WHAT DID *SFFA* BAN? ACTING ON THE BASIS OF RACE AND TREATING PEOPLE AS EQUALS

Issa Kohler-Hausmann*

The Supreme Court has declared that the "race-conscious admissions" at Harvard and the University of North Carolina ("UNC") are unconstitutional under the Fourteenth Amendment of the United States Constitution. The problem is, nobody knows what, precisely, has been banned by the Court's decision in Students for Fair Admissions v. Harvard. *The majority said things like admissions must not "depend," "turn on," or be "based on" race, and that admissions officers must not "consider" race. Part I of this Article explores what precisely these terms might mean. The majority's rhetoric sometimes indicates that anytime someone acts on the basis of race, it counts as unlawful under the Equal Protection Clause. But that is not what the majority opinion actually holds. Nor could it be. If race is a real category of thought, experience, and action in our world, then one cannot just excise it and leave social and cognitive antimatter in its place. But one can put forward a theory of what is fair or just treatment in light of race. And that is what the majority is doing—they just obfuscate it. Part II of this Article argues that any coherent view on what is required by the Equal Protection Clause (or non-discrimination under Title VI) on the basis of race amounts to taking a position on what kinds of considerations are just in light of race (among other statuses), not abstracted from it.*

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* Professor of Law and Associate Professor of Sociology, Yale University. I want to offer profound gratitude for feedback and critiques from Amin Afrouzi, Tomiko Brown-Nagin, Jessica Clark, John Manning, Martha Minow, Richard Primus, Robert Post, Kate Shaw, and especially to Gideon Yaffe and to the participants of the Public Law Workshop at Harvard Law School and Cornell Law School faculty workshop. I owe special appreciation (as always) to Robin Dembroff and Lily Hu, my academic life partners, whose ideas, support, and love are inseparable from me; and to Ashraf Ahmed for extended engagement on this paper (I hope you find current the formatting more mature!). I also want to thank the students who have been part of my seminars over the past six at Yale: you have been such inspirational, lively, and dedicated intellectual interlocutors as we struggled through hard questions together informing this piece and my other work. It has been an honor learning with you. Finally, the editors of the *Arizona Law Review* provided tremendous substantive and stylistic editing that greatly improved the paper. Thank you for taking a chance on an unconventional piece of scholarship. Last but certainly not least, a huge thank you to Charlotte Lawrence for superb research assistance, thoughtful exchange on these ideas, and careful editing.

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INTRODUCTION

The Supreme Court has declared that the "race-conscious admissions" practiced by Harvard and the University of North Carolina are unconstitutional under the Fourteenth Amendment of the United States Constitution.[1] The problem is, nobody knows what, precisely, has been banned by the Court's decision in *SFFA v. Harvard*. The Justices in the majority understand that defining the kind of "race-based admissions"[2] they believe is banned under the Fourteenth Amendment is a fraught and difficult question: a significant portion of the oral arguments featured exchanges trying to define (in their terms) "race neutral" practices.[3] Unfortunately, the decision largely punts on answering that question. It is somewhat ironic (in the Alanis Morissette sense) that the majority does not clearly define *what* they are banning because among the reasons the majority offered for holding "race-conscious admissions" unconstitutional was their assessment that its stated goals were "commendable" but "not sufficiently coherent for purposes of strict scrutiny."[4] So the conservative Justices in the majority have replaced one supposed incoherence—the holistic review authorized by the *Grutter* regime—with another—banning some underspecified set of admissions practices "based on" race.[5] Because the majority

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) [hereinafter SFFA v. Harvard].

2. *Id.* at 225.

3. *See, e.g.*, Transcript of Oral Argument at 7–9, 10, 15, 88, SFFA v. Harvard, 600 U.S. 181 (No. 20-1199) [hereinafter Harvard Oral Argument]; Transcript of Oral Argument at 6, 24–25, 33, 97, SFFA v. UNC, 600 U.S. 181 (No. 21-707) [hereinafter UNC Oral Argument].

4. SFFA v. Harvard, *supra* note 1, at 214.

5. *See id.* at 229–30; *see also id.* at 220 (discussing "race-based admissions programs in which some students may obtain preferences on the basis of race alone").

does not define what it is banning, it is hard to understand why it—whatever *it* is—offends the Equal Protection Clause of the Fourteenth Amendment. Nothing in the majority opinion helps answer these questions; if anything, it confuses matters.

The majority opinion speaks about race and equality in terms so abstract that few could disagree. Citing approvingly historical sources from the ratification of the Fourteenth Amendment, the majority vows that the "law which operates upon one man [should] operate equally upon all" and that "the Fourteenth Amendment would hold 'over every American citizen, without regard to color, the protecting shield of law.'"[6] At this level of abstraction, the dissenting Justices concur. They too believe that the "Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality."[7] The "colorblindness" refrain does not further specify what class of "race-based admissions" is banned under the opinion.[8] Invocations of the phrase—punctuating the majority and concurring opinions without any elaboration on what precisely it means—suggest a view that any and all racial classifications violate the Equal Protection Clause. But that is manifestly not the majority's view. The majority's holding here cannot be given precision, much less defended, by appeal to principles of equal or individual treatment, race blindness, or neutrality. Those phrases are, to quote Felix Frankfurter, "sonorous formula[s] which [are] in fact only a euphemistic disguise for an unresolved conflict."[9]

It is widely, but not universally, accepted that appeals to equality alone cannot resolve hard questions that divide us—questions like how race may figure into university admissions under the Equal Protection Clause.[10] There is no such thing as purely formal equality. We require some prior specific articulation of—to use the terms of the old egalitarian debate—equality of what?[11] Without answering the equality of what question, the formal rule can't be operationalized.[12] However,

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6. *Id.* at 202 (quoting Cong. Globe 2766 (statement of President James Garfield) (alteration in original)).

7. *Id.* at 318 (Sotomayor, J., dissenting).

8. *Id.* at 231 (Thomas, J., concurring); *see id.* at 218, 232, 241, 246–47, 252, 262.

9. Dennis v. United States, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring).

10. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 553–64 (1982); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107–08 (1976). My claim in this Article is broader: that the "equality of what" must be justified in light of one's explicit theory of what race is.

11. For a host of articles addressing the "equality of what" debate in egalitarianism literature see, e.g., G.A. Cohen, *Equality of What? On Welfare, Goods and Capabilities*, 56 LOUVAIN ECON. REV. 357 (1990); Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFFS. 185, 185–86 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283 (1981); Amartya Sen, *Equality of What?*, *in* EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 307, 307 (Stephen Darwall ed., 1995). And for a brilliant critique of the terms in which this debate is framed, see Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999).

12. There is renewed enthusiasm for what might be called "formal" tests. *See, e.g.*, Jessica Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699, 1699 (2023); Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621 (2021). Formal tests are not bad—they are simply incomplete. Something needs to fill in the relata of the formal equality or but-for causation.

this Article argues something more, which is that when it comes to answering whether persons are being denied equal protection on the basis of a social category, one's position on the equality of what question must be defended in light of what that category *is*. Thus, the argument of this Article is that the unresolved conflicts that the sonorous formulas recited above disguise could fall along two dimensions. The first would be a disagreement about what race is. The second would be a disagreement over what treating people as equals demands *in light of* or *in virtue of* what race is.

The majority opinion elides these hard questions. The rhetoric of colorblindness indicates that *any time* someone acts on the basis of race it counts as unlawful under the Equal Protection Clause. But that is not what the majority holds. Nor could it be. If race is a real category of thought, experience, and action in our world, then one cannot just excise it and leave social and cognitive antimatter in its place. But one *can* put forward a theory of what is fair or just treatment in light of race. And that is what the majority is doing—they just don't cop to it. Such coyness is unnecessary because taking a substantive stand on what is owed *given race* is the only way anyone—conservatives, liberals, SFFA, UNC, Harvard, etc.—can respond to a challenge that equal protection on the basis of race has been denied. Anything else is just to deny the premise of the challenge.

An analogy might illustrate the point. Imagine you are asked whether a given tax system treats people equally on the basis of income, given that we live in a society where some people are high earners and others low. You might consider a head tax, flat tax, progressive income tax, consumption tax, wealth tax, or any other way of assessing tax. But if you are going to be responsive to the question asked—whether some potential taxation system treats people as equals on the basis of income—you must have a theory of what it takes to treat people as equals given that persons in this society have different levels of income.

The empirical fact of different income has implications for what the equality principle entails because a single act can be at once described as treating people the same and differently. Which description one chooses is a way of expressing one's normative position, not the grounds for having it.[13] For example,

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13. Many catchy quotes express this idea. For example, in a concurring opinion, Justice Frankfurter wrote that "[i]t was a wise man who said that there is no greater inequality than the equal treatment of unequals." Dennis v. United States, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting). He likely referenced a quote often attributed to Aristotle:

> For all men lay hold on justice of some sort, but they only advance to a certain point, and do not express the principle of absolute justice in its entirety. For instance, it is thought that justice is equality, and so it is, though not for everybody but only for those who are equals; and it is thought that inequality is just, for so indeed it is, though not for everybody, but for those who are unequal; but these partisans strip away the qualification of the persons concerned, and judge badly.

ARISTOTLE, POLITICS bk. III, at 211 (Jeffrey Henderson, ed., H. Rackham trans., Harvard Univ. Press 1932) (c. 350 B.C.E.). Similarly, Anatole France wrote: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal

if you defend a head tax, you must explain why imposing the same fixed amount on each person counts as treating them equally in the right way given that people have different incomes. In this example, when you treat persons the same in one respect—e.g., the identical absolute dollar tax is paid by each person—you necessarily treat them differently in other respects—e.g., different proportions of their income are paid. If you advance a head tax as the way to treat people as equals on the basis of income, then the normative position you must defend is that the former is the right way in which they should be treated equally, and the latter is an acceptable way to treat them unequally.

Arguing that your taxation proposal treats people equally on the basis of income requires you to move down a level of abstraction from the demand that people be treated "equally." On that level, we all agree. You have to get into the sociological weeds about what it means to have different levels of income in our society and what role taxation ought to play *given* those empirical facts. Appeals to income neutrality, treating people the same on the basis of income, or treating people as individuals and not as members of economic classes just restate the question. Said another way, defending the claim that your head tax proposal treats people as equals *on the basis of income* requires you to defend why it is fair and just in light of income inequality, not abstracted from it.

Now, you could just deny the premise of the question in one of two ways. First, you could maintain that, as an empirical matter, there is no income inequality. This move just asserts that the question of what kind of taxation treats people as equals on the basis of income inequality is irrelevant because there are no existing differences in the population along that dimension. Second, you could admit the empirical fact of income inequality but deny that it has any normative force. This is just another way of saying that persons are not owed any kind of equal treatment on the basis of income; they may be owed equal treatment on the basis of other features, just not this one. If you take either of those routes, it means you cannot rule out any form of taxation on the grounds that it denies equal protection on the basis of income (you could rule it out on other grounds, just not these grounds). If you accept the premise of the challenge, then you can rule some taxation systems out on the grounds that they deny equal protection on the basis of income. But you must substantively defend your normative theory of what people are owed in light of income inequality. If you reject the premise, you don't have to defend any normative theory of what kind of equality people are owed in light of different incomes. But you cannot rule some taxation systems out on the grounds that they deny equal protection on the basis of income because you have denied that persons are owed anything at all along this dimension.

The same goes for race. This is because the term "race" does not pick out how people are grouped by mere physical traits such as skin color or phenotype, or by ancestral facts. Rather, it picks out the stratifying set of social relations, economic institutions, political arrangements, and cultural meanings by virtue of which those

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their bread." ANATOLE FRANCE, LE LYS ROUGE [THE RED LILY] 118 (1894), https://fr.wikisource.org/wiki/Le_Lys_rouge/VII [https://perma.cc/N8QF-6K8S].

physical traits or ancestral facts are salient. That is, race is a system of social distinction, and those processes explain why we think certain physical traits are meaningful. It is not a "natural kind" distinction, as genetic distinctions explain neither why we fixate on these distinctions (and not others) nor how we draw racial category boundaries and classify people within them. Most of the time, the Justices in the majority accept the premise that race exists as a differentiating social system, not a natural biological category. Even Justice Thomas says that "race is a social construct."[14]

The majority Justices certainly accept that people are owed something in light of race because they start from the premise that race ought to be subject to strict scrutiny. The premise of strict scrutiny means not only are persons owed something *because of race*, but they are owed a lot: we must be extra careful to make sure people are being treated equally in light of race. What are they owed? This Article is dedicated to unearthing possible interpretations of how the *SFFA* majority answered this question and probing the empirical and normative assumptions undergirding each interpretation. This is a somewhat unorthodox approach in a law review article, so a note on method is in order.

This Article's ultimate aim is to promote a particular theory (or to use a term at once more precise and pretentious, a meta-theory) of the Equal Protection Clause ("EPC"). All accounts require (i) a social ontology of the kind that is demanding equal treatment; and (ii) a normative theory of what equality is owed in light of the nature of the kind demanding equal treatment. Part I briefly introduces my positive (meta-)theory of the EPC by showing that we cannot even make sense of the majority's approach to analyzing SFFA's equal protection challenge without reference to (i) and (ii). I hope to show that, whether or not they recognize it, each interpretation of the *SFFA* holding is premised on a social theory of what race is and a normative theory about when treatment counts as equal in light of race.

One way to see why all EPC accounts require this is to try to work through the strongest version of various interpretations of the *SFFA* majority holding and show that without some theory of both (i) and (ii), each version fails by the metric of coherence, determinacy, or both. Therefore, Part II explores various versions of what precisely the majority's ruling that admissions must not "depend,"[15] "turn on,"[16] "consider"[17] or be "based on" race might mean.[18] I develop a (non-exhaustive) list of possibilities by analyzing the majority opinion itself, and since it offers little guidance, also the oral arguments and SFFA's briefs. I approach these sources in a very particular way, which is to take their words and arguments at face value and interrogate plausible arguments consistent with the examples they provide in their

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14. SFFA v. Harvard, *supra* note 1, at 276 (Thomas, J., concurring).

15. *Id.* at 193 ("[Admission] can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race.").

16. *Id.* at 208 ("These cases involve whether a university may make admissions decisions that turn on an applicant's race.").

17. *Id.* at 196–97 ("In making those decisions, the review committee may also consider the applicant's race.").

18. *Id.* at 220; *see also supra* note 5 and accompanying quote.

public statements regarding which practices are constitutionally permissible. I take this approach not because I believe that parties or Supreme Court justices always say what they mean, or because I fail to appreciate that their public statements are part of a deeper long-term political project. It is just not the aim of *this* Article to sus out the beliefs that lie in their heart of hearts or expose the political project that they are trying to achieve with their arguments and concepts. The aim of this Article is to see whether their words and arguments can withstand the demands of public reasoning that is (ostensibly) constitutive of what law-making is in the common law system.

Figuring out which practices that "depend" or "turn on" race are banned under *SFFA* is no mere academic exercise in conceptual taxonomy unmoored from practical concerns. Universities are actively trying to figure out what they must do to avoid running afoul of this ruling.[19] So are public schools, private firms, and foundations.[20] If studies of how organizations responded to new, vague, and indeterminate legal rules like Title VII are any guide, the on-the-ground decisions of legal actors like general counsels and university administrators will give content to what the rule means: institutional norms take shape by organizations copying each other's interpretations of what compliance with the law requires.[21] Lower courts will also give some precision to the imprecision of this ruling as they decide future challenges to the various admissions practices that universities try out in its wake. Some are already brewing.[22] These courts will have to decide which practices count as acting on the basis of race in the banned sense. As Part II shows, the possible conceptions are varied, and it is much more difficult to articulate what precisely each

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19. *See, e.g.*, Douglas Belkin, *Some Schools See Opening in Affirmative-Action Ruling*, WALL ST. J. (June 30, 2023, 7:24 PM), https://www.wsj.com/articles/some-schools-see-opening-in-affirmative-action-ruling-462e4cbf [https://web.archive.org/web/20230701012530/https://www.wsj.com/articles/some-schools-see-opening-in-affirmative-action-ruling-462e4cbf]; Neil H. Shah, *A Month After the Fall of Affirmative Action, How Can Colleges Uphold Diversity?*, HARV. CRIMSON (July 28, 2023), https://www.thecrimson.com/article/2023/7/28/admissions-post-supreme-court/ [https://perma.cc/443R-5ZUT]. The debate about Ed Blum's demand letter to 150 colleges and universities is also illustrative of the ongoing conversation around exactly what the decision requires. *See* Scott Jaschik, *The Demands of Students for Fair Admissions*, INSIDE HIGHER ED. (July 13, 2023), https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions [https://perma.cc/4KT6-298W]. *See also* David Bernstein, *Columbia Law School Posts, Then Retracts, Video Statement Requirement for Applicants*, VOLOKH CONSPIRACY: REASON (Aug. 1, 2023, 4:26 PM), https://reason.com/volokh/2023/08/01/columbia-law-school-posts-then-retracts-video-statement-requirement-for-applicants/ [https://perma.cc/4JNN-NJD4].

