AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Equality/Race/Affirmative Action

**Students for Fair Admissions, Inc. v. President and Fellows of Harvard College** (2023)

**Students for Fair Admissions, Inc., v. University of North Carolina** (2023)

*Harvard University uses a four-step process to admit undergraduate students. At each stage, admissions officers consider race along with numerous other factors. Race is considered both in terms of individual applications and to ensure that Harvard University does not substantially reduce the number persons from historically disadvantaged races in each entering class. The University of North Carolina (UNC) has a similar admissions process in which race, along with many of factors is considered from the time the application is first read until a final decision is made on the application. Students for Fair Admissions (SFFA) a nonprofit group filed separate lawsuits against Harvard and UNC, claimed that the admissions process at each institution violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Local trial courts concluded that both admissions processes passed constitutional muster. The Court of Appeals for the First Circuit affirmed the decision in Harvard’s case. Before the UNC appeal was decision, the Supreme Court took certiorari in both the Harvard and UNC cases.*

 *The Supreme Court by a 6-2 vote declared the Harvard admissions program illegal under Title VI and by a 6-3 vote declared the UNC admissions program unconstitutional (Justice Jackson recused herself in the Harvard case). Chief Justice John Roberts maintained strict scrutiny was the relevant standard under both Title VI and the equal protection clause. The use of race in the admissions process, he concluded, failed to meet this standard because the merits of diversity were amorphous, racial categories were not a necessary means for achieving those ends, and neither Harvard nor UNC time-limited their affirmative action programs. What arguments does the Chief Justice give for reaching these conclusions? Why do the dissents think both admissions programs satisfy strict scrutiny? Who has the better of the argument? The Chief Justice did not explicitly overrule* Grutter v. Bollinger *(2003). Are Justice Clarence Thomas and the dissents right when the claim* Grutter *is overruled for all practical purposes? Justice Thomas, Justice Ketanji Jackson and Justice Sonia Sotomayor engage in a lengthy debate over the merits of affirmative action. Is this a legal or policy debate? Who makes the better points and how do these points advance the legal argument?*

 *Justice Neil Gorsuch’s concurrence insists that Title VI bars all use of race. Justice Thomas signed his opinion, but no other judge discussed that point. Is there a difference between Title VI and the Equal Protection Clause? What is that difference? In a footnote not reproduced below, the Chief Justice insisted that the opinion did not cover the military academies. Why might conservatives make an exception for the Army and Navy? Is that exception rooted in law or conservative politics.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall “deny to any person . . . the equal protection of the laws.” To its proponents, the Equal Protection Clause represented a “foundation[al] principle”—“the absolute equality of all citizens of the United States politically and civilly before their own laws.” . . . . As soon-to-be President James Garfield observed, the Fourteenth Amendment would hold “over every American citizen, without regard to color, the protecting shield of law.”  And in doing so, said Senator Jacob Howard of Michigan, the Amendment would give “to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.” . . . .

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The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education “must be made available to all on equal terms.”  As the plaintiffs had argued, “no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.” . . . . Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action. . . . These decisions reflect the “core purpose” of the Equal Protection Clause: “do[ing] away with all governmentally imposed discrimination based on race.” *Palmore* v. *Sidoti* (1984) (footnote omitted). We have recognized that repeatedly. “The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies “without regard to any differences of race, of color, or of nationality”—it is “universal in [its] application.” . . . Any exception to the Constitution’s demand for equal protection must survive a daunting two-step examination known in our cases as “strict scrutiny.”  Under that standard we ask, first, whether the racial classification is used to “further compelling governmental interests.”  Second, if so, we ask whether the government’s use of race is “narrowly tailored”—meaning “necessary”—to achieve that interest.

Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot. Our acceptance of race-based state action has been rare for a reason. “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” . . . .

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*Grutter v. Bollinger* (2003) imposed one final limit on race-based admissions programs. At some point, the Court held, they must end.  This requirement was critical, and *Grutter* emphasized it repeatedly. “[A]ll race-conscious admissions programs [must] have a termination point”; they “must have reasonable durational limits”; they “must be limited in time”; they must have “sunset provisions”; they “must have a logical end point”; their “deviation from the norm of equal treatment” must be “a temporary matter.” . . .

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Twenty years later, no end is in sight. “Harvard’s view about when [race-based admissions will end] doesn’t have a date on it.” Neither does UNC’s. Yet both insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents’ admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.

Because “[r]acial discrimination [is] invidious in all contexts,”  we have required that universities operate their race-based admissions programs in a manner that is “sufficiently measurable to permit judicial [review]” under the rubric of strict scrutiny. . . .

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

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately “train[ed]”; whether the exchange of ideas is “robust”; or whether “new knowledge” is being developed?  Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? . . . . Finally, the question in this context is not one of *no*diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.

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Second, respondents’ admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, while Harvard likewise “guard[s ] against inadvertent drop-offs in representation” of certain minority groups from year to year. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as “Hispanic,” are arbitrary or undefined. . . . Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents’ goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. . . .

. . . . It is true that our cases have recognized a “tradition of giving a degree of deference to a university’s academic decisions.”  But we have been unmistakably clear that any deference must exist “within constitutionally prescribed limits,” and that “deference does not imply abandonment or abdication of judicial review.”  Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. . . .

