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Defense Against the Dark Arts: The Diversity Rationale and the Failed Affirmative Defense of Affirmative Action

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Abstract

Over the past forty years, affirmative action advocates have participated in a defensive campaign where they have admitted that affirmative action is a form of justified discrimination. This Article finds this a dangerous strategy because it allows for the practice of misguided beliefs about race and remedies for racism. When schools fail to fight the pernicious perception that affirmative action is a racial preference, they allow the bulk of

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society to participate in the belief that there are no other remedial justifications for affirmative action—like remedying an institution's history of discrimination, or curing a school's present and ongoing discrimination by accounting for bias in admissions measures like grades, standardized testing, and letters of recommendation which are the products of racial bias. Given this fact, affirmative action is neither a racial preference nor a form of "benign" racial discrimination. Instead, affirmative action acts as a corrective function.

This Article argues that the Supreme Court's dismantling of affirmative action in Students for Fair Admissions v. Harvard *("*SFFA v. Harvard*") was not solely the work of conservatives. Advocates of affirmative action implemented an over forty-year, weak affirmative defense strategy that centered diversity and treated race conscious remedies as a form of preferential treatment. This Article discusses how portions of the* SFFA *decision that are critical of the diversity rationale align with principles of racial equality. Additionally, this Article discusses equality, the critiques of the diversity rationale, and calls for advocates of affirmative action to abandon diversity in the wake of* SFFA.

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The Dark Arts are many, varied, ever-changing, and eternal. Fighting them is like fighting a many-headed monster, which, each time a neck is severed, sprouts a head even fiercer and cleverer than before. You are fighting that which is unfixed, [and] mutating . . . . Your defenses must therefore be as flexible and inventive as the arts you seek to undo.

Severus Snape[1]

I. THE DARK ART OF RACISM

In the famous fictional world of Harry Potter,[2] students who attend Hogwarts School for Witchcraft and Wizardry enroll in

1. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 169 (2005).

2. I acknowledge that the title and opening of this Article reference the work of British author J.K. Rowling who created the wizarding world of Harry Potter. Harry Potter is a young wizard and central character in a fantasy children's book series that Rowling wrote between 1997 and 2007. In the summer of 2020, many Potter fans became upset with Rowling after she tweeted comments on sex and gender that many consider transphobic. *See* Hannah Yasharoff, *How Trans 'Harry Potter' Fans Are Grappling with J.K. Rowling's Legacy After Her Transphobic Comments*, USA TODAY (July 31, 2020), https://perma.cc/VAW5-6EKR (last updated Dec. 13, 2021) (detailing the reactions of transgender fans of the Harry Potter series to Rowling's

Defense Against the Dark Arts.[3] This required core course teaches students to defend themselves from Dark Creatures and the Dark Arts—the magic used to harm, exert control over, or kill beings.[4] The course aims to teach students how to fight the Dark Arts by protecting themselves, primarily through defense.[5]

Art often imitates life, as parallels exist between this fantasy world and reality. Instead of witchcraft, lawyers in the real world fight the exercise of white supremacy, or—what Ta-Nehisi Coates describes as "the dark art of racecraft."[6] Those who resist the dark arts of racecraft and champion racial equality through affirmative action litigation have taken an approach similar to the protagonists in Harry Potter—be on the defensive.[7]

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comments and explaining the subsequent impact on the community). However, as a scholar, I believe that one's work can stand apart from its creator.

The "dark arts" concept that I draw from Rowling's novels, and reference in this Article, is not rooted in transphobia nor does the concept further the oppression of transgender folk. I subscribe to the view that Rowling's books transcend her, and that Harry Potter "belongs to the fans." *See* Saoirse Hanley, *'Harry Potter' Belongs to the Fans, and No Controversy Can Change That*, BOOKSTR (June 9, 2020), https://perma.cc/4J8J-XWWR (emphasizing the idea that the Harry Potter series has grown beyond its author and now belongs to its global community of fans).

3. *See Defense Against the Dark Arts*, HARRY POTTER COMPENDIUM, https://perma.cc/99BV-SDEA (last updated Mar. 7, 2022) (providing an overview of the mandatory subject at Hogwarts School of Witchcraft and Wizardry where students learn to defend themselves against Dark Creatures and the Dark Arts).

4. *See Dark Arts*, HARRY POTTER WIKI, https://perma.cc/ZGF2-ZENA (last updated Sept. 20, 2023) (providing an overview of the Dark Arts, including its definition as magic used with malevolent intent and its history in the wizarding world).

5. *See id.* (detailing the nature and history of the Dark Arts, including its dangers and the importance of defense against it).

6. *See* Ta-Nehisi Coates, *The Dark Art of Racecraft*, ATLANTIC (May 13, 2013), https://perma.cc/MDC4-L3J4 (exploring the historical and contemporary implications of race and intelligence research, and critiquing the shifting definitions and perceptions of race).

7. *See* KAREN E. FIELDS & BARBARA J. FIELDS, RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE 193–95 (2012) (discussing the concept of "racecraft" and its implications in society); *see also* Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCH. 16, 16 (2005) (emphasizing the social construction of race and its real-world consequences).

Affirmative action is a social policy originally initiated to achieve equality and economic and social advancement for racial and ethnic minorities.[8] Numerous institutions—e.g., private employers and non-profit colleges and universities—have used affirmative action policies to provide opportunities for minorities.[9] Starting in the 1970s, social conservatives and plaintiff litigants—Allan Bakke,[10] Jennifer Gratz,[11] Barbara

8. *See* Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961) (establishing one of the earliest federal affirmative action policies by mandating that government contractors ensure employment practices are free from racial, creed, color, or national origin discrimination).

9. Affirmative action, both in private employment and higher education, has roots in addressing social inequalities and promoting equal opportunities. *See* Richard N. Appel et al., *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 549 (2005) (analyzing the progression and implications of affirmative action policies in private sector employment); *see also* Natasha Warikoo & Utaukwa Allen, *A Solution to Multiple Problems: The Origins of Affirmative Action in Higher Education Around the World*, 45 STUD. HIGHER EDUC. 2398, 2399 (2020) (exploring the global adoption of affirmative action in academia and its connection to national identity and equality movements). In the United States, the 1960s saw significant strides with President Kennedy's Executive Order 10925 mandating affirmative action for businesses with federal contracts and the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d–2000d-7, prohibiting discrimination in the private sector. *See* Appel et al., *supra*, at 551–52. Globally, affirmative action in higher education has evolved in various forms, often as nation-building projects, responses to social movements, or indirect policies in the twenty-first century. *See* Warikoo & Allen, *supra*, at 2404–05.

10. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318–21 (1978) (holding that the university's special admissions program, which reserved spots for disadvantaged members of certain minority races, was unlawful under the Fourteenth Amendment's equal protection clause and the Civil Rights Act of 1964, but also recognizing that race could be considered in admissions if it was factored in with other characteristics in a competitive process).

11. Gratz v. Bollinger, 539 U.S. 244, 255–56, 275 (2003) (holding that the university's undergraduate admissions policy, which automatically granted twenty points to applicants from underrepresented minority groups, was not narrowly tailored to achieve the university's asserted compelling interest in diversity and thus violated the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981).

Grutter,[12] Abigail Fisher,[13] and the organization Students for Fair Admissions[14]—have fought to end these policies. Their campaign is a practice of racecraft geared towards reverting to a system of fewer opportunities for minority folk.[15] They

12. *See* Grutter v. Bollinger, 539 U.S. 306, 312 (2003) (holding that a state university law school had a compelling interest in having a diverse student body, and that a race-conscious admissions policy did not violate the Equal Protection Clause).

13. Abigail Fisher challenged the University of Texas's affirmative action program in two cases, distinguished as *Fisher I* and *Fisher II*. *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 304 (2013) (holding that strict scrutiny must be applied to determine the constitutionality of the university's consideration of race in admissions, and emphasizing that the university's mission of education is incompatible with justifying remedial racial classification solely to redress past discrimination); *see also* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. 365, 370 (2016) (upholding the university's affirmative action program, concluding that the program was narrowly tailored to achieve diversity and did not violate the Equal Protection Clause). Following the rulings, Ms. Fisher became the subject of internet mockery, epitomized by the hashtag "#BeckyWithTheBadGrades." *See* Abby Jackson, *People Are Tweeting a Modified Beyonce Lyric to Mock the Woman at the Center of the Supreme Court's Case on Affirmative Action*, BUS. INSIDER (June 27, 2016), https://perma.cc/V3FU-HLKR.

14. The non-profit organization Students for Fair Admissions filed lawsuits against both Harvard and the University of North Carolina, seeking to overrule the *Grutter* decision. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 190 (2023) [hereinafter SFFA v. Harvard] (holding that Harvard's and the University of North Carolina's admissions programs violated the Equal Protection Clause as they lacked sufficiently focused and measurable objectives warranting the use of race, unavoidably employed race in a negative manner, involved racial stereotyping, and lacked meaningful end points). The Court initially consolidated the cases for oral argument in the 2022–23 term but later deconsolidated them on July 22, 2022—this allowed Justice Ketanji Brown Jackson, who had recused herself from the Harvard case due to her service on their Board of Trustees, to participate in the oral arguments of the University of North Carolina ("UNC") case. *See* Amy Howe, *Court Will Hear Affirmative-Action Challenges Separately, Allowing Jackson to Participate in UNC Case*, SCOTUSBLOG (July 22, 2022), https://perma.cc/3EGM-2Z69. However, on June 29, 2023, the Court issued a single opinion for both cases, seemingly reconsolidating them. *See SFFA*, 143 S. Ct. at 2154.

15. Edward Blum, founder of Students for Fair Admissions, who successfully contested affirmative action in college admissions, exemplifies efforts to reduce opportunities for racial minorities by challenging race-conscious programs and hints at extending his challenges to workplace programs. *See* Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done.*, N.Y. TIMES (July 8, 2023), https://perma.cc/7PBM-BZ3R (discussing Blum's past litigation efforts,

advance arguments in the courts and media to influence the public to believe that affirmative action is a racial preference that reversely discriminates against Whites and folks of Asian descent.[16] This decades-long racecraft campaign has contributed to the warping of our collective understanding of race, merit, and opportunity.[17]

Unfortunately, conservatives are not the only ones to perpetuate the belief that affirmative action is a racial preference. Schools that defend affirmative action policies also have a hand in furthering that belief.[18] Colleges and universities

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including *Shelby County v. Holder*, 570 U.S. 529 (2013), and his future plans to challenge race-conscious programs in various sectors).

16. In addition to filing Fourteenth Amendment and Title VI of the 1964 Civil Rights Act claims against Harvard and the University of North Carolina, Students for Fair Admissions has promoted anti-affirmative action narratives discussed in the news media. *See* John McWhorter & Glenn Loury, *Racial Preferences May End, but the Fight Will Continue*, GLENN LOURY (June 18, 2023), https://perma.cc/5WDR-P5QD (discussing the expected end of racial preferences in college admissions and the continued advocacy for such preferences by some, including calls for civil disobedience); *see also* Rikki Schlott, *Asian and Black Students on Why They Oppose Affirmative Action*, N.Y. POST (June 15, 2023), https://perma.cc/J3EK-PL8N (reporting on the experiences and perspectives of Asian and Black students who oppose affirmative action and their involvement with Students for Fair Admissions).

17. The paradoxical stance of Americans on race is evident in their conflicting views on race-conscious admissions and diversity programs. A poll conducted in October 2022 by the Washington Post and the Schar School of Policy and Government at George Mason University revealed a dichotomy in public opinion: while 63% of Americans advocated for prohibiting the consideration of race and ethnicity in college admissions, an almost equal proportion, 64%, believed that initiatives aimed at enhancing racial diversity on campuses are beneficial. *See* Nick Anderson et al., *Over 6 in 10 American Favor Leaving Race Out of College Admissions, Post-Schar School Poll Finds*, WASH. POST (Oct. 22, 2022), https://perma.cc/Q3GN-F56H (illustrating the contradictory nature of public opinion on race-conscious admissions and diversity programs, and highlighting the dilemma faced by universities in cultivating diversity without racial and ethnic discrimination). This incongruity raises questions about the coherence of public attitudes towards race and diversity in education and reflects a broader societal struggle with concepts of race and opportunity.

18. In almost every affirmative action case, college and university defendants have relied on the diversity rationale to justify their consideration of race in affirmative action. *See* Brief for Respondents at 11, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter *Gratz* Brief for Respondents] (emphasizing the educational value of a diverse student body, the reliance on *Bakke* for crafting admissions policies, and the consideration of race as one of many factors to achieve educational diversity, while

have adopted an affirmative defense legal strategy when defending affirmative action lawsuits.[19] Instead of disputing the claim that affirmative action constitutes racial discrimination, schools advance an affirmative defense strategy, arguing that courts should permit some degree of racial discrimination in admissions because it meets the compelling government goal to achieve educational diversity.[20]

This affirmative defense strategy not only centers on diversity but is a nod to the dangerous racecraft myth that affirmative action is a racial preference. During the fifty-year history of the Supreme Court's affirmative action cases,[21] society took a detour from the road to racial equality in school admissions and found itself on a ragged path toward diversity.[22]

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underscoring the challenges and opportunities presented by racial and ethnic diversity in the student body); *see also* Brief for Respondents at 12, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter *Grutter* Brief for Respondents] (detailing the Law School's cautious and limited admissions policy aimed at achieving a diverse student body, highlighting the balance between achieving a critical mass of minority students and maintaining high academic standards, and discussing the absence of viable race-neutral alternatives); Brief for Respondents at 28, Fisher I, 570 U.S. 297 (2013) (No. 11-345) [hereinafter *Fisher I* Brief for Respondents] (explaining that the University of Texas's individualized consideration of race in holistic admissions did not subject the petitioner to unequal treatment under the Fourteenth Amendment); Brief for Respondents at 15, Fisher II, 79 U.S. 365 (2016) (No. 14-981) [hereinafter *Fisher II* Brief for Respondents] (arguing that University of Texas's consideration of race is necessary for securing the educational benefits of diversity, addressing challenges raised by the petitioner, and emphasizing the importance of diversity within and among racial groups in breaking down stereotypes and fostering varied perspectives).

19. *See supra* note 18.

20. *See supra* note 18.

21. Commemorating its 50th anniversary in 2024, *DeFunis v. Odegaard* marked the Court's initial engagement with race-based affirmative action in higher education. *See* 416 U.S. 312, 314–16, 319–20 (1974) (detailing Marco DeFunis Jr.'s challenge to the University of Washington Law School's admission policy, alleging racial discrimination in violation of the Equal Protection Clause; however, the case was deemed moot because DeFunis was admitted before the case reached the Supreme Court).

22. The year 1978 marked a pivotal moment as Justice Powell, in his plurality opinion in *Regents of University of California v. Bakke*, introduced the diversity rationale into the constitutional jurisprudence of the Supreme Court of the United States. *See* 438 U.S. 265, 300 (1978) (discussing the introduction of the diversity rationale by Justice Powell in 1978 and emphasizing the Court's stance on preferential classifications and the necessity of addressing identified discrimination). This rationale became a

While disparate and distinct, diversity became synonymous with equality, race, and racial minority.[23] By centering diversity, this affirmative defense strategy has ignored other rhetorically stronger arguments highlighting equality and the remedial nature of affirmative action.[24]

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guiding principle for schools as they navigated admissions policies to comply with the Fourteenth Amendment and Title VI of the Civil Rights Act, marking a shift from equality to diversity. *See* Colin S. Diver, *From Equality to Diversity: The Detour from* Brown *to* Grutter, 2004 UNIV. ILL. L. REV. 691, 691 (2004) (arguing that the shift from a remedial rationale to a diversity rationale in affirmative action cases represents a detour from the principles of *Brown v. Board of Education*, 347 U.S. 483 (1954), and advocating for a return to a remedial justification for racial preferences in admissions).