20. *See generally* Sonja B. Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024).

21. *See, e.g.*, FRANK DOBBIN, INVENTING EQUAL OPPORTUNITY (2009); *cf.* Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AM. J. SOC. 1589 (2001).

22. *See, e.g.*, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023), *cert denied*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024) (mem.). *See also* Complaint, Chica Project v. President & Fellows of Harvard College (U.S. Dept. of Ed. Office of Civil Rights 2023) [hereinafter Chica Project Complaint], *available at* http://lawyersforcivilrights.org/wp-content/uploads/2023/07/Federal-Civil-Rights-Complaint-Against-Harvard.pdf [https://perma.cc/AVS2-NUD8].

would prohibit than it might seem at first blush. This is because what the majority really seems to have done is banned acts consistent with racial inferences that it deems bad, unjustified, or socially harmful in light of its unstated—but logically necessary—background theory about what race is. But the majority makes neither theory—about what race is nor about what is bad in light of race—explicit. So, the legal rule is hard to understand, much less defend.

Part III returns to my positive argument that any coherent view on what is required by the Equal Protection Clause (or non-discrimination under Title VI) on the basis of race amounts to taking a position on what kinds of considerations are just *in light of* race (among other statuses), not abstracted from it. This is why the notion that "anti-classification/colorblindness" versus "antisubordination" is the fundamental fault line dividing philosophies of equal protection is a red herring.[23] Yet this notion is pervasive in academic and judicial discourse, and indeed featured prominently in Justice Thomas's *SFFA* concurrence assailing the "'antisubordination' view of the Fourteenth Amendment."[24] But everyone who thinks that persons are owed something on the basis of race, including Justice Thomas, has an antisubordination view of the Equal Protection Clause if by that we mean simply that the Clause forbids *subordinating* (in the evaluative, normative sense) on the basis of race.[25] Again, we just disagree one step down the ladder of abstraction: we disagree about what laws, acts, and practices count as subordinating on the basis of race. And it is my argument in this Article that the social facts that constitute race must explain and justify both *why* race is subject to strict scrutiny and what counts as subordinating on the basis of race.

I. CONCEPT CLEARING

The majority opinion does not ban all consideration of race or all instances where admissions decisions are based on race. The Justices in the majority do not express the view that it counts as not treating people as equals *any time* race figures as a reason in some respect. Before trying to figure out which kinds of considerations or practices the decision does seem to ban, this Part simply defends this threshold claim because some of the majority's language is confusing.

Here are two examples:

> (a) "Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.'"[26]

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23. Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1227 (2019).

24. SFFA v. Harvard, *supra* note 1, at 246 (Thomas, J., concurring).

25. *See, e.g.*, *id.* (quoting Plessy v. Ferguson, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting)) (Justice Thomas defining his view by referencing Justice Harlan's dissent in *Plessy* that "the Constitution [is] colorblind and categorically reject[s] laws designed to protect 'a dominant race—a superior class of citizens,' while imposing a 'badge of servitude' on others").

26. *Id.* at 206 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

> (b) "Eliminating racial discrimination means eliminating all of it." The majority goes on to say, "our precedents have identified only two compelling interests that permit resort to race-based government action."[27]

Let's distinguish between two different meanings of terms like "discrimination" or "an exception to the Constitution's demand for equal protection." One meaning I will call "acting on the basis of race": it encompasses all instances when race figures as a reason in choosing a course of action ("Meaning One").[28] A second meaning of the word "discrimination" is to take race as a reason in a manner that violates a legal or normative rule—to act on the basis of race in a wrongful, unjustified, or illegal manner (e.g., in violation of the EPC) ("Meaning Two").[29] Because this Article addresses discrimination marked as unlawful under the EPC, I will just denote this second meaning as "unlawful discrimination."

So, one reading of sentences (a) and (b) is that *all* instances of acting on the basis of race (Meaning One) count as unlawful discrimination (Meaning Two).[30] This reading makes these utterances either circular or illogical. On this interpretation, (a) would read "an *exception* to the Constitution's demand for equal protection must survive strict scrutiny." The *exception* is not surviving strict scrutiny. Rather, the act in question counts as an exception because it is an instance of some class or type of action, and that action type is allowed only under certain circumstances. And (b) would also be illogical, as it would read: "*All* racial discrimination must be eliminated. Some racial discrimination is permitted." To read

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27. *Id.* at 206–07. Other examples include the following: "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." *Id.* at 214 (alterations in original) (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) and Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 381 (2016)). Justice Thomas's concurrence is also full of such language: "First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental discrimination must be closely tailored to address that particular past governmental discrimination." *Id.* at 252–53 (Thomas, J., concurring) (emphasis omitted). If he really intended "racial discrimination" to mean unlawful and wrongful actions on the basis of race, then he would be saying that unlawful and wrongful racial discrimination is, under certain circumstances, not unlawful and wrongful racial discrimination.

28. Part II explains that *this* requires further specification.

29. This is a familiar distinction that many philosophy-of-discrimination approaches start with. *See generally* BENJAMIN EIDELSON, DISCRIMINATION AND DISRESPECT (2015); SOPHIA MOREAU, FACES OF INEQUALITY: A THEORY OF WRONGFUL DISCRIMINATION (2020); Deborah Hellman, *Defining Disparate Treatment: A Research Agenda for Our Times*, 99 IND. L. REV. 205 (2023).

30. Roberts is famous for this elision between the two different meanings of the same word, as in his famous (infamous) sentence from *Parents Involved*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

these sentences in this way would be like saying: "All murder is outlawed, but some murder is permitted," where murder is used to *mean* unjustified and illegal killings.

Therefore, a sensical interpretation is as follows. The initial part of the quoted passage in (a) and (b) is defining some set of action types—acting on the basis of race (Meaning One). Actions of this type define a set eligible to be outlawed. The second part is stating the conditions under which an action in the eligible set *counts* as unlawful discrimination (Meaning Two)—a violation of the Equal Protection Clause. So, these sentences must mean that sometimes acting on the basis of race counts as unlawful discrimination. Under what conditions? When the act or practice fails strict scrutiny.

To read it this way would be like saying: "All killings are suspect, some count as murder." To actually put that to work one needs two things. First, one needs a definition of when an act counts as a killing. Second, one needs to define the necessary and sufficient conditions for a killing to count as *murder* (i.e., unjustified/unlawful killings). Similarly, the majority's reasoning as applied to racial discrimination under the EPC needs to define two things:

(1) when an act or practice is on the basis of race;

(2) what makes instances of (1) unjustified or wrong in light of race.

The strict scrutiny test is the stage at which the majority *says* it determines whether acts in the eligible set count as unjustified or wrong and therefore, are in violation of the EPC: "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."[31] However, as we will see in the next Part, the majority is also drawing on some normative theory to define what counts as acting on the basis of race. That is, the line drawing that the majority is doing to define what counts as acting on the basis of race is already pulling on an unstated, but essential, set of evaluations.

As Part III argues, it is not just the majority's view that requires specification of both of (1) and (2). Any view of discrimination does, including those in the dissent. Although the dissenting Justices indicate in general terms that they believe "race-conscious admissions," or "considering" or giving "tips" for race is constitutional, I doubt they mean that, in their view, any and all racial considerations are constitutional.[32] I would wager my 401(k) that the dissenting Justices do not think that acting on the basis of the belief that "tests are easy for Asians" or "students of African descent are less talented at math" are permissible racial considerations. Thus, they do not believe that any and all "race-conscious means" are lawful under the Fourteenth Amendment.[33] The dissenters also use the term "race-conscious

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31. SFFA v. Harvard, *supra* note 1, at 206–07 (citations omitted).

32. *See id.* at 318 (Sotomayor, J., dissenting) (positing that race-consciousness can advance constitutional equality); *id.* at 348 (Sotomayor, J., dissenting) (arguing that Harvard's use of "tips" is consistent with Court precedents).

33. *See id.* at 318 (Sotomayor, J., dissenting); *id.* at 322 ("This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.").

means" to pick out acts and practices that, in their view, are justified or fair in light of race. My point is simply that the analysis of (1) and (2) is one that *anyone*—conservatives, liberals, SFFA, Harvard, or UNC—must answer if they are to explain why specific actions do or do not treat people as equals on the basis of race in accordance with the U.S. Constitution.

A brief clarification is in order here before proceeding to the main point of this Article. When I say that every EPC theory must give an account of when an act or practice is on the basis of race, I mean "on the basis of" in the broad sense. I explicitly eschew mental or psychological language such as to be "motivated by" or "by reason of" because I do not think that the decision-maker's mental state is a necessary (although it may be a sufficient) condition for making an act on the basis of race. My view is that an act or practice can be on the basis of race if the decisional process is in fact on the basis of race.[34]

However, the dominant legal (and many scholarly) theories of discrimination are what I call mental state or criminal-law-like definitions of discrimination. I call these mental state or criminal-law-like definitions of discrimination because, in criminal law, the actor's mental state with respect to some element of the action situation—the voluntary act, the results, the attendant circumstances—is the wrong-making feature that makes the act criminal and determines its seriousness. For example, a human actor's mental state with respect to causing death is the wrong-making feature of an act that in fact causes death, which marks the distinction between a killing and a murder. Likewise, many jurists and theorists hold that a human actor's intent to act on the basis of racial status is the wrong-making feature of an act that in fact causes an outcome on the basis of race, which marks the distinction between "disparate impact" and "disparate treatment."[35] Some theorists, such as Deborah Hellman and Ben Eidelson, take a wider view of the kinds of mental states that could function as the wrong-making feature, including unconscious ones, psychological states that are not subjectively endorsed by the actor, or mental processes that do not rise to the level of the actor's

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34. This view also requires one to answer a complex set of ontological questions about what race is and when it is being acted upon. And yes, an implication of this view is that the distinction between "disparate impact" and "disparate treatment" is not tenable as it has been drawn in the doctrine.

35. Famously, in *Washington v. Davis*, the Supreme Court held that Fifth and Fourteenth Amendment equal protection claims are only cognizable if defendants acted with the "necessary discriminatory racial purpose," explaining that "[their] cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional [s]olely because it has a racially disproportionate impact." Washington v. Davis, 426 U.S. 229, 239, 241 (1976). In antidiscrimination statutes, the Supreme Court has long distinguished disparate treatment from disparate impact by reference to the defendant's "intent or motive." *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Comtys. Project, Inc., 576 U.S. 519, 524 (2015) (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)); *id.* at 533 (finding that disparate-impact claims are cognizable under the Fair Housing Act because "*Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors").

firsthand reasons for action.[36] But all of these designate human mental states as necessary grounds for an act being "on the basis of" race.

I reject mental-state or criminal-law-like definitions of discrimination and believe that they are not defensible for various reasons. But this Article is not about that. This Article is about what kind of mental states qualify as being on the basis of race in the way that the majority uses the term in the *SFFA* decision. These Justices hold some kind of mental state view of discrimination where the mental state of a human decision-maker who does some act is the wrong-making feature that *makes* the act discriminatory (read: grounds the normative fact that the act is discrimination).[37] The question is, what *is* that discrimination-making mental state?

So what does the majority think counts as "acting on the basis of race"? The next Part will explore various possible meanings. This Part makes a few general points. First, it is exceedingly difficult to nail down what precisely the majority means to pick out as acting on the basis of race. Second, whether or not the Justices realize it, their definition is drawing on some background (but unstated) view of what race *is* in our society. Third, the lines they draw between acting on the basis of race and not acting on the basis of race are motivated by a normative view about what racial considerations are fair or just. However, this normative view is neither made explicit nor defended. But it must be there in the background because the general directive to just "not consider race" can't be operationalized. Benchmarking is everyone's problem. If the majority deems certain racial inferences as wrongful, it must have in mind some alternative way that universities *ought* to evaluate candidates. This alternative must be defended in light of what race is, not as if it did not exist.

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36. Deborah Hellman, *Discrimination by Proxy: An Empty Idea* (unpublished manuscript) (on file with author) ("[T]he account that I endorse would encompass unconscious bias, while Schwartzman's account would not. In cases of unconscious bias, the actor disadvantages people of a particular group. Something about his psychological state causes this result. But the actor does not take disadvantaging people of this group as his aim; doing so is not his reason for action."); *see generally* EIDELSON, *supra* note 29. For an exploration of the distinction between an actor's subjective reasons and the actor's psychological states that produced or caused the act, *see generally* Pamela Hieronymi, *Reasons for Action*, 111 PROC. ARISTOTELIAN SOC'Y 407 (2011); Lily Hu, *Race, Reasons, and Acting on the Basis of Race* (unpublished manuscript) (on file with author).

37.

> We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." 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.

SFFA v. Harvard, *supra* note 1, at 220 (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993) (internal citation omitted)); *see also id.* at 288–89, 303–04 (Gorsuch, J., concurring) (using terms like "purposeful" and "intentional" to mark out what they take to be objectionable about the admissions systems).

II. WHAT IS ACTING ON THE BASIS OF RACE?

The majority opinion does not explicitly tell us what it is banning. This is a glaring omission because the Justices, and especially some of the conservative Justices that made up the majority, asked a lot of questions about this issue at oral arguments. They seemed to grasp that it would be difficult to define precisely what would be banned when they banned affirmative action. As stated above, the Justices are operating within a framework of discrimination that assumes that whether or not an admissions policy or practice is on the basis of race turns on facts about the minds of decision-makers.[38] Illustrative samples of phrases used in the opinion to define what the decision bans as unconstitutional include describing university admissions practices that "depend,"[39] "turn on,"[40] give a "plus,"[41] "consider,"[42] or are "based on" race.[43] The opinion does not define these phrases. However, there are some clues in the back and forth at oral arguments as to what the majority Justices might have had in mind.[44]

A. An Act Is on the Basis of Race Whenever the Decision-Maker Is Not Blinded as to Racial Categorization

One definition of acting on the basis of race (which I'll refer to as "Version 1" or "(1)") includes anytime relevant decision-makers have any knowledge of the expressed racial status or beliefs about the racial category of the candidate, or are not fully "blinded to" to the racial status of candidates.[45] On this view, if admissions

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38. All counts in the original complaints against Harvard and UNC allege intentional discrimination in various forms. *See* Complaint at ⁋⁋ 100–18, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176); Complaint at ⁋⁋ 55–56, 63, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-CV-00954). SFFA's Supreme Court brief is replete with language implying some kind of mental state view of discrimination: "At Harvard, race *matters* more than every other diversity factor"; "Harvard is *obsessed* with race"; "Harvard's racial *preferences* are enormous." Brief for Petitioner at 76–79, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) (No. 20-1199) [hereinafter Brief for Petitioner] (emphasis added).

39. SFFA v. Harvard, *supra* note 1, at 193–94 ("[Admission] can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race.").

40. *Id.* at 208 ("These cases involve whether a university may make admissions decisions that turn on an applicant's race.").

41. *Id.* at 196 ("In making that decision, readers may offer students a 'plus' based on their race, which 'may be significant in an individual case.'").

42. *Id.* at 196–97 ("In making those decisions, the review committee may also consider the applicant's race.").

43. *Id.* at 220 (referencing "race-based admissions programs in which some students may obtain preferences on the basis of race alone").

44. I do not canvas every possible meaning, just the ones that seem to be taken up by the majority.

45. That is, if the discriminatory taint is the act of *classification per se*, then it would not seem to make a difference if the decisionmaker merely had formed a belief as to racial classification (say, from making a wild guess or ascribing category membership from some cue) or had positive racial knowledge (say, from a candidate stating a category affiliation).

officers have formed beliefs about racial classifications of candidates at the time the decisions are made, they have acted on the basis of race. This definition would require the Court to further define what counts as a *racial* classification (e.g., do classifications on the basis of ethnicity, cultural practices, or national origin count as a racial classification?) and what mental states count as having formed one. For example, does forming a mental impression of someone's skin color count as having classified them into a racial group even if the perceiver believes that skin color is neither necessary nor sufficient to classify someone as a member of a racial group (say, because they believe that ancestry defines racial membership and skin color does not perfectly track ancestry)?