. . . . [O]ur cases have stressed that an individual’s race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard’s consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. . . .

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. . . . How else but “negative” can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been? . . . .

. . . . 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.” . . . . Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents’ programs tolerate the very thing that *Grutter*foreswore: 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 offer.” . . . .

. . . . If all this were not enough, respondents’ admissions programs also lack a “logical end point.” . . . . “[O]utright racial balancing” is “patently unconstitutional.” . . . By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs “effectively assure[ ] that race will always be relevant . . . and that the ultimate goal of eliminating” race as a criterion “will never be achieved.”

. . . . Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or “productive citizens and leaders” have been created. . . .

. . . . The 25-year mark articulated in *Grutter* . . . . reflected only that Court’s view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses.  That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested. . . . . [T]he Court made clear that race-based admissions programs eventually had to end—despite whatever periodic review universities conducted.

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. . . . In the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling interest that justifies race-based state action. . . . . Permitting “past societal discrimination” to “serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief ’ for every disadvantaged group.” Opening that door would shutter another—“[t]he dream of a Nation of equal citizens . . . would be lost,” we observed, “in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”  “[S]uch a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.” *Id.*, at 506.

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For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . . A benefit to a student who overcame racial discrimination, for example, must be tied to *that student’s* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student’s* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

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JUSTICE THOMAS, concurring.

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I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court’s *Grutter*jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And, with the authority conferred by these Amendments, Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures’ enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

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. . . . [The Thirteenth Amendment] not only prohibited States from themselves enslaving persons, but also obligated them to end enslavement by private individuals within their borders. Its Framers viewed the text broadly, arguing that it “allowed Congress to legislate not merely against slavery itself, but against all the badges and relics of a slave system.” . . . It quickly became clear, however, that further amendment would be necessary to safeguard that goal. Soon after the Thirteenth Amendment’s adoption, the reconstructed Southern States began to enact “Black Codes,” which circumscribed the newly won freedoms of blacks. The Black Code of Mississippi, for example, “imposed all sorts of disabilities” on blacks, “including limiting their freedom of movement and barring them from following certain occupations, owning firearms, serving on juries, testifying in cases involving whites, or voting.” Congress responded with the landmark Civil Rights Act of 1866, in an attempt to pre-empt the Black Codes. The 1866 Act promised such a sweeping form of equality that it would lead many to say that it exceeded the scope of Congress’ authority under the Thirteenth Amendment. . . .

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The text of the provision left no doubt as to its aim: All persons born in the United States were equal citizens entitled to the same rights and subject to the same penalties as white citizens in the categories enumerated. And, while the 1866 Act used the rights of “white citizens” as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all*citizens “of every race and color” and providing the same rights to all.

. . . . The addition of a citizenship guarantee thus evidenced an intent to broaden the provision, extending beyond recently freed blacks and incorporating a more general view of equality for *all* Americans. . . . As Trumbull explained, the provision created a bond between all Americans; “any statute which is not equal to *all*, and which deprives any citizen of civil rights which are secured to other citizens,” was “an unjust encroachment upon his liberty” and a “badge of servitude” prohibited by the Constitution.

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Critically, many of those who believed that Congress lacked the authority to enact the 1866 Act also supported the principle of racial equality. So, almost immediately following the ratification of the Thirteenth Amendment, several proposals for further amendments were submitted in Congress. . . . In April, Representative Thaddeus Stevens proposed to the Joint Committee an amendment that began, “[n]o discrimination shall be made by any State nor by the United States as to the civil rights of persons because of race, color, or previous condition of servitude.” Stevens’ proposal was later revised to read as follows: “ ‘No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.’ ” . . . .Stevens explained that the draft was intended to “allo[w] Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.” . . .

Senator Jacob Howard introduced the proposed Amendment in the Senate, powerfully asking, “Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both equally responsible to justice and to God for the deeds done in the body?” . . . .

. . . . As enacted, the text of the Fourteenth Amendment provides a firm statement of equality before the law. . . . . The drafters and ratifiers of the Fourteenth Amendment focused on this broad equality idea, offering surprisingly little explanation of which term was intended to accomplish which part of the Amendment’s overall goal. “The available materials . . . show,” however, “that there were widespread expressions of a general understanding of the broad scope of the Amendment similar to that abundantly demonstrated in the Congressional debates, namely, that the first section of the Amendment would establish the full constitutional right of all persons to equality before the law and would prohibit legal distinctions based on race or color.” . . . .

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In the period closely following the Fourteenth Amendment’s ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes—systems of government-imposed segregation—and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875 and the justifications offered by proponents of that measure are further evidence for the colorblind view of the Fourteenth Amendment. . . . . For example, they asserted that “free government demands the abolition of all distinctions founded on color and race.” And, they submitted that “[t]he time has come when all distinctions that grew out of slavery ought to disappear.” Leading Republican Senator Charles Sumner compellingly argued that “any rule excluding a man on account of his color is an indignity, an insult, and a wrong.” . . . .