23. *See* Caryn Saxon, *Equality Is Not Synonymous with Diversity*, SPRINGFIELD NEWS-LEADER (Oct. 15, 2015), https://perma.cc/Y9MV-38V3 (emphasizing the distinct nature of equality and diversity and critiquing societal handling of diversity); *see also* Xinyu Joanne Hu & Marisa Cefola, *"Diversity Becomes Substitute of Racial Justice": Stanford Professor Discusses Affirmative Action at Martin Luther King Commemorative Lecture*, CORNELL DAILY SUN (Feb. 16, 2023), https://perma.cc/4J3S-6FXE (quoting Professor Richard T. Ford as saying, "While the ideal of diversity is encouraging modest efforts to promote racial integration and racial inclusion, I'm afraid that the term 'diversity' has also become a lazy stand for any discussion of the generations of race-based exclusion and exploitation that make race-conscious hiring and race-conscious college admissions necessary").

The conflation between diversity and minority is further seen when people inaccurately refer to minority applicants or students as the institution's "diversity applicants" or "diversity students." For an example of the use of the term "diversity applicant," see, e.g., Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361, 399, 410, 413 (1977). The term "diversity applicant" is inaccurate because diversity describes the varied social make-up of the class, and it is not meant to describe on the individual level. A diverse student body needs minority and nonminority students. Without the presence of nonminority White students, a student body would lack diversity, however, White students are never referred to as diversity applicants.

24. Several articles critique the diversity rationale, asserting that focusing on equality and remedial rationales would be more beneficial. *See, e.g.*, Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 319 (2017) (explaining that the diversity rationale has essentially supplanted remedial justifications for affirmative action, emphasizing the performance of racial identity over lived experiences and historical racial discrimination); *see also* Sheldon Bernard Lyke, *Diversity as Commons*, 88 TUL. L. REV. 317, 331–32 (2013) (arguing that diversity is a shared resource subject to collective action problems and critiquing the enclosure of diversity by individuals seeking to privatize it for their own benefit, such as gaining admission into elite universities).

While colleges and universities may have good intentions, they participate in the dark art of racecraft that negatively shapes understandings of racial equality laws in the following ways.[25] First, defendant schools help perpetuate the narrative that affirmative action injects race into the admissions process when they (1) explicitly adopt the language of affirmative action as a racial preference,[26] and (2) solely rely on diversity rationale and fail to explain that affirmative action can serve remedial functions (e.g., as a check for the racially biased assessments they utilize).[27] Not only does the diversity rationale reinforce

25. Colleges and universities, despite their good intentions, may inadvertently contribute to racial inequality. *See* Osamudia James, *The "Innocence" of Bias*, 119 MICH. L. REV. 1345, 1345 (2021) (highlighting the widespread influence of implicit bias on minority groups). The practice of dark racecraft (i.e., racism) is a social process that does not require bad intent. There are numerous examples of implicit or unconscious bias where "innocent" people engage in practices that oppress minorities. *Id.* at 1353 (elucidating how unconscious biases and discriminatory policies foster racial subordination).

The dynamics of racecraft go beyond mere individual intent and include structural racism. Drawing on Pierre Bordieu's concept of social habitus, sociologist Eduardo Bonilla-Silva argues that "white habitus" (i.e, the practice of everyday White folks' lives)—not only the bad intentions of individual White folks or some mysterious White collective—can lead to minority oppression. *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 121 (6th ed. 2021) (arguing that how White folks live their everyday life—through the arguments they make, the stories they tell, and the phrases that they use—not only justifies racial inequality, but makes it appear to be the natural order of the world).

26. In its Response Brief, Harvard draws a parallel between the use of race in admissions and a hypothetical preference for orchestra-excelling applicants. *See, e.g.*, Brief for Respondents at 51, SFFA v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (arguing that Harvard's admissions program fully complies with the Court's holdings in *Bakke*, *Grutter*, and *Fisher* and does not discriminate against Asian-American applicants). Notably, the Brief adopts the *Grutter* Court's language of "racial preferences" without contesting it, suggesting an implicit equating of race-conscious admissions with racial preferences. *See id.* at 52 (emphasizing that, while race is a consideration, it is not the sole or decisive factor, even for top academic candidates).

27. In *Grutter*, student intervenors submitted written arguments articulating an equality rationale, as opposed to a diversity rationale, in support of affirmative action. *See* Brief for Respondents Kimberly James et al. at 13–32, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) [hereinafter *Grutter* Brief for Respondents Kimberly James et al.] (discussing the student intervenor brief and the arguments for an equality rationale in affirmative action); *see also infra* note 101 and accompanying text.

myths about affirmative action as a racial preference, but it also produces a discourse that frames minority applicants' bodies and perspectives as commodities for schools to use so that it may offer a better educational product.[28]

In Part II, this Article discusses the affirmative defense strategy schools have used to defend affirmative action.[29] In addition to comparing and contrasting affirmative versus negating defense strategies in the affirmative action context, this part shows how the affirmative defense strategy is a product of our nation's unique equal protection jurisprudence.[30] This part also offers a history of this defense strategy in the Court's affirmative action cases.[31]

In Part III, this Article explains the meaning of racecraft and argues that the affirmative defense strategy is a form of dark racecraft.[32] This Part illustrates how the affirmative

28. *See, e.g.*, Kenneth B. Nunn, *Diversity as a Dead-End*, 35 PEPP. L. REV. 705, 723 (2008) ("The diversity regime endorsed by the Supreme Court allows people of color to be used for the purposes of the educational institution and ultimately for the benefit of white students and their educational needs."); *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2154 (2013) (arguing that affirmative action relying on the diversity rationale is a form of racial capitalism that exploits and derives value from racial minority identity); Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 649–50 (2006) (highlighting the administrative challenges and potential insincerity of applicants when expressing viewpoints if race wasn't used as a proxy).

29. *See, e.g.*, *Bakke*, 438 U.S. 265, 300 (1978) (highlighting the use of affirmative action in university admissions and the challenges it faced); *see also* Grutter v. Bollinger, 539 U.S. 306, 312–16 (2003) (discussing the diversity rationale and the defense of affirmative action in the University of Michigan's admissions process); SFFA v. Harvard, 600 U.S. 181, 214 (2023) (outlining Harvard's justifications for diversity as a compelling government interest).

30. *See, e.g.*, *Bakke*, 438 U.S. at 300 (highlighting the uniqueness of the affirmative defense strategy in the context of the nation's equal protection jurisprudence and contrasting it with negating defense strategies); *see also* Brief for Respondent at 38–42, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235) [hereinafter *DeFunis* Brief for Respondents] (indicating the indirect discriminatory nature of certain admission policies).

31. *See, e.g.*, *DeFunis* Brief for Respondents, *supra* note 30, at 37–39 (providing a historical perspective on the application of the affirmative defense strategy in the Court's affirmative action cases, including the evolution of arguments used in subsequent cases).

32. *See* FIELDS & FIELDS, *supra* note 7, at 19 (exploring the social construction of race, and the intertwining of action and imagination in producing "vivid truth"); *see also* Jess Blumberg, *A Brief History of the Salem Witch Trials*, SMITHSONIAN MAG. (Oct. 23, 2007), https://perma.cc/GDZ5-TJVT

defense strategy is linked to descriptions of affirmative action as a racial preference.[33] Finally, in Part IV, this Article explores how abandoning the diversity rationale is the first step in reviving affirmative action.[34] It notes that affirmative action is highly vulnerable, but not dead.[35] Part IV goes on to argue that abandoning diversity and centering equality rationales is the path to providing racial justice through affirmative action policies.[36]

II. THE AFFIRMATIVE DEFENSE OF AFFIRMATIVE ACTION

A. *What Is the Affirmative Defense Strategy? Contrasting Affirmative and Negating Defenses*

Schools have employed an affirmative defense strategy in litigation when defending affirmative action. Technically, an affirmative defense occurs when defendants introduce "evidence, which, if found to be credible, will negate . . . liability, even if it is proven that the defendant committed the alleged

(last updated Oct. 24, 2022) (highlighting historical instances of social belief in witchcraft, such as the Salem witch trials, as examples of dark social witchcraft).

33. *See, e.g.*, Luke C. Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994) (challenging the notion of affirmative action as preferential treatment); John Yoo & James C. Phillips, *An End to Racial Preferences at Last?*, NAT'L REV. (Dec. 4, 2018), https://perma.cc/H7QE-8NKD (arguing that the Court's use of a plus factor to promote racial diversity is seen by some as a racial preference).

34. *See* Kenneth B. Nunn, *supra* note 28, 720–22 (arguing that diversity is poorly defined and suggesting that a shift away from the diversity rationale could lead to a revival of affirmative action).

35. *See SFFA*, 600 U.S. at 213–14 (indicating the vulnerability of affirmative action in the face of legal challenges, yet not declaring it unconstitutional).

36. *See, e.g.*, Uma Mazyck Jayakumar & Ibram X. Kendi, *'Race Neutral' Is the New 'Separate but Equal'*, ATLANTIC (June 29, 2023), https://perma.cc/AZ2J-4MYN (arguing that race-neutral policies can lead to segregation and fail to provide substantive equal rights to racial minorities, suggesting that a shift towards equality rationales could better serve the goals of racial justice).

acts."[37] For example, self-defense is an affirmative defense.[38] Even if a plaintiff (in a tort action) or the state (in a criminal action) can prove that a defendant committed assault, the defendant can avoid liability if they can successfully assert self-defense (i.e., that there was a reasonable belief of imminent danger and they took justified actions to protect themselves or another) as an affirmative defense.[39] However, this Article does not argue that school defendants employ actual affirmative defenses in litigation. After all, there are no affirmative defenses in the equal protection law. Instead, this Article uses the affirmative defense concept to describe schools' strategy when coordinated conservative organizing attacks their affirmative action policies.

In brief, the affirmative defense strategy arises when a rejected applicant sues to claim that a school's affirmative action policy is racially discriminatory.[40] Schools respond with an affirmative defense.[41] First, schools do not contest that their affirmative action policies treat students differently based on race.[42] Secondly, they argue that this differential treatment is justifiable because it has valuable benefits.[43] For example, in *Grutter v. Bollinger*,[44] the University of Michigan did not deny that its affirmative action policy treated students differently based on race, only that this differential treatment was justified because it promoted diversity.[45]

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37. *Affirmative Defense*, CORNELL L. SCH.: LEGAL INFO. INST., https://perma.cc/6X4J-SRUP (last updated June 2022).

38. *See id.* ("Self-defense, entrapment, insanity, necessity, and respondeat superior are some examples of affirmative defenses.").

39. *See* 22 C.J.S. *Criminal Law: Substantive Principles* § 53 (2023) (discussing various theories of justifications for self-defense).

40. *See infra* Part II.C.

41. *See infra* Part II.C.

42. *See Grutter* Brief for Respondents, *supra* note 18, at 3 ("The policy . . . openly acknowledges that the racial background of a minority applicant can be one of many factors relevant to the admissions decision.").

43. *See id.* at 21–27 (explaining various benefits of increased diversity in educational institutions).

44. 539 U.S. 306 (2003).

45. *See Grutter* Brief for Respondents, *supra* note 18, at 13 ("Because the educational benefits of a diverse student body depend on opportunities for interaction among students, the Law School hopes that its policy will enroll a 'critical mass' of minority students.").

In contrast, schools do not offer a "negating defense" strategy where they disprove an element of the plaintiff's case.[46] They do not advance the argument that affirmative action is not preferential treatment; therefore, it is not discriminatory because it serves the remedial purpose of offsetting racial bias already present in college admissions.[47] This approach might be a better strategy for colleges and universities to address the equities arguments that permeate affirmative action debates.

B. *The Affirmative Defense Strategy Is a Product of Equal Protection Jurisprudence*

The practice and structure of equal protection law contribute partly to why colleges and universities use an affirmative defense strategy.[48] When a plaintiff challenges a

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46. *See* Jessica Smith, *Mistake of Fact: A Negating Defense*, U.N.C. SCH. GOV'T: N.C. CRIM. L. BLOG (Dec. 10, 2010), https://perma.cc/A5XJ-RBLX (defining a "negating" defense or "failure of proof" defense as the strategy "[w]hen a defendant introduces evidence at trial showing that the State has failed to prove some element of the crime").

47. This argument is not novel and has been made by justices on the Court, student intervenors, and academics. *See* DeFunis v. Odegaard, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting)

> I personally know that admissions tests were once used to eliminate Jews. How many other minorities they aim at I do not know. My reaction is that the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.

see also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) ("Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures."). As discussed below, the student intervenors in *Grutter* made similar arguments about the racial bias in admissions standards at the University of Michigan. *See infra* notes 101–103 and accompanying text. Legal scholars have also written about the value of legal arguments claiming the compelling government interest in remedying facially racially biased admissions measures. *See, e.g.*, Lyke, *supra* note 24, at 356–60; Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PENN. L. REV. 1075 (2009) (arguing that Title VI of the 1964 Civil Rights Act can be used to challenge the disparate impact of facially race-neutral admissions criteria).

48. In previous work, I have argued that one reason that colleges and universities do not advance equality rationales for affirmative action is because it is against their interests to do so. Doing so would require them to acknowledge that they use racially discriminatory assessments. *See* Sheldon

state public school's race-based affirmative action policy, they claim it violates the Fourteenth Amendment's Equal Protection Clause.[49] The Equal Protection Clause states, "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[50] The Court has interpreted this clause to require the judiciary to apply the strict scrutiny test when reviewing all government racial classifications.[51] A racial classification can survive the strict scrutiny test if the government narrowly tailors the law or policy to meet a compelling government interest.[52] In one application of the strict scrutiny test, the Court accepted a school's goal to improve educational diversity as a compelling government interest for using race in admissions decisions.[53]

The affirmative defense strategy is a product of the Court's equal protection interpretative framework.[54] Under the Court's interpretation of the Equal Protection Clause—even though it

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Bernard Lyke, *Can Affirmative Action Offer a Lesson in Fighting Enclosure?*, *in* THE CAMBRIDGE HANDBOOK OF COMMONS RESEARCH INNOVATIONS 284, 285 (Sheila R. Foster & Chrystie F. Swiney eds., 2021) (arguing that universities' interests diverge from minority students when they do not offer equality-based defenses); *see also* Lyke, *supra* note 24, at 362 (acknowledging the racial bias inherent in law school admissions through the use of undergraduate GPA and LSAT scores).

49. *See, e.g.*, *Bakke*, 438 U.S. at 277–78. Private schools are not governed by the Fourteenth Amendment, but because most private schools receive federal funding, they cannot violate Title VI of the Civil Rights Act of 1964. *See* Seid v. Univ. of Utah, No. 19-cv-00112, 2020 WL 6873833, at *5 (D. Utah Nov. 23, 2020) ("Title VI explicitly covers 'a college, university, or other postsecondary institution, or a public system of higher education' that receives federal financial assistance."). The Court has interpreted violations under the Fourteenth Amendment's Equal Protection Clause as violations of Title VI. *See Bakke*, 438 U.S. at 287 ("In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."). Therefore, if a private school receives federal funding it will be held to the same standard as a public school.

50. U.S. CONST. amend. XIV, § 1.

51. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

52. *See* Shaw v. Hunt, 517 U.S. 899, 908 (1996).

53. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

54. *See id.* at 327 (stating that under strict scrutiny, if the Government affirmatively asserts a compelling state interest narrowly tailored to pursue that interest, the action does not violate the constitutional guarantee of equal protection).

may be allowed[55]—the explicit classification of race is treated as per se objectionable.[56] The Court stated in *Hirabayashi v. United States*[57] 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."[58] The Court's framework correctly links race to social notions of perceived ancestry and finds that categorizing race is objectionable when the government engages in these classifications.[59] The framework assumes that racial classifications lead to the differential treatment of individuals in different race categories.

The Court's interpretive framework has made no room for the possibility that racial classifications do not equate to discrimination or differential treatment.[60] The Court employs

55. *See Adarand Constructor*s, 515 U.S. at 237 (stating that strict scrutiny is not "strict in theory, but fatal in fact").

56. The Court seems to have uncritically equated the concepts of racial classification and unequal treatment. *See Adarand Constructors*, 515 U.S. at 229–30 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection."). It is quite possible, however, to classify individuals by race and not engage in racial discrimination. In fact, racial classifications can be used to make sure that policies are implemented fairly and equitably. For example, the U.S. Census collects racial data and explains that they collect this data so that the federal government can monitor compliance and enforce things like the Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 42 U.S.C.), bilingual election requirements, and employment opportunities under the Civil Rights Act of 1964. *See About the Topic of Race*, U.S. CENSUS BUREAU, https://perma.cc/85RD-K27U (last updated Mar. 1, 2022) ("Information on race is required for many Federal programs and is critical in making policy decisions, particularly for civil rights.").