Despite using the term "colorblind" to describe what the Fourteenth Amendment demands of admissions, the plaintiffs in *SFFA* appeared to reject this definition.[46] The majority opinion also repeatedly invokes the phrase "colorblind," and the concurrences are heavy on it.[47] A literal interpretation of the term bars seeing, cognizing, or having beliefs about race *in toto*. This version would render large swaths of admissions practices (not to mention everyday activities) unconstitutional. Admissions officers form beliefs about racial classifications from visual or verbal cues during interviews, so those would be off limits. Either candidates would be positively barred from expressing racial–ethnic affiliation or admissions officers would be positively barred from being exposed to these statements or cues. But it is exceedingly unlikely that the majority Justices mean the term in this literal sense; they use active language like admissions must not "depend" or "turn[] on" race, or that candidates ought not to be "treated" on the basis of race.[48]

Nonetheless, it is helpful to get this literal interpretation of "colorblind" off the table because it shows that if the majority does not mean that any cognition of racial status is barred, then only some active use of a racial consideration was banned by their decisions. But which uses of race?

B. An Act Is on the Basis of Race Whenever Race Figures Among the Reasons for One of the Decision-Maker's Admissions Evaluations

A second view of acting on the basis of race ("Version 2" or "(2)") is when the racial classification of an applicant figures among the reasons for an admissions

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46. SFFA occasionally used the term colorblindness. *See* Harvard Oral Argument, *supra* note 3, at 5–6 (arguing that the Fourteenth Amendment's impetus was to constitutionalize the Civil Rights Act of 1866, which was "a series of color-blind measures and requirements"). But ultimately SFFA focuses on "use" rather than mere awareness of race. Brief for Petitioner at 1, *supra* note 38 (arguing that the constitution is "color-blind" and that *Brown* interpreted the Fourteenth Amendment to reject "any authority . . . to use race as a factor in affording educational opportunities" (citations omitted)).

47. *See* SFFA v. Harvard, *supra* note 1, at 227 (citation omitted) ("For what one dissent denigrates as 'rhetorical flourishes about colorblindness,' . . . are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law.").

48. *See id.* at 193–94 (arguing that "[g]aining admission to Harvard . . . can also depend on your race"); *id.* at 301 (Gorsuch, J., concurring) (asking "[j]ust how many admissions decisions turn on race?"); *id.* at 231 (majority opinion) (requiring that "the student must be treated based on his or her experiences as an individual—not on the basis of race").

evaluation, even an intermediate evaluation.[49] However, this formulation is too broad. In the final paragraphs of the opinion, the majority says:

> [A]s 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.[50]

The majority is putting forward a distinction, which figured prominently in the oral arguments, between (i) "race as such," "race *qua* race," or "race for race's sake"[51] figuring as a reason versus (ii) race figuring as a reason as "contextual relevance."[52] During oral arguments, the conservative Justices and the lawyers for SFFA advanced the view that only (2)(i), acting on the reason of "race itself,"[53] is forbidden under the Fourteenth Amendment. They expressed this view by saying that they objected to "consideration[s] of race and race by itself"[54] or awarding "racial preferences" because of "checking the right racial box."[55] However, both the Justices and SFFA lawyers stated that they believed it *was* constitutionally permissible to act on race reasons where "race provides a context for [the

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49. Even if that evaluation is for some intermediate point and not the final 0–1 admissions decision. I thank Jessica Clark for pointing out that distinction to me.

50. SFFA v. Harvard, *supra* note 1, at 230–31 (citations omitted).

51. "The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake." *Id.* at 220.

52. Pressed to distinguish "race in a box-checking way" from "race in an experiential way" (the latter use endorsed by SFFA), SFFA's attorney, Strawbridge, said that race "may have some contextual relevance when you're evaluating an essay . . . about being subjected to racial discrimination[, which] obviously indicates that the applicant has grit, that the applicant has overcome some hardship. It . . . tells you something about the character and the experience of the applicant other than their skin color." UNC Oral Argument, *supra* note 3, at 27:3–28:3.

53. SFFA's Attorney Norris claims that "what Title VI bans is race itself as a consideration." Harvard Oral Argument, *supra* note 3, at 8:24–25.

54. UNC Oral Argument, *supra* note 3, at 24:22–25:7 ("Mr. Strawbridge: . . . What we object to is a consideration of race and race by itself. Justice Barrett: Race in a box-checking way as opposed to race in an experiential . . . statement? Mr. Strawbridge:—which the record in this case is that they can give the preference based on the check of a box alone.").

55. Harvard Oral Argument, *supra* note 3, at 4:13–15 ("Mr. Norris: . . . . [F]or competitive applicants, checking the right racial box is an anvil on the admissions scale."); *id.* at 13:4–11 ("Mr. Norris: . . . [T]here's a finding from the district court . . . that Harvard can award a racial preference based on the check box alone, whether or not an applicant writes about it or otherwise indicates that it's important to them. And that is important. That's race itself.").

applicant's] experience,"[56] or where "race [is considered] in an experiential way."[57] They suggested no objection to when race figures into the relevance accorded by admissions officers to certain experiences[58] (such as being subject to racial discrimination[59]), when race is considered for the way is relevant to the applicant's "background" or valued for how the candidate expresses their "culture, tradition, heritage."[60] This seems to be the distinction the majority is drawing when they hold that it is unproblematic for "universities [to] consider[] an applicant's discussion of how race affected his or her life."[61]

The above proffered distinction raises several questions. First, if one wants to make a distinction between (2)(i) and (ii)—forbidding the former but tolerating the latter—then one needs to give an account of the necessary and sufficient conditions for when a decision-maker is acting on the reason of (i) "race *qua* race" as opposed to (ii) race in a "contextual" fashion. Second, even if one believes there is a feasible conceptual distinction to be drawn between (i) and (ii), it is not obvious how the distinction is empirically detectable. For example, could any of the reams of statistical evidence submitted by the parties in the lower courts distinguish when (i), but not (ii), was responsible for generating the observed decision patterns? If the massive evidentiary record established over years of litigation in this case cannot empirically distinguish between these two versions of using race as a reason, then future litigants will have a hard time establishing that the forbidden manner of considering race is at play.

With respect to the first issue, what exactly counts as (i) acting on the reason of "race *qua* race" or race as a "checkbox"? During exchanges with the Justices at oral arguments, the SFFA plaintiffs often suggested that (i) consists in a decision-maker taking the fact of a candidate's "skin color" *as such* to be a reason for action.[62] The majority opinion also indicates that one acts on "race *qua* race"

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56. UNC Oral Argument, *supra* note 3, at 6:17 ("Mr. Strawbridge: [A]n applicant . . . could write something in which race provides a context for their experience. But just considering race and race alone is—is not consistent with the Constitution.").

57. *Id.* at 27:7–8.

58. *Id.* at 28 ("Mr. Strawbridge: [A]n Asian American student who took an active interest in perhaps . . . traveling back to their grandmother's . . . country of origin or somebody who . . . was involved in some extracurricular activities with a particular . . . interest in supporting . . . Asian American students, for example, those kind of show dedication, they show extracurricular involvement, they show perhaps a global interest in the world.").

59. *See, e.g.*, Harvard Oral Argument, *supra* note 3, at 7:6–24 (Chief Justice Roberts asked whether Mr. Strawbridge would object to allowing consideration of "an essay about having to confront discrimination growing up," "what a faculty recommender said," and an applicant's ability "to deal with racial discrimination in an area or in a school where he's part of a very small minority." Mr. Norris replied: "Absolutely not, Mr. Chief Justice.").

60. *Id.* at 10:11–19 ("Mr. Norris: I think culture, tradition, heritage are all not off limits for students to talk about and for universities to consider. They can't consider . . . this person is Hispanic or black or Asian . . . . They need to credit something unique and individual in what they actually wrote, not race itself.").

61. SFFA v. Harvard, *supra* note 1, at 230.

62. Brief for Petitioner, *supra* note 38, at 66 ("[N]o one has a legitimate interest in treating people differently based on skin color."). The brief characterizes race-conscious

when one acts on "skin color"[63] and indeed locates the wrongfulness of the action in the fact that this epidermal feature is the decisional difference maker. For example:

> We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin. *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*."[64]
>
> . . . .
>
> Most troubling of all is [that] the dissent must . . . defend[] a judiciary that picks winners and losers based on the color of their skin.[65]
>
> . . . .
>
> In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.
>
> Many universities have for too long done just the opposite. . . . [T]hey have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin.[66]

In contrast, they define (ii) to consist of a decision-maker taking facts about the candidate's life experiences or social position that the decision-maker believes to be true because of race as a reason for action.[67] The "because of" here is explanatory; it means that the experiences have a particular quality only by virtue of the social experience and cultural meanings of race. For example, a candidate might have felt their intelligence doubted throughout primary education in virtue of pervasive cultural assumptions about white superiority, which is a distinct experience from, say, having felt their intelligence doubted throughout primary education in virtue of pervasive cultural assumptions about ableist superiority.

If that is the distinction the majority means to draw between these two different ways that race can figure as a reason, it is hard to find many pure instances

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admissions as based on skin color: "[W]hen elite universities place highschoolers on racial registers and tell the world that their skin color affects what they think and know, the universities are hurting, not helping." *Id.* at 49.

63. *Id.*

64. SFFA v. Harvard, *supra* note 1, at 220 (emphasis added) (citations omitted).

65. *Id.* at 229.

66. *Id.* at 231. Justice Thomas's concurrence makes a similar allusion to universities' supposed foregrounding of skin color over experience, writing that "UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation." *Id.* at 254 (Thomas, J., concurring).

67. During UNC's oral argument, Mr. Strawbridge and Chief Justice Roberts concurred that "allowing . . . applicants to indicate experiences they have had because of their race" would be constitutional. UNC Oral Argument, *supra* note 3, at 43:5–13.

of (i) that do not, upon closer inspection, look like (ii). In the former, the decision-maker acts on the reason that the candidate has a particular genetic profile, skin hue, or phenotypic feature all by itself—stripped of any meaning or association—as something that counts for or against a candidate's admission. This would be, in the words of the parties and Justices, "[r]ace in itself [being] considered a plus factor."[68] Apprehending the candidate's trait triggers an affective "yea!" or "boo!", generating more or fewer (figurative or literal) points being added to some latent tally that determines admission. In the latter, the decision-maker acts on the reason that the candidate has been socially positioned in a specific way, had some set of life experiences that have a particular quality, or navigated some collection of social meanings because the candidate was racialized during their life.

Is it credible to believe that admissions officers are taking the color of an applicant's skin simpliciter to be a reason for admission? First, most candidates do not disclose the color of their skin on college admissions applications. Second, the "checkbox" about which SFFA complained did not ask about skin color; it asked about the candidate's subjective racial category affiliation. The culturally dominant view of racial categories holds that skin color is neither necessary nor sufficient for category membership claims, as people across categories may share a skin color and people within one may not.[69]

Skin color is the only example the majority gives us for what counts as (i) "race *qua* race," but perhaps the majority Justices are using "skin color" as a literary metonym to represent something like ancestry, or at least recent ancestry, or the

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68. Asked by Justice Alito whether "[r]ace in itself may be considered a plus factor," David Hinojosa (attorney for UNC student respondents) replied in the affirmative. UNC Oral Argument, *supra* note 3, at 136:7–9. Justice Alito uses the language of "plus factors" particularly frequently, but so do other justices. *See id.* at 94, 95, 98, 99, 103, 136. So do the parties. The North Carolina Attorney General, for example, denied any "automatic plus factor that's given" but said that "it can matter what an applicant's racial background is." *Id.* at 98:4–9.

69. This cultural view has been fairly stable since at least the eighteenth century, when the ideology of racial difference was forged through the violence of slavery. *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1739–40 (1993) (explaining that historically "[b]lood as 'objective fact' dominated over appearance and social acceptance, which were socially fluid and subjective measures" but that "'blood' was no more objective than that which the law dismissed as subjective and unreliable. The acceptance of the fiction that the racial ancestry could be determined with the degree of precision called for by the relevant standards or definitions rested on false assumptions that racial categories of prior ancestors had been accurately reported, that those reporting in the past shared the definitions currently in use, and that racial purity actually existed in the United States. Ignoring these considerations, the law established rules that extended equal treatment to those of the 'same blood,' albeit of different complexions, because it was acknowledged that, '[t]here are white men as dark as mulattoes, and there are pure-blooded albino Africans as white as the whitest Saxons.'" (second alteration in original) (citations omitted)). See also the discussion of the adjudication of the obviousness of Alice Jones's blackness in Angela Onwuachi-Willig, *A Beautiful Lie: Exploring* Rhinelander v. Rhinelander *as a Formative Lesson on Race, Identity, Marriage, and Family*, 95 CAL. L. REV. 2393, 2399 (2007).

experience or state of being *racialized*.[70] In the first case, the majority must mean recent ancestry in a very narrow fashion (the fact that ancestor A came from continent C and *nothing more*) because acting on (i) "race *qua* race" was held out as categorically distinct from (ii) acting on race in a contextual fashion, and if someone takes recent ancestry to mean the candidates' social, cultural and economic position *because of* the historical position of their ancestors, that lapses into (ii). For example, if admissions officers admit candidates with recent ancestors from continent C because they think this will be looked upon favorably in some public arena, they are not acting "just" on the reason of continent C ancestry. Rather, admissions officers are acting on the reason that some portion of the public assigns some value to admitting students with recent ancestors from continent C because of how that ancestral trait is imbued with social meaning through a host of interactions and institutions in our society.[71] Same with the second case; if acting on the basis of "skin color" is used as a metonym to represent being treated with racialized meanings in a race-stratified society, then when decision-makers act on "skin color," they are taking something beyond that dermatological fact as a reason for action. So we are still left with the question: Under what conditions is someone acting on the basis of (i) "race *qua* race"?

What is odd is that the majority makes contradictory allegations within the same paragraph regarding whether the defendants' admissions practices are doing (i) or (ii). The majority Justices accuse UNC and Harvard of doing (i) when they say that "[t]he point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake."[72] However, one sentence later, they affirm that what Harvard and UNC are doing is (ii) when they accuse university admissions officers of "stereotyping." The majority says that the use of race must not "devolve into 'illegitimate . . . stereotyp[ing]'"[73] and goes on to allege that Harvard and UNC have already so devolved, stating:

> [W]hen a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike"—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their

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70. The term "racialized" indicates that race is not an intrinsic trait people possess, but a relational property one has by "living as a 'raced' person." Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1303 (2005). *See also* Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1694 (2000) ("The term racialization embodies the idea of race as a process."); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1806–07 (1993) ("I have suggested in some of my work in critical race theory that 'race' is a verb, that we are 'raced' through a constellation of practices that construct and control racial subjectivities." (citation omitted)).

71. I thank Richard Primus for this example.

72. SFFA v. Harvard, *supra* note 1, at 220.

73. *Id.* at 211 (alteration in original) (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

> very worth as citizens—according to a criterion barred to the Government by history and the Constitution."[74]

What must be true about an admissions officer's mental state for them to be engaged in the stereotyping alleged in that paragraph? The most basic thing that must be true is that they are not acting on the basis of *merely* skin color or any other physical trait that (in the majority's view) defines racial category membership. Rather, the decision-maker must be using the trait to make inferences about some matters beyond the trait itself. That is the dictionary definition of stereotyping—to infer that someone has one characteristic that is not observed from the fact that they have another trait that is observed.[75] If admissions officers are doing what the majority accuses them of in the second sentence—admitting students who have a particular skin color *because* they believe that they hold a particular viewpoint or have navigated certain life experiences—then they are not acting on the basis of skin color simpliciter. They are acting on the basis of viewpoint or life experiences and the admissions officer is using race in a "contextual" fashion.[76]

Of course, many understand the term "stereotyping" to connote making inferences that are wrong, harmful, or unjust. And the majority may believe that admissions officers' inferences are unjustified or will produce bad social or political effects. That is presumably why the opinion sometimes modifies the term "stereotyp[ing]" with the adjective "illegitimate." But let's put aside whether it is justified, true, or right for admissions officers to believe that, for example, candidates have navigated certain meanings or positions because of their race. The point is when a decision-maker believes or assumes (rightly or wrongly) that a candidate has navigated certain meanings and positions or adopts a particular characterization of their life experiences because of race, and takes that to be the reason for action, then, according to the conceptual distinction the majority itself has advanced, they are acting on the basis of (ii), not (i).

Certainly, the majority would want to resist this. But they cannot do so while maintaining that the distinction they draw between race-based reasons is truly

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74. *Id.* at 220–21 (second alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 912 (1995)).