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The earliest Supreme Court opinions to interpret the Fourteenth Amendment did so in colorblind terms. . . . [T]he Court . . . conclude[d] that “[t]he words of the [Fourteenth A]mendment . . . contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored.” *Strauder*v. *West Virginia* (1880). The Court thus found that the Fourteenth Amendment banned “expres[s]” racial classifications, no matter the race affected, because these classifications are “a stimulant to . . . race prejudice.” . . .

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Despite the extensive evidence favoring the colorblind view, as detailed above, it appears increasingly in vogue to embrace an “antisubordination” view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks. . . . . Start with the 1865 Freedmen’s Bureau Act. That Act established the Freedmen’s Bureau to issue “provisions, clothing, and fuel . . . needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children” and the setting “apart, for the use of loyal refugees and freedmen,” abandoned, confiscated, or purchased lands, and assigning “to every male citizen, whether refugee or freedman, . . . not more than forty acres of such land.” . . . Importantly, however, the Acts applied to *freedmen* (and refugees), a formally race-neutral category, not blacks writ large. And, because “not all blacks in the United States were former slaves,” “ ‘freedman’ ” was a decidedly under-inclusive proxy for race. Moreover, the Freedmen’s Bureau served newly freed slaves alongside white refugees. . . .

Several additional federal laws cited by respondents appear to classify based on race, rather than previous condition of servitude. . . . These laws—even if targeting race as such—likely were also constitutionally permissible examples of Government action “undo[ing] the effects of past discrimination in [a way] that do[es] not involve classification by race,” even though they had “a racially disproportionate impact.” . . . .

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Most importantly, however, there was a wide range of federal and state statutes enacted at the time of the Fourteenth Amendment’s adoption and during the period thereafter that explicitly sought to discriminate *against* blacks on the basis of race or a proxy for raceThese laws, hallmarks of the race-conscious Jim Crow era, are precisely the sort of enactments that the Framers of the Fourteenth Amendment sought to eradicate. Yet, proponents of an antisubordination view necessarily do not take those laws as evidence of the Fourteenth Amendment’s true meaning. And rightly so. Neither those laws, nor a small number of laws that appear to target blacks for preferred treatment, displace the equality vision reflected in the history of the Fourteenth Amendment’s enactment. . . .

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To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate. *Grutter*recognized “only one” interest sufficiently compelling to justify race-conscious admissions programs: the “educational benefits of a diverse student body. Even in *Grutter*,the Court failed to clearly define “the educational benefits of a diverse student body.” Thus, in the years since *Grutter*, I have sought to understand exactly how racial diversity yields *educational* benefits. 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.

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. . . . [I]t is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination. We would not offer such deference in any other context. In employment discrimination lawsuits under Title VII of the Civil Rights Act, for example, courts require only a minimal prima facie showing by a complainant before shifting the burden onto the shoulders of the alleged-discriminator employer. And, Congress has passed numerous laws—such as the Civil Rights Act of 1875—under its authority to enforce the Fourteenth Amendment, each designed to counter discrimination and each relying on courts to bring a skeptical eye to alleged discriminators. This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct. . .

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. . . [O]ur precedents have repeatedly and soundly distinguished between programs designed to compensate victims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action.  To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warrants a present remedy. Today’s opinion for the Court reaffirms the need for such a close remedial fit, hewing to the same line we have consistently drawn. Without such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination. . . . .

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The Constitution’s colorblind rule reflects one of the core principles upon which our Nation was founded: that “all men are created equal.” Those words featured prominently in our Declaration of Independence and were inspired by a rich tradition of political thinkers, from Locke to Montesquieu, who considered equality to be the foundation of a just government. . . .

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person’s skin is irrelevant to that individual’s equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

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Respondents and the dissents argue that the universities’ race-conscious admissions programs ought to be permitted because they accomplish positive social goals. . . . . Arguments for the benefits of race-based solutions have proved pernicious in segregationist circles. Segregated universities once argued that race-based discrimination was needed “to preserve harmony and peace and at the same time furnish equal education to both groups.” “Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories.”  We cannot now blink reality to pretend, as the dissents urge, that affirmative action should be legally permissible merely because the experts assure us that it is “good” for black students. . . . .

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. “Affirmative action” policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. . . . . These policies may harm even those who succeed academically. I have long believed that large racial preferences in college admissions “stamp [blacks and Hispanics] with a badge of inferiority.” . . . .

Finally, it is not even theoretically possible to “help” a certain racial group without causing harm to members of other racial groups. “It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others.” . . . . As the Court’s opinion today explains, the zero-sum nature of college admissions—where students compete for a finite number of seats in each school’s entering class—aptly demonstrates the point.  Petitioner here represents Asian Americans who allege that, at the margins, Asian applicants were denied admission because of their race.

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It has become clear that sorting by race does not stop at the admissions office. In his *Grutter*opinion, Justice Scalia criticized universities for “talk[ing] of multiculturalism and racial diversity,” but supporting “tribalism and racial segregation on their campuses,” including through “minority only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies. . . . [T]hese discriminatory policies risk creating new prejudices and allowing old ones to fester. . . .

. . . . But, under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person’s ideology, beliefs, and abilities. Of course, that is false Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. . . . .

