., dissenting); *see id.* at 384–411 (Jackson, J., dissenting).

proffered reasons for racial preferences, and scarcely argued for at all.<sup>30</sup> It receives at most a single glancing mention in Justice Jackson's dissent.<sup>31</sup> The idea that there is a compelling state interest in racial preferences to enhance academic quality in higher education—much less that this is the only constitutionally acceptable justification for such preferences—seems to have died a natural death, more or less unanimously on the Supreme Court. Given the degree to which Justice Powell's "diversity" idea has become so commonplace and influential in American institutions and culture generally, to the point of the mantra-like prominence of the word, it is extraordinary that the idea has nearly disappeared from the Supreme Court's jurisprudence on all sides of the controversy.

It is also noteworthy how much less common ground there is in *SFFA* between the majority and concurrences on the one hand, and the dissents on the other, in comparison to the conflicting opinions in the 1978 *Bakke* and 2003 *Grutter* cases. The Justices' opinions supporting the limited use of racial preferences in *Bakke* and *Grutter* extensively acknowledged the drawbacks and dangers of such preferences and fully credited that strict, or at least significantly-more-than-minimal, scrutiny was appropriate when confronting racial preferences.<sup>32</sup> There are virtually no such concessions in Justices Sotomayor and Jackson's dissenting opinions in *SFFA*.

## II. THE DEATH OR TRANSFIGURATION OF DIVERSITY

Racial preferences in admissions took hold at many selective universities and colleges in the 1960s, but their legality was not reviewed in the Supreme Court until the *Bakke* decision in 1978.<sup>33</sup> Several years earlier, in 1974, the Supreme Court had dismissed a challenge as moot in *DeFunis v. Odegaard*;<sup>34</sup> Justice William O. Douglas, a longtime liberal stalwart on the Court, dissented from the dismissal and implied that he might have ruled against racial preferences.<sup>35</sup> In the *Bakke* case, the Medical School of the University of California at Davis (UC Davis) reserved 16 out of 100 places in its entering class under a special admissions program for "Black," "Chicano," "Asian," and "American Indian" applicants.<sup>36</sup> Allan Bakke, a White applicant, was rejected although minority applicants were admitted with

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30. See, e.g., *id.* at 214–15; *id.* at 259–60 (Thomas, J., concurring); *id.* at 360–64 (Sotomayor, J., dissenting).

31. See *id.* at 411 (Jackson, J., dissenting).

32. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290, 298–99 (1978) (Powell, J., announcing the judgment of the Court); *id.* at 361–62 (Brennan, J., concurring in the judgment in part and dissenting in part); *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003).

33. See Genevieve Bonadies Torres, *Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds*, AM. BAR ASS'N (Jan. 6, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/black-to-the-future-part-ii/affirmative-action-in-higher-education—relevance-for-today-s-ra/?login](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education—relevance-for-today-s-ra/?login) [<https://perma.cc/878N-FCZD>].

34. *DeFunis v. Odegaard*, 416 U.S. 312, 319–20 (1974).

35. See *id.* at 344 (Douglas, J., dissenting) ("So far as race is concerned, any state-sponsored preference to one race over another . . . is in my view 'invidious' and violative of the Equal Protection Clause.").

36. *Bakke*, 438 U.S. at 274 (Powell, J., announcing the judgment of the Court).

significantly lower grade averages and test scores than Bakke's.<sup>37</sup> The California Supreme Court held that the medical school's special admissions program violated the Equal Protection Clause of the Fourteenth Amendment and ordered Bakke admitted at UC Davis.<sup>38</sup> The U.S. Supreme Court granted certiorari.<sup>39</sup>

Justice Lewis Powell announced the judgment of the Court, although he wrote for himself alone.<sup>40</sup> Four Justices, in an opinion by Justice Stevens, held that UC Davis's special admissions program violated Title VI by excluding Bakke from the medical school because of his race.<sup>41</sup> Four Justices, in an opinion by Justice Brennan, held that UC Davis's purpose of remedying the effects of past societal discrimination was important enough to justify the race-based admissions policy.<sup>42</sup> Justice Powell cast the decisive vote, agreeing with Justice Stevens's bloc that Bakke was entitled to an injunction, admitting him to the medical school, and concluding that UC Davis's admissions program violated the Fourteenth Amendment.<sup>43</sup>

But Justice Powell arrived at that conclusion in his own way. He considered four possible justifications for racial preferences: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession"; (2) "countering the effects of societal discrimination"; (3) "increasing the number of physicians who will practice in communities currently underserved"; and (4) "obtaining the educational benefits that flow from an ethnically diverse student body."<sup>44</sup> Justice Powell rejected three of them outright as insufficient to satisfy the constitutional requirement that any governmental discrimination by race must be precisely tailored to serve a compelling governmental interest.<sup>45</sup> Seeking proportional representation is "facially invalid . . . discrimination for its own sake" forbidden by the Constitution.<sup>46</sup> Improving services to underserved communities would require proof, and the record contained "virtually no evidence" that UC Davis "must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens."<sup>47</sup> As for racial preferences to remedy widespread past discrimination, "an amorphous concept of injury that may be ageless in its reach into the past," it would be unconstitutional for the government to prefer "persons perceived as members of relatively victimized groups at the expense of other innocent individuals" except as a remedy upon formal findings of a specific violation of the law.<sup>48</sup>

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37. *Id.* at 277.