75. *Stereotype*, DICTIONARY OF PSYCHOLOGY (2d ed. 2015) (Stereotype is "a set of cognitive generalizations (e.g., beliefs, expectations) about the qualities and characteristics of the members of a group or social category. . . [which] are often exaggerated, negative rather than positive, and resistant to revision"); *see also Stereotype*, MERRIAM-WEBSTER https://www.merriam-webster.com/dictionary/stereotype (last visited Mar. 7, 2024) [https://perma.cc/69HU-GYS3] ("*Stereotype* is most frequently now employed to refer to an often unfair and untrue belief that many people have about all people or things with a particular characteristic.").

76. This is literally the same point the SFFA lawyers make in response to Justice Alito's hypothetical about an African immigrant to rural North Carolina who writes their admissions essay about having to find a way to relate to classmates despite cultural differences. *See* UNC Oral Argument, *supra* note 3, at 33:9–25. Attorney Strawbridge responded, "I think that that would generally be permissible because the—the preference in that case is not being based upon the race but upon the cultural experiences or the ability to adapt or the fact of encountering a new language . . . in a new environment." *Id.* at 33:22–34:3. Admissions officers must assess beliefs about race to interpret this as engaging across cultural *differences*, but nonetheless, SFFA characterizes this as not acting on race *qua* race.

along the fault line of the *mental content* of the reason—the former consisting in "race *qua* race" and the latter consisting in positions occupied or experiences had because of being racialized—rather than the fault line of some *normative evaluation* of the reasons—the former consisting in race-based reasons the Justices deem bad, unjustified, or socially deleterious and the latter consisting in those they deem good, right, or sociologically justified. The majority could concede that they are simply putting into (i) the "race *qua* race" bucket anytime a decision-maker uses "race . . . [for its] contextual relevance when . . . evaluating"[77] some piece of information under the following conditions: when the decision-maker affords a contextual relevance to race to give meaning to the information that *in their view* is not justified or *in their view* causes social harm.

That would mean that acting on the basis of race is an evaluative term masquerading as a descriptive one. It would be something like the way the old common law mens rea standard of "malice aforethought" worked to distinguish murder from other lesser forms of unlawful or lawful killings: it was just a label for the collection of content-diverse mental states that courts had determined were extra bad.[78] But sometimes the majority Justices want to maintain that they are doing something closer to the Model Penal Code's use of the purposeful, knowing, reckless, and negligent mens rea standards: tracking real distinctions in mental states that can, with admitted difficulty, be distinguished conceptually and empirically.[79]

Even if one grants, for the purpose of argument, that a conceptual distinction can be drawn between the reason of "race itself" versus its "contextual relevance," it was not clear why the majority thought UNC and Harvard were using race in the first sense, the way they think the Constitution forbids. This case proceeded largely on reams of statistical evidence. The expert reports submitted to the district courts consisted of nearly 2,000 pages.[80] The majority opinion only references the statistical evidence in a handful of places, and nowhere does it engage any of the sophisticated debates about regression modeling choices or variable inclusion that marked the expert exchanges and lower court debates.[81]

In a footnote refuting Justice Jackson's dissent in which she—according to the majority's characterization—"attempts to minimize the role that race plays in UNC's admissions process,"[82] the majority cites a number of statistics showing

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77. *See id.* at 27.

78. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949–1953, REPORT, at 27 (Greenwood Press 1980) ("'Malice aforethought' is simply a comprehensive name for a number of different mental attitudes which have been variously defined at different stages in the development of the law, the presence of any one of which in the accused has been held by the courts to render a homicide particularly heinous and therefore to make it murder.").

79. *See* MODEL PENAL CODE § 2.02(2) (1985).

80. *See, e.g.*, Expert Report of Peter S. Arcidiacono, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176); *see also* Report of David Card, Ph.D., Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176).

81. *See generally* Issa Kohler-Hausmann, *What's the Point of Parity? Harvard, Groupness, and the Equal Protection Clause*, 115 NW. U. L. REV. 1 (2020).

82. SFFA v. Harvard, *supra* note 1, at 197 n.1.

divergence from what has been called "conditional statistical parity."[83] This is the notion that, conditional on some collection of variables such as academic scores, racial groups ought to have the same rate of admissions. For example, the majority notes the following facts about UNC and Harvard's admissions:

> In the second highest academic decile, the disparity [in UNC admissions] is even starker: 83% of black applicants were admitted, while 58% of white applicants and 47% of Asian applicants were admitted . . . . [At Harvard,] ". . . [a]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%)."[84]

Does this count as evidence of discrimination because Harvard and UNC are *constitutionally obligated* to admit a racial composition that mirrors the racial composition in the top academic decile? If so, this is just a quota view of discrimination where any deviation from those designated racial proportions counts *per se* as discriminatory. Only the quota composition is set by the relative demographic proportions in, e.g., the top academic deciles as opposed to, e.g., the relative demographic proportions in the applicant pool or the population at large.[85] Or does this count as discrimination because the majority believes this is evidence of a prohibited mental state—i.e., admitting students because of "race *qua* race"? If the latter, why?

SFFA lawyers repeatedly pointed to the statistical evidence to argue that Harvard and UNC are considering race "by itself" as opposed to in an experiential

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83. Kohler-Hausmann, *supra* note 81, at 5; *see also* Sam Corbett-Davies et al., *The Measure and Mismeasure of Fairness*, 24 J. MACH. LEARNING RSCH. 4, 5 (2023); CYNTHIA DWORK ET AL., FAIRNESS THROUGH AWARENESS 1 (2011), https://arxiv.org/pdf/1104.3913.pdf [https://perma.cc/X9SB-DQES]; MORITZ HARDT ET AL., EQUALITY OF OPPORTUNITY IN SUPERVISED LEARNING 1–2 (2016), https://arxiv.org/pdf/1610.02413.pdf [https://perma.cc/AX7H-GWW3].

84. SFFA v. Harvard, *supra* note 1, at 197 n.1.

85. Although they would likely disavow this, some commentators sound as if they in fact have a quota view, not a mental state view, of discrimination. For example, responding to prompts that colleges put out in the summer of 2023 asking about "identity" and "life experience," the *New York Times* reported that "John Yoo, a law professor at the University of California, Berkeley, who opposes race-conscious admissions, said that the new essay prompts seemed consistent with the court's ruling." Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your 'Identity'*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/college-applications-admissions-essay.html [https://perma.cc/9MC4-4QYV]. However, Yoo was quoted saying: "Suppose Harvard asked these questions and, magically, the racial composition of the freshman class is within three to four points of what it was before these essay questions . . . . I don't think the courts are going to be fooled by innocuous-seeming essay questions which are used as a pretext by the colleges." *Id.* But why? Does Professor Yoo believe that colleges are constitutionally obligated to admit a racial composition that matches the one that would be produced by, say, random sampling on the top academic decile or ranking by some standardized test? Or does Professor Yoo think that admitting a racial composition that matches that of last year supports the inference that college administrators necessarily had prohibited mental states when they did so? If the latter, he needs to (i) define the prohibited mental states and (ii) defend the assumptions that justify that inference from such data.

way.[86] And at times, Harvard stated that race was a "determinative factor" for admissions for some subset of candidates—that for some highly qualified applicants, "being African American or being Hispanic or in some instances being Asian American can provide one of many, many tips that will put you in."[87] The Justices in the majority picked up on this concession and repeated it in their opinion, saying, for example:

> Once the lop process is complete, Harvard's admitted class is set. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."[88]
>
> And they acknowledge that race is determinative for at least some—if not many—of the students they admit.[89]
>
> Justice Jackson contends that race does not play a "determinative role for applicants" [for admission] to UNC. But . . . even the principal dissent acknowledges that race—and race alone—explains the admissions decisions for hundreds if not thousands of applicants to UNC each year . . . .[90]

However, it was not clear why the Justices believed that any evidence adduced at trial showed that what "determined" the outcome was considering "race *qua* race" as opposed to considering race in the "contextual" manner. Even if we observe that, conditional on sharing some set of observed credentials such as SAT, GPA, and other applicant features, one group has a higher rate of admission than another, what licenses the inference that the decision-makers acted on race in the prohibited, as opposed to tolerated, manner?

Consider the following example: an admissions officer has two files—one from someone who checks the "racial box" of "white" and the other "Asian." They both have the following text in their files: "SAT/GPA: top score. Personal information: Second generation child of immigrants." For purposes of illustration, imagine the officer must decide on the basis of this information alone. We observe that the officer chooses the Asian applicant. Should we infer that he did so because he afforded a "plus factor" for "race *qua* race"? Or should we infer that he did so because he interpreted the scores to mean two different things in light of race and acted on the basis of that assessment? Say, for example, that the admissions officer agrees with the statement that SFFA made in their Supreme Court brief, that "Asian Americans have been the victims of horrific racial discrimination in this country."[91]

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86. The plaintiff's case relied heavily—almost exclusively—on statistical evidence. SFFA v. Harvard, *supra* note 1, at 343 (Sotomayor, J., dissenting) ("Harvard and UNC introduced dozens of fact witnesses, expert testimony, and documentary evidence in support of their admissions programs. SFFA, by contrast, did not introduce a single fact witness and relied on the testimony of two experts.") (citation omitted).

87. Harvard Oral Argument, *supra* note 3, at 67.

88. SFFA v. Harvard, *supra* note 1, at 195 (citations omitted).

89. *Id.* at 219.

90. *Id.* at 219 n.6 (citation omitted) ("UNC expert testif[ied] that race explains 1.2% of in state and 5.1% of out of state admissions decisions.").

91. Brief for Petitioner, *supra* note 38, at 25.

The admissions officer might believe that those experiences of the student and their family put the Asian-American candidate's achievement in a different light than those of the white candidate. Again, put to one side whether you agree with SFFA and this hypothetical admissions officer that Asian-Americans have experienced pervasive discrimination in the United States and whether you think it is right or justified for the admissions officer to assess the meaning of the SAT/GPA score in light of racialized experiences. The question here is whether we can empirically distinguish between an automatic racial checkbox plus factor and a contextual use of race through which the other information in the file is given meaning.

To illustrate the difficulty, let's assume that the admissions officer is not interested in the SAT/GPA score per se. The latent feature of interest could be something like "grit,"[92] academic potential, or creativity in the face of adversity. This officer might assess "the same" SAT score to mean different things about this latent feature in light of the racialized experiences of the candidates and their families. Which race-based reason "determined" the outcome in this example: "race *qua* race" or the contextual relevance of race to interpret what SAT/GPA says about grit or academic potential?

The typical response is to say we can distinguish between these two uses of race by giving the decision-maker more and more information. In this example, imagine you *tell* the decision-maker that these two applicants and their families had identical kinds of racial experiences. You say to him: "Neither this Asian candidate nor their family was treated with any of the meanings, associations, or structural positions of being racialized Asian in the United States. In fact, they were treated as if white their entire lives." If we still observe the officer choosing the Asian-American applicant, can we now infer that he did so because he awarded a racial plus-factor in a checkbox fashion? Only if you assume that the officer believed what you told him can you infer that the reason he chose the Asian applicant over the white applicant was because he had a "racial preference" for the former.[93] Without that substantive assumption, you cannot distinguish between the decision-maker not taking the signals or cues you offer to mean *what you think he ought to think these signals mean* from the decision-maker believing you and choosing one over the other on the basis of "skin color" alone or because he has a "racial preference."[94]

And this is exactly what SFFA's own economist amici argued when they pointed out that nothing in the statistical evidence can distinguish whether admissions officers' race-based reasons are versions (2)(i) or (ii). These economists argued that trying to "distinguish[] 'pure' or 'per se' racial tips from the use of race as 'a contextual factor'" was a "distinction [that] is unworkable," and they went on to say that "[*a*]*mici* are not aware of—and Harvard's expert did not identify—any sound econometric method for distinguishing the use of race as a 'pure' versus

92. Harvard Oral Argument, *supra* note 3, at 27–28 (describing "grit," ability to "overcome some hardship," and "character" as qualities potentially revealed by the experience of being subjected to racial discrimination).

93. SFFA v. Harvard, *supra* note 1, at 214 (referencing Harvard's use of the "perilous remedy of racial preferences").

94. *Id.*

'contextual' tip."[95] What SFFA's own amici are arguing—and I would agree with this point and not much else they said—is that it is empirically indistinguishable whether a higher admission rate for Black and Hispanic applicants than white and Asian ones, conditional on being in, for example, the top academic decile, is evidence of "'pure' or 'per se' racial tips" (whatever that means) as opposed to race as "a contextual factor."

This brings us back to whether the distinction the majority is drawing is really between the cognitive content of reasons for action—skin color on the one hand and race-contextualized reasons on the other—as opposed to what they deem to be good and bad race-based reasons. Here is a perfectly legitimate interpretation of the statistical evidence that was presented in this case: when we see, for example, that a higher percentage of white applicants in the top academic decile is admitted than Asian applicants, we infer that the decision-makers acted on racially discriminatory reasons. Why? Only because of a prior normative position that decision-makers *ought* to take "being in the top academic decile" to mean the same thing irrespective of white or Asian racialized status. Once we commit to that normative position, we have no reasons to try to empirically distinguish between, on the one hand, decision-makers thinking that the "same" SAT/GPA score means something different because of race, and, on the other hand, a decision-maker thinking that the "same" SAT/GPA score means the same thing irrespective of race and just "preferring" one over the other on the basis of "race itself."

But notice that this move requires one to substantively defend which relational inferences made in light of race are good, justified, or warranted—and therefore, count as acceptable "contextual" uses of race—and which are bad, unjustified, or unwarranted—and therefore, count as discriminatory uses of race. For example, are decision-makers constitutionally obliged to disregard information about, for example, the racial barriers specific to African American students in primary and secondary education when they decide if "the same" raw SAT score for white and Black candidates reveals identical information about the latent feature of interest? If one wants to say that all contextual inferences made in light of race are bad, unjustified, or unwarranted, then the definition of race neutrality encompasses both (i) and (ii)—forbidding all race-based reasons whatsoever.

But that is not what the majority says it is doing. The majority Justices *say* they are tolerating a contextual use of race, but only under certain circumstances.

C. An Act Is on the Basis of Race Whenever Decision-Makers Act on Racial Associations that the Candidates Did Not Tell the Decision-Makers Were True

A third view of acting on the basis of race ("Version 3" or "(3)") is that race can constitutionally be a contextual reason (i.e., (2)(ii)) for a decision-maker's action, but *only* if the decision-maker adopts the candidate's expressed interpretation

95. Brief for Economists as Amici Curiae Supporting Petitioners at 25, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) (No. 20-1199).

of their racialized experiences. The final paragraphs of the majority opinion could be read to support this view:

> [A]s 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 . . . . In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[96]

On this view, if candidates say something like: "My other credentials mean *p* in light of my racialized experiences" or "this aspect of my experience is important to me and relevant to my admissions merit in light of my race," then it can be taken as a reason. I read this final paragraph to mean that the majority does not think acting on the basis of "how race affected [the applicant's] life"[97] even counts in the eligible set of acting "on the basis of race" *if* the candidate *tells* the decision-maker how to do so. This is because, in their language, the decision-maker is now acting on the basis of the candidate's "experiences as an individual—not on the basis of race."[98] The majority's view, it appears, is that if universities act on "*an applicant's discussion* of how race affected [their] life,"[99] decision-makers are no longer "stereotyping." I use scare quotes here only to denote that the majority uses the word "stereotyping" to pick out racial inferences that, in their opinion, are bad, unjustified, or harmful, not to pick out racial inferences in general.

Let's define racial inferences as any time someone believes something to be true about the individual candidate from observing some other thing—a thing that, in our culture, is an indicium of racial category membership (e.g., skin color or phenotype). That definition shows that to cognize race *is* to engage in inference. Living in a racialized society means that certain traits point to meanings and associations beyond just the trait itself. Traits—which under other circumstances could be just thin features like skin color, phenotype, ancestry, or names—have acquired the power to signify something beyond themselves precisely because there exists a set of material and dignitary distinctions that are practiced in our society imbuing those traits with certain meanings. When cultural insiders of a racialized society cognize individuals with features like skin color, phenotype, ancestry, or particular names, they do not cognize those individuals as *just having* that particular skin color shade, phenotype, or name. Rather, they cognize those features as *racial features*; they cognize the individuals bearing those features as *racialized individuals*, and that cognition entails at least some set of associations and inferences with things beyond just the physical feature or name.