57. 320 U.S. 81 (1943).

58. *Id.* at 100.

59. *See id.* (stating that classifications based on race alone are often held to be a denial of equal protection).

60. There are a number of instances where institutions use racial classifications to monitor whether discrimination is taking place. One popular example is found in the field of law enforcement and the collection of race data when police officers make traffic stops. The goal of making racial classifications and collecting race data is not to treat anyone differently. The goal is to ascertain whether police officers are engaged in racially discriminatory profiling. *See, e.g.*, Deborah Ramirez et al., *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, U.S. DEP'T JUST. (Nov. 2000), https://perma.cc/6C4D-VV76 ("One of

the blunt tool of strict scrutiny review for all racial classifications.[61] The Court has not approved any interpretative mechanisms for the judiciary to determine whether a racial classification is discriminatory (i.e., unfairly reduces opportunity for people of different races).[62]

While racial classifications are objectionable, the Court is careful to note that "[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context."[63] To determine which racial classifications are least objectionable and where the government's goal is "important enough to warrant" the use of race, the Court has mandated the application of strict scrutiny review.[64]

C. *A Brief History of the Affirmative Defense Strategy in Affirmative Action*

Colleges and universities' affirmative defense strategy emerged unsurprisingly for the first time in—*DeFunis v. Odegaard*[65]—the first higher education affirmative action case to go before the Court.[66] In this case, Marco DeFunis sued the University of Washington School of Law ("UW") after he was denied admission.[67] DeFunis alleged that UW violated his rights under the Equal Protection Clause because the school operated

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the ways that law enforcement agencies are addressing concerns and allegations regarding discriminatory policing is through data collection.").

61. *See* Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("It is for this reason that we must subject all racial classifications to the strictest of scrutiny . . . .").

62. Although, one might argue that Justice Powell implies that there is an instance where the use of race does not constitute discrimination. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) ("To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all.").

63. Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

64. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

65. 416 U.S. 312 (1974).

66. *Id.* at 314.

67. *Id.*

two separate admissions programs, one solely for racial minorities.[68] The Court declined to decide the merits in its opinion because the majority determined that the case was moot.[69]

However, UW submitted its response brief to the Court, arguing the merits and advancing several affirmative defenses for using race.[70] First, UW accepted the preference framework of race consideration and often referenced its race-conscious

68. *Id.*

69. *See id.* at 319–20 (explaining that petitioner will complete schooling regardless of court decision and thus issue is moot and beyond the Court's purview). The trial court in the case agreed with DeFunis's claim and ordered that he be admitted as a member of the 1971 first-year class at UW. *Id.* at 314. The Washington Supreme Court reversed the trial court judgment. *Id.* at 315. However, on appeal to the Supreme Court, Justice Douglas, who was the Circuit Justice, stayed the state court's judgment. *Id.* The Court did not consider DeFunis's petition for a writ of certiorari until he was a third-year law student. *Id.* At oral argument, the Court learned that DeFunis was registered for his final law school term, and that UW confirmed that his registration was fully effective. *Id.* at 315–16. The Court ruled that "[b]ecause the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties." *Id.* at 319–20.

70. *See generally DeFunis* Brief for Respondents, *supra* note 30. UW offered an inkling of a negating defense in its response brief. While UW never defended itself by claiming that its affirmative action policy was not preferential treatment, it did hint that its regular general admissions criteria—although neutral both facially and in intent—were discriminatory against minorities. *See id.* at 39–40 (arguing the university would be almost exclusively all White and subject to challenges of discrimination if it did not have a compensatory admissions program). The law school's brief quoted Chief Justice Burger in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), who held that "[u]nder the Act, practice, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 42 (quoting *Griggs*, 401 U.S. at 430). UW acknowledged that *Griggs* was a Title VII employment case but analogized to the ruling because it involved the use of test criteria that effectively excluded racial minorities from employment. *See id.* This discussion of the admission policy as indirectly discriminatory is unseen in subsequent schools' defenses in *Bakke*, *Gratz*, *Grutter*, *Fisher I*, and *Fisher II*. A qualitative study of the evolution of arguments that the litigants have used in the Court's affirmative action cases is needed to understand better how law and society shape legal arguments and the conceptualization of racial equality.

admissions program as a "preferential" admissions policy.[71] Second, UW justified using racial preferences using an argument resembling the diversity rationale. In its brief, UW stated that its affirmative action admission program provided "a better education because it was not education in a racially segregated student body."[72] The law school explicitly claimed that its consideration of race benefitted the "non-minority" portion of the class because UW did not deny White students "the opportunity of a fully integrated legal education."[73] Lastly, UW argued that its use of race was justified because it increased minority representation in the law school and the legal profession.[74]

The affirmative defense strategy continued with the litigation that led to the Court's 1978 *Regents of the University of California v. Bakke*[75] decision. In this case, the University of California Davis School of Medicine ("UC Davis") had two separate admissions programs—one was marked regular, and the other was marked special.[76] The regular admissions program rejected all candidates with undergraduate GPAs below 2.5 on a 4.0 scale.[77] The special admissions program only reviewed applicants from minority groups.[78] The special program did not rank its applicants against regular program

71. *See, e.g.*, *DeFunis* Brief for Respondents, *supra* note 30, at 39 (arguing DeFunis himself would be disadvantaged without the opportunity "of a fully integrated legal education").

72. *Id.* at 37.

73. *Id.* at 39.

74. *See id.* at 46–50 (arguing that prohibiting schools from considering race would increase racial disparities in law school and legal profession as a whole).

75. 438 U.S. 265 (1978).

76. *See id.* at 272–73 (identifying the university's strategy in operating a separate admissions program).

77. *Id.* at 273.

78. *See id.* at 265, 276 (explaining the committee only considered members of minority groups and the racial/ethnic groups included in the definition of minority group included "Blacks, Chicanos, Asians, [and] American Indians").

candidates and did not share the regular program's GPA cutoff.[79]

Allan Bakke—a White man—applied to UC Davis twice and was rejected even though, on both occasions, special admissions applicants were admitted with lower scores.[80] Bakke sued, alleging that UC Davis's special admissions program violated the Equal Protection Clause because the special admissions program excluded him based on his race.[81] The Court agreed with Bakke that UC Davis violated the Equal Protection Clause because the special admission program operated as an impermissible quota.[82] The Court affirmed Bakke's admission to UC Davis.[83]

Like UW, UC Davis offered different affirmative defenses to support their affirmative action program, which focused on justifying what they labeled a special admissions program.[84] The Court considered UC Davis's rationale that the consideration of race in admissions decisions was aimed towards: (1) reducing the deficit of minorities in medical school and the medical profession, (2) countering the effects of general societal discrimination, (3) increasing the number of doctors who practice in underserved communities, and (4) obtaining the educational benefits that flow from a diverse student body.[85]

These rationales are all affirmative defenses. They accept that UC Davis's consideration of race discriminatorily treats applicants in the regular and special programs differently based on race. However, the discrimination is justified because it benefits society. UC Davis argued that the special program should not face strict scrutiny because its consideration of race

79. *See id.* at 275 (identifying that special program applicants were not compared against regular program applicants and did not have to meet same requirements).

80. *Id.* at 266, 276.

81. *Id.* at 277–78.

82. *See id.* at 320 (describing the flaw in the program as offering preferential treatment in disregard of Fourteenth Amendment).

83. *See id.* (entitling respondent to an injunction, which admitted him to medical school).

84. *See id.* at 272 (describing the UC Davis faculty as devising "a special admissions program to increase the representation of 'disadvantaged' students in each Medical School class").

85. *Id.* at 305–06.

constituted benign discrimination.[86] The Court, however, refused to establish a category of benign discrimination immune from strict scrutiny.[87]

The Court rejected all of UC Davis's rationales except for the diversity argument.[88] The Court permitted UC Davis to continue using race but struck the use of its two separate admissions tracks.[89] However, no majority opinion emerged from *Bakke* articulating an apparent reason why UC Davis could continue using race.[90] Justice Powell's plurality opinion held that UC Davis's aim of achieving a diverse student body was a compelling reason to use race in admissions.[91] However, the section of his opinion establishing diversity as a compelling government interest to satisfy strict scrutiny did not receive support from any other justice.[92]

Post-*Bakke,* schools have used the affirmative defense strategy—with diversity as the rationale—when fighting all subsequent affirmative action cases. In *Gratz v. Bollinger*[93] and *Grutter v. Bollinger* the University of Michigan used the diversity rationale as its compelling government interest to defend its consideration of race against Equal Protection Clause actions brought by Jennifer Gratz and Barbara Grutter.[94] The

86. *See* Brief for Petitioner at 68–73, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (arguing that the classifications here do not harm any minority groups and thus do not warrant traditional strict scrutiny review).

87. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (declining to identify any conceivable bases for racial classifications that might survive strict scrutiny).

88. *See id.* at 311–12 ("The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.").

89. *See id.* at 320.

90. *See* Grutter v. Bollinger, 539 U.S. 306, 322 (2003) (noting that *Bakke* "produced six separate opinions, none of which commanded a majority of the Court").

91. *See Bakke*, 438 U.S. at 311–20.

92. *See id.* at 269, 311–20.

93. 539 U.S. 244 (2003).

94. *See Gratz* Brief for Respondents, *supra* note 18, at 13–32 (arguing that "[t]he University of Michigan may consider race and ethnicity as factors in admissions to obtain the educational benefits of diversity"); *Grutter* Brief for Respondents, *supra* note 18, at 14–33 (arguing that "[t]he Law School has

University of Texas also employed diversity as an affirmative defense strategy[95] in *Fisher v. University of Texas at Austin* ("*Fisher I*")[96] and *Fisher v. University of Texas at Austin* ("*Fisher II*").[97] In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*SFFA v. Harvard*")[98] and *Students for Fair Admission v. University of North Carolina* ("*SFFA v. UNC*"),[99] the defendant schools also used diversity to justify their use of race for what they accepted as the differential treatment of applicants.[100]

In all of the cases before the Court, no defendant has ever advanced a negating defense where the defending school claimed that their affirmative action policy did not treat students differently based on race. In fact, in the almost fifty years of affirmative action litigation before the Court, only one party—the student intervenors in *Grutter*—has ever offered a negating defense arguing that affirmative action was not discriminatory.[101] The student intervenors argued that affirmative action eliminated the racial bias already present in the University of Michigan's admissions process;[102] however, they never had an opportunity to present this perspective at oral argument.[103]

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a compelling interest in the limited, competitive consideration of race in admissions to secure the educational benefits that flow from student body diversity").

95. *See Fisher I* Brief for Respondents, *supra* note 18, at 38–47 (arguing that the University of Texas had a compelling interest in diversity); *Fisher II* Brief for Respondents, *supra* note 18, at 24–27 (same).

96. 570 U.S. 297 (2013).

97. 579 U.S. 365 (2016).

98. 600 U.S. 181 (2023).

99. This case was combined with *SFFA v. Harvard*.

100. *See, e.g.*, Brief in Opposition at 35–36, SFFA v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (defending *Grutter* and arguing that achieving diversity is a compelling government interest that justifies the consideration of race).

101. *See Grutter* Brief for Respondents Kimberly James et al., *supra* note 27, at 1 ("41 individually named . . . students and three coalitions . . . sought and eventually won the right to present our defense of the Law School's affirmative action plan. . . . As the student intervenors will show, the plaintiff has not proved that she has been a victim of discrimination.").

102. *See id.* at 40–50.

103. *See* Jeremy Berkowitz, *Student Intervenors Denied Time to Give Oral Arguments to Court*, MICH. DAILY (Mar. 11, 2003), https://perma.cc/59FQ-NUD7 (explaining that the University of Michigan refused to share its oral

III. THE AFFIRMATIVE DEFENSE AS DARK RACECRAFT

At the core of schools' affirmative defense strategy of racial consideration in admissions is a dangerous embrace of the dark racecraft. This Part argues that the affirmative defense strategy crafts inaccurate views of our racialized world. One inaccuracy is that affirmative action constitutes a racial preference that injects race into the admissions process.[104] Because schools fail to raise negating defenses that focus on the remedial nature of affirmative action, and other parties cannot raise negating defenses (or face significant roadblocks), schools' admissions policies appear to be equitable, fair, and racially neutral.[105] When society accepts these myths of neutrality and preference as truth and schools eliminate affirmative action programs, it leads to the end of opportunity for racial minorities.[106]

This Part explores a specific example of the practice of racecraft, particularly how individuals and institutions in law, media, and politics craft racial meaning through myth and misunderstanding. The first subpart briefly defines racecraft.[107] The second subpart provides an example of racecraft at work—the media spectacle surrounding the question: Should Malia and Sasha Obama, the daughters of President Barack Obama, receive affirmative action?[108] It examines a televised exchange between journalist George Stephanopoulos and Obama regarding his daughters to illustrate how the media and politicians perpetuate and participate in misguided

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argument time with a group of students granted intervenor status in *Grutter*, and the Court denied the students petition to expand the oral argument by 10 minutes).

104. *See infra* Part III.C.

105. *See infra* Part III.D.

106. Despite an increasing supply of underrepresented minority students, when states like California ban affirmative action, the percentage of minority students admitted and enrolled in public schools of higher education decreases significantly. *See* Mark C. Long & Nicole A. Bateman, *Long-Run Changes in Underrepresentation After Affirmative Action Bans in Public Universities*, 42 EDUC. EVALUATION & POL'Y ANALYSIS 188, 191 (2020) (observing "a *large* decline in [underrepresented minorities'] share of students admitted to . . . and enrolling in . . . UC-Berkeley immediately upon the elimination of affirmative action in 1998").

107. *See infra* Part III.A.

108. *See infra* Part III.B.

understandings of affirmative action and race.[109] The final two subparts explore the myths of preference and neutrality.[110] As such, Part III focuses solely on the dangers of an affirmative defense strategy that accepts the premise that affirmative action programs are engaged in justified discrimination. It does not discuss the dangerous racecraft used in the diversity rationale employed in the affirmative defense strategy.[111]

A. *What is Racecraft?*

Race is a social concept where individuals are grouped based on visual phenotypic traits linked to the perception of common biological ancestry.[112] Biologists and sociologists condemn the idea that race is biological.[113] Yet, it does not take a social scientist to understand that race exists socially and has real consequences that affect individuals' life chances.[114] Race is

109. *See infra* Part III.B.

110. *See infra* Part III.C–D.

111. For a discussion of the problems of the diversity rationale which the affirmative defense strategy uses, see *infra* Part IV.B. This Article separates strategy from rationale because the problems of the affirmative defense strategy that justifies discrimination would exist regardless of the utilized rationale.

112. *See Race*, THE HARPERCOLLINS DICTIONARY OF SOCIOLOGY (1st ed. 1991) [hereinafter *Race*, HARPERCOLLINS DICTIONARY] ("['Race' is] a scientifically discredited term formerly used to describe biologically distinct groups of persons who were alleged to have characteristics of an unalterable nature. . . . Social scientists now recognize that race is exclusively a socially constructed categorization that specifies rules for identification of a given group."); *see also Race*, A DICTIONARY OF SOCIOLOGY (John Scott & Gordon Marshall eds., 3d ed. 2005) ("Racial categorization is frequently (though not always) based on phenotypical differences; that is, differences of facial characteristics, skin colour, and so forth. But these do not correlate with genotypical differences (differences in genetic makeup).").

113. *See Race*, THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER'S GUIDE TO SOCIOLOGICAL LANGUAGE (2d ed. 2000) ("Most sociologists (and biologists) dispute the idea that biological race is a meaningful concept.").

114. *See* Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCH. 16, 22 (2005)

> From a policy perspective, although the term race is not useful as a biological construct, policymakers cannot avoid the fact that social race remains a significant predictor of which groups have greater access to societal goods and resources and which groups face

a socially constructed concept.[115] Race is the product of social practices.[116]

This Article defines racecraft as the social practices that make and manufacture race.[117] These practices include the processes that lead to the formation of racial groups and how society assigns people to different racial groups (i.e., racial categorization).[118] Racecraft is also the process by which society (1) comes to understand (and modify its understanding of) racial difference, (2) assigns meaning to different racial categories, and (3) regulates and treats racial groups.[119]

Scholars Karen E. Fields and Barbara J. Fields initially coined the term racecraft to describe the existence of the pervasive belief in race.[120] In their work, they use racecraft to describe the social practice that constructs race.[121] They write that racecraft is a mental terrain, but "[l]ike physical terrain, racecraft exists objectively; it has topographical features that Americans regularly navigate, and we cannot readily stop traversing it. Unlike physical terrain, racecraft originates not in nature but in human action and imagination; it can exist in no other way."[122] The racecraft conceptualization captures the widely held understanding that race does not originate in nature (i.e., the biological or physical world) but in the social world of

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barriers—both historically and in the contemporary context—to full inclusion. (emphasis omitted).