. . . [A]ny statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant. . . People discriminate against one another for a whole host of reasons. But, under the Fourteenth Amendment, the law must disregard all racial distinctions:

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Nor do JUSTICE JACKSON’s statistics regarding a correlation between levels of health, wealth, and well-being between selected racial groups prove anything. Of course, none of those statistics are capable of drawing a direct causal link between race—rather than socioeconomic status or any other factor—and individual outcomes. So JUSTICE JACKSON supplies the link herself: the legacy of slavery and the nature of inherited wealth. This, she claims, locks blacks into a seemingly perpetual inferior caste. Such a view is irrational; it is an insult to individual achievement and cancerous to young minds seeking to push through barriers, rather than consign themselves to permanent victimhood. . . . .

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Universities’ recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its “most diverse undergraduate class ever,” despite California’s ban on racial preferences. . . . . In fact, meritocratic systems have long refuted bigoted misperceptions of what black students can accomplish. . . . I continue to strongly believe (and have never doubted) that “blacks can achieve in every avenue of American life without the meddling of university administrators.”  Meritocratic systems, with objective grading scales, are critical to that belief. Such scales have always been a great equalizer—offering a metric for achievement that bigotry could not alter. Racial preferences take away this benefit, eliminating the very metric by which those who have the most to prove can clearly demonstrate their accomplishments—both to themselves and to others. Schools’ successes, like students’ grades, also provide objective proof of ability. Historically Black Colleges and Universities (HBCUs) do not have a large amount of racial diversity, but they demonstrate a marked ability to improve the lives of their students. . . . .

The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities’ admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation’s equality ideal. In short, they are plainly—and boldly—unconstitutional. . . .

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

. . . . Today, the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.

“[F]ew pieces of federal legislation rank in significance with the Civil Rights Act of 1964.” Title VI of that law contains terms as powerful as they are easy to understand: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The message for these cases is unmistakable. Students for Fair Admissions (SFFA) brought claims against Harvard and UNC under Title VI. That law applies to both institutions, as they elect to receive millions of dollars of federal assistance annually. And the trial records reveal that both schools routinely discriminate on the basis of race when choosing new students—exactly what the law forbids.

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The key phrases in Title VI at issue here are “subjected to discrimination” and “on the ground of.” Begin with the first. To “discriminate” against a person meant in 1964 what it means today: to “trea[t] that individual worse than others who are similarly situated.” From this, we can safely say that Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin.

What does the statute’s second critical phrase—“on the ground of ”—mean? Again, the answer is uncomplicated: It means “because of.” . . . .All that matters is that the plaintiff ’s injury would not have happened *but for* the defendant’s conduct.

Now put these pieces back together and a clear rule emerges. Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin. It does not matter if the recipient can point to “some other . . . factor” that contributed to its decision to disfavor that individual. . . .

. . . . Applying Title VI to the cases now before us, the result is plain. The parties debate certain details of Harvard’s and UNC’s admissions practices. But no one disputes that both universities operate “program[s] or activit[ies] receiving Federal financial assistance.” No one questions that both institutions consult race when making their admissions decisions. And no one can doubt that both schools intentionally treat some applicants worse than others at least in part because of their race.

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Just as there is no question Harvard and UNC consider race in their admissions processes, there is no question both schools intentionally treat some applicants worse than others because of their race. Both schools frequently choose to award a “tip” or a “plus” to applicants from certain racial groups but not others. . . . .

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[T]he parties’ debates raise some hard-to-answer questions. Just how many admissions decisions turn on race? And what really motivates the universities’ race-conscious admissions policies and their refusal to modify other preferential practices? Fortunately, Title VI does not require an answer to any of these questions. It does not ask how much a recipient of federal funds discriminates. It does not scrutinize a recipient’s reasons or motives for discriminating. Instead, the law prohibits covered institutions from intentionally treating *any* individual worse even *in part* because of race. . . . .

The . . . dissent does not dispute that everything said here about the meaning of Title VI tracks this Court’s precedent in *Bostock v. Clayton County* (2020) interpreting materially identical language in Title VII. That raises two questions: Do the dissenters think *Bostock*wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things? . . . .

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. . . . [F]or over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment. And what a confused body of constitutional law followed. For years, this Court has said that the Equal Protection Clause requires any consideration of race to satisfy “strict scrutiny,” meaning it must be “narrowly tailored to further compelling governmental interests.”  Outside the context of higher education, “our precedents have identified only two” interests that meet this demanding standard: “remediating specific, identified instances of past discrimination that violated the Constitution or a statute,” and “avoiding imminent and serious risks to human safety in prisons.”

Within higher education, however, an entirely distinct set of rules emerged. Following *Reents of the University of California v.* *Bakke* (1978), this Court declared that judges may simply “defer” to a school’s assertion that “diversity is essential” to its “educational mission.”  Not all schools, though—elementary and secondary schools apparently do not qualify for this deference. See *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1* (2007). Only colleges and universities, the Court explained, “occupy a special niche in our constitutional tradition.”*. . .*

. . . . [T]the Court today cuts through the kudzu. It ends university exceptionalism and returns this Court to the traditional rule that the Equal Protection Clause forbids the use of race in distinguishing between persons unless strict scrutiny’s demanding standards can be met. . . .