All of the social psychological literature on implicit bias confirms that showing skin or ancestry entails associations and meanings beyond merely

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96. SFFA v. Harvard, *supra* note 1, at 230–31.
97. *Id.* at 230.
98. *Id.* at 231.
99. *Id.* at 230 (emphasis added).

perceiving the feature, whether consciously or not.[100] For example, perception of racial cues entails changing how agents pay attention to and perceive other features of an action or situation.[101] And perception of certain cues or concepts (like "guns" or "crime") will change whether someone perceives a racialized person or perceives a person as racialized.[102] Audit and correspondence studies of race discrimination proceed on the assumption that perception of certain traits like names or skin color triggers some collection of associations in the minds of decision-makers, i.e., the set of associations that count as perceiving *racial* status (as opposed to merely the status of having that name or having that epidermis tone).[103] Study after study shows that perceiving racially distinctive names entails beliefs about socio-economic status.[104]

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100. Phillip Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 304 (2008).

101. Aneeta Rattan & Jennifer L. Eberhardt, *The Role of Social Meaning in Inattentional Blindness: When the Gorillas in Our Midst Do Not Go Unseen*, 46 J. EXPERIMENTAL SOC. PSYCH. 1085, 1086 (2010); Estée Rubien-Thomas et al., *Processing of Task-Irrelevant Race Information is Associated with Diminished Cognitive Control in Black and White Individuals*, 21 COGNITIVE, AFFECTIVE, & BEHAV. NEUROSCI. 625, 625 (2021).

102. Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876, 877–78 (2004); B. Keith Payne et al., *Best Laid Plans: Effects of Goals on Accessibility Bias and Cognitive Control in Race-Based Misperceptions*, 38 J. EXPERIMENTAL SOC. PSYCH. 384, 386 (2002). Psychologists call this "bidirectional associations." I would call it co-constitutive.

103. That is, if the cues used in these studies did not successfully trigger the category perception, then they would not be studies *about* the effects of perceiving that category (as opposed to studies about just being exposed to some random stimuli). Audit and correspondence studies state that they are doing the former, not the latter. Patrick Kline, Evan Rose, and Christopher Walters assert that their study "is concerned with measuring such disparate treatment, however motivated." PATRICK M. KLINE ET AL., SYSTEMIC DISCRIMINATION AMONG LARGE U.S. EMPLOYERS 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 29053, 2022). They define disparate treatment as any difference in action resulting from the "manipulat[ion of] employer *perceptions of protected characteristics*." *Id.* at 6–7 (emphasis added); *see also* Sonja B. Starr, *Testing Racial Profiling: Empirical Assessment of Disparate Treatment by Police*, 2016 U. CHI. LEGAL F. 485, 485–88 (2016). Sonja Starr states that audit methods can detect "police racial discrimination of the 'disparate treatment' variety," which she defines as:

> the extent to which police treat persons who are otherwise similarly situated (along relevant dimensions that the police perceive) differently because of race). Disparate treatment by police includes what is commonly called racial profiling: that is, disparate treatment that is based on race-based assumptions about differential crime risk. It also could encompass any other way in which racial perceptions consciously or unconsciously affect the decision-making of police vis-à-vis individuals or communities.

Id. at 487–88. Notice that these researchers could not claim that the stimuli (e.g., name, bodily feature) bring about the treatment—perception of racial status—unless apprehension of the stimuli successfully triggered *racial* perception. *See id.*

104. *See, e.g.*, Martin Abel & Rulof Burger, *Unpacking Name-Based Race Discrimination* 11 (IZA Inst. of Lab. Econ., Discussion Paper No. 16254, 2023), https://docs.iza.org/dp16254.pdf [https://perma.cc/JU2Z-6JC2]; Roland G. Fryer, Jr. &

All economics research on statistical discrimination is premised on the idea that racial cognition entails probabilistic beliefs about some other features of candidates such as education, neighborhood opportunities, training, or skills. This is all to say that when someone cognizes someone *as* white, Black, Asian, Hmong, Mexican American, etc., they do not merely cognize them as having some intrinsic bodily feature or individually interesting ancestral lineage. They cognize a whole host of associations and meanings by virtue of that trait. These are not two distinct cognitions, one in which a decision-maker first clocks someone as being raced and then, later, a second in which a decision-maker draws on some association *with* race. Rather, to clock someone *as raced* is just to register some set of meanings and associations. For race to exist in a society just means that things like skin color, phenotype, ancestry, or names are *treated as pointing to something beyond the intrinsic trait itself*, at least in some domains. If these traits were never treated as meaningful, we would not live in a racialized society just as we do not live in a bunioned society. That is, in our society people *have* bunions and people *see* bunions. But these protrusions on the foot do not mark a category of dignitary and material differentiation. Seeing a bunion does not trigger in the minds of cultural insiders additional associations or inferences about the person with the bunion.

This is another way of restating the point argued in Section II.B, which is that when someone acts on the basis of race, one is always already acting on the basis of race in a "contextual" fashion because one is interpreting other pieces of information through the lens of beliefs about race as a social system, evaluating what specific facts mean in light of the racialized status of the individual, a status they can only have because of a set of social arrangements treating those traits as meaningful. The set of practices that act on race *qua* race—what the majority defines as acting on racial cues simpliciter (e.g., skin color per se)—is likely an empty set, at least in the context of admissions decisions. When people act on the basis of race, they are always already engaged in inferential thought based on an individual's identifiable trait (e.g., skin color, phenotype, ancestry, or name), linking that trait to some other feature—*some* set of experiences, social meanings, or position they have navigated in light of having that trait.

This slight detour to social ontology is essential because it shows that there is no way to eliminate racial inference in a racially stratified society even with the majority's requirement that racial considerations must be preceded by an applicant's explicit urging.[105] The majority's requirement just pushes the bump in the rug. If admissions officers are allowed to consider "an applicant's discussion of how race affected [their] life," there is no mechanical, automatic significance of *that* information. They still have to decode it, weigh it, and give it value for purposes of deciding admissions under conditions of scarcity.

Steven D. Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q.J. ECON 767, 783 (2004).

105. The constructivist social ontology of race seems to be accepted even by the most conservative Justices. *See, e.g.*, SFFA v. Harvard, *supra* note 1, at 275 (Thomas, J., concurring) (stating that "race is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity").

Lawyers for SFFA addressed—somewhat obliquely—the question of how universities ought to treat such expressions during oral arguments by insisting that individual disclosures about how race affected a candidate's life must be treated "equally" by universities. They said that it is constitutionally acceptable to "give[] credit to a black student who writes an essay about overcoming discrimination and equal credit to an Asian student who writes an essay about overcoming discrimination."[106] Their claim to "equality" seems to be that whatever value to admissions merit assigned by the university to the candidate's expression of the relevance of race, it must be "the same" no matter the expressed race of the candidate. It sounds easier than it is because the same two questions arise: *which* sense of sameness and *what* value?

Benchmarking is everyone's problem. Making sense of SFFA's demand to give "equal credit"[107] to applicant-expressed racial information requires two things. First, someone must fix the right description of the information disclosed, given that race makes a single assessment of two candidates fairly describable as treating them the "same" and "differently" at once. Second, someone must fix the value that can be accorded to the information. This is illustrated by tweaking a question asked by Justice Barrett at oral arguments about whether admissions officers are allowed to give weight to expressions of "pride" in their racial heritage.[108] Imagine there two applicants, one of whom says they have a strong sense of "white pride" while the other says they have a strong sense of "Black pride." Have these two candidates expressed the "same" thing—racial pride—or different things—white supremacy versus positive self-image in the face of a culture that degrades and devalues blackness? Or are admissions officers *constitutionally obliged* to decode those essays as expressing the identical notion of some kind of non-racial pride? Are universities *constitutionally obliged* not to give "a 'negative'" to the applicant expressing white pride?[109] What weight or value should be conferred on expressions of racial pride, if they must be interpreted by university admissions officers as expressions of non-racial pride, relative to applicants who do not share anything about their racial pride?

Both SFFA and the majority Justices understand that being free to assign differential value to expressions of life experiences in light of race means—necessarily and logically—that some profiles will be a benefit relative to others in the bid for scarce admissions spots. College admission is, in the majority's words,

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106. Harvard Oral Argument, *supra* note 3, at 8–9.

107. *Id.*

108. *Id.* at 9–10. SFFA stated candidate-disclosed race-based reasons could be considered only if the admissions officer "gives credit to a black student who writes an essay about overcoming discrimination and equal credit to an Asian student who writes an essay about overcoming discrimination." *Id.* at 8–9. But this example elides the hard question because both sides of this debate (I hope) agree that—again in the words of SFFA—"Asian Americans have been the victims of horrific racial discrimination in this country" . . . and today "continue to face explicit and implicit bias." Brief for Petitioner, *supra* note 38.

109. The majority states that one of the reasons that Harvard and UNC's affirmative action programs are unconstitutional is because "unavoidably [they] employ race in a negative manner." SFFA v. Harvard, *supra* note 1, at 230.

"zero-sum."[110] One of the majority's purported reasons for disallowing the use of race *qua* race is "that race may never be used as a 'negative' and that it may not operate as a stereotype."[111] But if universities can value an expression of Black pride in an admission essay more than an expression of white pride, that means that decision-makers are free to reach back into their beliefs about race as a social category to evaluate the specific candidate-provided information.

SFFA seems to recognize that allowing admissions officers to consider candidates' essay discussions of how race affected their lives means universities will weigh and assess that information using *their* beliefs about race and *their* normative values about what is fair and just in light of those beliefs. In the example above, I assume (hope) that most university administrators would—drawing on their beliefs about race as a social category in the United States—devalue expressions of white pride relative to expressions of Black pride. But SFFA's beliefs and normative values are, in general, at odds with those of many university administrators. So they do not want universities to be free to interpret what candidates disclose about their racial experiences or how race was relevant to their lives. Presumably, this is why SFFA sent an email to 150 universities within 12 days of the Supreme Court ruling demanding that they

> [p]romulgate new admissions guidelines that make clear race is not to be a factor in the admission or denial of admission to any applicant. This includes clear instructions that essay answers, personal statements, or other parts of an application cannot be used to ascertain or provide a benefit based on the applicant's race.[112]

Complying with that demand simply means that universities are not free to value *any* expressions of how race affected applicants' lives in the admissions process as they see fit. But SFFA does not explain how admissions officers ought to strip expressions of how *race* affected the applicant's life of all *racial* meaning so that they do not "provide a benefit based on the applicant's race." Nor do they explain how admissions officers ought to value the expressions once stripped of racial context.

However, the majority opinion said that universities *could* decide how to value "an applicant's discussion of how race affected [their] life," as long as the "benefit" is "tied to *that student's* unique ability to contribute to the university. In

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110. "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." *Id.* at 218–19.

111. *Id.* at 218; *see also id.* at 212 ("The second risk is that race would be used not as a plus, but as a negative—to discriminate against those racial groups that were not the beneficiaries of the race-based preference."); *id.* at 213 ("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.").

112. The letter continued: "For 'what cannot be done directly cannot be done indirectly,' and an applicant 'must be treated based on his or her experiences as an individual—not on the basis of race.'" *See* Scott Jaschik, *The Demands of Students for Fair Admissions*, INSIDE HIGHER ED. (July 13, 2023),https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions [https://perma.cc/3LPA-Z59N].

other words, the student must be treated based on his or her experiences as an individual—not on the basis of race."[113] Imagine two candidates both say: "I grew up in rural Wisconsin, and that has shaped my life and outlook." One candidate discloses that they have been racialized white, the other that they have been racialized Black. The majority seems to hold that by cabining race as a reason only to those interpretations explicitly endorsed by the candidates, they are keeping admissions officers from stereotyping. But we are still left with the question of how admissions officers are *constitutionally permitted* to evaluate the disclosure of "growing up in rural Wisconsin" given that the candidate expressed that they were racialized during that experience. Is considering growing up in rural Wisconsin forbidden altogether? Can officers consider Wisconsin ruralness if (somehow) they subtract the racial dimensions of Wisconsin ruralness?

If the decision-maker does what the applicant asks of her, and what the Court here authorizes her to do, which is to really *take account of* the way in which "race affected [the applicant's] life,"[114] then the decision-maker will be making racial inferences beyond those that the applicant explicitly warranted. The admissions officers cannot interpret the candidate-expressed information without drawing on some beliefs about race. The candidate will never license every single inferential move from the specific race-contextual information they affirmatively provide. For example, can officers act on the race-based reason that what is interesting about this candidate is that their outlook was shaped by growing up with a racialized status *similar* to most others in their home region? If so, that is true for the white candidate but not for the Black candidate.[115] Or can they act on the race-based reason that what is interesting about this candidate is that their outlook was shaped by growing up with a racialized status *dissimilar* to most others in their home region?

My sense is the majority does not think that admissions officers are constitutionally bound to *never* act on the basis of racial inferences that the candidate does not explicitly license. Candidate disclosures must be evaluated and weighed in light of the decision-maker's beliefs about race as a social category. The majority calls some instances "illegitimate stereotyping" and others treating someone "as an individual" simply because they believe some of those inferences are bad and harmful and others are justified and legitimate. And presumably, the dissenting Justices also believe that *some* "race-conscious college admissions" practices count as "illegitimate stereotyping."[116]

What the majority, dissent, and the rest of us must do is simply state which racial inferences or beliefs are bad ones and defend why they are harmful and ought not to be tolerated in light of the facts that constitute race. But phrasing one's position in terms of some qualitative shift in mental states, as if at some point the decision-maker is treating the candidate "as an individual" or "equally," just

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113. SFFA v. Harvard, *supra* note 1, at 230–31.

114. *Id.* at 230.

115. Approximately 94% of rural residents are classified as white in Wisconsin. WIS. OFF. OF RURAL HEALTH, RURAL WIS. DEMOGRAPHICS 1 (2022), https://worh.org/wp-content/uploads/2022/01/Rural-WI-Demographics-2022.pdf [https://perma.cc/B7WTGQJ7].

116. *See* SFFA v. Harvard, *supra* note 1, at 318 (Sotomayor, J., dissenting).

confuses more than it clarifies. Asserting that someone has or has not been so treated begs the question: under what conditions is one being treated equally, with respect, or as an individual in light of race when the inference in question is used? Expressions like treating people as individuals or equally do not engage the question at the level at which it must be engaged because at *that* level of abstraction, we all agree. We disagree on a level of abstraction one step down: on how to properly characterize the social forces that constitute race in our society and what should be done about it. As Part III will argue, the level at which the question must be engaged is what counts as treating persons equally, with respect, or as individuals *in light of* the facts that constitute race in our society.

D. An Act Is on the Basis of Race Whenever Race Figures as a Reason for Admissions Policies or Valuations of Various Credentials

A fourth conception of acting on the basis of race ("Version 4" or "(4)") is that beliefs about race at the social level may not figure into the reasons for adopting a particular admissions policy, approach, general interpretive strategy of credentials, valuing or seeking experience, or method of recruitment. Admissions practices could run afoul of this version of acting on the basis of race even if decision-makers did not take race as a reason in individual admissions decisions (in any sense under Sections B or C above) and even if they had no knowledge or beliefs about specific applicants' racial classifications at the time of individual evaluations. This version is susceptible of two conceptually distinct, but deeply related, rules: (i) a proscription against adopting any admissions policy with the purpose (not mere knowledge) of having a causal effect on racial composition;[117] and (ii) a prescription that any definition of academic merit or evaluation of applicants for such merit must be "race neutral."[118]

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117. *Id.* at 223. Often, the Court uses the term "racial balancing" to describe what is prohibited. Notice there are a few conceptually distinct ways of understanding the ban on "racial balancing": one is banning any purpose to change racial composition; a second is banning only purposes of bringing about a specific racial proportion (e.g., to bring the proportions in line with some benchmark); and a third would be using "balancing" in a normative sense to ban only purposes to bring about bad—under some theory—racial proportions or changes (e.g., to ban the purpose of increasing white but not minority representation, ban aiming at the wrong benchmark, or ban "invidious" but not "benign" changes). Some have interpreted the Supreme Court's precedent banning "racial balancing" to mean only the second or third understanding. *See e.g.*, Starr, *supra* note 20, at 204–13. I see nothing in past doctrine or in the Court's current leanings to support the idea that the Supreme Court would adopt the narrow benchmark construction or agree with affirmative action supporters regarding which benchmarks or directions are "benign" versus "invidious." *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329–30 (2003); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 732, 741–42 (2007) (plurality opinion); *id.* at 757–59 (Thomas, J., concurring). Therefore, here I consider the most sweeping definition, which would ban any purpose to cause a change in racial composition.