115. *See Race*, HARPERCOLLINS DICTIONARY, *supra* note 112.

116. There are a number of studies detailing the social production of race. *See generally* NATALIA MOLINA, HOW RACE IS MADE IN AMERICA: IMMIGRATION, CITIZENSHIP, AND THE HISTORICAL POWER OF RACIAL SCRIPTS (2014) (describing how American immigration policy from 1924 to 1965 created racial categorizations that still influence America today); *see also* ANTHONY W. MARX, MAKING RACE AND NATION: A COMPARISON OF SOUTH AFRICA, THE UNITED STATES, AND BRAZIL 1–3, 10–17 (1997) (linking the construction of nation states to racial identity).

117. *See* FIELDS & FIELDS, *supra* note 7, at 5–6 (describing racecraft through social practices that resulted in the creation of race).

118. *See id.* at 1–24 (providing examples of social processes by which race is created).

119. *See id.*

120. *See id.*

121. *See id.* at 1–24 (describing racecraft as the propagation of pseudoscience to create designations of race).

122. *Id.* at 18.

human interaction and social imagination.[123] Fields and Fields identify racecraft as a daily practice with historical antecedents, and despite its mundane routine, it has consequences in our lived experience.[124]

Like this Article, Fields and Fields use the term racecraft intentionally to invoke the concept of witchcraft.[125] They made this comparison to show how race and witchcraft are similar in that they are both social constructs.[126] Today, most people reject witchcraft as incredible,[127] yet historically, many Europeans and American colonists believed in the practice.[128] Both witchcraft

123. *See supra* notes 112–116 and accompanying text.

124. *See id.* at 18–19 ("The action and imagining [that originate racecraft] are collective yet individual, day-to-day yet historical, and consequential even though nested in mundane routine.").

125. *See id.* at 19 ("Our term racecraft invokes witchcraft . . . .").

126. *See id.* at 19–24 (equating the ability of belief in witchcraft to overcome reason to the similar ability of belief in race).

127. *See* Boris Gershman, *Witchcraft Beliefs Around the World: An Exploratory Analysis*, PLOS ONE, Nov. 23, 2022, at 1, 3 (stating that, in a ninety-five country dataset, only 40% of the 140,000 survey respondents claimed to believe in witchcraft). There are studies, however, that show belief in magic persists in modern society. *See, e.g.*, Bernard M. Garrett & Roger L. Cutting, *Magical Beliefs and Discriminating Science from Pseudoscience in Undergraduate Professional Students*, HELIYON, Nov. 3, 2017, at 1, 1 (citing a plethora of studies that found widespread belief in ghosts and magic).

128. *See* Suzannah Lipscomb, *A Very Brief History of Witches*, HISTORYEXTRA (Oct. 27, 2020), https://perma.cc/SNU5-9E7M ("[B]etween 1482 and 1782, around 100,000 people across Europe were accused of witchcraft, and some 40–50,000 were executed . . . . Across Europe, 70–80 per cent of people accused of witchcraft were female . . . .").

A classic example of European settlers' social belief in witchcraft can be found in the late seventeenth-century Salem witch trials in colonial Massachusetts, where twenty people were executed for the practice of witchcraft. *See* Blumberg, *supra* note 32. This Article makes a clear distinction between the social belief and social practice of witchcraft, and the magical practice of witchcraft. This Article holds that the European settlers who accused at least 140 people of using the Devil's magic were engaged in the social belief of the social practice of witchcraft. *See* PAUL BOYER & STEPHEN NISSENBAUM, SALEM-VILLAGE WITCHCRAFT 376–78 (1972). They believed in witches. *See* Blumberg, *supra* note 32. They created witches. *See* FIELDS & FIELDS, *supra* note 7, at 19–24. They determined whether witches lived or died through the use of law and court. *See* Blumberg, *supra* note 32. While those who tried witches did not engage in the magical practice of witchcraft (i.e., they did not cast spells), they worked to further a social reality in which witches exist and have meaning. *See* FIELDS & FIELDS, *supra* note 7, at 19–24. Those Europeans settlers who categorized tens of thousands of women as witches and subjugated them to execution can be said to have engaged in a

and the concept of race exist in the social world.[129] Rational people believe in magic.[130] Intelligent people believe in race.[131] People believe in these concepts despite a lack of evidence in the physical and biological sciences for either magic or race.[132] Witchcraft has persisted so long, just as the craft of race-making continues, not because their believers find proof in the natural world of physics and biology—but because their believers find confirmation in the social.[133]

Social scientists who study social constructs like witchcraft are not concerned about whether the belief holds objective truth in the physical world.[134] The social scientist assumes the rationality of those who believe in witchcraft and realizes that practice and imagination work together to create social reality.[135] The trained social observer is concerned with whether

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dark social witchcraft. *See* Blumberg, *supra* note 32 ("Tens of thousands of supposed witches—mostly women—were executed.").

129. *See* FIELDS & FIELDS, *supra* note 7, at 19–24.

130. *See, e.g.*, Eugene Subbotsky, *The Belief in Magic in the Age of Science*, SAGE OPEN, Jan. 30, 2014, at 1, 3 (explaining why rational people in modern industrial cultures continue to hold a belief in magical powers).

131. *See* Wolfgang Umek & Barbara Fischer, *We Should Abandon "Race" as a Biological Category in Biomedical Research*, 26 FEMALE PELVIC MED. RECONSTR. SURGERY 719, 719 (2020) ("Despite the evidence that biological races do not exist in the human species, categorizations based on a 'self-definition of race' are abundant in medical studies, and many medical practitioners do still believe that they are informative regarding the biology of patients.").

132. *See* FIELDS & FIELDS, *supra* note 7, at 19–24 (describing the dearly held but unsupported beliefs in both race and witchcraft). Interpreting the work of W.E.H. Lecky, Fields and Fields write that to understand the position of those who believe in witchcraft "is to picture a bygone real world of normally constituted people who accepted, as obviously true, notions that the real world of one's own present dismisses as obviously false." *Id.* at 19–20. This likely applies to racecraft, or to any socially imagined, socially constructed concept. *Id.* at 19–24 (equating witchcraft and racecraft).

133. *See id.* at 19–24 (describing how social support of witchcraft perpetuated its believability).

134. *See generally* Subbotsky, *supra* note 130; Gershman, *supra* note 127; Garrett & Cutting, *supra* note 127.

135. *See* FIELDS & FIELDS, *supra* note 7, at 18–19 (stating that both witchcraft and racecraft are manifested in the product of the intertwining of action and imagination). Fields and Fields reference the work of W.E.H. Lecky to conclude that this intertwining produces "vivid truth." *See id.* at 19 (quoting W.E.H. LECKY, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE 40 (2nd ed. 1865)).

people believe in spells and hexes—not whether the belief in charms and curses is rational.[136]

The same holds for social scientists who study race. The social scientist assumes the rationality of those who believe in race. It does not matter that race has no support in biological reality. Race lives as a social fact. Just because spells do not occur according to the laws of chemistry and race does not exist according to the science of biology does not mean that the belief does not have real-world consequences. Believers in witchcraft have burned people at the stake,[137] and people who believe in the crafting of race have lynched folks from trees.[138] As a practice, racecraft has real consequences.[139]

This Article agrees with Fields and Fields that racecraft is not synonymous with racism; however, it departs from their view that it is evidence of racism.[140] This Article holds that racecraft is not necessarily inherently socially undesirable.[141] People can participate in the production of race and craft imagined communities around benign activities (e.g., a migratory experience or how to style hair).[142]

There is, however, a dark art of racecraft. In his piece, *The Dark Art of Racecraft*, Ta-Nehisi Coates wrote that research

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136. *See supra* note 134 and accompanying text.

137. *See, e.g.*, Lipscomb, *supra* note 128 ("[I]n Scotland and under the Spanish Inquisition witches were burned . . . .").

138. According to the Equal Justice Initiative, over 6,400 racial lynchings took place between 1865 and 1950. *See* EQUAL JUSTICE INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 7 (2020), https://perma.cc/KB7Y-9WM4 (PDF) (reporting that there were "over 4,400 documented racial terror lynchings of Black people in America between 1877 and 1950" and "[from 1865 to 1876] at least 2,000 Black women, men, and children were victims of racial terror lynchings").

139. *See id.* at 6–7 (documenting the racial violence that ensued during the period of Reconstruction).

140. *See* FIELDS & FIELDS, *supra* note 7, at 19. Fields and Fields state that "racecraft is not a euphemistic substitute for racism. It is a kind of fingerprint evidence that racism has been on the scene." *Id.* (emphasis omitted).

141. *But see id.* at 261 (describing racecraft as a practice that entrenches socially undesirable racism).

142. *See* David R. Williams, *Stress and the Mental Health of Populations of Color: Advancing Our Understanding of Race-Related Stressors*, 59 J. HEALTH SOC. BEHAV. 466, 466–85 (describing studies that found that connecting to one's community through church or relationship can reduce racism-related depression for Black and African American people).

linking race and IQ has been used in "justifying slavery and inspiring genocide."[143] Drawing on the work of Fields and Fields, Coates discussed the "dark arts of race and IQ"[144] as racecraft whose practice is part of a long tradition of racism.[145] Racecraft does not have to include the production of racial inequality. However, if that practice leads to the subjugation of people, then it is racism or dark racecraft. Dark racecraft is the production of imagined communities or the portrayal of those communities so that the life chances of the racial group's members are made worse. Dark racecraft has to be neither intentional nor conscious, but in whatever form it manifests, it must be identified, stopped, and remedied.

This Article argues that affirmative action is a policy to counteract the dark arts of racecraft (i.e., racism). The categorization of affirmative action as either preferential treatment or reverse racism is dark racecraft. When affirmative action plaintiffs attempt to end a policy that aims to improve equal opportunity, they are engaged in classic (dark) racecraft. The plaintiffs' practice not only negatively shapes the social perception of understanding minority groups on the question of merit, but their actions can lead to the end of these policies and minority opportunities.

B. *Do Malia and Sasha Obama Need Affirmative Action?*

Unfortunately, society does not consider affirmative action as a possible process for removing racial bias from admissions decisions, partly because of a post-racial world narrative where bias no longer exists. For evidence, one can observe the post-racial racecraft mythology in the aftermath of the Obama presidency.[146] Myth-making practices even deployed President Obama's daughters—Malia and Sasha Obama—as symbolic ends of racial oppression.

For example, in an interview with then-Senator Barack Obama, journalist George Stephanopoulos asked Obama

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143. Coates, *supra* note 6.

144. *Id.*

145. *See id.* (describing the pseudoscientific research that connects race to IQ).

146. *See, e.g.*, Ibram X. Kendi, *Our New Postracial Myth*, ATLANTIC (June 22, 2021), https://perma.cc/R5BE-XW34.

whether he supported affirmative action and whether his daughters should benefit from affirmative action.[147] The assumption behind the question was that the daughters of a well-educated senator (and potential president) benefit from an incredible class privilege. That they should not also benefit from the plus factor of racial preference. For most of their lives as young Black women, Malia and Sasha Obama experienced the advantage of class privilege.[148] Obama stated that his daughters experienced class privilege and are "pretty advantaged."[149] At the heart of the Stephanopoulos inquiry was: Should colleges and universities use race-based affirmative action policies to admit affluent (i.e., nonpoor, and not otherwise economically disadvantaged) racial minorities?[150]

Stephanopoulos continued exploring Obama's position on affirmative action during the April 16, 2008, Democratic

147. In an exclusive interview on "This Week" on the ABC television network, host George Stephanopoulos questioned Barack Obama on his views on affirmative action and asked whether his two daughters should benefit from affirmative action. *See Obama and Affirmative Action*, CBS NEWS (May 14, 2007), https://perma.cc/25MV-W5GK. He stated that affirmative action programs should become "a diminishing tool for us to achieve racial equality" and that his daughters should be considered "as folks who are pretty advantaged." *Id.*

148. While there are no reports on the auto-identification (i.e. self-identification) of Malia and Sasha Obama, they are often hetero-identified (i.e., identified by others) as Black/African-American. Their mother, First Lady Michelle Obama, has referred to them as Black in a speech before the 2016 Democratic National Convention, where she said, "[a]nd I watch my daughters, two beautiful, intelligent, black young women playing with their dogs on the White House lawn." Will Drabold, *Read Michelle Obama's Emotional Speech at the Democratic Convention*, TIME (July 25, 2016), https://perma.cc/P6QK-2B2W.

149. *Obama and Affirmative Action*, *supra* note 147. Additionally, while running for president, then-Senator Obama said that he did not believe that his daughters were disadvantaged "because their father is a United States senator, and both their parents are working professionals." Interview by Farai Chideya with Barack Obama, U.S. Senator from Ill. (July 12, 2007), https://perma.cc/6YUN-Y65B.

150. In this Article, when I use the word affirmative action, I am referencing affirmative action decisions based on an applicant's race and ethnicity. I understand that identity-based affirmative action decisions can favor a number of different social identities and social characteristics including: gender, income, wealth, geography, religion, sexual orientation, and legacy status (i.e., whether one's close relatives graduated from the applicant's school). When I use affirmative action outside of the context of race and ethnicity, I will clearly denote that in the text.

primary presidential debate between Senators Hillary Rodham Clinton and Barack Obama at the National Constitution Center in Philadelphia.[151] The following exchange between Obama and moderator George Stephanopoulos focused on minority affluence:

> STEPHANOPOULOS: Senator Obama, last May we talked about affirmative action, and you said at the time that affluent African Americans, like your daughters, should probably be treated as pretty advantaged when they apply to college and that poor, White children, kids, should get special consideration, affirmative action. So as president, how specifically would you recommend changing affirmative action policies so that affluent African Americans are not given advantages and poor, less affluent Whites are?
> OBAMA: Well, I think that the basic principle that should guide discussions not just of affirmative action, but how we are admitting young people to college generally, is: How do we make sure that we're providing ladders of opportunity for people? How do we make sure that every child in America has a decent shot in pursuing their dreams?
> And race is still a factor in our society. And I think that for universities and other institutions to say, you know, we're going to take into account the hardships that somebody has experienced because they're black or Latino or because they're women . . .
> STEPHANOPOULOS: Even if they're wealthy?
> OBAMA: I think that's something that they can take into account, but it can only be in the context of looking at the whole situation of the young person.
> So, if they look at my child, and they say, you know, Malia and Sasha, they've had a pretty good deal, then that shouldn't be factored in.
> On the other hand, if there's a young White person, who has been working hard, struggling, and has overcome great odds, that's something that should be taken into account.

151. *Democratic Presidential Candidates Debate in Philadelphia* (ABC News television broadcast Apr. 16, 2008) (transcript available at *Democratic Presidential Candidates Debate in Philadelphia*, AM. PRESIDENCY PROJECT (Apr. 16, 2008), https://perma.cc/SBL6-GHQ5).

> What we want to do is make sure that people who've been locked out of opportunity are going to be able to walk through those doors of opportunity in the future.[152]

Stephanopoulos's question reveals fundamental assumptions that people make regarding affirmative action. Both detractors and (many) advocates understand affirmative action as a preference that colleges and universities use to boost low-achieving Black and Latino students' admissions scores and admit more minority applicants. Following this "racial preferences" logic, affluent Black folks do not need affirmative action because they have the economic and social resources to attend high-achieving schools that should serve as a base for success. Because they have the advantage of wealth, they do not need the "additional advantage" of affirmative action.