If *Bakke* led to errors in interpreting the Equal Protection Clause, its first mistake was to take us there. These cases arise under Title VI and that statute is “more than a simple paraphrasing” of the Equal Protection Clause. . . . Title VI says: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” The Equal Protection Clause reads: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” That such differently worded provisions should mean the same thing is implausible on its face.

. . . .

. . . . The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications. . . . By contrast, Title VI targets only certain classifications—those based on race, color, or national origin. And that law does not direct courts to subject these classifications to one degree of scrutiny or another. Instead, as we have seen, its rule is as uncomplicated as it is momentous. Under Title VI, it is *always* unlawful to discriminate among persons even in part because of race, color, or national origin.

. . . .

. . . . Under our Constitution, judges have never been entitled to disregard the plain terms of a valid congressional enactment based on surmise about unenacted legislative intentions. Instead, it has always been this Court’s duty “to give effect, if possible, to every clause and word of a statute,” and of the Constitution itself. In this country, “[o]nly the written word is the law, and all persons are entitled to its benefit.” . . . Today, the Court corrects course in its reading of the Equal Protection Clause. With that, courts should now also correct course in their treatment of Title VI. . . . .

JUSTICE KAVANAUGH, concurring.

. . . .

. . . [E]even if a racial classification is otherwise narrowly tailored to further a compelling governmental interest, a “deviation from the norm of equal treatment of all racial and ethnic groups” must be “a temporary matter”—or stated otherwise, must be “limited in time

. . . .

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003, notwithstanding the progress made since *Bakke*. . . . . Importantly, the *Grutter*Court saw “no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.” *Ibid.*The Court reasoned that the “requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” . . . .

. . . .

A generation has now passed since *Grutter*,and about 50 years have gone by since the era of *Bakke*and *DeFunis* v. *Odegaard* (1974), when race-based affirmative action programs in higher education largely began. In light of the Constitution’s text, history, and precedent, the Court’s decision today appropriately respects and abides by *Grutter*’s explicit temporal limit on the use of race-based affirmative action in higher education.

. . . .

. . . . To be clear, although progress has been made since *Bakke*and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still “can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race.”

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

. . . .

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. . . . Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery’s longevity by prohibiting the education of Black people, whether enslaved or free. Thus, from this Nation’s birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came. More than two centuries after the first African enslaved persons were forcibly brought to our shores, Congress adopted the Thirteenth Amendment to the Constitution, which abolished “slavery” and “involuntary servitude, except as a punishment for crime.” “Like all great historical transformations,” emancipation was a movement, “not a single event” owed to any single individual, institution, or political party. The fight for equal educational opportunity, however, was a key driver. Literacy was an “instrument of resistance and liberation.” It allowed enslaved Black people “to disturb the power relations between master and slave,” which “fused their desire for literacy with their desire for freedom.” . . .

. . . .

. . . . Proponents of the [Fourteenth] Amendment declared that one of its key goals was to “protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.” . . . . To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. That Clause commands that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”  Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting “proposals that would have made the Constitution explicitly color-blind.” This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment’s promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen’s Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. . . . . Black people were the targeted beneficiaries of the Bureau’s programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau “educated approximately 100,000 students, nearly all of them black,” and regardless of “degree of past disadvantage.” . . . . [C]ontemporaries understood that the Freedmen’s Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. . . . .

. . . .

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. For example, it appropriated money for “ ‘the relief of destitute colored women and children,’ ” without regard to prior enslavement. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to “colored soldiers and sailors” of the Union Army. . . .

. . . .

*Brown*v.*Board of Education* (1954).was a race-conscious decision that emphasized the importance of education in our society. Central to the Court’s holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities “solely because of their race,” denoting “inferiority as to their status in the community.” . . . The desegregation cases that followed *Brown* confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness. . . . Passively eliminating race classifications did not suffice when *de facto* segregation persisted.  . . . . Affirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown*’s promise of racial equality. . . .

. . . .

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who “led the litigation campaign” to dismantle segregation as a civil rights lawyer and “rejected the hollow, race-ignorant conception of equal protection” endorsed by the Court’s ruling today. Justice Marshall joined the *Bakke* plurality and “applaud[ed] the judgment of the Court that a university may consider race in its admissions process The Court’s recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

*Regents of the University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), and *Fisher v. University of Texas at Austin (2016)* are an extension of *Brown*’s legacy. Those decisions recognize that “ ‘experience lend[s] support to the view that the contribution of diversity is substantial.’ ”  Racially integrated schools improve cross-racial understanding, “break down racial stereotypes,” and ensure that students obtain “the skills needed in today’s increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints.” More broadly, inclusive institutions that are “visibly open to talented and qualified individuals of every race and ethnicity” instill public confidence in the “legitimacy” and “integrity” of those institutions and the diverse set of graduates that they cultivate. That is particularly true in the context of higher education, where colleges and universities play a critical role in “maintaining the fabric of society” and serve as “the training ground for a large number of our Nation’s leaders.”  It is thus an objective of the highest order, a “compelling interest” indeed, that universities pursue the benefits of racial diversity and ensure that “the diffusion of knowledge and opportunity” is available to students of all races.