38. *Id.* at 279–81.

39. *Id.* at 281.

40. *Id.* at 269.

41. *Id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part).

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

43. *Id.* at 271 (Powell, J., announcing the judgment of the Court).

44. *Id.* at 306.

45. *Id.* at 307–11.

46. *Id.* at 307.

47. *Id.* at 310–11.

48. *Id.* at 307.

The fourth justification, on the other hand—“the attainment of a diverse student body”—might be a compelling interest to promote academic quality through a “robust exchange of ideas.”<sup>49</sup> However, reserving a specific number of places for particular racial or ethnic groups, as UC Davis had done, was “seriously flawed” since there are many other ways that applicants might be diverse: focusing “solely on ethnic diversity[] would hinder rather than further” the goal of genuine diversity.<sup>50</sup> In other words, a racial quota, like the one before the Court in *Bakke*, is not narrowly tailored to the compelling academic interest. Hence, Justice Powell, and the Supreme Court by his deciding vote, gave judgment for Allan Bakke and against the UC Davis Medical School and its admissions program’s racial preferences.<sup>51</sup>

That ended the case for UC Davis, but it did not end it for colleges and universities more generally. In what amounted to an extended *obiter dictum*, Justice Powell suggested that when Harvard College “take[s] race into account,” so that race or ethnicity may be a “plus” for an admissions applicant, this is a “flexible” system which considers “all pertinent elements” and qualifications of each applicant and “treats each applicant as an individual.”<sup>52</sup> The applicant who loses out, because the place goes to another by virtue of a racial “plus,” would then “have no basis to complain of unequal treatment under the Fourteenth Amendment.”<sup>53</sup> Justice Powell was enamored enough of the Harvard way of “taking race into account” that he added an extended encomium to Harvard’s admissions program (drawn from an amicus brief by Harvard and other universities in behalf of UC Davis) as an appendix to his opinion in *Bakke*.<sup>54</sup>

It did not take long for it to be questioned whether there was anything more than a cosmetic difference between the Harvard program and the UC Davis program. Justice Brennan’s bloc in *Bakke* took up the point immediately: “The ‘Harvard’ program” too, “employs a racial criterion,” and although Harvard “does not . . . make public the extent of the preference,” whereas UC Davis sets aside an openly stated number, “there is no basis for preferring a particular preference program [i.e., Harvard’s] simply because . . . it proceeds in a manner that is not immediately apparent to the public.”<sup>55</sup>

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49. *Id.* at 311, 313.

50. *Id.* at 315.

51. *Id.* at 320.

52. *See id.* at 316–18.

53. *Id.* at 318.

54. *See id.* at 321–24.

55. *Id.* at 379 (Brennan, J., concurring in the judgment in part and dissenting in part). Justice Powell replied to the effect that a court should not “assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system.” *Id.* at 318 (Powell, J., announcing the judgment of the Court).



## A. THE ORIGINS OF THE HARVARD WAY

Justice Powell, moreover, was presumably unaware of the unwholesome origins of Harvard's holistic or "flexible" admissions policy.<sup>56</sup> In the early twentieth century, Harvard and other elite universities and liberal arts colleges had offered admission to applicants who passed an academic entrance examination.<sup>57</sup> The decades just before and after the turn of the century were an era of large-scale immigration, including substantial numbers of impoverished Jewish immigrants from Eastern Europe.<sup>58</sup> Many of these immigrant families put great emphasis on education, and children of these families took and passed the college entrance exams. Therefore, while Jewish students comprised only 7% of Harvard's freshmen class in 1900, they were 21% of the class in 1922, and about 27% in 1925.<sup>59</sup>

In 1922, Harvard's president, A. Lawrence Lowell, made it known that he favored an explicit limitation of about 15% on Jewish enrollment.<sup>60</sup> Lowell's initial idea was to impose a straightforward restrictive quota. But Lowell anticipated, correctly as it turned out, that,

[T]he Faculty, and probably the Governing Boards, would prefer to make a rule whose motive was less obvious on its face, by giving to the Committee on Admissions authority to refuse admittance to persons who possessed qualities described with more or less distinctness and believed to be characteristic of Jews.<sup>61</sup>

Lowell nonetheless insisted that, "[T]he Faculty should understand perfectly well what they are doing, and that any vote passed with the intent of limiting the number of Jews should not be supposed by anyone to be passed as a measurement of character really applicable to Jews and Gentiles alike."<sup>62</sup>

In 1926, after considerable wrangling, the Harvard faculty voted to rely less on the academic admissions exam, to give the Admissions Committee more discretion, and to lay greater emphasis on selection based on "character" and applicants' alleged "usefulness in the future as a result of a Harvard education."<sup>63</sup> From then on, annual Jewish admissions fluctuated between 10% and 16% at Harvard through the 1930s and beyond.<sup>64</sup> Thus was born Harvard's "holistic" admissions policy.