Obama's vision of affirmative action questions, "How do we open the doors of opportunity?" and therefore sees race-based affirmative action policies as tools for overcoming historical and present discrimination.[153] While Obama accepts Stephanopoulos's frame of affirmative action as an "advantage" or "preference," he does not automatically preclude an admissions process that utilizes a race-based affirmative action policy when reviewing his daughters' applications.[154] Obama's

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152. *Id.*

153. During the April 16, 2008 debate, Obama said,

> So, I still believe in affirmative action as a means of overcoming both historic and potentially current discrimination, but I think that it can't be a quota system and it can't be something that is simply applied without looking at the whole person, whether that person is Black, or White, or Hispanic, male or female.

Id.

154. Malia Obama graduated from Harvard, and there have been no credible reports regarding whether race-based affirmative action was a part of her college admissions process. Her grades and standardized test scores have been "closely guarded secrets." *See* Katherine Skiba, *Malia Obama Will Take a Gap Year, Then Attend Harvard in 2017*, L.A. TIMES (May 1, 2016), https://perma.cc/CP5J-4AW5; *see also* Barsha Roy, *Did Malia Obama Graduate from Harvard University? Education and Major Explored as Donald Glover Hires Former President's Daughter as a Writer*, SPORTSKEEDIA, https://perma.cc/944Y-WHE2 (last updated Mar. 27, 2022). Sasha Obama graduated from the University of Southern California. *See* Cassie Hurwitz, *Sasha Obama is Officially a College Graduate*, OPRAH DAILY (May 16, 2023), https://perma.cc/YX5Y-9TNF.

position seems to be that it is acceptable to consider the racial hardships that affluent racial minorities might experience as long as an admissions committee measures that adversity in the context of the privileges of their affluence.

This debate over affirmative action as a racial preference is classic and preexisting.[155] While Obama discussed affirmative action as a means to provide equal opportunity, Stephanopoulos's inquiry rested on a toxic interpretation that affirmative action means differential treatment based on race. Affirmative action detractors pejoratively refer to this as a "special consideration" or "special treatment."[156]

Stephanopoulos's framing of affluence, and the Obama daughters, treats affirmative action as preferential treatment. It also assumes that for these young women the admission process is neutral and free of racial bias—or at least that their affluence shields them. The perpetuation of this thinking is classic racecraft.

C. *Racial Preference as Racecraft*

A racial gap in admissions criteria—as measured by standardized test scores and grades—exists between Black and Latino applicants with lower achievement scores than their Asian-American and White counterparts.[157] A prevalent view in

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One might argue this Article's claim, that Malia and Sasha Obama need affirmative action, is moot since the sisters have already graduated from college. First, Malia and Sasha Obama are young women, and the question of whether their admissions consideration should undergo race-based affirmative action is a question that can still arise if they were to apply to professional school (e.g., business, law, or medicine) or graduate school after college. Second, and more importantly, it should be clear that both George Stephanopoulos and this Article use Malia and Sasha Obama as examples of two of the most privileged Black individuals who could experience affirmative action in admissions. Stephanopoulos's question about the Obama daughters is not limited to Malia and Sasha and is clearly aimed at probing whether affirmative action should be available to affluent minorities.

155. *See generally* Luke C. Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994).

156. During debate questioning, Stephanopoulos used the words "special consideration" and "advantage" when describing affirmative action. *See Democratic Presidential Candidates Debate in Philadelphia*, *supra* note 151.

157. *See, e.g.*, Scott Jaschik, *New SAT, Old Gaps on Race*, INSIDE HIGHER ED. (Sept. 27, 2017), https://perma.cc/R4W5-FF7B (illustrating that race and

American society is that affirmative action constitutes preferential racial treatment, which boosts Black and Latino applicants to overcome the admissions gap.[158] From think tanks (e.g., The Heritage Foundation)[159] to U.S. presidential administrations (i.e., the Trump administration),[160] conservative institutions have often characterized affirmative action as unjustifiable and unconstitutional special treatment.[161]

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ethnicity gaps in average scores on the 2017 SAT remain). The 2017 SAT revealed that Blacks and Latinos scored a mean of 479 and 500, respectively, on the reading and writing portion of the exam, as compared to Asian and White test takers whose mean scores were 569 and 565, respectively. *Id.* On the mathematics section, Blacks and Latinos received mean scores of 462 and 487, respectively, which were lower compared to the scores of their Asian and White counterparts, who received mean scores of 612 and 553, respectively. *Id.*

A racial gap exists between underrepresented minority applicants and their White counterparts in college and university admissions measures like GPA and standardized test scores. *See, e.g.*, *New Data Shows a Wide Racial Disparity in the GPAs of College Graduates*, J. OF BLACKS IN HIGHER ED. (Nov. 5, 2012), https://perma.cc/TD5N-JXCM; *The Widening Racial Scoring Gap on the SAT College Admissions Test*, J. OF BLACKS IN HIGHER ED. (2005), https://perma.cc/EEU4-CDLJ.

158. *See* John Gramlich, *Americans and Affirmative Action: How the Public Sees the Consideration of Race in College Admissions, Hiring*, PEW RSCH. CTR. (June 16, 2023), https://perma.cc/DW67-WDX3 (explaining that affirmative action generally refers to programs that constitute preferential racial treatment).

159. *See, e.g.*, Jennifer Gratz, *Discriminating Toward Equality: Affirmative Action and the Diversity Charade*, HERITAGE FOUND. (Feb. 27, 2014), https://perma.cc/VE3W-CRYA.

160. *See* Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), https://perma.cc/M363-W8WK (demonstrating the Trump administration's view that affirmative action is unconstitutional). Not all conservative leaning presidents viewed affirmative action as per se unconstitutional. In 2003, President George W. Bush released a statement on affirmative action. *See* President George W. Bush, Remarks on the Michigan Affirmative Action Case (Jan. 15, 2003), https://perma.cc/TT4P-SGP9 (voicing support for "racial diversity in higher education" but stating that he would oppose the University of Michigan's affirmative action program because it gave too many points to Black and Latino students based on their race and, therefore, operated as an unconstitutional quota). The Bush administration stated that "[s]chools should seek diversity by considering a broad range of factors in admissions, including a student's potential and life experiences." *Id.*

161. *See, e.g.*, Yoo & Phillips, *supra* note 33 (arguing that the Court's use of a plus factor as a means to promote racial diversity is a racial preference

Affirmative action opponents, however, are not alone in this interpretation of affirmative action. While proponents of affirmative action consider the description "special treatment" or "special consideration" as an inaccurate pejorative,[162] some proponents believe the policy—although justified—constitutes a racial preference or differential treatment.[163] As discussed earlier, those defending affirmative action as preferential treatment offer the promotion of educational diversity as a justifying rationale.[164]

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and a form of racism). Yoo and Phillips's words demonstrate that they consider race-based affirmative action to be a racial preference and instance of racial favoritism when they write that "[f]avoring a particular race—an immutable characteristic beyond one's control—hurts both the favored and disfavored." *Id.*

162. *See, e.g.*, Sandy Lee, Member for Range Lake, Legislative Assembly of the Northwest Territories, 4th Session, 15th Assembly (Feb. 24, 2006) (Can.), https://perma.cc/8TBV-WB3R (PDF)

> I think affirmative action, for me, I was quite amused to hear during the last federal campaign from some talks and that really showed me misunderstandings about affirmative action. The fact is, affirmative action is entrenched in our Constitution and Charter. Affirmative action is not a special treatment for any group. It means it's accepting that there are some sections in our society who are not being given a fair chance. When you have a hundred people that are made up of all colours and all backgrounds and all genders, and when you see 90 percent of the people that are getting jobs are of one sector, then, in fact, there is an affirmative action for the dominant class. Affirmative action is not special treatment, but it is about understanding that there are people in society who are not being treated fairly. I think, in this regard, that we need to refine and enhance affirmative action, but also there is a need for communicating what affirmative action is, because I often get calls from people who feel that they didn't get a job because of affirmative action or because they should get a job because of affirmative action. I don't think either is reflective of what it was meant to be. I look forward to seeing this department looking after that complicated area.

163. *See, e.g.*, *In Defense of Affirmative Action*, L.A. TIMES (Feb. 23, 2012), https://perma.cc/ZG6N-QMM9 (acknowledging that affirmative action compensates "for the effect of racial discrimination by giving them an advantage" yet arguing that this form of discrimination is benign, compared to the invidious discrimination of slavery and Jim Crow). The L.A. Times Editorial Board writes, "[r]edressing racial disparities that are reflected in lower grades and test scores is not racism, reverse or otherwise." *Id.*

164. To date, United States Supreme Court precedent on affirmative action in higher education holds that race can be used a plus factor. *See* Fisher II, 579 U.S. 365, 375 (2016) (acknowledging that under holistic review,

Other affirmative action proponents advance a more equality-driven account that affirmative action is a means to remedy societal discrimination.[165] In the following excerpt, scholar Girardeau A. Spann notes that affirmative action serves to compensate for past oppression that links to the present and continues to subjugate racial minorities:

> This historical treatment of racial minorities as inferior has had a pervasive effect on society, causing race to remain either a conscious or an unconscious factor in virtually all societal decision making. The racial attitudes that continue to emanate from the nation's long history of discrimination have placed racial minorities in a disadvantaged position in the competition for societal resources. As a result, minorities continue to be systematically underrepresented—relative to the percentage of the population that they comprise—in the allocation of educational, employment, and political opportunities. This underrepresentation, in turn, has caused racial minorities to have lower standards of living, poorer health, higher vulnerability to crime, and shorter life expectancies than members of the white majority. Proponents of affirmative action contend that the only way to compensate for the historical disadvantage of racial minorities is through the prospective race-conscious allocation of educational, employment, and political resources to minorities through affirmative action programs.[166]

Following a compensation theory, proponents might interpret the racial gap in admissions as the product of historical and general societal racial disadvantage. This rationale holds that Black and Latino students have lower

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"admissions officers can consider race as a positive feature of a minority student's application"). The Court has also held that this plus factor can be used to bridge the racial gap in admissions. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (accepting the use of race in admissions to further an interest in student body diversity but claiming that "the use of racial preferences" will no longer be necessary in the future).

165. *See, e.g.*, Khiara Bridges, *POV: Defending Affirmative Action*, BU TODAY (Aug. 9, 2017), https://perma.cc/WQV4-VGT6 ("Thus, affirmative action is not about diversity. It is about remedy. It is about addressing this nation's sad, sorry, and sustained history of racism against historically disadvantaged racial groups.").

166. Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 9 (1995).

admissions scores because they have had inferior life chances (i.e., they were born poor, attended low-achieving segregated schools, or have poorly educated parents).[167]

Opponents and proponents of affirmative action both accept (or fail to explicitly criticize) the idea that the racial gap in admission scores between Whites and underrepresented minorities is objective, actual, and reflective of the candidates' abilities.[168] Accepting the racial gap in admissions as fact is dark racecraft practiced by opponents and proponents because both are engaging in the production of racial meaning that disadvantages minority folk. Opponents do so when they advance the narrative of the racial gap, and proponents do so when they fail to scrutinize and interrogate the accuracy of the claim. This racecraft allows for the presentation of affirmative action as preferential treatment, which has devastating consequences for the opportunities of Blacks and Latinos.

Accepting the racial gap in admission scores as a true reflection of a racial gap in ability is troubling. An uncritical acceptance that the racial gap in grades and standardized tests is correct and objectively accurate implies differences in the acumen and ability between minority and nonminority applicants. When tied to rhetoric of special consideration, this acceptance serves as fodder for the myth that affirmative action leads to mismatch, where elite universities admit unqualified minorities who are unprepared to cope with the rigor of the institution and fail.[169]

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167. *See id.*

168. I am specifically referencing those proponents who argue that race-based affirmative action is necessary to promote diversity or remedy past and historic discrimination. *See, e.g.*, Brief for the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae Supporting Respondents at 4, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)

> Voluntary race-conscious admissions policies by colleges and universities remain one of the sole avenues for seeking to mitigate the stubborn vestiges of past wrongs, ameliorating the effects of ongoing discrimination, and increasing the participation of all members of our society. Indeed, this Court [has] stated that our Constitution encourages us to weld together various racial and ethnic communities, and to avoid the racial balkanization that has plagued other nations.

169. The chief proponents of the racial mismatch theory in affirmative action are Rick Sander and Stuart Taylor Jr., who argue that affirmative

D. *Myth: Income and Upward Mobility Eviscerates Racism*

Another problem with framing affirmative action as a racial preference is that it unfairly makes the racial remedy susceptible to affluence and class critique. Stephanopoulos raised the class critique with Obama during the Democratic presidential debate, questioning whether nonpoor racial minorities should benefit from affirmative action policies.[170] The news magazine *The Economist* presented the class critique: "Compared with class, affirmative action based solely on race seems awfully blunt in today's America: it would be hard to claim that the son of Black millionaires was more deserving of special consideration than the daughter of hard-up White coal miners."[171] These class critiques reflect numerous calls for class-based affirmative action, not only as a means of achieving

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action is a racial preference and that these preferences in university admissions not only hurt minority students but shroud the education admissions process in dishonesty. *See, e.g.*, Rick Sander, *An Emerging Scholarly Consensus on Mismatch and Affirmative Action (Ideologues Not Welcome)*, WASH. POST (Dec. 10, 2015), https://perma.cc/7T5Y-MAUU; Richard Sander & Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, ATLANTIC (Oct. 2, 2012), https://perma.cc/4NPS-YZG5; RICHARD SANDER & STUART TAYLOR JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT (2012).

There is considerable scholarly disagreement with mismatch theory. *See, e.g.*, Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 714 (2008) (finding that, without affirmative action, many Black applicants to law schools would simply never get in, therefore "any resulting mismatch effects are concentrated among students who would not be admitted to any law school without preferences"); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1857 (2005) (concluding that eliminating affirmative action would lead to a decline in the number of Blacks entering the bar); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. Rev. 1807, 1816–18 (2004); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systemic Flaws in Richard Sander's Affirmative Action Study*, 46 J. BLACKS IN HIGHER EDUC. 102, 102–05 (2004) (analyzing Sander's data and arriving at an opposite conclusion).

170. *See Democratic Presidential Candidates Debate in Philadelphia*, *supra* note 151. This reveals an assumption that either racial disadvantage does not exist for the nonpoor, or that it can be eviscerated and remedied by upward class mobility.

171. *After Affirmative Action*, ECONOMIST (Aug. 10, 2017), https://perma.cc/4XTD-J3AB.

economic diversity, but also as a method for admitting underrepresented minorities.[172]

Proponents of class-based affirmative action rely on faulty logic resting on four beliefs. First, affirmative action is a preference.[173] Second, people with privilege should not receive preferences.[174] A corollary to this point is that only people who are among the disadvantaged should receive preferences. Next, the daughters of presidents and the sons of millionaires are economically privileged and cannot be the victims of racial injustice. Finally, affluent children should not receive admissions preferences because they are not disadvantaged.[175] Therefore, affluent racial minorities do not need affirmative action.[176]

This argument that affirmative action should only be available for the economically disadvantaged was at the crux of the litigation between Abigail Fisher and the University of Texas ("UT").[177] Whether more affluent African-Americans and

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172. *See* Richard D. Kahlenberg & Halley Potter, *Class-Based Affirmative Action Works*, N.Y. TIMES: ROOM FOR DEBATE (Apr. 27, 2014), https://perma.cc/W7PP-WBVN.

173. *See* Richard D. Kahlenberg, *The Affirmative Action That Colleges Really Need*, ATLANTIC (Oct. 26, 2022), https://perma.cc/K64L-9Q6G (characterizing affirmative action as a "race-based preference").

174. *See* Adolph Reed Jr., *The Uses of Affirmative Action*, ATLANTIC (Aug. 9, 2023), https://perma.cc/ETK2-XGFS ("That Kamala Harris is vice president does little for any Black woman not named Kamala Harris. Diversifying the upper class can be an ideal only for a 'left' that is totally embedded within neoliberalism.").

175. *See Class-Based Affirmative Action*, BALLOTPEDIA, https://perma.cc/S9ZR-FPJB (last visited Oct. 13, 2023) (quoting Haibo Huang, a proponent of class-based affirmative action policies, "[a]dmission to college should be based on merit with preference given to low-income students").

176. *See* Kahlenberg, *supra* note 173 ("The current framework of race-based preferences . . . disproportionately helps upper-middle-class students of color, and pits working-class people of different races against one another.").