. . . .

. . . . Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment. The share of intensely segregated minority schools (*i.e.*,schools that enroll 90% to 100% racial minorities) has sharply increased. . . .

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty. When combined with residential segregation and school funding systems that rely heavily on local property taxes, this leads to racial minority students attending schools with fewer resources. . . .

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system. Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process. Further, low-income children of color are less likely to attend preschool and other early childhood education programs that increase educational attainment.. . .

In North Carolina, the home of UNC, racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution. . . . .

**. . . .**

For much of its history, UNC was a bastion of white supremacy. . . . The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. *Id.*, at 1681–1683. It resisted racial integration after this Court’s decision in *Brown*, and was forced to integrate by court order in 1955. . . . UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born. . . . To this day, UNC’s deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders.  Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black.  These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population.

. . . From Harvard’s founding, slavery and racial subordination were integral parts of the institution’s funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. . . . Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard’s leadership and prominent professors openly promoted “ ‘race science,’ ” racist eugenics, and other theories rooted in racial hierarchy. . . . Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through “statues, buildings, professorships, student houses, and the like.” . . . “Even those students of color who beat the odds and earn an offer of admission” continue to experience isolation and alienation on campus. . . .

. . . .

Answering the question whether Harvard’s and UNC’s policies survive strict scrutiny under settled law is straightforward. . . . The use of race is narrowly tailored unless “workable” and “available” race-neutral approaches exist, meaning race-neutral alternatives promote the institution’s diversity goals and do so at “ ‘tolerable administrative expense.’ ” . . . . As the District Court found after considering extensive expert testimony, SFFA’s proposed race-neutral alternatives do not meet those criteria.  . . . . SFFA’s proposed top percentage plans, for example, are based on a made-up and complicated admissions index that requires UNC to “access . . . real-time data for all high school students.”  . . .

. . . . Under SFFA’s model, . . . . Black representation would plummet by about 32%, and the admitted share of applicants with high academic ratings would decrease, as would the share with high extracurricular and athletic ratings. . . . .

. . . .

. . . . Consistent with the Court’s precedents, Harvard properly “considers race as part of a holistic review process,” “values all types of diversity,” “does not consider race exclusively,” and “does not award a fixed amount of points to applicants because of their race.”  Indeed, Harvard’s admissions process is so competitive and the use of race is so limited and flexible that, as “SFFA’s own expert’s analysis” showed, “Harvard rejects more than two-thirds of Hispanic applicants and slightly less than half of all African-American applicants who are among the top 10% most academically promising applicants.”

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. . . . Harvard does not specify its diversity objectives in terms of racial quotas, and “SFFA did not offer expert testimony to support its racial balancing claim.”  Harvard’s statistical evidence, by contrast, showed that the admitted classes across racial groups varied considerably year to year, a pattern “inconsistent with the imposition of a racial quota or racial balancing.” . . . Harvard’s ongoing review complies with the Court’s command that universities periodically review the necessity of the use of race in their admissions programs.

. . . .

There is no better evidence that the Court is overruling the Court’s precedents than those precedents themselves. “Every one of the arguments made by the majority can be found in the dissenting opinions filed in [the] cases” the majority now overrules. . . . Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. . . . At bottom, the six unelected members of today’s majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

. . . .

Tellingly, in sharp contrast with today’s decision, the Court has allowed the use of race when that use burdens minority populations. In *United States*v.*Brignoni-Ponce*, (1975), for example, the Court held that it is unconstitutional for border patrol agents to rely on a person’s skin color as “a single factor” to justify a traffic stop based on reasonable suspicion, but it remarked that “Mexican appearance” could be “a relevant factor” out of many to justify such a stop “at the border and its functional equivalents.” . . . . The result of today’s decision is that a person’s skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person’s individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment’s guarantee of equal protection.

. . . .

Consistent with the Court’s precedents, respondents’ holistic review policies consider race in a very limited way. Race is only one factor out of many. . . . That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard’s holistic system, for example, provides points to applicants who qualify as “ALDC,” meaning “athletes, legacy applicants, applicants on the Dean’s Interest List [primarily relatives of donors], and children of faculty or staff.”  ALDC applicants are predominantly white:. . . Although “ALDC applicants make up less than 5% of applicants to Harvard,” they constitute “around 30% of the applicants admitted each year.”  Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. . . .

. . . .

. . . . In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all sectors of the American public and where “the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood,” is precisely what the Equal Protection Clause commands.

. . . .

It is not a stereotype to acknowledge the basic truth that young people’s experiences are shaded by a societal structure where race matters. Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students. “For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” . . . The absence of racial diversity, by contrast, actually contributes to stereotyping. . . . When there is an increase in underrepresented minority students on campus, “racial stereotypes lose their force” because diversity allows students to “learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”

. . . .

As noted above, this Court suggests that the use of race in college admissions is unworkable because respondents’ objectives are not sufficiently “measurable,” “focused,” “concrete,” and “coherent.” . How much more precision is required or how universities are supposed to meet the Court’s measurability requirement, the Court’s opinion does not say. That is exactly the point. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious plans fail. Any increased level of precision runs the risk of violating the Court’s admonition that colleges and universities operate their race-conscious admissions policies with no “ ‘specified percentage[s]’ ” and no “specific number[s] firmly in mind.” . . .