118. Over twenty years ago, Glenn Loury suggested the term "race-indifferent" in contrast to "raceblind" to capture (as I read him) both proscriptions (4)(i) and (ii). *See* GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 133 (2002) ("Let us reserve the phrase 'raceblind' to describe the practice of not using race when carrying out a policy. And let us employ a different term—'race-indifferent'—to identify the practice of not thinking about race when determining the goals and objectives on behalf of which some policy is adopted.").

SFFA argued that one or both of these versions are forbidden by the Fourteenth Amendment. For example, during oral arguments, Chief Justice Roberts asked an SFFA lawyer to further clarify his position on what he characterized as "race-neutral alternatives" and whether such practices were "appropriate, even if the intent of the state in adopting them is to reach a certain level of minority students?"[119] The SFFA lawyer replied, "If the only reason to adopt a particular admissions policy, if the sole exclusive reason was for racial diversity alone, we think that would probably raise problems under . . . precedent."[120] In this exchange, SFFA pressed the view that acting on the basis of race includes (4)(i)—whenever a policy is adopted for the purpose (in the Model Penal Code sense, as opposed to knowledge) of having a causal effect on racial composition. Importantly, this definition is insensitive to which group's relative composition the actor is aiming to change or the content of the normative justification or motivation for seeking such compositional effects. So, this version of the race neutrality principle is violated when the reason is to increase racial diversity or homogeneity, or to increase the proportions of historically underrepresented minority students or the proportion of white students. This definition of acting on the basis of race simply means that seeking *racial* diversity is a constitutionally forbidden reason for action—full stop. As will be discussed in the next Subsection, this mandate is easy to assert, but it is hard to pin down what precisely it covers.

SFFA proposed a rule even more stringent than (4)(i) later in the same exchange. When pressed about whether seeking racial diversity as a reason for an admissions policy would violate the Fourteenth Amendment if it were "one of the reasons" for a particular admissions practice, the SFFA lawyer responded that it would be tolerable *only if* the university could "demonstrate they would have . . . pursued that policy anyway," i.e., where the university can offer some other "race-neutral justification" for the policy.[121] The demand of (4)(ii) is more stringent than (4)(i) because it requires not only that university administrators never have the intent

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119. UNC Oral Argument, *supra* note 3, at 12.

120. *Id.*

121. *Id.* at 16. SFFA uses contradictory language such that it is unclear whether they believe that (1) racial diversity may be a reason to adopt a policy so long as there are other "non-racial" justifications that could be advanced (even if they were not the actual reasons or were neither necessary nor sufficient for the decision); or (2) these so-called non-racial justifications must independently be sufficient for the policy adoption. Other areas of equal protection law hardly illuminate the matter. In the jury selection context, for instance, after a criminal defendant makes a prima facie case that the state has struck jurors because of their race, the "State must demonstrate that 'permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" Batson v. Kentucky, 476 U.S. 79, 94 (1986) (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)), *holding modified*, Powers v. Ohio, 499 U.S. 400 (1991). "The prosecutor therefore must articulate a neutral explanation" and the trial court must then determine "if the defendant has established purposeful discrimination." *See id.* at 98. For race-neutral selection criteria to "have produced the . . . result," must they have been the actual reasons that guided the actor when they took the decision? Some possible sufficient reason for the action? Necessary reasons? Other cases exploring the trial court's duty to assess the "neutral explanation" do not clarify, holding simply that the trial court must issue a finding "largely . . . turn[ing] on evaluation of credibility" as to whether the neutral explanation "should be believed." Hernandez v. New York, 500 U.S. 352, 365 (1991) (quoting *Batson*, 476 U.S. at 98 n.21).

to create any change in the racial composition of their classes, but also that the reason for any policy or practice that they do adopt be a "race-neutral" justification. Operationalizing this view, (4)(ii) requires nailing down what counts as a "race-neutral justification" for a policy.

Although SFFA advanced arguments suggesting that both (4)(i) and (4)(ii) were forbidden by the EPC, such arguments are flatly at odds with other positions that SFFA itself proposed in its briefing and that the conservative Justices making up the majority endorsed in oral arguments. SFFA offered a "simulated . . . alternative where Harvard eliminates its preferences for the children of donors, alumni, and Harvard faculty—who are overwhelmingly white and wealthy—and increases its preference for the socioeconomically disadvantaged."[122] SFFA and some Justices endorsed as constitutional "10 percent" programs where universities accept some top-performing percentile of certain high schools.[123] SFFA even pronounced that such programs "account for residential segregation in a race-neutral way."[124] The conservative Justices in the majority advanced many other proposals during oral arguments for how the universities could pursue what they deemed *racial* diversity with what they called race-neutral means. Justice Gorsuch suggested that Harvard was obligated to give up admitting "children of large donors," who might donate "that museum we talked about earlier"; "children of legacies"; and "the squash team."[125] Agreeing, SFFA's attorney argued that Harvard must accept declines in their "fencing status, [or] drops in five points on the U.S. News and World Report" if they wanted to pursue racial diversity because they are forbidden (in SFFA's view) from pursuing racial diversity in "race conscious" ways.[126] They then suggested that Harvard ought to measure socioeconomic status in terms of "wealth instead of income" because doing so would yield more Black admitted students.[127]

However, if the universities chose any of these proposals *for the reason of affecting racial* composition, they would run afoul of (4)(i) as defined above. Under (4)(i), universities could pursue other forms of diversity, and racial diversity would have to be a happy—but necessarily unintended—consequence of such pursuits. If, for example, Harvard were to eliminate "its preferences for the children of donors, alumni, and Harvard faculty"; disband its squash and fencing teams *because* they are "overwhelmingly white"; and "increase[] its preference for the socioeconomically disadvantaged" as measured by wealth instead of income *because* they are overwhelmingly non-white, that would run afoul of SFFA's definition of (4)(i).[128] But could Harvard—or any other university—eliminate its

122. Brief for Petitioner, *supra* note 38, at 81.

123. Harvard Oral Argument, *supra* note 3, at 21–22; UNC Oral Argument, *supra* note 3, at 13–15.

124. Harvard Oral Argument, *supra* note 3, at 21–22.

125. *Id.* at 23.

126. *Id.* at 23–24.

127. *Id.* at 23.

128. This type of scheme is discussed by the parties in their briefs and the Justices in their opinion. *See, e.g.*, SFFA v. Harvard, *supra* note 1, at 299–331 (Gorsuch, J., concurring). For this reason, I am not as confident as the lawyers who filed a recent federal

preferences for the children of donors, alumni, and Harvard faculty or disband its squash and fencing teams for other reasons? As will be discussed in Subsection 2, that question turns on what counts as a "race-neutral justification" for a policy.

It is unclear whether the majority Justices believe either version of (4) would count as part of the "race-based admissions systems that respondents employ" that "fail to comply with the twin commands of the Equal Protection Clause."[129] Some of the exchanges recounted above indicate that the majority Justices would, at this time, say "no." However, it is possible they might say "yes" in the future.[130] Doing so would be in line with one interpretation of the Court's *Ricci v. DeStefano* decision.[131] At least three of the Justices in the *SFFA* majority were also in the *Ricci* majority, which held that "under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action."[132] In that decision, the Court concluded that discarding a specific test and promotion policy that yielded zero African American promotions counted as making "its employment decision because of race."[133] The

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civil rights complaint against Harvard's use of legacy preferences arguing that "if the Donor and Legacy Preferences did not exist, more students of color would be admitted to Harvard." It depends on what Harvard is allowed to do in the absence of Donor and Legacy Preferences. Chica Project Complaint, *supra* note 22.

129. SFFA v. Harvard, *supra* note 1, at 218. ("The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype."). As discussed below in Subsection II.D.2, calling the use a "negative" is just question begging: relative to what baseline, and what justifies *that* baseline?

130. Indeed, some Justices have indicated their willingness to do so. *See* Coal. for TJ v. Fairfax Cty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023), *cert. denied*, No. 23-170, 2024 WL 674659 (U.S. Feb. 20, 2024) (mem.).

131. 557 U.S. 557 (2009). Some scholars believed the "statutory disparate-impact standards like the one in Title VIl might be on a collision course with the Fourteenth Amendment's Equal Protection Clause." Richard A. Primus, *Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact after* Ricci *and* Inclusive Communities, *in* TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR 295, 295 (2015) (arguing that the concern was mitigated after *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, 576 U.S. 519 (2015)). If the views Justices Thomas and Kavanaugh expressed in their respective dissent and concurrence to a recent Voting Rights Act Section 2 case prevail, the collision might be revived. *See, e.g.*, Allen v. Milligan, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring) ("[E]ven if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future. . . . But Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time.") (citation omitted).

132. *Ricci*, 557 U.S. at 585.

133. Two exams—a captain's exam and a lieutenant's exam—were at issue in *Ricci*. A small number of Black candidates passed each exam but did not score highly enough to receive one of the limited open positions. *Id.* at 566. As many have pointed out, it was not

Ricci case did not address, much less resolve, the constitutional question of whether taking a particular evaluative stance on a credential or assessment mechanism because of its anticipated effects on racial composition counted as a violation of the EPC.[134] Nothing in the *SFFA* majority opinion indicates an answer one way or another.

If the Court does, on some later occasion, declare that either version of (4) counts as acting on the basis of race, it will have a future problem. Unsurprisingly, that problem comes back to the issue at the heart of this Article: what precisely it means to act on race in the banned fashion. With respect to (4)(i), one needs a clear account of what is entailed in the mental state of purpose/intent to "racially balance" or seek "racial diversity." That is, if the Court is going to declare that having the purpose to seek *racial* balance or diversity is constitutionally banned, but not other kinds of balance or diversity, then they need to specify the conditions under which someone is in the prohibited mental state. Same with respect to (4)(ii): one needs a clear definition of what constitutes having a "race-neutral justification" for an admissions practice. These questions might seem unnecessarily picky to many readers, demanding a level of analytic rigor unsuited to the broad strokes of constitutional law. But insofar as the Supreme Court is wedded to a criminal law-type theory of the Equal Protection Clause, it is incumbent on them to provide guidance to actors seeking to comply with the law as to *which* mental states put them in constitutional jeopardy. Providing such guidance is not beyond the ken of the Court, as it is often called on to interpret federal criminal law and give precision to mens rea requirements. To other readers, the answers to these questions might seem so obvious it is not worth troubling over. I hope to shake loose this assumption of obviousness.

For example, what does it take for university administrators to comply with (4)(i) while deciding how to evaluate SAT scores and admissions essays? You might think the answer with respect to (4)(i) is easy: universities are free to pick an evaluative system in any manner they choose, so long as they are not trying to affect the racial composition of the accepted class. The university administrators will certainly *know* (in the Model Penal Code sense) the likely effect of any scheme on racial composition. However, the typical response goes, so long as it is not their

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clear if the case turned on the fact that the test was discarded after being administered but before they certified the results and specific firefighters had an interest in some employment benefit they earned from their performance, or if it turned on the fact that the city agents had the mental state of evaluating the merits of a test in part based on anticipated effects on racial composition, or something else like the threat of disparate-impact liability was not high enough. The opinion was unclear. For instance, it wrote that "[t]he City rejected the test results solely because the higher scoring candidates were white. The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action." *Id.* at 580.

134. *See, e.g.*, *id.* at 584 ("Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.").

purpose or intent (again, in the Model Penal Code sense) to move the racial composition, they are in the clear.[135]

I want to put forward a few questions about this typical response. As an initial matter, the Court never explains why constitutional liability stands or falls on the line between purpose and knowledge with respect to results when, for example, criminal law usually sweeps those mental states into a shared level of culpability.[136] Perhaps it is because living in a racialized society means that most of us are in the mental state of knowing what the likely racial effects of our conduct will be much of the time. So, they might worry, lumping the purposeful and knowing mental states together as is typically done in criminal law would sweep too broadly. It would require many more actors to defend why their challenged policies should be allowed in the face of the known racial effects, whereas under the current doctrine actors can escape this duty to justify if they can convince a judge or jury that they merely knew, but did not intend, the racial effects. But let's leave aside the justification for requiring a purposeful, and not just knowing, mental state. I want to ask what is purpose with respect *to*—what the object of the intent is.

Let's assume the Court, at some future point, insists that the Fourteenth Amendment is offended only when someone chooses a course of conduct with the aim of "*racial* diversity" or "*racial* balancing" but not the aim of some other type of diversity or balancing. Now they need to nail down what exactly an actor aims at when they are aiming at *racial* diversity so that we can know when someone is in the offending purposeful state. But notice that the possible reason for splitting purpose and knowledge offered in the prior paragraph—that persons living in a racialized society are too often in the mental state of knowing the likely racial effects of our conduct—indicates that there might be substantial cognitive overlap between aiming at race and aiming at what some folks have called "race neutral" things. Again: What precisely is a decision-maker having purpose with respect *to* when they have the purpose of *racial* impact?

The best way to shake out why this is a difficult thing to nail down is with analogy, so let's return to the example of socioeconomic status ("SES"). Imagine the Supreme Court tells universities they are constitutionally forbidden from acting with the purpose of "socioeconomic balancing" or seeking "socioeconomic diversity." It is difficult to define what such a purpose consists of because socioeconomic distinctions are complexly constituted by multiple kinds of material

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135. *Feeney* is usually cited for the proposition that the Supreme Court believes a necessary condition of discriminatory motive is having purpose—not merely knowledge—of racial effects. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (footnotes omitted) (citation omitted) ("'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

136. For example, the Model Penal Code defines the intentional version of murder as criminal homicide "committed purposely or knowingly." Model Penal Code § 210.2(1)(a). Another reason why I reject criminal law-type theories of EPC and discrimination: I do not see why this area of law is about discerning the culpability or blameworthiness of the discriminator, as opposed to the rights and opportunities owed to the persons who allege discrimination.

relations, cultural meanings, social positions, and relational capacities. There are many contested definitions of the category. Indeed, some would argue there is no single necessary and sufficient feature that makes a person a member of a definitive SES class. Rather, persons have variously experienced being "classed" by being positioned by the different material and social meanings that collectively constitute socioeconomic distinction making. So, under this hypothetical rule, what, precisely, would university administrators be prohibited from balancing or diversifying on? Are university administrators forbidden from curating the composition of people whose parents have specific income levels? Wealth levels? Combinations of the two? What about family cultural and social capital? Socioeconomic status is a gestalt category; it is constituted by all of these distinction-making practices and more. When does aiming at some subset of them turn into aiming at "socioeconomic diversity"? Answering that question requires one to take a stand on defining socioeconomic class and the conditions under which a person has the mental state of purpose with respect to that category.

1. The Lumping and Splitting Problem

Even once you stipulate a definition of SES, you must decide which mental states should be treated as if they are comparable to "socioeconomic balancing."[137] We can call this the lumping and splitting problem to refer to the question of which mental states should be lumped with "socioeconomic balancing" and treated as if a person is doing the same thing, and which should be split and treated as if a person is doing something different. My contention here is that the lumping and splitting problem is everyone's problem. Stipulating a definition for SES does not foreclose the question for two reasons: first, because many mental states have significant cognitive overlap such that they are not wholly distinct (e.g., being "fed up" and being "angry"); and second, because the normative reasons to deem one mental state bad apply with similar force to others (e.g., if you know you should not send emails when you are fed up, you probably shouldn't send them when you are angry, either).

For example, if you decide to define SES just as current family wealth, then having the purpose to "socioeconomic balance" is having the purpose to effect composition with respect to current family wealth. Now, you could grant that the mental state of purpose with respect to this one meaning of SES, family wealth, is not identical to purpose with respect to, say, family history of higher education philanthropy. Nonetheless, you could still think that these mental states should be lumped (as opposed to split) into the category of purpose with respect to SES for one or both of the reasons noted above. First, you could think there is meaningful cognitive overlap between those categories in the minds of cultural insiders precisely because of how facts about family wealth and philanthropy coincide in our society. Moreover, you might think that the normative reasons to forbid wealth balancing extend to history of philanthropy balancing.

Therefore, we need a principled reason for lumping or splitting these mental states *given* how the categories of thought and action are connected as a matter of social constitution and psychological association in the minds of decision-makers. Why, for example, would it be constitutionally verboten to intend to curate

137. I thank Gideon Yaffe for pushing me on the substitution issue.

a class consisting largely of people whose family wealth exceeds $10,000,000 but permissible to curate a class of people whose parents have donated museums to universities *given* the social and psychological relation between these statuses? What principle justifies splitting them *in this context*?