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56. See generally JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (2005) (giving a detailed and well-documented history of these universities' admissions policies in the twentieth century); MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970* (1979).

57. See generally SYNNOTT, *supra* note 56, at 5-8.

58. See generally *id.* at 13-20.

59. See *id.* at 19-20. It was much the same at Yale, where 2% of upperclassmen were Jewish in 1901, and more than 13% in the Yale Class of 1925. *Id.* at 19. At Columbia, the proportion of Jewish students grew to 40% or more until Columbia imposed a quota in 1922. See *id.* at 18-19.

60. KARABEL, *supra* note 56, at 89.

61. *Id.*

62. *Id.*

63. *Id.* at 108.

64. See *id.* at 172-73.

Similar subjective admissions standards were adopted by other selective universities and colleges at about the same time, with the same goal of reducing Jewish enrollment, although in most cases with less publicity and less public controversy than at Harvard.<sup>65</sup>

The barriers against Jews began to come down in the decades after the Second World War, but the idea that there should be a variety of criteria for admissions with inevitable discretion for admissions officers in weighing and applying these criteria was now entrenched and institutionalized at America's selective colleges and universities.<sup>66</sup>

Holistic admissions are now strongly associated with “diversity” admissions. But discretionary holistic admissions with less reliance on academic criteria serve other priorities as well. Recruiting athletes is one such priority, in addition to preferences for the children of faculty and staff, “legacies” (the children of alumni), and actual or potential donors.<sup>67</sup> Unsurprisingly, universities and colleges are reluctant to be too explicit about these preferences or about the weight attached to them. Holistic admissions are a convenient way to veil them and maintain flexibility about how much favoritism to grant to any particular applicant. This is precisely the lack of transparency that Justice Brennan’s bloc noted about admissions policies like Harvard’s in their rejoinder to Justice Powell in *Bakke*.<sup>68</sup>

#### B. FURTHER DRAWBACKS TO JUSTICE POWELL’S DIVERSITY RATIONALE

The “diversity” rationale for racial preferences, at least as put forth by Justice Powell in *Bakke*, has other drawbacks as well for colleges and universities and for institutions outside the world of higher education that might be anxious to grant such preferences.

In suggesting that a “diverse student body” might be “a constitutionally permissible goal for an institution of higher education,” Justice Powell emphasized that this was for reasons of “[a]cademic freedom, [which] though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>69</sup> The idea is that racial preferences would be decided upon for academic reasons, which implies that the initiative must come from the academic faculty—the holders, first and foremost, of academic freedom—or at least from university officials with direct academic responsibility. In reality, the pressures to grant racial preference often come from

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65. See, e.g., *id.* at 207 (“Yale had moved much more quietly than Harvard to restrict the number of Jewish students . . .”).

66. See generally *id.* at 210–11.

67. See generally Michael C. Dorf, *Donor, Legacy, and Athlete Preferences in Higher Education Admissions: Art Museum and Squash Edition*, DORF ON L. (Nov. 1, 2022), <https://www.dorfonlaw.org/2022/11/donor-legacy-and-athlete-preferences-in.html> [https://perma.cc/V934-ZZXJ].

68. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 379 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

69. *Id.* at 311–12 (Powell, J., announcing the judgment of the Court).

outside the university or college altogether, from accrediting agencies, which are not purely academic bodies; legislators or other political figures; or bureaucracies on campus, such as DEI offices, whose role is not academic either by way of teaching or research.<sup>70</sup> If racial preferences satisfy a “compelling interest” only if they are adopted in a true exercise of academic freedom, then many preferential policies at colleges and universities would be difficult or impossible to justify.