. . . [T]he racial categories that the Court finds troubling resemble those used across the Federal Government for data collection, compliance reporting, and program administration purposes, including, for example, by the U. S. Census Bureau. . . . The majority . . . appoints itself as an expert on data collection methods, calling for a higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents’ methodology has prevented any student from reporting their race with the level of detail they preferred. . . .

*. . . . Grutter* simply announced a general “expect[ation]” that “the use of racial preferences [would] no longer be necessary” in the future. As even SFFA acknowledges, those remarks were nothing but aspirational statements by the *Grutter* Court.

. . . .

*Grutter*’s requirement that universities engage in periodic reviews so the use of race can end “as soon as practicable” is well grounded in the need to ensure that race is “employed no more broadly than the interest demands.” That is, it is grounded in strict scrutiny. By contrast, the 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. . . . Harvard and UNC engage in the ongoing review that the Court’s precedents demand. They “use [their] data to scrutinize the fairness of [their] admissions program[s]; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures [they] dee[m] necessary.”  . . .

JUSTICE THOMAS . . . first renews his argument that the use of race in holistic admissions leads to the “inevitable” “underperformance” by Black and Latino students at elite universities “because they are less academically prepared than the white and Asian students with whom they must compete.”  The Court previously declined to adopt this so-called “mismatch” hypothesis for good reason: It was debunked long ago. The decades-old “studies” advanced by the handful of authors upon whom JUSTICE THOMAS relies have “major methodological flaws,” are based on unreliable data, and do not “meet the basic tenets of rigorous social science research.” By contrast, “[m]any social scientists have studied the impact of elite educational institutions on student outcomes, and have found, among other things, that attending a more selective school is associated with higher graduation rates and higher earnings for [underrepresented minority] students—conclusions directly contrary to mismatch.” . . .

. . . .

Citing nothing but his own long-held belief, JUSTICE THOMAS also equates affirmative action in higher education with segregation, arguing that “racial preferences in college admissions ‘stamp [Black and Latino students] with a badge of inferiority.’ ”  Studies disprove this sentiment, which echoes “tropes of stigma” that “were employed to oppose Reconstruction policies.” . . .

Relatedly, JUSTICE THOMAS suggests that race-conscious college admissions policies harm racial minorities by increasing affinity-based activities on college campuses.  Not only is there no evidence of a causal connection between the use of race in college admissions and the supposed rise of those activities, but JUSTICE THOMAS points to no evidence that affinity groups cause any harm. . . .

. . . .

In its “radical claim to power,” the Court does not even acknowledge the important reliance interests that this Court’s precedents have generated. . . . Students of all backgrounds have formed settled expectations that universities with race-conscious policies “will provide diverse, cross-cultural experiences that will better prepare them to excel in our increasingly diverse world.” Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court’s precedents. . . . .

. . . .

Experience teaches that the consequences of today’s decision will be destructive. The two lengthy trials below simply confirmed what we already knew: Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation’s colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved. . . . After California amended its State Constitution to prohibit race-conscious college admissions in 1996, for example, “freshmen enrollees from underrepresented minority groups dropped precipitously” in California public universities. . . . The costly result of today’s decision harms not just respondents and students but also our institutions and democratic society more broadly. Dozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially diverse college graduates to crucial professions. . . . . Indeed, history teaches that racial diversity is a national security imperative. During the Vietnam War, for example, lack of racial diversity “threatened the integrity and performance of the Nation’s military” because it fueled “perceptions of racial/ethnic minorities serving as ‘cannon fodder’ for white military leaders.” . . . *Amici*also tell the Court that race-conscious college admissions are critical for providing equitable and effective public services. State and local governments require public servants educated in diverse environments who can “identify, understand, and respond to perspectives” in “our increasingly diverse communities.” . . . Examples of other industries and professions that benefit from race-conscious college admissions abound. American businesses emphasize that a diverse workforce improves business performance, better serves a diverse consumer marketplace, and strengthens the overall American economy.

. . . .

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand scrutiny “in the eyes of the citizenry.” . . . By ending race-conscious college admissions, this Court closes the door of opportunity that the Court’s precedents helped open to young students of every race. It creates a leadership pipeline that is less diverse than our increasingly diverse society, reserving “positions of influence, affluence, and prestige in America” for a predominantly white pool of college graduates. . . .

. . . .

JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

. . . .

Imagine two college applicants from North Carolina, John and James. Both trace their family’s North Carolina roots to the year of UNC’s founding in 1789. Both love their State and want great things for its people. Both want to honor their family’s legacy by attending the State’s flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race of these applicants properly play a role in UNC’s holistic merits-based admissions process?

. . . .

Given our history, the origin of persistent race-linked gaps should be no mystery. It has never been a deficiency of Black Americans’ desire or ability to, in Frederick Douglass’s words, “stand on [their] own legs.” Rather, it was always simply what Justice Harlan recognized 140 years ago—the persistent and pernicious denial of “what had already been done in every State of the Union for the white race.”

The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.