The same questions arise with aiming at "*racial* diversity" or "*racial* balancing." One question brings us back to the "race *qua* race" question explored under version (2): what exactly *is* this mental state of aiming at "race *qua* race" composition? Perhaps aiming at racial diversity consists in having purpose with respect to the skin color or genes composition of the admitted class. But that is a very narrow view, and I would venture that neither SFFA nor the majority Justices would endorse it because university administrators almost never have *that* purpose. So perhaps aiming at racial diversity consists in having purpose with respect to the composition of the admitted class members' racialized experiences. That is, when admissions officers think of people as racialized, they do not think of them as simply having an intrinsic trait, since there is not a single intrinsic trait that persons claiming membership in a racial group share. But they do share being treated as or perceived under some subset of cultural racialized meanings in our race-stratified society. And those meanings—as with socioeconomic status—are many and diverse. So again, it is not clear which subset is activated in the minds of decision-makers when they have the purpose of racial diversity.

This brings us back to the lumping and splitting issue. One can grant that aiming at racial composition when one chooses a course of action is a distinct mental state from, e.g., aiming at a composition based on growing up in East New York versus the Upper East Side. Nonetheless, we need to justify splitting them for purposes of determining what counts as a racial purpose under the majority's construction of the EPC. One principle that could justify when these aims are lumped or split would be a normative theory about what aims are fair and just to consider in admissions in light of the social facts that constitute race. SFFA and the conservative Justices might be drawn to lumping these two together in the context of affirmative action cases,[138] but they have resisted it in the criminal justice context.[139] The Court has two choices if it wants to include some aims that, according to its view, are distinct from "race *qua* race": either it articulates a rule that counts all purposes that stand in some close cognitive or metaphysical relation

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138. For example, Justice Kavanaugh asked the SFFA attorney, "What if a college says we're going to give a plus to descendants of slaves? Is that race-neutral or not?" Mr. Strawbridge replied, "I think descendants of slaves is a very difficult question because it's so – it's so highly correlated with race in the history of our country." UNC Oral Argument, *supra* note 3, at 44–45. Of course, it is not clear from this exchange if SFFA believes that the mental state of "a plus to descendants of slaves" is always or sufficiently reliably only a pretext for what they understand to be the actually prohibited mental state of "race *qua* race" (whatever that is) or if they think that the mental state should also be prohibited because race and "descendants of slaves" is (to use their historically inaccurate and insulting language) "correlated."

139. *See* Kohler-Hausmann, *Detecting Racial Discrimination*, *supra* note 23, at 1174–75, 1181–94 (collecting federal cases brought by Black and Hispanic plaintiffs in the criminal legal arena where courts have refused to recognize an EPC violation on the grounds that the police, prosecutor, or other agency's purpose was something merely "correlated" with race).

to its notion of "race *qua* race" as prohibited across all contexts (e.g., policing *and* admissions), or it must give a principled justification for when such aims ought to be lumped in with its notion of "race *qua* race" and thus prohibited in some contexts (e.g., only in admissions).

2. Benchmarking: A.K.A. The Void Problem

Consider again administrators trying to decide how to evaluate SAT scores and candidate essays for admissions merit. Version (4)(ii) demands that however administrators choose to evaluate these credentials, they must have a "race neutral" justification for their selection. But this again opens the benchmarking (otherwise known as "The Void") problem: it is just not clear what the slogan of race neutrality demands in the face of race realities.

Proponents of view (4)(ii) must take a stand on how universities *ought* to evaluate things like tests, grades, class rankings, teacher evaluations, extracurricular activities, etc. *given true social facts about race in our society*. That requires proponents of view (4)(ii) to take a stand on what facts about race obtain in our social world. What I mean here is that the embodied real candidates that apply to universities are touched by the forces that constitute the social relations we call race. As discussed in Part III, if one rejects that proposition, then one does not think race exists in our society or that we currently live in a racialized society. One can certainly take that position, but doing so means there would be no reason to subject race to strict scrutiny.

Here is another way of posing the question. The majority opinion uses the term "racial preferences" nine times.[140] It states that race may not operate as a "negative."[141] These notions of preference or negative only make sense relative to some baseline or benchmark, some normative way of evaluating candidates that is, definitionally, the norm. So again, defending a benchmark is everyone's problem. The same relational facts can be defined as a preference-benefit or disfavored-tax depending on which benchmark you choose as your reference class. For example, in-state tuition at the University of North Carolina is about $9,000, and out-of-state tuition is $39,000.[142] Is the North Carolina legislature exhibiting bias against out-of-state students or favoring in-state students? Which description you choose reflects your views on what is normative or meaningful in the question being asked.[143] When the majority uses the term "racial preferences" or "negative," they are just question begging because they do not disclose, much less defend, what the norm or

140. *See* SFFA v. Harvard, *supra* note 1, at 211–16 (four times), 225–30 (five times).

141. "The second risk is that race would be used not as a plus, but as a negative—to discriminate against those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that 'unduly harm[ed] nonminority applicants.'" *Id.* at 212 (alteration in original) (quoting Grutter v. Bollinger, 539 U.S. 306, 341 (2003)).

142. *University of North Carolina at Chapel Hill Tuition & Financial Aid*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-colleges/unc-2974/paying [https://perma.cc/YU39-7G63] (last visited March 7, 2024).

143. *See generally* Christopher Hitchcock & Joshua Knobe, *Cause and Norm*, 11 J. PHIL. 587 (2009).

benchmark *is in their view*. What is the baseline, non-discriminatory way of interpreting and valuing candidates' credentials, deviation from which makes the way UNC and Harvard were doing it count as imposing a "racial preference" or "negative"? If the majority wants to say that, for example, giving more weight to essays than to SATs as a means of assessing academic potential and creativity is prohibited if race figures into that decision, then how *ought* universities decide on the relative weight of these two possible evaluative mechanisms in a "race neutral" fashion?

Since the majority simply ignores this question, it seems as if they think race can just be blotted out of the decision-maker's mind, with no need to specify what should take its place. But if race is actually occupying some cognitive space in decision-makers' minds when they make this call, this is nonsense. Philosopher David Lewis once proposed such a notion for evaluating counterfactuals: "When asked to suppose counterfactually that C does not occur, we don't really look for the very closest possible world where C's conditions of occurrence are not quite satisfied. Rather, *we imagine that C is completely and cleanly excised from history*, leaving behind no fragment or approximation of itself."[144] To continue borrowing from philosophers, Ned Hall's critique of Lewis's formulation is apt here. He notes that the italicized portion "lapse[s] into incoherence" because we cannot know what would happen in a world where C did not happen until we know what *did* happen in that world instead of C. As Hall puts it: "What exactly does such 'complete and clean excision' consist in? Removal of the event by some sort of metaphysical scalpel? Leaving behind . . . what? The Void?"[145]

But why, you might ask, must we specify how administrators ought to evaluate the SAT in light of race? Can the Court not just say that universities are free to decide how to weigh credentials such as the SAT in any manner they choose, so long as they are not thinking about race when they decide the value of those credentials? Seeing why this demand is subject to what I call the benchmarking

144. David Lewis, *Causation as Influence*, 97 J. PHIL. 182, 190 (2000) (emphasis added).

145. Hall comments that "I think Lewis's observations are right on target—up to the italicized portion, at which point they lapse into incoherence. What exactly does such 'complete and clean excision' consist in? Removal of the event by some sort of metaphysical scalpel? Leaving behind . . . what? The Void?" Ned Hall, *Structural Equations and Causation*, 132 PHIL. STUDIES. 109, 129 (2007) (omission in original). Folks have made similar claims with respect to filling out counterfactuals in causal analyses for purposes of defining discrimination. *See, e.g.*, Robin Dembroff & Issa Kohler-Hausmann, *Supreme Confusion About Causality at the Supreme Court*, 25 CUNY L. REV. 57, 70 (2022) (explaining why so-called "but-for" definitions of discrimination are necessarily indeterminate because the "test requires a prior and separate specification of duty or some other functionally similar legal-normative concept to get off the ground. Without that specification, it is entirely unclear what D is imagined to be doing in our counterfactual thought experiment or why the proposed causal dependence results in D's liability for V's loss. These normative concepts circumscribe the class of relevant counterfactual contrasts (things D would be doing if not driving at 65 mph) that we can consider in establishing that D's action was a but-for cause of the outcome and that D is thereby liable for V's loss."); *see also* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NORTE DAME L. REV. 67, 72 (2021).

problem (alternatively, The Void problem) will require dislodging the taken-for-granted premise that social categories like race and evaluation of merit are wholly distinct.

Let's return to the example of socioeconomic status. Imagine universities want to decide how to evaluate SAT scores in making admissions decisions.[146] Assume that these administrators are interested in a host of the applicant's multifaceted and difficult-to-ascertain qualities, including intellectual creativity, current skill, future leadership, and potential to contribute to innovation. In social science jargon, things like SAT scores and GPA are noisy signals for the latent features of true interest unobserved (and unobservable, as some of these features come to be in the future) by admissions officers. University administrators know that socioeconomically disadvantaged candidates report lower SAT scores than advantaged candidates. Furthermore, suppose that they believe that socioeconomically disadvantaged candidates report lower SAT scores than advantaged candidates *because* they are SES disadvantaged. They believe SES is a relational position constituted by, among other things, differential access to tutors, SAT preparation classes, family assistance and experience, confidence that comes with these experiences, and other things that make high SAT scores easier or harder to achieve.

Now imagine someone who subscribes to that view of socioeconomic class is commanded: "You must completely disregard socioeconomic class when deciding how to evaluate the SAT for admissions purposes." What, exactly, have they been commanded to do? If the decision-maker still believes that, in our world, it is true that socioeconomic class is relevant to how persons can prepare for and take the SAT, they cannot just evaluate the SAT by excising socioeconomic class from their mind and leaving The Void there in its stead. They must have some instruction on the *normatively correct way* to evaluate candidates in light of or in virtue of the facts that constitute the relations of socioeconomic class. What SES positions had the candidates occupied when they took the SAT? The Void?

Perhaps the command means that decision-makers are obliged to evaluate candidates that are socioeconomically disadvantaged *as if* they were socioeconomically advantaged. (This might seem strange, but both SFFA and Harvard used the approach when they generated "simulations" of "race-neutral alternative[s]" where they proffered statistical exercises that supposedly showed what would happen if all applicants were treated "as if white.")[147] Alternatively,

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146. To state the obvious, there is no mechanical way to evaluate the SAT scores for whatever notion of admissions merit the university is after—the university must decide what they think the scores indicate about the person who took the test.

147. As far as I can tell, they do so by using their various statistical models to predict who would be admitted if all candidates were treated "as if 'white'" (using the candidate's actual values for all other variable inputs but assigning them as the omitted category for the race variable) and then adjusting the model constant to yield the actual number of class admissions. Both the university respondents and SFFA put forth simulations of race-neutral admissions that "turn off" the effect of race by running a base regression model of admissions decision-making and then switching the coefficient on race indicators to zero

the command could be making the empirical or normative moves discussed in the Introduction that deny the premise of the problem.

The command to disregard socioeconomic class could be interpreted as just asserting that nobody thinks SES is any different from whether the candidate has bunions or was born on a prime number day. In that case, the command is just an empirical assertion that we live in a classless society. The problem with this interpretation of the command is that it sounds unmotivated. If the speaker really believes that in our world class is *descriptively irrelevant* to how and under what conditions people can score well on the SAT and most people know this, then why command decision-makers not to consider class? Furthermore, what would be wrong—much less deeply wrong—about considering class if it really is as inconsequential as bunions or being born on a prime number day? It might be weird or dumb to evaluate the meaning of the SAT score in light of this (stipulated to be irrelevant) attribute, but not morally wrong.

Alternatively, the command could be instructing decision-makers not to think of socioeconomic class as constituted by a set of relations and experiences relevant to SAT achievement. But, as stipulated, *these* decision-makers do not think that SES status is like bunions; they think that it is relevant to interpreting the SAT score for the latent feature of their true interest. Robbed of their sense-making framework by the command, they cannot interpret the SAT from The Void. So if the folks who issued the command think that SES status is like bunions, then it is incumbent on them to solve the benchmarking problem they have engendered. How ought these decision-makers interpret the SAT given that they are forbidden from pulling on *their* beliefs about its meaning in light of SES?

Notice that the first interpretation just denies that socioeconomic class stands in a special relation to the meaning of SAT scores such that one cannot interpret the substantive value of the scores without assessing or making assumptions about the SES positions of the test takers. It asserts that SES is not a collection of stratifying life experiences; it is like bunions or prime number birthdays. The latter interpretation embraces the opposite empirical premise: that SES consists in a set of differentiating life experiences. So it requires the commander to take a stand on what a just way to evaluate the SAT is, given that SES is the kind of status that positions persons as more or less advantaged with respect to scoring well on the SAT.

These two interpretations of the command not to consider SES are mutually exclusive. The first interpretation asserts that SES is not a status that gives rise to any special duty of equal treatment. Under our current EPC doctrine, such categories are subject to rational basis review, not strict scrutiny. It might be irrational or idiosyncratic to interpret SAT scores in light of SES status, just as it is irrational or

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(white was the omitted categorical race variable). Such simulations are referenced at oral argument and in SFFA's brief. *See* Harvard Oral Argument, *supra* note 3, at 36; UNC Oral Argument, *supra* note 3, at 47; Brief for Petitioner, *supra* note 38, at 33. One of SFFA's experts describes the simulation of "no racial/ethnic preferences" as treating "applicants from all racial/ethnic groups . . . as if they were white." Expert Report of Peter S. Arcidiacono Supporting Plaintiff at 73, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 14-cv-14176-ADB).

idiosyncratic to interpret SAT scores in light of bunions. But it is not wrongful in the special way that makes it discrimination *on the basis of* SES because persons are not owed any special consideration (beyond the duties owed to acting on any other status) *on the basis of* SES.[148] In contrast, if one thinks that SES is a fundamental stratifying status, then what gives rise to the special quality of wrongfulness when persons are not treated as they should be *on the basis of* SES are the very social relations that constitute socioeconomic status.[149]

Now, if we move back to the category of race, some things the majority Justices say suggest that they are trying to push both interpretations of the command not to consider race at once. The command issued to universities to disregard race or evaluate credentials in a race-neutral fashion sometimes sounds like an instruction to evaluate those credentials in a manner that the majority thinks is normatively just in light of race. However, they do not fill in what that benchmark fair mode of evaluation consists of.

At other times, it seems the majority is just rejecting the empirical premise that race is, in our world, relevant to interpreting any of the credentials or experiences candidates present to merit admission (i.e., they do not think that race is analogous to socioeconomic class).[150] For example, the majority Justices say things like the following:

> We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." 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. . . . But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," —at the very least alike in the sense of being different from nonminority students.[151]

And Justice Thomas says in his concurrence:

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148. Said yet another way, someone who thinks that persons who score well on the SAT without bunions are more impressive than those with bunions is, of course, making a distinction on the basis of bunions. But nothing about the status of having *bunions* makes that distinction extra wrongful.

149. *See generally* Kohler-Hausmann, *Detecting Racial Discrimination*, *supra* note 23, at 1171 (arguing that discrimination on the basis of a status is a thick ethical concept combining descriptive assertions about how the wrong obtains through the category and an evaluative assertion about the quality of the wrong: "[T]o morally evaluate an action with a thick ethical concept communicates information about *the way in which* the action is bad that relies on institutional and cultural facts.").

150. They are internally inconsistent here, too. Sometimes they suggest that they believe race has real joints and universities have just carved racial categories at the *wrong* joints. SFFA v. Harvard, *supra* note 1, at 216 (arguing that "the categories are themselves imprecise" because the Asian category is overbroad and the Hispanic racial category is arbitrary or undefined).

151. *Id.* at 220–21 (alteration in original) (citations omitted).

> Under [the Fourteenth] 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.[152]

The irrelevance of race is a central theme of Thomas's argument, writing that "under our Constitution, race is irrelevant"[153] and that "any statistical gaps between the average wealth of black and white Americans is constitutionally irrelevant."[154] And yet Thomas, and the other majority Justices, constantly refer to race as a "dangerous"[155] or "perilous" consideration.[156]

The following Part will argue that the majority cannot have it both ways. If "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," some facts in the world must explain this difference. Race must not, in fact, be "irrelevant" in our world. If race were, in fact, "irrelevant" in our world, then there would be no principled reason *why* treating someone differently because of race is constitutionally different from treating someone differently because of urban–suburban status or violin skill.