It is increasingly implausible, moreover, that colleges and universities have adopted racial admissions preferences out of a broad commitment to diversity as a basis for an academically fruitful “robust exchange of ideas.”<sup>71</sup> It is widely recognized that the faculties of elite and semi-elite colleges and universities are startlingly—in many cases overwhelmingly—one-sided ideologically, which suggests that ensuring a diversity of points of view has hardly been a priority for these institutions. At Harvard, for example, the Harvard Crimson published a survey in 2018 of the political leanings of Harvard faculty. The survey found that 83% of faculty respondents identified themselves as “liberal” or “very liberal,” 15% identified themselves as “moderate,” and only 2% selected “conservative” or “very conservative.”<sup>72</sup> Similarly, a 2015 analysis by the *Harvard Crimson* showed that 96% of political donations by Harvard faculty and “affiliates” went to the Democratic Party.<sup>73</sup> A broader study of party registration of faculty at 116 selective (or “flagship”) American colleges, published in 2021, revealed an overall 8.5-to-1 ratio of Democratic to Republican registration.<sup>74</sup> The ratios were found to be still more skewed for humanities faculty: ranging from 8.2-to-1 in political science, 17.4-to-1 in history, 70-to-1 in religion, and no registered Republicans at all in anthropology and “communications.”<sup>75</sup> Many of these ratios seem reminiscent of the “election returns” in the Soviet Union or East Germany in the heyday of those communist regimes. They surely do not suggest that colleges and universities—virtually all of them committed to racial and identity-group diversity—are fostering any diversity of political or ideological viewpoints in their faculties’ teaching

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70. See Gail Heriot & Carissa Mulder, *The Sausage Factory*, in A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION 167, 188–97 (Gail Heriot & Maimon Schwarzschild eds., 2021) (detailing how university and college accreditation agencies press for racial and ethnic preferences).

71. See *Bakke*, 438 U.S. at 313 (Powell, J., announcing the judgment of the Court).

72. Lucy Wang, Luke Xu, Brian Yu & Phelan Yu, *Eighty-Eight Percent of Surveyed Harvard Faculty Believe Trump Has Done a “Very Poor” Job as President*, HARV. CRIMSON (May 3, 2018, 1:45 PM), <https://www.thecrimson.com/article/2018/5/2/faculty-survey-part-2> [<https://perma.cc/7TEU-PRDY>] (reporting on the political self-identification of Harvard faculty); see also Meimei Xu, *More Than 80 Percent of Surveyed Harvard Faculty Identify as Liberal*, HARV. CRIMSON (July 13, 2022), <https://www.thecrimson.com/article/2022/7/13/faculty-survey-political-leaning> [<https://perma.cc/4RP4-LB9Q>].

73. Wang, Xu, Yu & Yu, *supra* note 72.

74. Mitchell Langbert & Sean Stevens, *Partisan Registration of Faculty in Flagship Colleges*, 47 STUD. HIGHER EDUC. 1750, 1753 (2022); see also Francesca Block, *Exodus of the Wrongthinkers from American Universities*, FREE PRESS (Oct. 12, 2023), <https://www.thefp.com/p/exodus-of-wrongthinker-university-professors> [<https://perma.cc/SR6W-HQH9>] (reporting on conservative-leaning faculty “forced to leave the profession”).

75. Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty*, 31 ACAD. QUEST 186, 190 (2018).

and research, whose high quality, putatively enhanced by “robust debate,” is supposed to be the goal of academic freedom.

If ideological diversity is scarcely a priority for many elite or semi-elite colleges, social class diversity within the student body—which might also be thought to enhance diversity of viewpoint—likewise appears to be less than a high priority. At Harvard, a statistical review of recent undergraduate admissions reveals that more than 43% of White applicants admitted to Harvard were either recruited athletes, children of alumni, children of financial donors to Harvard, or children of faculty or staff.<sup>76</sup> Families of Harvard alumni, donors, and faculty hardly represent a broad array of social class backgrounds.<sup>77</sup> It has been estimated that in the Ivy League, the University of Chicago, Stanford, MIT, and Duke, as a group, “more students come from families in the top 1 percent of the income distribution than from the entire bottom half.”<sup>78</sup> As one recent author puts it, “[a]t elite colleges, rich students utterly dominate not just poor students but also students from the broad middle class.”<sup>79</sup> If ideological and social class diversity are so vividly not a priority for these institutions, it would seem difficult to claim with a straight face that they treat diversity as a compelling interest academically.

Finally, Justice Powell’s rationale for racial preferences for reasons of academic freedom provides no justification whatsoever for such preferences outside the academic context. Yet “diversity” preferences are implicit in many government programs that foster or require “affirmative action” far afield from higher education, and they are a phenomenon in many private corporations, institutions, law firms, and other professional practices, which are subject to the anti-discrimination provisions of the civil rights laws or receive government contracts or financing.<sup>80</sup>

Still, Justice Powell’s dictum about diversity, or at least the word “diversity,” which his *Bakke* opinion launched as a rationale for “taking race into account,” has become extraordinarily widespread in American life and culture. As one critic writes, “diversity”

casts Broadway plays, doles out highway improvement contracts,  
and hires football coaches. Ministers and priests invoke its godlike

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76. See Allysia Finley, *Harvard Discriminates Against Middle-Class Kids*, WALL ST. J. (July 9, 2023, 11:56 AM), <https://www.wsj.com/articles/harvard-discriminates-against-middle-class-kids-legacy-admissions-court-85cf4503> [<https://perma.cc/H9H4-Y8RC>]; see also generally Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard* (Nat’l Bureau of Econ. Rsch., Working Paper No. 26316, 2019).