177. *See* Brief for Petitioner at 2, Fisher I, 570 U.S. 297 (2013) (No. 11-345)

> After the Fifth Circuit struck down the use of racial preferences in undergraduate admissions at the University of Texas at Austin ("UT"), Texas made the choice to seek diversity through race-neutral alternatives. . . . And UT broadened its admissions policies to ensure a fair opportunity for qualified students who did not come from privileged backgrounds. . . . Yet the day that *Grutter* issued, UT leapt at the opportunity to reintroduce racial preferences "whose utility is highly dubious."

Latinos should receive affirmative action protections was a central question to the main issue in *Fisher I*.[178] This case arose when Abigail Fisher, a White applicant, applied for admission to UT's undergraduate program in 2008 and was rejected.[179] When Fisher submitted her application, UT automatically admitted students in the top ten percent of each Texas high school's graduating class under Texas House Bill 588 ("Top Ten Percent Law").[180] UT admitted additional applicants (those not accepted under the Top Ten Percent Law) using a holistic review based on a combination of (1) a quantitative assessment of test scores and high school performance, and (2) a measure of a student's personal background, which included student leadership, work experience, awards, extracurricular activities, community service, family socioeconomics, growing up in a single-parent home, and race.[181]

Fisher sued UT, claiming that its race-conscious holistic review program was unconstitutional and violated the Equal Protection Clause of the Fourteenth Amendment.[182] Fisher argued that UT's use of race was unnecessary because the Top Ten Percent Law was a workable race-neutral alternative that produced the diversity that UT needed to fulfill its compelling governmental interest to achieve educational diversity.[183]

The University argued that its use of race in the holistic review was an attempt to admit minority students across various socioeconomic backgrounds and to have "diversity

178. *See, e.g.*, Oral Argument at 1:29:54, Fisher I, 570 U.S. 297 (2013), https://perma.cc/BH7E-AYUJ

> This is a statistic that jumped out at me. . . . Of the African American and Hispanic students who were admitted under the Top Ten Percent Plan, 21% had parents who had either a bachelor's degree or a four-year degree. And for the holistic admittees, African Americans and Hispanics, it's 26% . . . . So, it seems to me it refutes the idea that all of these minority students who were admitted under—or most of them—admitted under the percent plan come just from these predominately, overwhelmingly black and Hispanic schools with poor students. It just doesn't seem to be true.

179. *See* Fisher I, 570 U.S. 297, 304–05 (2013).

180. *Id.*

181. *Id.*

182. *Id.*

183. *See id.* at 312.

within diversity."[184] UT reasoned that it needed a race-conscious holistic review because minorities admitted under the Top Ten Percent program tended to be less affluent and have lower standardized test scores than their holistic review counterparts.[185] UT wrote,

> In addition, although the top 10% law helps admit minorities, it does so largely as a result of well-known de facto segregation throughout much of Texas's secondary school system. The segregation produces clusters of overwhelmingly majority-minority schools—largely confined to particular geographic areas of the State—that then produce large numbers of minority admits under the top 10% law. But that clustering also means that the top 10% law systematically hinders UT's efforts to assemble a class that is broadly diverse, and academically excellent, across the board—including within groups of underrepresented minorities.
>
> Holistic review permits the consideration of diversity within racial groups. And, in fact, admissions data show that African-American and Hispanic students admitted through holistic review are, on average, more likely than their top 10% counterparts to have attended an integrated high school; are less likely to be the first in their families to attend college; tend to have more varied socioeconomic backgrounds; and on average, have higher SAT scores than their top-10% counterparts.[186]

In a seven-to-one decision, now referred to as *Fisher I*, the Court held that, while universities receive deference in determining whether diversity is important to their educational mission, a university must demonstrate that its program is narrowly tailored to achieve its diversity goal.[187] The Court found that part of the narrow tailoring requirement was that a university had to prove that there were no other workable race-neutral alternatives to attaining diversity and that using race was necessary.[188] As a result, the Court vacated and remanded the Fifth Circuit's decision that presumed that UT

184. *Fisher I* Brief for Respondents, *supra* note 18, at 34.

185. *See id.* at 43.

186. *See id.* at 33–34 (emphasis and citations omitted).

187. *Fisher I*, 570 U.S. at 310–11.

188. *Id.* at 312–13.

was acting in good faith and that Fisher could only challenge whether UT made its decision (to have a race-conscious admissions process) in good faith.[189]

On remand, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of UT.[190] Once again, Fisher appealed, and the Court granted certiorari.[191] In *Fisher II*, the Court held that UT needed to use race because race-neutral programs had not achieved the University's diversity goals.[192] In addition, the Court found that UT's use of race had a small yet meaningful impact on the number of minority students the university admitted.[193] The Court affirmed the lower court's ruling in favor of UT.[194]

The litigant parties were not alone in arguing whether the Court should permit UT's use of race-based affirmative action to admit middle-class minorities. Justice Alito focused on the issue during the oral arguments in both *Fisher I* and *Fisher II*.[195] The following exchange with UT attorney Gregory Garre, during oral argument in *Fisher I* illustrates Justice Alito's displeasure with granting affirmative action protections to minorities from more affluent socio-economic backgrounds:

> MR. GARRE: I don't think it's been seriously disputed in this case to this point that, although the percentage plan certainly helps with minority admissions, by and large, the—the minorities who are admitted tend to come from segregated, racially-identifiable schools.
> JUSTICE ALITO: Well, I thought that the whole purpose of affirmative action was to help students who come from

189. *Id.* at 314–15.

190. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 660 (5th Cir. 2014).

191. Fisher v. Univ. of Tex. at Austin, 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 576 U.S. 1054 (2015).

192. Fisher II, 579 U.S. 365, 382–83 (2016).

193. *See id.* at 385 ("[N]one of [the petitioner's] proposed alternatives was a workable means for the University to attain the benefits of diversity it sought.").

194. *Id.* at 389.

195. *See* Transcript of Oral Argument at 43–44, Fisher I, 570 U.S. 297 (2013) (No. 11-345) (questioning whether the admissions policy targeted prospective students from underprivileged backgrounds irrespective of race); *see also* Transcript of Oral Argument at 44–45, Fisher II, 579 U.S. 365 (2016) (No. 14-981) (analyzing the policy's weighing of race over lower socioeconomic status in admissions decisions).

> underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before.
>
> The top 10 percent plan admits lots of African Americans—lots of Hispanics and a fair number of African Americans. But you say, well, it's—it's faulty, because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds. And you specifically have the example of the child of successful professionals in Dallas.
>
> Now, that's your argument? If you have—you have an applicant whose parents are—let's say they're—one of them is a partner in your law firm in Texas, another one is a part—is another corporate lawyer. They have income that puts them in the top 1 percent of earners in the country, and they have—parents both have graduate degrees. They deserve a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income?[196]

In *Fisher II*, Justice Alito criticized UT's use of affirmative action to capture minority students outside those already admitted through the Texas Ten Percent Law.[197] In an exchange with Mr. Garre, Justice Alito questioned why UT did not view minorities admitted under the Ten Percent Law as capable, competent students.[198] He said,

> What—one of the things I find troubling about your argument is the suggestion that there is something deficient about the African-American students and the Hispanic students who are admitted under the top percent plan. They're not dynamic. They're not leaders. They're not change agents. And I don't know what the basis for that is.[199]

Justice Alito ended the exchange arguing, "[W]asn't that the—the reason for adopting affirmative action in the first place because there are people who have been severely disadvantaged through discrimination and—and lack of wealth, and they

196. Transcript of Oral Argument at 42–44, Fisher I, 570 U.S. 297 (2013) (No. 11-345).

197. *See* Transcript of Oral Argument at 71, Fisher II, 579 U.S. 365 (2016) (No. 14-981) (probing the validity of relying on a process that structurally disadvantages students and adding race as a "special factor to counteract that").

198. *See id.* at 41.

199. *Id.*

should be given a benefit in admission."[200] While Justice Alito articulated what he saw as the original goal of affirmative action—to fight discrimination—he placed that goal in the context of wealth access.[201]

Justice Alito's inquiries in oral argument, Abigail Fisher's claim, and George Stephanopoulos's question to then-Senator Obama share a common theme that one can categorize as an "affluence critique" of affirmative action. The affluence critic believes affirmative action policies should only protect economically poor students. The result is that there is no need to provide affirmative action to relatively affluent, middle-class racial minority students who are "privileged" and have had better access to schools and resources. This position views affirmative action as a special benefit; thus, there is no reason to confer additional assistance on individuals with economic privilege. Following this reasoning, the only disadvantage accompanying race is economic, which class-based upward mobility can overcome.

This Article is critical of the view that income and wealth have the power to eviscerate racism. If this view is left unchecked, relatively affluent (i.e., middle-class) Black and Latino applicants who are the victims of present-day racial discrimination in admissions are left vulnerable.[202] This view is dark racecraft.

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200. *Id.* at 43–44.

201. *Id.*

202. The main problem with historical arguments is that they do not necessarily account for ongoing discrimination in present society. Current income and wealth do not necessarily have the power to heal and eviscerate the effects of racism in the present. *See, e.g.*, Allan Hall, *Now Oprah Winfrey Insists She Was Victim of Racism at Swiss Store and Reveals How She Nearly Called Her Friend Jennifer Aniston Who the $38,000 Bag Was Named After*, DAILY MAIL (Aug. 14, 2013), https://perma.cc/RE76-MVC9 (reporting that billionaire Black media mogul Oprah Winfrey was discriminated against in Switzerland when a salesperson refused to show her a $38,000 handbag). Even the most affluent of racial minorities face discrimination. *See id.* ("I was asked if I am confronted with racism. . . . My answer—not in the same way as others because I am so well known. . . . I feel discrimination in a different way." (internal quotation omitted)).

IV. ABANDONING THE DIVERSITY RATIONALE

This Article views the *SFFA v. Harvard* decision from a critical race theory perspective and argues that the Court's abandonment of diversity aligns with principles of fairness and justice. The problem, however, is that the Court halted its inquiry and failed to provide a remedy for schools' admissions processes that actively discriminate against racial minority applicants. This Article argues that the diversity rationale is a product of the practice of dangerous racecraft (i.e., the dark art of racism). Those in favor of affirmative action must take the Court's lead and abandon diversity as a goal and tool for achieving racial justice. Unlike the Court, however, advocates should not merely abandon the diversity rationale—they should instead replace it with better arguments rooted in equality and fairness that push for race-conscious remedies.

A. *Affirmative Action Is Not Dead*

With race-conscious polices on life support, the time has come for advocates to reconsider how to protect affirmative action. A discourse of death has surrounded affirmative action in popular and scholarly discussions for at least a decade.[203] In 2014, *The New York Times* ran an article claiming, "Affirmative action as we know it is probably doomed. When you ask top Obama administration officials and people in the federal court system about the issue, you often hear a version of that prediction."[204] Columnist Juan Williams wrote, "Affirmative action, age 45, is dead," in an op-ed published after a 2009 Supreme Court affirmative action employment decision.[205] Coates has written that race-based "[a]ffirmative action is on its

203. *See* Juan Williams, *Affirmative Action's Untimely Obituary*, WASH. POST (July 26, 2009), https://perma.cc/SE38-U9KB (heralding the demise of affirmative action nearly fifteen years prior to its virtual cancellation by the Supreme Court).

204. David Leonhardt, *If Affirmative Action Is Doomed, What's Next?*, N.Y. TIMES (June 14, 2014), https://perma.cc/G5LB-JY5M.

205. Juan Williams, *Affirmative Action's Untimely Obituary*, WASH. POST, (July 26, 2009), https://perma.cc/THZ9-UR5P; *see also* Ricci v. DeStefano, 557 U.S. 557, 579, 593 (2009) (concluding that New Haven city officials violated Title VII's disparate-treatment provision when they refused to certify promotion exam results based on "how minority candidates had performed when compared to white candidates").

last legs. In substituting a broad class struggle for an anti-racist struggle, progressives hope to assemble a coalition by changing the subject."[206] Coates wrote that many liberal policies—like affirmative action and the Voting Rights Act—have eroded and that it is time to seek reparations as a national policy to remedy the combined histories of slavery, Jim Crow, separate but equal, and racist housing policies.[207] Scholars have spilled significant ink on the question of the death of affirmative action.[208] While discourse does not necessarily reflect reality, it can create a social condition of expectation that leads society to believe (and accept without protest) an "inevitable" end to affirmative action.[209]

In addition to the discourse of death, changes in the Court have devastated affirmative action. In 2016, the Supreme Court, in a four-to-three decision, upheld the University of Texas' race-conscious admissions program in *Fisher II*.[210] The *Fisher II* decision marked the last victory affirmative action advocates

206. Coates, *supra* note 6.

207. *See id.* (attributing the decline in effectiveness of mid-twentieth century reforms to an attempt to "chang[e] the subject" from white supremacy).

208. *See, e.g.*, Matthew W. Hughley, *The Life and (Near Death Experience) of Affirmative Action—But What of Its Soul?*, HUFFPOST, https://perma.cc/9HTE-YLF2 (last updated July 2, 2017) (arguing that affirmative action encountered a near death experience in *Fisher II* and examining the "soul" of affirmative action by reviewing the moral support for affirmative action policies); Michele Goodwin, *The Death of Affirmative Action?*, 2013 WIS. L. REV. 715, 725 (2013) (suggesting that affirmative action may be on "life support" due to declining enrollment of Black students at top law schools).

209. Social constructivists often argue that social perception can shape reality, regardless of accuracy. *See* Lee Jussim, *Social Perception and Social Reality: A Reflection-Construction Model*, 98 PSYCH. REV. 54, 54–55 (1991) (summarizing the social constructivist perspective). Social psychologist Lee Jussim places qualifiers on this argument (i.e., that the biased perceptions of observers have a small effect on the construction of social reality). *See id.* at 70 (noting that "even meta-analyses that have addressed conditions under which self-fulfilling prophecy effects are most powerful have found small effects"). Jussim, however, acknowledges that in the realm of equal opportunity, even if the biasing effects of social beliefs are relatively small, such effects can be "quite important." *See id.*

210. *See* 579 U.S. 365, 388 (2016) (holding that the University "met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored").

celebrated.[211] The same year the Court decided *Fisher II*, the nation elected President Trump, who reshaped the Court by appointing three conservative judges: Associate Justices Neil Gorsuch,[212] Brett Kavanaugh,[213] and Amy Coney Barrett.[214]

One might attribute affirmative action advocates' fear of overturning the result in *Grutter* to the Court's recent record on reproductive rights issues and stare decisis. Within two years of the Trump administration's last Supreme Court justice appointment, the Court decided *Dobbs v. Jackson Women's Health Organization*[215] and overruled the landmark reproductive rights case *Roe v. Wade*.[216] The *Roe* decision had stood for almost fifty years.[217] Even before *Dobbs*, pundits have

211. A number of organizations in favor of affirmative action viewed *Fisher II* as a victory, including the National Association for the Advancement of Colored People ("NAACP"), the Center for American Progress ("CAP"), and the National Women's Law Center. *See, e.g.*, Sherrilyn Ifill, *U.S. Supreme Court Ruling Reaffirms the Importance of Diversity in College Admissions*, NAACP LEGAL DEF. FUND (June 23, 2016), https://perma.cc/E5DW-V64L (calling the decision "a huge victory for civil rights and equality in our nation"); *Statement: CAP's Danyelle Solomon Responds to Fisher v. University of Texas Supreme Court Decision*, CTR. FOR AM. PROGRESS (June 23, 2016), https://perma.cc/2PR5-A49F (referring to the Supreme Court's decision as "an important victory for all Americans"); *Affirmative Action Stands Victorious After the Supreme Court Ruling in Fisher v. University of Texas*, NAT'L WOMEN'S L. CTR. (June 24, 2016), https://perma.cc/Z35E-WH8D ("[P]ublic universities across the country have the freedom to build diverse student bodies with the help of affirmative action programs. For now, at least, we've won the battle.").

212. *See* Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://perma.cc/2KSF-W663 (noting Justice Gorsuch "would be a reliable conservative" on the Court).

213. *See* Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Conformation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), https://perma.cc/D99N-7ZZC ("In replacing Justice Kennedy, a moderate conservative, [Kavanaugh] will give the court a reliably conservative bloc.").

214. *See* Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 27, 2020), https://perma.cc/SC25-4VQL ("[Barrett] is widely viewed by both parties as a judge in the mold of Justice Scalia, her mentor, who would rule consistently in favor of conservative positions.").