III. TREATING PEOPLE AS EQUALS IN LIGHT OF RACE

Recall the analogy presented in the Introduction: what tax systems treat people equally on the basis of income, given that we live in a society where some people are high earners and others low? As discussed there, one could deny the premise of the question in one of two ways. One could deny, as an empirical matter, that there is any income inequality. Alternatively, one could deny, as a normative matter, that differences in income entitle persons to any kind of equal treatment on the basis of income.

The conservative Justices who make up the majority do not want to, or are not able to, make either denial move in this case because they hold that UNC and Harvard violate equal protection *on the basis of race*. First, both SFFA and the conservative Justices say that we live in a race-stratified society; that race exists—not existed, but *exists*—as a salient differentiating vector that people (rightly or wrongly) take as meaningful in interactions; and that because of that it shapes life trajectories, family contexts, and individuals' senses of identity.[157] For example,

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152. *Id.* at 263 (Thomas, J., concurring).
153. *Id.* at 276 (Thomas, J., concurring).
154. *Id.* at 278 (Thomas, J., concurring).
155. *Id.* at 313 (Kavanaugh, J., concurring).
156. *Id.* at 214.
157. SFFA repeatedly acknowledges the societal salience of race, writing that "[t]oday, Asian Americans continue to face explicit and implicit bias. They are stereotyped as timid, quiet, shy, passive, withdrawn, one-dimensional, hard workers, perpetual foreigners, and 'model minorities.'" Brief for Petitioner, *supra* note 38, at 25 (citations omitted). At oral argument, Attorney Norris describes "Asians" as "a group that continues to face immense racial discrimination in this country." Harvard Oral Argument, *supra* note 3, at 3. SFFA also presents hypothetical scenarios wherein candidates write about overcoming racial

Justice Thomas says that he is "painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination,"[158] and he argues that "statistical gaps between the average wealth of black and white Americans [are] constitutionally irrelevant," not that they do not exist.[159] Indeed, the majority's principal reason for claiming that the "end point"[160] of affirmative action suggested by the dissent—when "racial inequality will end"—was unworkable *because* it was an "unceasing" justification.[161] So the majority is not disputing the empirical premise that there *is* racial inequality. They are conceding it, and expressing concern that such inequality will be "unceasing."[162]

Second, the majority must maintain that people are owed something on the basis of race because that is what strict scrutiny means. There must be some set of social facts that obtain in our world today that justify applying strict scrutiny to race and not to other categories. Although the majority Justices sometimes say things like race is "irrelevant,"[163] they can't really mean it—at least not in a descriptive sense. They could mean what they say, but then they are left with the implications of that denial. People would not be owed anything special on the basis of race as a matter of constitutional equal protection.[164]

Universities are free to act on the basis of a candidate being from Wisconsin or Wyoming, playing the oboe or lacrosse, having rich or low-income parents, and countless other distinctions, even if it is bad, mean, stupid, or socially deleterious to

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discrimination or connecting to others on the basis of racial identity. UNC Oral Argument, *supra* note 3, at 27–28. Chief Justice Roberts also raises such a hypothetical. Harvard Oral Argument, *supra* note 3, at 7. And Justice Barrett cites the benefits of "allow[ing] minority students to band together to reduce some of the feelings of isolation" via affinity group housing, acknowledging that race affects experiences. UNC Oral Argument, *supra* note 3, at 140.

158. SFFA v. Harvard, *supra* note 1, at 287 (Thomas, J., concurring).

159. *Id.* at 278.

160. *Id.* at 221 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

161. *Id.* at 227–28 (citations omitted).

162. *Id.* at 228.

163. In its filings, SFFA stated that "the importance of education is the point: These crucial opportunities cannot turn on so irrelevant and dangerous a factor as race." Reply Brief for Petitioner at 9, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 746–47 (2007) (plurality opinion)). This framing from *Parents Involved*, however, raises the question: how can race be both currently socially "irrelevant" and "dangerous" to act on at once? The same tension underlies Justice Thomas's concurrence in *SFFA*. He writes that race is a "legally irrelevant trait" and "the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation" under the Fourteenth Amendment. SFFA v. Harvard, *supra* note 1, at 263 (Thomas, J., concurring). And yet, he is deeply concerned about "the pernicious effects of all such discrimination." *Id.* at 232 (Thomas, J., concurring). If race really were irrelevant, like bunions or prime number birthdays, how could acting on it cause such pernicious effects?

164. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("In short, the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.").

act on any of these reasons.[165] Most legislation draws classifications between persons on the basis of something and often accords advantages and disadvantages on the basis of those classifications. Equal protection doctrine assumes that entities governed by the Equal Protection Clause can make distinctions on the basis of all sorts of things, including ascribed cognitive or mental disability,[166] or the number of years operating a food pushcart in the French Quarter of New Orleans.[167] But these Justices assert that "[d]istinctions 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."[168] But *why*, if race really is irrelevant, is it "odious" to freedom and equality to make distinctions based on racial ancestry, but not pushcart ownership ancestry?

In sum, the Justices seem not only to believe that there exists some set of relations and meanings constituting race as a stratifying social system *today*, but also that strict scrutiny is normatively and legally justified because of those facts.

I want to briefly address a possible move someone might make to help themselves to strict scrutiny while simultaneously denying that race is currently constituted by a collection of socially stratifying relations and meanings. One might be tempted to maintain that race is subject to strict scrutiny only because it was, at the time of the Fourteenth Amendment's ratification, consequential. Perhaps this is what Justice Roberts meant when he said "[w]e did not fight a Civil War about oboe players."[169] I do not see how that move is open to this Court.

First, this Court's own logic dictates that the current—not past—significance of a classification is what matters for equal protection claims. For example, the *Bakke* Court said that, although "[t]he Court's initial view of the Fourteenth Amendment was that its 'one pervading purpose' was 'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had

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165. That is, Harvard might be an asshole for doing legacy or donor admissions, but *under the current EPC doctrine that these Justices endorse*, there is no claim that it is unconstitutional to act on the basis of legacy or donor status.

166. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 442 (1985) (holding that the court of appeals "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

167. *See, e.g.*, *Dukes*, 427 U.S. at 299, 305 (holding that the "grandfather provision" of a New Orleans statute banning newer pushcarts from the historic French Quarter was not a "totally arbitrary and irrational method of achieving the city's purpose," although the categorization and law conferred a material benefit on some at the cost of others).

168. SFFA v. Harvard, *supra* note 1, at 208 (alteration in original) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)); *see also* Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."). But why does it "demean[] us all" when it uses *this* classification and not others?

169. Harvard Oral Argument, *supra* note 3, at 68. However, if Roberts believes SFFA, then the Civil War was fought about slavery, not race. *Id.* at 14–15 (Attorney Norris arguing that the post-war Freedmen's Bureau Bill makes classifications on the basis of formerly enslaved status, not race).

formerly exercised dominion over him,'" the current (and, on their view, correct) interpretation of the Amendment must turn on *contemporary* racial circumstances.[170] The Court noted that the "Equal Protection Clause . . . was '[v]irtually strangled in infancy by post-civil-war judicial reactionism,'" and when it was revived, "it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority" because "during the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities."[171]

As the Court said about the Fifteenth Amendment, which commands that "the right . . . to vote shall not be denied or abridged . . . on account of race or color,"[172] it was "not designed to punish for the past; its purpose is to ensure a better future."[173] It is the same with the Fourteenth Amendment: persons are denied equal protection of the laws based on current facts, not historical facts standing alone. Now, historical facts might have current relevance and form part of what gives current facts about race their content, character, and significance. But if historical facts about race have no current relevance, if they have dissolved in the dustbin of history, their symbolic and material significance disintegrated into inconsequential memory, there is no good reason to subject race to strict scrutiny *now*. And both the conservative Justices and SFFA want to subject race to strict scrutiny now. Therefore, by their own logic, they must hold that race is not "irrelevant" in our current society in a descriptive sense. Rather, they must hold its current *relevance* is what justifies it being subject to strict scrutiny now.

Second, the Court's treatment of so-called "remedial justification for racial classifications" assumes that what counts as equal protection must be evaluated by the light of current racial facts.[174] For example, the Court recognizes "remedying the

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170. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (plurality opinion) (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873)).

171. *See id.* at 292–93 (alteration in original).

172. U.S. CONST. amend. XV, § 1.

173. Shelby Cnty. v. Holder, 570 U.S. 529, 553 (2013). The *Shelby County* Court extensively elaborated its view that changes in the underlying conditions of voter discrimination inform the permissibility of the Voting Rights Act. On the Court's view, past discrimination alone could not justify federal interference with states' power to regulate elections. Of the progress in voting rights made since Jim Crow, it wrote that "[t]he Nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were," *id.* at 551, and that "the coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs." *Id.* at 53.

174. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. 701, 737 (2007) (plurality opinion) (arguing that "the remedial justification for racial classifications cannot decide these cases" because the school districts were either never segregated or have "eliminated the vestiges of . . . prior dual status"); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . [because] a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."); Fisher v. Univ. of Tex., 579 U.S. 365, 415 (2016) (Alito, J., dissenting) ("UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming.").

effects of past intentional discrimination" as a compelling interest even after de jure segregation is no longer operative.[175] Even Justice Thomas says in his *SFFA* concurrence that "our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregation system, which must have some discrete and *continuing discriminatory effect that warrants a present remedy*."[176]

Specifically, *what* "discriminatory effect[s] that warrant[] a present remedy"? By assumption, there is no de jure segregation at the time of the claim, so that can't be the compelling reason (anyway, it is not the "effect[] of past intentional discrimination," it *is* the "past intentional discrimination" itself). Nor can it just be the "effect" of the racial composition achieved by de jure segregation: "We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that 'the Constitution is not violated by racial imbalance in the schools, without more.'"[177] So what other "effects" or "harm[s] . . . traceable to segregation" could be the compelling reasons satisfying strict scrutiny on their view? It must be that the institutional, cognitive, and political facts that brought about de jure segregation in the first instance *still exist* in some manner at the time when the "remedial" efforts are proposed.[178] There is no other "continuing discriminatory effect that warrants a *present* remedy" on the majority's own view.

Admittedly, in these discussions the Court addresses whether, given current facts, the use of race serves an interest sufficiently compelling to overcome strict scrutiny, not whether, given current facts, race ought to be subject to strict scrutiny in the first place. However, as many have pointed out, the compelling interest and level of scrutiny inquiries are conceptually interchangeable.[179] You can take the Justice Stevens view that there is "only one Equal Protection Clause," and in each case one needs to look at current facts to see if the classification treats

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175. *Parents Involved*, 551 U.S. at 720.

176. SFFA v. Harvard, *supra* note 1, at 260 (Thomas, J., concurring) (second emphasis added).

177. *Parents Involved*, 551 U.S. at 721 (quoting Milliken v. Bradley, 433 U.S. 267, 280 n.14 (1977)).

178. SFFA v. Harvard, *supra* note 1, at 226–27. ("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.'" (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989))).

179. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially."); San Antonio v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) ("The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality . . . . [But a] principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause . . . . [D]epending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."). *See generally* James E. Fleming, *There is Only One Equal Protection Clause: An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301 (2006).

persons as "equals" in light of what the classification means now. Or you can take the tiered scrutiny approach, which assumes that the use of certain classifications (such as race) does not treat persons as equals absent a compelling reason. But if the reasons for why that classification was placed on the strict scrutiny list, as opposed to the rational basis list, have no current force, then there's just no reason to keep it on that list. At least no principled reason.

All this is to say that the premise of strict scrutiny entails endorsing an empirical view that race *is* relevant. It cannot be a category of difference in mere skin color or phenotypic features (like bunions). It must be constituted by some relations and meanings that make people differently situated along some socially and economically meaningful vectors. The entire graded scrutiny scale is premised on a judgment that persons are owed something *because of* whatever category is subject to heightened scrutiny. Here, "because of" is used in the sense of grounding: the facts that constitute what race *is* as a social system form (at least part of) what makes it the case that persons are owed what they are owed. This, I believe, even SFFA and the conservative majority of the current Supreme Court must accept. If they reject it, they have no reason to treat race any differently than playing the oboe, playing squash, or having parents who can fund art museums.

And this is the point I hope to drive home in this Part: those same facts relevant to making race subject to strict scrutiny are relevant to determining what counts as equal treatment on the basis of race. Once one recognizes that the category is a significant and consequential differentiator in society—and accordingly that people are owed something special *on the basis of* that category—one cannot turn around and deny those same facts when it comes time to debate what people are owed on the basis of the category.[180] In sum, any coherent theory of equal protection on the basis of race must rest on a sociological account of what race is and a normative theory of what is owed in light of what it is.

CONCLUSION

It is admittedly tiresome to slog through four different versions—and sub-versions (!)—of "acting on the basis of race." But some tiresome tasks are worth the slog. And this is one such task. The Supreme Court has declared that the Equal Protection Clause of the Fourteenth Amendment forbids universities from conducting "race conscious" admissions. The majority opinion offered a lot of lofty abstractions to justify banning the practice. But the majority Justices utterly failed to define what "it" was they banned. This Article has argued that the best interpretation of what the Court has done is ban racial inferences that *the majority* deems bad, unjustified, or socially harmful in light of some unstated, but necessary, background theory about what race *is*. But the opinion is at odds with itself. At times, the conservative Justices insist that race is "irrelevant," but they cannot mean that in the descriptive sense if certain uses of race will in fact "harm and demean individuals."[181] Moreover, they never make explicit the equality-of-what theory that is driving their determination of which uses of race are bad or socially harmful in

180. Kohler-Hausmann, *What's the Point of Parity?*, *supra* note 81, at 5, 18–19.
181. SFFA v. Harvard, *supra* note 1, at 255 (Thomas, J., concurring).

light of racial facts. Worse still, they obfuscate that such a theory is doing the driving.

This lack of conceptual clarity plagues both sides of this debate. Justice Thomas fairly complained during oral arguments that he did not know what UNC meant when it used the term "racial diversity."[182] SFFA similarly complained that the Court's prior definition of constitutionally permissible "race-conscious" admissions was somewhere between confusing and incoherent.[183] At times, Harvard and UNC seemed to embrace SFFA's view that equal protection demands some version of race "neutrality" but suggested that affirmative action survives strict scrutiny because race is a small or inconsequential reason in admissions.[184] That is, they argued that affirmative action survives strict scrutiny simply because race is not being used as a significant reason in admissions, and when it is being used it makes little causal difference. But in so doing, they put themselves in a tough position: at once maintaining that the way they treat race as a reason in admissions decisions is inconsequential to admissions outcomes, but also insisting that practicing "race conscious" admissions is essential for racial diversity. This tension was not lost on the conservative Justices, who reveled in pointing out that such a position was contradictory.[185]

The source of these logical problems is the same: a definition of equal protection on the basis of race that works with inconsistent models of what race is and seeks to avoid making normative arguments for what counts as just or fair *given* what it holds race to be. I believe that "race conscious" admissions are constitutional because I believe that there is an answer to what kind of race inferences are fair and just in light of race. It is not an easy answer. It requires probing what social relations and meanings constitute the form of social distinction-making we know of as race. And it requires hashing out what kind of equality persons are owed *given* some sociologically-specific account of the relations and meanings that constitute race. People may disagree on both fronts: in terms of sociological facts and in terms of a normative theory of equality. But the current approach—seeking to define equal

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182. UNC Oral Argument, *supra* note 3, at 71 ("Justice Thomas: Mr. Park, I've heard the word 'diversity' quite a few times, and I don't have a clue what it means. It seems to mean everything for everyone.").

183. Brief for Petitioner, *supra* note 38, at 61, 68 ("Obscurity, after all, is the only way a university could navigate *Grutter*'s Delphic instructions. How else could a university seek a 'critical mass' of racial minorities without seeking 'some specified percentage'? Or make race 'outcome determinative' for minorities without making it the 'defining feature' of their application?" (quoting Gratz v. Bollinger, 539 U.S. 244, 329–30, 337–39 (2003) (Ginsburg, J., dissenting))).

184. UNC Oral Argument, *supra* note 3, at 110 (Attorney Park arguing that Grutter requires "aggressive and enthusiastic adoption of race-neutral alternatives" and that UNC had "dial[ed] down" their use of race such that race was determinative for a small number of applicants, anticipated to reach zero); Brief for Respondent at 49, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) ("The evidence was unequivocal that a race based tip matters only for the small category of applicants so strong on multiple dimensions that they are serious candidates for admission.").

185. *See, e.g.*, UNC Oral Argument, *supra* note 3, at 94–97.

protection in only in terms of hollow formalisms such as equality or neutrality—suffers from the "disadvantage of deliberate obfuscation."[186]

186. *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).