77. See Finley, *supra* note 76.

78. DANIEL MARKOVITS, *THE MERITOCRACY TRAP* 137 (2019); see also Daniela Blei, *How College Admissions Hurt Intergenerational Mobility*, 18 STAN. SOC. INNOVATION REV. 59, 59 (2020).

79. MARKOVITS, *supra* note 78, at 136.

80. See, e.g., U.S. COMM’N ON CIV. RTS., *FEDERAL PROCUREMENT AFTER ADARAND* 15 (Comm. Print 2005) (finding that many federal contracting programs applied race-conscious criteria: “Members of designated minority groups continue to be presumed economically and socially disadvantaged.”); Subash S. Iyer, *Resolving Constitutional Uncertainty in Affirmative Action Through Constrained Constitutional Experimentation*, 87 N.Y.U. L. REV. 1060, 1062 n.6 (2012) (listing state race-conscious contracting programs).

blessings. Politicians court it as eagerly as they do millionaire campaign contributors. The books we read, the movies we watch, and even the food we eat are weighed and sifted on *diversity* scales.<sup>81</sup>

Yet in the Supreme Court, Justice Powell's actual diversity rationale for racial preferences in higher education has essentially lapsed, not only in the majority and concurring opinions in *SFFA*, but in the vehemently dissenting opinions as well.

### C. THE DEMISE OF DIVERSITY AS AN ACADEMICALLY COMPELLING INTEREST

Given the Supreme Court's holding that racial preferences like those at Harvard and UNC are unconstitutional and illegal, it is unsurprising that the majority and concurring opinions reject the claim that such preferences, in aid of racial and ethnic diversity, are justified by compelling academic considerations. The majority noted, "We have long held that universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'"<sup>82</sup> This, says the Court, is racial stereotyping:

The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot . . ."

. . . The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.<sup>83</sup>

Justice Gorsuch's concurrence adds that the stereotypes are incoherent because the standard diversity categories, such as "Asian" and "Hispanic," and for that matter "Black" and "White," lump widely divergent ethnicities and cultures together.<sup>84</sup> The "Asian" category includes East Asians and South Asians who together make up some 60% of the world's population.<sup>85</sup> The "White" category includes anyone with ancestry from "Europe, Asia west of India, and North Africa," and it "embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family."<sup>86</sup>

Justice Thomas writes, "It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone

81. Peter Wood, *Diversity's Descent, in* A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION 87, 87 (Gail Heriot & Maimon Schwarzschild eds., 2021).

82. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (SFFA), 600 U.S. 181, 219 (2023) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

83. *Id.* at 220 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J., announcing the judgment of the Court)).

84. *See id.* at 291–93 (Gorsuch, J., concurring).

85. *Id.* at 291–92.

86. *Id.* at 292.

students' reasoning skills. But it is not clear how diversity with respect to race, *qua* race, furthers this goal.”<sup>87</sup> Justice Thomas added,

With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their *amici* can explain that critical link.

....

... If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.<sup>88</sup>

Even in the dissenting opinions, Justice Powell's idea that racial preferences can only be justified by academic considerations is far from prominent. In Justice Sotomayor's lengthy dissent, that justification receives sustained reiteration only briefly.<sup>89</sup> Justice Sotomayor's dissent mentions the word “diversity” frequently throughout, but otherwise almost always either in a citation to briefs for the universities or their *amici*, or to suggest broader social—rather than specifically educational—virtues to racial diversity.<sup>90</sup> In Justice Jackson's dissent, there is a single brief mention of the idea that academic learning is compellingly enhanced by racial diversity.<sup>91</sup> It is fair to say that the predominant themes of the dissenting opinions are that America has a deep, shameful, and lasting history of racial discrimination and that racial preferences are a necessary and appropriate means to achieve racial justice in America.<sup>92</sup> The idea that preferences are needed for academic reasons, in the interest of academic quality, fades almost to the vanishing point in the dissenting opinions. Justice Powell's position that academic concerns are the *only* lawful justification for racial preferences—that they are unconstitutional as a remedy for past societal discrimination—is implicitly, but thoroughly, rejected by the dissenters.

Perhaps the sincerest argument for preferential affirmative action was always the claim that it counteracts racial inequality and advances racial integration. Justice Thomas, concurring in *SFFA*, wrote that “it has long been apparent that ‘diversity [was] merely the current rationale of convenience’ to support racially discriminatory admissions programs.”<sup>93</sup> The decline of the specifically academic justification—or pretext—for racial preference brings to the fore the questions that have been implicit, or ought to have been implicit, all along: namely, whether preferential affirmative

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87. *Id.* at 254 (Thomas, J., concurring).