215. 597 U.S. 215 (2022).

216. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

217. *See* Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. TIMES (June 24, 2022), https://perma.cc/4CH8-

speculated that this Court was ready to end affirmative action.[218] This speculation was partially attributable to the Justices granting certiorari in *SFFA v. Harvard*[219] and *SFFA v. UNC*[220]—two cases challenging the affirmative action programs at Harvard and the University of North Carolina.[221]

Advocates of race-conscious remedies rightfully worried that the Court would overturn decisions like *Grutter* and *Bakke*—which upheld affirmative action in admissions over twenty and forty years ago, respectively.[222] In the *SFFA* decision, while the Court did not explicitly overrule *Grutter*, it effectively gutted its prior affirmative action rulings.[223] The *SFFA* decision ruled, in part, that the use of race to achieve educational diversity is unworkable.[224]

94JC (last updated Nov. 2, 2022) (noting the repercussions of *Dobbs*, including its elimination of "the constitutional right to abortion after almost 50 years").

218. *See* Nicholas Lemann, *The Supreme Court Appears Ready, Finally, to Defeat Affirmative Action*, NEW YORKER (Jan. 27, 2022), https://perma.cc/U74R-EP7R ("The message is clear: the Supreme Court wants to consider decisively departing from a long string of decisions that have permitted the use of race as a plus factor in admissions.").

219. 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

220. 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 S. Ct. 896 (2022).

221. *See* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), https://perma.cc/NVV7-MEGN (last updated Oct. 31, 2022) ("The Supreme Court agreed . . . to decide whether race-conscious admissions programs at Harvard and the University of North Carolina are lawful, raising serious doubts about the future of affirmative action in higher education.").

222. *See, e.g.*, Dana Milbank, Opinion, Et tu*, Alito? Murder of Stare Decisis Creates Legal Circus Maximus*, WASH. POST (July 1, 2022), https://perma.cc/RPG5-NRD6 (discussing the void left by the Supreme Court's "burial" of stare decisis in *Dobbs* and speculating that future decisions will be based on political allegiances); Ariane de Vogue, *The Supreme Court Just Threw the Idea of Settled Law Out the Window*, CNN POLITICS (June 28, 2022), https://perma.cc/Q8J7-ESBR (noting, from the Court's overturning of *Roe*, that "liberals especially are worried about more precedents that could fall").

223. *See* SFFA v. Harvard, 600 U.S. 181, 211, 230 (2023) (finding that while *Grutter* endorsed the "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," the admissions policies under review could not "be reconciled with the guarantees of the Equal Protection Clause" (internal quotation omitted)).

224. *See id.* at 224, 230 (noting both that "it is not clear how a court is supposed to determine when stereotypes have broken down or 'productive

The fight for racial equality moving beyond the *SFFA* decision requires affirmative action advocates to re-think how to protect and frame the policy. This Article argues that the first step in the fight for affirmative action is to abandon the affirmative defense strategy and to stop solely defending against anti-affirmative action litigation (i.e., the practice of dark racecraft and white supremacy).[225] Affirmative action could benefit from a new strategy that creates an offensive line actively working to destroy the dark arts of racism and racecraft.

An offensive strategy supporting affirmative action calls for an abandonment of the diversity rationale in *Bakke* and *Grutter*, which has served as a distraction to equality arguments that could serve remedial interests like correcting the present racial bias found in grades, letters of recommendation, and standardized tests that colleges and universities have relied on for decades.[226]

B. *Diversity as Dangerous Racecraft*

Affirmative action should continue because the policy is a tool for attaining equal opportunity for all, not because affirmative action enriches the value of schools' educational products. This subpart argues that the portion of the *SFFA* decision that is critical of the diversity rationale reads much like a critical race theory decision and explains why diversity operates as a form of dangerous racecraft.

1. *SFFA* as a Critical Race Theory Decision?

In June 2023, the Court ended Harvard's and UNC's affirmative action programs that used race to promote educational diversity.[227] Chief Justice Roberts, writing for the majority, stated that:

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citizens and leaders' have been created" and that the programs under review "lack sufficiently focused and measurable objectives" (citation omitted)).

225. *See supra* Part III.

226. For more discussion on how diversity obscures racial inequality arguments, see *infra* Part IV.B.2.

227. *See* SFFA v. Harvard, 600 U.S. 181, 213 (2023) (holding that the race-based admissions programs of Harvard and UNC are invalid under the Equal Protection Clause of the Fourteenth Amendment).

> University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[228]

While several affirmative action advocates criticized the decision,[229] portions of the *SFFA* ruling read like a critical race theory decision and mimicked at least two critiques that race scholars have expressed in the past: (1) diversity is vague, and (2) diversity stereotypes minority applicants.[230]

a. Vagueness

Chief Justice Roberts emphasized that Harvard's and UNC's affirmative action plans were subject to judicial review and, therefore, must be measurable.[231] To that end, Roberts found that the goal of educational diversity, while commendable, was incoherent "for purposes of strict scrutiny."[232] He argued that "[a]t the outset, it is unclear how

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228. *Id.*

229. *See, e.g.*, Uma Mazyck Jayakumar & Ibram X. Kendi, *'Race Neutral' Is the New 'Separate but Equal'*, ATLANTIC (June 29, 2023), https://perma.cc/E4BG-WAR7 (arguing that the constitutional demand for race-neutral policies leads to segregation and a failure to provide substantive equal rights to racial minorities).

230. Although the result in this case does not lead to a politically progressive race conscious remedy, the Article links the *SFFA* decision to critical race theory because there are portions of the decision that illustrate the way that a legal policy of pursuing diversity that is vague and relies on stereotypes is antithetical to interests of racial minorities and equality. *See, e.g.*, *SFFA*, 600 U.S. at 219–20 ("[U]niversities may not operate their admissions programs on the belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. That requirement is found throughout our Equal Protection Clause jurisprudence . . . ." (internal citation omitted)). This critique of diversity as oppressive aligns with the core values of critical race theory. Unfortunately, the Court does not take this critique to its conclusion and does not provide a remedy that leads to equal opportunities for racial minorities.

231. *See SFFA*, 600 U.S. at 224 (relying on *Fisher II*, 579 U.S. 365, 381 (2016) to state that race conscious admissions must be "sufficiently measurable" to allow judicial review).

232. *Id.* at 214.

courts are supposed to measure any of these goals. . . . Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease?"[233]

The Court's vagueness critique of diversity is not novel.[234] Professor Kenneth B. Nunn has argued that the diversity rationale is a flawed tool for social justice because it is poorly defined.[235] Nunn wrote that in cases like *Bakke* and *Grutter*, the Court defined diversity so broadly that it could encompass any characteristic or trait.[236] Although written fifteen years before the *SFFA* ruling, Nunn predicted affirmative action diversity policy's vulnerability to attack when he wrote,

> Because the definition of diversity is so diffused, the diversity argument cannot be used to attack the policies of schools that do not want to become racially and ethnically diverse. After all, they are just envisioning diversity in a different way. However, the diversity argument can be used to attack the policy of a school that seeks ethnic diversity too aggressively. Such a school would obviously not be considering diversity in the broadest possible sense.[237]

The Court amplified this sentiment when it stated its approach to examining the use of race in admissions.[238] While the *SFFA* Court acknowledged that it should give deference to

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233. *Id.*

234. *See, e.g.*, Nunn, *supra* note 28, at 720–22; Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625, 650–52 (2006) (stating that there are inconsistencies in defining the critical mass necessary for diversity). *But see* Sheldon Bernard Lyke, *Catch Twenty-Wu? The Oral Argument in* Fisher v. University of Texas *and the Obfuscation of Critical Mass*, 107 NW. L. REV. COLLOQUY 209, 212 (2013) (arguing that, while broad, there have been deliberate attempts to obfuscate the meaning of critical mass in diversity).

235. *See* Nunn, *supra* note 28, at 720 (arguing that diversity fails as a social tool because "diversity is poorly defined and thus cannot be targeted on racial and ethnic inequality").

236. *See id.*

237. *Id.* at 721.

238. *See* SFFA v. Harvard, 600 U.S. 181, 217 (2023) ("[G]iven the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.").

academic institutions, it noted that judicial review is mandatory and requires measurable justifications.[239]

b. Stereotype

The *SFFA* Court also found that the affirmative action programs at issue stereotyped minority applicants and that for race to bring about diversity, Harvard and UNC relied on the belief that certain minority students held certain "minority" beliefs.[240] The Court found that the universities' admissions programs treated race as valuable and like a thing with some inherent benefit to their university.[241] The majority presented an example from *Bakke* that "a black student can usually bring something that a white person cannot offer."[242] It argued that Harvard's process rests on this premise of valuable bodies.[243] The Court stated that this premise is a pernicious stereotype and rejected the notion that race inherently says something about an applicant.[244]

Scholarship on racial equality aligns with the Court's position on stereotyped viewpoints and race. At best, race is an imprecise proxy for diversity of viewpoint, and an opponent of affirmative action might argue that—while costly—universities should ask students to state their viewpoints (a facially race-neutral alternative) instead of requesting students' racial

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239. *See id.* (recognizing that the Supreme Court has a "tradition of giving a degree of deference to a university's academic decisions" while acknowledging that "deference must exist 'within constitutionally prescribed limits,' and that 'deference does not imply abandonment or abdication of judicial review'" (first quoting Grutter v. Bollinger, 539 U.S. 306, 328 (2003); and then Miller-El v. Cockrell, 537 U.S. 322, 340 (2003))).

240. *See id.* at 211–12 ("Universities were thus not permitted to operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003))).

241. *See id.* at 220 ("The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake.").

242. *Id.*

243. *Cf. id.* The concept of racial identity and value touches on the commodification critique that critical race theory scholars have of the diversity rationale. This rationale holds that diversity policies treat minority students' bodies and ideas as commodities for use by the White majority. For a discussion of this commodification argument, see *infra* Part IV.B.2.b.

244. *See SFFA*, 600 U.S. at 220.

identity.[245] Additionally, scholars of racial equality tend to support anti-essentialist theories of race, which state that race is a social construction and that there is no quintessential feature of a particular racial group.[246] For example, there is no feature—including viewpoint—that all Black people have in common.[247]

2. The Importance of Detaching from Diversity

Even though the *SFFA* decision struck down Harvard's and UNC's affirmative action policies for violating Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment, people continue to highlight diversity as an important goal.[248] Diversity is a sticky concept that institutions cannot seem to let go.[249] After the *SFFA* decision, schools have issued statements showing that they remain glued to the pursuit of diversity.[250]

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245. *See* Lizotte, *supra* note 234, at 649–50. Lizotte states that one reason why schools continue to use race as a proxy for viewpoint is because the alternative is administratively costly and burdensome. *See id.* at 649 (explaining the alternative would require admissions committees to read essays, and more). Additionally, Lizotte writes that schools might have concerns that applicants might not express their genuine viewpoints in an attempt to gain a preference. *Id.* at 650.

246. For a discussion of race and essentialism, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 589 (1990) (arguing that "feminist essentialism paves the way for unconscious racism").

247. *See, e.g.*, Kiana Cox & Christine Tamir, *Black Americans: Personal Identity and Intra-Racial Connections*, PEW RSCH. CTR. (Apr. 14, 2022), https://perma.cc/6DU5-257Y (noting only 54% of Black adults surveyed responded that they had "everything or most things in common with other Black people born in the U.S.").

248. *See* SFFA v. Harvard, 600 U.S. 181, 230 (2023) ("[N]othing 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.").

249. *See* Steven M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1062 (2016) (surveying diversity management practices, including diversity training, diversity mission statements, diverse work team compositions, and status-based affinity groups, among others).

250. *See, e.g.*, Nicole Markus, *Northwestern Affirms Commitment to Diversity After SCOTUS Strikes Down Affirmative Action*, DAILY NW. (June 29, 2023), https://perma.cc/5XC3-3TEN (reporting that, after the Court's decision in *SFFA*, Northwestern University President Michael Schill affirmed the institution's commitment to diversity). Even before the *SFFA* decision was released, the deans of the Big Ten law schools issued a similar statement of commitment to diversity, regardless of the case outcome. *See* Johanna Bond et

Even the Biden administration continues to cling to diversity.[251] In a letter explaining the Court's decision, the administration urged colleges and universities to diversify enrollment by creating or maintaining pipeline programs.[252] Institutions are either unwilling or socially unable to free themselves from the tar baby that is diversity.[253]

Yet, as noted previously, there are significant issues with the diversity rationale.[254] In addition to its vagueness and stigmatization of minority students, Professor Nunn argued that the diversity rationale is a flawed tool for social justice because it encourages tokenism and fails to address existing racism and racial inequality.[255] Eboni S. Nelson argued that pursuing diversity distracts from equal opportunity for minority students.[256] This Article emphasizes that the diversity rationale poisons our collective understanding of race because it draws

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al., *Big Ten Law Schools Affirm Commitment to Diversity*, NW. PRITZKER SCH. L. (June 21, 2023), https://perma.cc/H5SF-RP4D ("[D]iversity, equity, and inclusion are core values of our law schools.").

251. *See* Anemona Hartocollis, *Administration Urges Colleges to Pursue Diversity Despite Affirmative Action Ban*, N.Y. TIMES (Aug. 14, 2023), https://perma.cc/TJZ5-UQ2S (citing the Biden administration's letter as broadly endorsing diversity, equity, and inclusion efforts on campuses).

252. *See id.* (reporting that the letter "said the court's decision does not require institutions to ignore race when identifying prospective students for outreach and recruitment" (internal quotations omitted)).

253. A tar baby is a situation or problem that is impossible to solve or becomes more difficult to break away from the more you involve yourself with it. *See Tar Baby*, COLLINS DICTIONARY, https://perma.cc/P2Y9-36RM (last visited Sept. 25, 2023). The word has its origin in an American folklore story commonly known as Br'er Rabbit and the Tar Baby, where a villainous Br'er Fox creates a trap for protagonist, Br'er Rabbit. *See* JOEL CHANDLER HARRIS, *Legends of the Old Plantation*, *in* UNCLE REMUS, HIS SONGS AND HIS SAYINGS ch. II (2000) (ebook), https://perma.cc/83R8-L3B8 (last updated Dec. 31, 2020) (sharing the original story of the Br'er Rabbit). The trap is a lump of tar disguised as a little boy. *Id.* When Br'er Rabbit is offended by the tar baby's refusal to respond to his greeting, the rabbit punches the trap and is ensnared in a sticky mess. *Id.*

254. *See supra* Part I.

255. *See* Nunn, *supra* note 28, at 722–27 (contending the diversity rationale encourages tokenism, stigmatizes people of color, and fails to address racial inequality).

256. *See* Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 613 (2009) (indicating that diversity initiatives "have distracted school officials from addressing more pressing qualitative obstacles that hinder the academic achievements of many students of color").

society away from robust conversations about curing racial inequality.[257] In addition, the diversity rationale negatively crafts how society at large should racially interact because it furthers the racial commodification of minorities.[258]

This section argues that individuals and institutions must stop adopting and utilizing diversity rationales, not only because of the issues raised in the *SFFA* decision (i.e., vagueness and the promotion of racial stereotyping), but for additional reasons not discussed in the decision. These reasons include the fact that using the diversity rationale commodifies minority bodies and viewpoints and can distract affirmative action advocates from adopting equality arguments.[259] Abandoning the diversity rationale is a step towards ending this country's pernicious practice of dark racecraft.

a. Diversity Obscures Racial Inequality

One of the problems with the diversity rationale is that it allows schools to discuss the social inclusion of racial minorities without interrogating the causes of inequality or implicating themselves as likely sources of inequality.[260] At its heart, the diversity rationale is "results-driven" and obscures the mechanisms of racial oppression.[261] The diversity rationale permits schools (and society at large) to ignore the multi-causal reasons (e.g., general societal discrimination, histories of discrimination, current and present biases in schools' admissions criteria) and why there is a racial gap in admissions

257. *See infra* Part IV.B.2.a.

258. *See infra* Part IV.B.2.b.

259. *See infra* Part IV.B.2.b.

260. *See* Nelson, *supra* note 256, at 610 ("[T]he aesthetically pleasing student body often masks the racial inequities that persist in such 'diverse' learning environments.").