Start with wealth and income. Just four years ago, in 2019, Black families’ median wealth was approximately $24,000. For White families, that number was approximately eight times as much (about $188,000). These wealth disparities “exis[t] at every income and education level,” so, “[o]n average, white families with college degrees have over $300,000 more wealth than black families with college degrees.”. . . .

. . . .

 In most state flagship higher educational institutions, the percentage of Black undergraduates is lower than the percentage of Black high school graduates in that State. Black Americans in their late twenties are about half as likely as their White counterparts to have college degrees. And because lower family income and wealth force students to borrow more, those Black students who do graduate college find themselves four years out with about $50,000 in student debt—nearly twice as much as their White compatriots.

As for postsecondary professional arenas, despite being about 13% of the population, Black people make up only about 5% of lawyers. Such disparity also appears in the business realm: Of the roughly 1,800 chief executive officers to have appeared on the well-known Fortune 500 list, fewer than 25 have been Black (as of 2022, only six are Black). .

Health gaps track financial ones. . . . Black men are twice as likely to die from prostate cancer as White men and have lower 5-year cancer survival rates. Uterine cancer has spiked in recent years among all women—but has spiked highest for Black women, who die of uterine cancer at nearly twice the rate of “any other racial or ethnic group.” “Across the board, Black Americans experience the highest rates of obesity, hypertension, maternal mortality, infant mortality, stroke, and asthma.” . . .

We return to John and James now, with history in hand. It is hardly John’s fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James’s (or his family’s) fault that he would be the first. And UNC ought to be able to consider why.

Most likely, seven generations ago, when John’s family was building its knowledge base and wealth potential on the university’s campus, James’s family was enslaved and laboring in North Carolina’s fields. Six generations ago, the North Carolina “Redeemers” aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship. Five generations ago, the North Carolina Red Shirts finished the job. Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC “enforced its own Jim Crow regulations.” Two generations ago, North Carolina’s Governor still railed against “ ‘integration for integration’s sake’ ”—and UNC Black enrollment was minuscule. So, at bare minimum, one generation ago, James’s family was six generations behind because of their race, making John’s six generations ahead.

These stories are not every student’s story. But they are many students’ stories. To demand that colleges ignore race in today’s admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is not only an affront to the dignity of those students for whom race matters. It also condemns our society to never escape the past that explains *how and why*race matters to the very concept of who “merits” admission.

Permitting(not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment’s core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John’s and James’s individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations’ worth of historical privileges and disadvantages that each of these applicants was born with when his own life’s journey started a mere 18 years ago.

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. Students must submit standardized test scores and other conventional information. But applicants are *not*required to submit demographic information like gender and race. UNC considers whatever information each applicant submits using a nonexhaustive list of 40 criteria grouped into eight categories: “academic performance, academic program, standardized testing, extracurricular activity, special talent, essay criteria, background, and personal criteria.”

. . . . So where does race come in? According to UNC’s admissions-policy document, reviewers may also consider “the race or ethnicity of any student” (if that information is provided) in light of UNC’s interest in diversity. And, yes, “the race or ethnicity of *any* student may—or may not—receive a ‘plus’ in the evaluation process depending on the individual circumstances revealed in the student’s application. . . . *Every* student who chooses to disclose his or her race is eligible for such a race-linked plus, just as any student who chooses to disclose his or her unusual interests can be credited for what those interests might add to UNC. . . .

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Understood properly, then, what SFFA caricatures as an unfair race-based preference cashes out, in a holistic system, to a personalized assessment of the advantages and disadvantages that everyapplicant might have received by accident of birth plus all that has happened to them since. It ensures a full accounting of everything that bears on the individual’s resilience and likelihood of enhancing the UNC campus. It also forecasts his potential for entering the wider world upon graduation and making a meaningful contribution to the larger, collective, societal goal that the Equal Protection Clause embodies (its guarantee that the United States of America offers genuinely equal treatment to every person, regardless of race).

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To be sure, while the gaps are stubborn and pernicious, Black people, and other minorities, have generally been doing better. But those improvements have only been made possible because institutions like UNC have been willing to grapple forthrightly with the burdens of history. SFFA’s complaint about the “indefinite” use of race-conscious admissions programs, then, is a non sequitur. These programs respond to deep-rooted, objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.

. . . . In addition, and notably, that end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows that it matters for students’ ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar experiences related to that shared characteristic. Equally critical, UNC’s program ensures that students who don’t share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand each other’s stories, which *amici* tell us improves cognitive abilities and critical- thinking skills, reduces prejudice, and better prepares students for postgraduate life.

Beyond campus, the diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives. For marginalized communities in North Carolina, it is critically important that UNC and other area institutions produce highly educated professionals of color. Research shows that Black physicians are more likely to accurately assess Black patients’ pain tolerance and treat them accordingly (including, for example, prescribing them appropriate amounts of pain medication). For high-risk Black newborns, having a Black physician more than doubles the likelihood that the baby will live, and not die. . . .

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With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces “colorblindness for all” by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country’s actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America’s real-world problems.

No one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today’s ruling makes things worse, not better. The best that can be said of the majority’s perspective is that it proceeds (ostrich-like) from the hope that preventing consideration of race will end racism. . .

The only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

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