88. *Id.* at 253–54.

89. *Id.* at 331–33 (Sotomayor, J., dissenting).

90. *See id.* at 259 (Thomas, J., concurring) (noting the dissenting opinions' broad invocations of diversity, beyond the scope of specifically academic interests).

91. *See id.* at 410 (Jackson, J., dissenting).

92. The dissenting opinions justify preferences with reference to Blacks almost exclusively, *see, e.g., id.* at 319–26, although ethnic preferences for “Hispanics” are widespread in higher education and beyond.

93. *Id.* at 258 (Thomas, J., concurring) (alteration in original) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting)).

action is a just way toward racial equality and integration and whether in fact it leads to those goals at all. Disagreement about those questions is perhaps sharper, on the Supreme Court and in the country, than it has been in the past. Yet more is known today about these questions than might readily have been understood when race-preferential policies got under way more than half a century ago.<sup>94</sup>

### III. THE DANGERS OF "BENIGN" DISCRIMINATION: THEN AND NOW

In the Supreme Court's earlier encounters with race-preferential affirmative action, important drawbacks and dangers of racial preferences were acknowledged even by Justices prepared to accept them for some purposes or under some circumstances.

In the *Bakke* case, for example, Justice Brennan, writing for the bloc of four Justices who would have ruled that "past racial prejudice" justifies some "race-conscious programs,"<sup>95</sup> nonetheless insisted that any such program must receive "strict and searching"<sup>96</sup> judicial review for some of the very reasons underlying opposition to race preferences:

First, race . . . 'too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.' . . . [T]he line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear . . . . State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.

Second, race . . . is an immutable characteristic which its possessors are powerless to escape or set aside . . . . [Hence] our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing" and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual.<sup>97</sup>

Moreover, it may well be "that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination."<sup>98</sup> Hence,

[I]t is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable

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94. See generally Heriot & Mulder, *supra* note 70.

95. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324–25 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

96. *Id.* at 362.

97. *Id.* at 360–61 (internal citations omitted).

98. *Id.* at 361 (quoting *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 174 (1977) (Brennan, concurring)).

characteristics. Thus, [there can be no waiving of] the personal rights of individuals under the Fourteenth Amendment.

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification . . . . [A]ny statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.<sup>99</sup>

Justice Powell, whose fifth vote decided the *Bakke* case, insisted that equal protection applies equally to all, White and Black alike;<sup>100</sup> helping “victims of societal discrimination” does not justify favoring some at the expense of others “who bear no responsibility for whatever harm the beneficiaries . . . are thought to have suffered”;<sup>101</sup> and “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”<sup>102</sup>

Twenty-five years after *Bakke*, in *Grutter v. Bollinger*, a 5–4 majority of the Supreme Court endorsed Justice Powell’s suggestion that the “educational benefits” of diversity can be a compelling interest, sufficient to justify “narrowly tailored” racial preferences in admitting students to public universities.<sup>103</sup> However, the majority reiterated that racial classifications must be subject to strict scrutiny, a “searching judicial inquiry,” to ensure, among other things, that any preference is not motivated by “simple racial politics” and that the government is “pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>104</sup>

The majority added, “We acknowledge that ‘there are serious problems of justice connected with the idea of preference itself.’ Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group.”<sup>105</sup> The majority in *Grutter* therefore stipulated,

Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.

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

100. *See id.* at 289–90 (Powell, J., announcing the judgment of the Court).

101. *Id.* at 310.

102. *Id.* at 291.

103. *Grutter v. Bollinger*, 539 U.S. 306, 325–44 (2003).

104. *Id.* at 326 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

105. *Id.* at 341 (quoting *Bakke*, 438 U.S. at 298 (Powell, J., announcing the judgment of the Court)).



... We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.<sup>106</sup>

By contrast, Justice Sotomayor's and Justice Jackson's dissenting opinions in *SFFA* express no reservations about racial preferences, in the academic context or beyond. The overwhelming theme of the dissents is that the history of discrimination in America and the allegedly pervasive and continuing effects of that discrimination justify and require racial preferences beyond admissions to selective colleges and universities. Justice Jackson writes,

[T]he Court's own missteps are now both eternally memorialized and excruciatingly plain. For one thing—based, apparently, on nothing more than Justice Powell's initial say so—[the Court] drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court's own [historical] dustbin.<sup>107</sup>

Past societal discrimination, in other words, is the real justification for racial preferences. It is almost beside the point whether race and identity-group diversity are compellingly in the interest of academic quality in higher education. Racial preferences are appropriate and necessary, not only in higher education, but also in many other spheres of American life.