261. Nunn wrote that diversity can be conceptualized as both a process and a result, however, "[m]ost people use the term 'diversity' in the sense of diversity of result." Nunn, *supra* note 28, at 721. This is in contrast to the idea of "diversity" as the process of selection and choices that could lead to diverse outcomes. *See id.* He noted, "this kind of selectivity is precisely what the Supreme Court does not allow government actors to engage in, at least not when it comes to race." *Id.* at 722.

scores.[262] Because the diversity rationale does not call for a review of the potential bias in facially race-neutral admissions criteria, it allows for crafting racial narratives of Black and Latino inferiority. For example, when Blacks and Latinos are minimally qualified for admission, we see the proliferation of inferiority narratives that comment that there are equally suitable or more qualified White applicants.[263] The diversity rationale provides no mechanism for exploring whether White applicants are more qualified or whether admissions criteria are biased in their favor.[264] As a result, through obfuscation, diversity permits the crafting of dangerous understandings of racial difference—particularly in a society that promotes meritocracy and the belief that one's race should never diminish one's life chances.[265]

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262. *See* Nelson, *supra* note 256, at 602–03 (discussing the disparities exhibited by minority students' academic achievement as measured by standardized-test scores).

263. Racial inferiority/superiority narratives (i.e., that White applicants have the same or better scores as minorities but are not being considered for admission) are at the heart of every affirmative action case to go before the Supreme Court. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978) ("[A]pplicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."); Gratz v. Bollinger, 539 U.S. 244, 299 (2003) (Ginsburg, J., dissenting) (reasoning "African-American and Hispanic children" generally fare poorly on standardized tests due to their education in underperforming institutions); Grutter v. Bollinger, 539 U.S. 306, 320 (2003) (noting disputed expert testimony at trial concluding "applicants from these minority groups are given an extremely large allowance for admission" considering their LSAT scores compared to applicants who are members of "nonfavored groups" (internal quotations omitted)); Fisher I, 570 U.S. 297, 331 (2013) (Thomas, J., concurring) ("Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates."); *see also* Fisher II, 579 U.S. 365, 421 (2016) (Alito, J., dissenting) ("On average, [the University of Texas] claims, African-American and Hispanic holistic admits have higher SAT scores than their Top 10% counterparts." (internal quotations omitted)).

264. *Cf. Grutter*, 539 U.S. at 373 (Thomas, J., concurring) (wrestling with whether affirmative action "played a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination." (internal quotations omitted)).

265. *See* Hillary Clinton, *Remarks at Ohio State University in Columbus*, AM. PRESIDENCY PROJECT (Oct. 10, 2016), https://perma.cc/RWF3-GWNQ ("I want this to be a true meritocracy. I'm tired of inequality. I want people to feel like they can get ahead if they work for it."); *see also* President George Bush,

b. Diversity Commodifies Minority Identity

The Supreme Court has held that diversity positively affects colleges' and universities' educational products.[266] Scholars and critics have commented that the diversity rationale treats Black and Latino students as commodities and objects that benefit a school's interest in providing a valuable education—primarily to White students.[267] Nunn has argued that while minority students may receive some educational benefit, "[a]pparently, the reason the Supreme Court found a compelling state interest in *Grutter* was that people of color could be used as a means to white ends." [268] He noted that the Court only recognized benefits to non-minorities in support of its decision and found that the old stereotype of racial minorities occupying "servile roles . . . are reprised and resurrected."[269] Identity scholar Nancy Leong has argued that affirmative action driven by diversity rationales reinforces the commodification of racial identity and reduces racial identity to something to be exchanged for value.[270] Even conservative columnist George

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Remarks on the Observance of National Afro-American (Black) History Month, AM. PRESIDENCY PROJECT (Feb. 25, 1991), https://perma.cc/3KTW-F9RU ("For, as Booker T. Washington said: No greater injury can be done to any youth than to let him feel that because he belongs to this or that race he will be advanced regardless of his own merit or efforts.").

266. *See Grutter*, 539 U.S. at 330 ("[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." (internal quotations omitted)).

267. *See, e.g.*, Nunn, *supra* note 28, at 723 ("The diversity regime endorsed by the Supreme Court allows people of color to be used for the purposes of the educational institution and ultimately for the benefit of white students and their educational needs."); Leong, *supra* note 28, 2154–55 (arguing that affirmative action relying on the diversity rationale is a form of racial capitalism that exploits and derives value from racial minority identity).

268. Nunn, *supra* note 28, at 724.

269. *Id.* at 724–25.

270. *See* Leong, *supra* note 28, at 2202

> [T]here is no way to structure a transaction involving race in a way that avoids this degradation: the value associated with racial identity cannot, for example, be understood as an appropriate gift or subject of barter, in part because of the close linkage between racial experience and selfhood, and in part because the social meaning of such a transaction inevitably invokes the historical and ongoing racialized slavery in America.

Will has stated that affirmative action in pursuit of diversity has effectively transformed Black and Latino students into public utilities.[271]

Due to affirmative action's close connection with commodification and the distribution of resources, property theory provides a helpful perspective for understanding the policy's many aspects.[272] Jim Chen has argued that affirmative action policies confer a property interest on its intended beneficiaries because the economic benefits historically conferred on White people are now delivered to racial minorities with the legally "privileged" racial identity.[273] Cheryl Harris addressed this reverse discrimination argument, stating that while affirmative action acknowledges Black identity, it "does not involve the systematic subordination of whites, nor does it even set up a danger of doing so."[274] Harris also refuted the claim that affirmative action is a racial privilege.[275] She argued that affirmative action policies do not confer a privileged property interest on racial minorities but instead de-legitimates the property interest in Whiteness.[276]

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271. *See* George F. Will, *The Unintended Consequences of Racial Preferences*, WASH. POST (Nov. 30, 2011), https://perma.cc/8Z48-C74L.

272. Beginning with Cheryl Harris's thought-provoking article, *Whiteness as Property*, a number of scholars have discussed affirmative action using a property-theory lens. *See* 106 HARV. L. REV. 1710, 1769 (1993) (underscoring colorblindness as "the doctrinal mode of protecting the property interest in whiteness . . . in three major affirmative action cases decided by the Supreme Court: *Bakke*, *Croson*, and *Wygant*"); *see also, e.g.*, Jim Chen, *Embryonic Thoughts on Racial Identity as New Property*, 68 U. COLO. L. REV. 1123, 1156 (1997) ("The more race 'counts' as property, the more unacceptable its devaluation at the hands of those who would end affirmative action."); Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. & C.L. 51, 168 (2005) (arguing Justice O'Connor's opinion in *Grutter* carries undertones of "the antebellum South's 'blackness as property' doctrine"); Lyke, *supra* note 24, at 367 ("[C]ourts and educational institutions treat educational diversity as a shared resource with a valuable property interest.").

273. *See* Chen, *supra* note 272, at 1134 ("Affirmative action is fiercely defended precisely because it is perceived as the key to higher education, public employment, and public contracts . . . .").

274. Harris, *supra* note 272, at 1785.

275. *See id.* at 1786 ("[A]ffirmative action does not implement a set of permanent, never-ending privileges for Blacks.").

276. *See id.* at 1785 ("[A]ffirmative action does not reestablish a property interest in Blackness because Black identity is not the functional opposite of whiteness.").

While Harris is correct that affirmative action does not confer racial property interest on minorities, it does appear—at least according to scholars like Leong and Nunn—that the diversity rationale commodifies minority identity.[277] This commodification exploits racial identity (and the minority folk who hold those identities) as servient property interests.[278] Constructing minority racial identity as a commodity furthers exploitation, and one can describe the subjugation of minorities as a kind of dark crafting of race.[279] The goal of affirmative action should be the decommodification of racial identity and the decoupling of property interests from racial identity.

Relying on the work of Margaret Radin, Leong argued that the decommodification of racial identity poses a "transition problem" as society tries to move from the nonideal to the ideal world.[280] Leong argued that

> even if instant decommodification were possible, that prospect raises what Radin terms a "double bind": commodification powerfully symbolizes and legitimates racial hierarchy, yet an immediate, wholesale decommodification of race would freeze existing racial hierarchies as they currently stand. Such instantaneous

277. *See* Leong, *supra* note 28, at 2199–204 (suggesting race "is the subject of commodification and exchange" that "gives others a stake in one's racial identity"); Nunn, *supra* note 28, at 724 (saying that the diversity rationale reduces people of color to "means to an end for white people" and that those benefits flow "one-way").

278. *See* Harris, *supra* note 272, at 1731 ("When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.").

279. Racial commodification is not new. In the instance of Blackness, white supremacist cultural norms and laws have transformed Black bodies and Black identity into value objects (i.e., commodities), starting with slavery in the early seventeenth century Americas and continuing to the present day with mass incarceration. *See* Cecil J. Hunt, II, *Feeding the Machine: The Commodification of Black Bodies from Slavery to Mass Incarceration*, 49 UNIV. BALT. L. REV. 313, 350–51 (2020) ("There is, indeed, a straight historical and causal line of the exploitation of black bodies for private white profit, from Slavery to the Black Codes and convict leasing, to Racialized Mass Incarceration, and finally to Private Prisons."). This Article argues that the way colleges and universities use Black and Latino students' identities is part of this long 400-year arc of dark racecraft and the exploitation that Hunt details.

280. Leong, *supra* note 28, at 2220–21 (internal citation omitted).

> decommodification would leave behind a society stratified along racial lines as the result of past commodification and would offer no way of altering this status quo.[281]

Writing about the commodification of sex work, Radin argued against instant decommodification in favor of market alienability.[282] For Radin, the "double bind" present with the commodification of sex is that, on the one hand, women could earn money and gain forms of autonomy.[283] On the other hand, however, commodified sex work could lead to exploitation.[284] For Radin, complete decommodification of sex work may be impractical and leave some women without a source of economic autonomy.[285] Therefore, she advocated a tactic of incomplete commodification regarding sex work.[286] Incomplete commodification would require decriminalizing sex work (i.e., allowing women to engage in the commodification of sex), but it would mandate bans on exploitative sexual commodification services like pimping and sex recruitment.[287]

Leong applies Radin's approach to the world of racial identity.[288] Leong argued that

> [a]lthough the diversity rationale has reinforced a way of thinking of race as a commodity, it has also had certain material positive effects on the life trajectories of many individuals. To decommodify race immediately and completely would remove a potential tool—flawed, but not

281. *Id.* at 2220.

282. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921–22 (1987) (arguing that, because of current conditions, "prostitution should be governed by a regime of incomplete commodification").

283. *See id.*

284. *See id.* (noting the possible negative consequences of the complete commodification for sex work).

285. *See id.* at 1923.

286. *See id.* (proposing that incomplete commodification of sex work avoids the actual negatives of noncommodification and the possible destructive consequences of complete commodification).

287. *See id.* at 1924 ("At the same time, in order to check the domino effect, we should prohibit the capitalist entrepreneurship that would operate to create an organized market in sexual services . . . .").

288. *See* Leong, *supra* note 28, at 2220–21 (reasoning that due to current conditions and probable unintended consequences, Radin's incomplete commodification theory may be better than complete commodification and non-commodification).

> entirely useless—for addressing lingering social inequality.[289]

She then advocated for a transition period of incomplete commodification where the commodification of minority student identity allows minority students to gain admission into law school.[290] She argued that when universities use minorities for photos to signal their commitment to diversity, universities should compensate students monetarily.[291]

Leong's application of Radin's incomplete commodification approach is flawed because it does not fully appreciate the significant contextual differences between exchanging sex for compensation and identity for compensation. Radin's work is concerned with prematurely ending commodification in sex work and freezing women in a hierarchy where they lack resources and have no immediate mechanism to attain equality.[292] However, the concern of hierarchical freezing does not exist in the context of racial identity and affirmative action. If we stop the commodification of racial identity and end the diversity rationale, affirmative action as a tool can continue if a different compelling government interest—particularly one rooted in equality—is used.[293] Therefore, ending racial commodification need not stop affirmative action or freeze hierarchy in place.

Another question concerning the commodifying nature of diversity is: What happens to affirmative action if society no longer values diversity? There is a lot of research and popular opinion that diversity is a social good.[294] For example, businesses with gender-diverse leadership have better financial

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289. *Id.* at 2221.

290. *See id.* at 2221–22.

291. *See id.* at 2223 (explaining that the outcome of the photo use transactions "expressed the goal of racial equality rather than instantiating racial capitalism").

292. *See* Radin, *supra* note 282, at 1915–17 (stating that both complete commodification and non-commodification of sex work submerge women in an oppressive social status).

293. *See supra* Part II.B.

294. *See* Joann Weiner, *Diversity is Good. Why Doesn't Everyone Agree?*, WASH. POST (Nov. 26, 2014), https://perma.cc/2UED-JMWS (surveying various research studies that show diversity has a positive effect on society).

outcomes than those without diversity.[295] Academic writing with ethnically diverse co-authors has higher ratings on scholarly impact than co-authors with common ethnicity.[296] When Wall Street traders are ethnically diverse, they are more accurate than those who share ethnicity.[297]

Research demonstrates that diversity might not be a valuable resource that enriches social life and that its presence can lead to civic weakness. [298] The work of political scientist Robert Putnam found that greater diversity in a community was associated with declining civic engagement, which was indicated by fewer people voting, volunteering, and donating to charity.[299] What happens to Black and Latino access to educational opportunities if there are enough empirical studies to demonstrate that diversity has downsides and might not be a resource that the state should promote and protect? What if minority individuals cease to be useful? Should affirmative action then end?

Our current system perverts justice by linking the fate of minorities' equal opportunity to whether the state values commodifying Black and Latino identities. A Black student's chances of going to a selective college should never hinge on whether that school values their race or the perspectives that flow from their racial experiences. Instead, schools should place a high value on crafting admissions processes that do not

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295. *See id.* (expounding that companies with at least one woman in a leadership position are worth more on average).

296. *See* Richard B. Freeman & Wei Huang, *Collaborating with People Like Me: Ethnic Co-Authorship Within the US* 17 (Nat'l Bureau Econ. Rsch., Working Paper No. 19905, 2014), https://perma.cc/7366-BYTS (PDF) ("The negative significant coefficients on the Homophily Index for impact factors and citation percentiles in nearly all of the calculations show that greater homophily is associated with publication in lower-impact journals and fewer cites, which presumptively implies that those papers are of lower quality than other papers.").

297. *See* Sheen S. Levine et al., *Ethnic Diversity Deflates Price Bubbles*, 111 PROCS. NAT'L ACAD. SCIS. 18524, 18524 (2014) ("Specifically, in homogenous markets, overpricing is higher as traders are more likely to accept speculative prices.").

298. *See, e.g.*, Michael Jonas, *The Downside of Diversity*, N.Y. TIMES (Aug. 5, 2007), https://perma.cc/GL52-SZFH (summarizing scholarship critiquing diversity as leading to civic weakness).

299. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 49–55 (2000).

discriminate against minority students so that all students can participate in an admissions process free of racial bias.

CONCLUSION

Over the past forty years, affirmative action advocates have participated in a defensive campaign where they have admitted that affirmative action is a form of justified discrimination. This is a dangerous strategy because it allows for the practice of pernicious beliefs about race and remedies for racism. When schools fail to fight the perception that affirmative action is a racial preference, they allow the bulk of society to participate in the belief that affirmative action has no remedial purpose and that we live in a society of institutions that do not have histories of discrimination, or do not engage in current practices of discrimination.

This Article calls for institutions to follow—at least partially—the Court's lead in the *SFFA* decision. Portions of the *SFFA* decision that are critical of the diversity rationale (or at least its means) align with principles of racial equality.

The time has come for advocates of affirmative action to free themselves of the shackles of diversity, abandon the rationale because it is vague, stereotypes, and commodifies racial minorities, and fully embrace equality rationales. Most importantly, however, it is time for advocates to shed diversity because it distracts us from fully embracing and making robust arguments that call for the racial equality of traditionally disadvantaged people.

In future work, it is crucial to think about taking a more offensive approach to white supremacy and the dark arts of racecraft. Future legal research needs to challenge whether college and university admissions are free of racial basis. One step is to collect credible social science evidence that admissions measures, such as grades, standardized testing, and letters of recommendation, are laced with racial bias. Accounting for these biases and providing a remedy for them is paramount in the next chapter of affirmative action.