As for any time limitation, the dissenting opinions firmly reject the idea, at least until such time as all racial inequalities—in what is now “an endemically segregated society”—have been eliminated.<sup>108</sup> Justice Sotomayor writes:

[T]he Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable . . . . Speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst. There is no constitutional duty to engage in that type of shallow guesswork.<sup>109</sup>

In both substance and tone, the gap between the Justices who would permit, or who strongly favor, race preferences and those who judge them to be illegal is wider now than it was when the Court decided *Bakke* and *Grutter*. Justice Brennan opened his concurring and dissenting opinion in *Bakke* with praise for the “mature consideration” of the case by each of the Court's members.<sup>110</sup> The dissenting opinions in *SFFA* are much sharper throughout. Justice Sotomayor writes of the majority's “radical claim to

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106. *Id.* at 342–43.

107. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 410 (2023) (Jackson, J., dissenting).

108. *See id.* at 318 (Sotomayor, J., dissenting).

109. *Id.* at 370 (internal citation omitted).

110. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 325 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

power”<sup>111</sup> and concludes that “[t]he devastating impact of this decision cannot be overstated.”<sup>112</sup> Justice Jackson writes of the Court “pitifully perceiving itself as the sole vanguard of the legal high ground”; the Court, she charges, “indulges those who either do not know our Nation’s [racial] history or long to repeat it.”<sup>113</sup>

The diminished or vanished common ground between the Justices in these cases may reflect the deepening divisions among Americans today on many social and political issues. Justice Jackson suggests openly that by discountenancing racial preferences, the Court might really wish to enable those wanting to restore Jim Crow racial discrimination.<sup>114</sup> In a sense, the bitterness of the dissenting opinions underlines the turn that a clear majority of the Court has now taken, away from decades of ambiguity and splitting the difference as to racial preferences, and towards a clear ruling as to what is constitutional or legal and what is not.

#### IV. CONCLUSION: A NEW CLARITY

In *SFFA*, the Supreme Court has charted a new course. Racial classifications and preferences are now under a strong presumption of illegality, notwithstanding claims that they are benign.<sup>115</sup> Racial preference for some is almost inevitably racial discrimination against others, like the Asian-Americans in *SFFA*.<sup>116</sup> Such preferences in higher education, and implicitly in other areas, will be very difficult or impossible to defend from here on in light of the Court’s decision.

Preferential affirmative action was originally advanced, above all in the context of higher education, with the hope that it was a temporary expedient and that it would promote racial integration. Justice Thurgood Marshall’s concurring and dissenting opinion in *Bakke* made the case for admissions programs like those of the UC Davis on the basis of “bringing the Negro into the mainstream of American life.”<sup>117</sup> Justice Marshall continues, “If we are ever to become a fully integrated society,” educational institutions must open the doors to “positions of influence, affluence, and prestige” by “giv[ing] consideration to race.”<sup>118</sup>

In the ensuing decades, race preferences—as well as preferences for other selected groups—were institutionalized in American higher education: under the slogan of “diversity” they have become a way of life.

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111. *SFFA*, 600 U.S. at 376 (Sotomayor, J., dissenting) (quoting *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 409–10 (2022) (Breyer, Sotomayor, Kagan, JJ., dissenting)).

112. *Id.* at 383.

113. *Id.* at 410 (Jackson, J., dissenting).

114. *See id.* at 406–11.

115. *See id.* at 230–31 (majority opinion).

116. *See id.* at 218–19.

117. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396 (1978) (Marshall, J., concurring in part and dissenting in part).

118. *Id.* at 401–02; *see also* Erwin N. Griswold, *The Bakke Problem—Allocation of Scarce Resources in Education and Other Areas*, 1979 WASH. U. L.Q. 55 (emphasizing the integrationist argument for preferential affirmative action, in an article by a former dean of Harvard Law School).

Proliferating campus bureaucracies oversee and promote preferential policies. Preferences are an important factor not only in undergraduate and graduate admissions but in hiring and promoting faculty and administrators as well. Yet college and university campuses, far from growing more racially integrated, are increasingly segregated.<sup>119</sup> On many campuses there are now racially separate dormitories, racially separate orientation and graduation ceremonies, and racially separate social lives.<sup>120</sup> Even entire academic departments are effectively set aside racially.<sup>121</sup>

Preferential affirmative action, moreover, as Justice Marshall hoped, was supposed to put Black students in particular on the road to high-status careers.<sup>122</sup> Yet Justice Thomas, in his *SFFA* concurrence, cites evidence that many students admitted on the basis of preferences to institutions where their entering qualifications are well below average succeed less well than they would at colleges or universities where they would be near the middle of the class.<sup>123</sup> Through no fault of their own, these students have been “mismatched.”<sup>124</sup> Justice Thomas writes,

[S]tudies suggest that large racial preferences for black and Hispanic applicants have led to a disproportionately large share of those students receiving mediocre or poor grades once they arrive in competitive collegiate environments. Take science, technology, engineering, and mathematics (STEM) fields, for example. Those students who receive a large admissions preference are more likely to drop out of STEM fields than similarly situated students who did not receive such a preference.<sup>125</sup>

The evidence is contested—Justice Sotomayor contests it in her dissenting opinion<sup>126</sup>—yet the evidence is at least substantial enough to warrant serious consideration. The studies cited by Justice Thomas suggest that in too many cases, students who have been “mismatched” give up on tough but rewarding subjects—in which they would have been competitive on campuses where they were admitted on their academic merits—and opt for softer majors that are less likely to lead to prestigious and productive

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119. See generally C.W. Von Bergen, Martin S. Bressler & David W. Whitlock, *Separate but Equal on College Campuses: A Case of “Déjà Vu All Over Again,”* 38 RSCH. IN HIGHER EDUC. J. 1 (2020).

120. See generally *id.*

121. See Peter N. Kirsanow, *Segregation Now*, in A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION 111, 111–18 (Gail Heriot & Maimon Schwarzschild eds., 2021) (detailing the growing prevalence of racial and ethnic segregation on campuses committed to “diversity” and racial preferences).

122. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401–02 (1978) (Marshall, J., concurring in part and dissenting in part).

123. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 268–70 (2023) (Thomas, J., concurring).

124. See Gail Heriot, *A Dubious Expediency*, in A DUBIOUS EXPEDIENCY: HOW RACE PREFERENCES DAMAGE HIGHER EDUCATION 19, 26 (Gail Heriot & Maimon Schwarzschild eds., 2021).

125. *SFFA*, 600 U.S. at 269 (Thomas, J., concurring) (internal citations omitted).

126. See *id.* at 372–74 (Sotomayor, J., dissenting). Justice Thomas rebuts Justice Sotomayor about this. See *id.* at 270 n.8 (Thomas, J., concurring).

careers.<sup>127</sup> If so, there are fewer African-American scientists, physicians, and engineers—and likely other professionals as well—than there would be if colleges and universities had followed race-neutral policies.

It was hoped, when preferential affirmative action policies began, that these policies would gradually reduce racial divisions and racial consciousness in America. Yet racial division, expressions of racial grievance, and identity politics have surged in recent years—race looms ever larger in public and private life.<sup>128</sup> It is difficult to escape the suspicion that race-preferential policies, in higher education and beyond, have contributed to these developments or at least failed to mitigate or counteract them.

If a national debate over the merits of such policies is to continue, it will perhaps no longer be over whether universities and colleges have a unique justification for racial preferences, deriving from academic freedom and a compelling academic interest in diversity. The dissenting opinions in *SFFA* make clear that their defense of racial preferences is not unique to higher education, and that such preferences are no longer to be viewed as a temporary expedient. Rather, the logic of preferences must extend to many spheres of American life, if not to virtually all of them, and there is to be no foreseeable time limit.

The 6–3 decision in *SFFA* now clarifies the constitutional and legal position. After half a century of closely contested decisions, some of them seeming to point in opposing directions, others relying on fragmented pluralities among the Justices, the Court has set out a clear resolution. The decision is surely welcome to the two of us as proponents of a race-neutral Constitution, as it is surely unwelcome to proponents of race-preferential policies. The vehemence of the dissents and the prevalence of “diversity” preferences (and bureaucracies promoting them in higher education and elsewhere) suggest that further legal and political battles on the issue may lie ahead.<sup>129</sup> Perhaps all sides have reason to be grateful for the clarity of the Supreme Court’s decision. One might hope, without confidently predicting, that the decision on its own will soon lead to better policies in higher education and elsewhere, and to less division on the basis of race and identity in American life.

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127. See *id.* at 268–70 (Thomas, J. concurring) (collecting sources).

128. See generally *Deep Divisions in Americans’ Views of Nation’s Racial History—and How to Address It*, PEW RSCH. CTR. (Aug. 12, 2021), <https://www.pewresearch.org/politics/2021/08/12/deep-divisions-in-americans-views-of-nations-racial-history-and-how-to-address-it> [<https://perma.cc/36X9-SDSK>].

129. See Ryan Mills, *The Generational Fight to Rid Business, Government of Racial Preferences Is Just Beginning*, NAT’L REV. (Nov. 12, 2023), <https://www.nationalreview.com/news/the-generational-fight-to-rid-business-government-of-racial-preferences-is-just-beginning> [<https://perma.cc/27HV-UVPU>] (surveying the legal strategies after the Supreme Court’s *SFFA* decision to oppose racial preferences in higher education and beyond).

