Students for Fair Admissions: Affirming Affirmative Action and Shapeshifting Towards Cognitive Diversity?

*Steven A. Ramirez**

ABSTRACT

The Roberts Court holds a well-earned reputation for overturning Supreme Court precedent regardless of the long-standing nature of the case. The Roberts Court knows how to overrule precedent. In *Students for Fair Admissions v. Harvard* (*SFFA*), the Court's majority opinion never intimates that it overrules *Grutter v. Bollinger*, the Court's leading opinion permitting race-based affirmative action in college admissions. Instead, the Roberts Court applied *Grutter* as authoritative to hold certain affirmative action programs entailing racial preferences violative of the Constitution. These programs did not provide an end point, nor did they require assessment, review, periodic expiration, or revision for greater institutional efficacy, including possible race-neutral alternatives. The programs also failed to break down stereotypes through the introduction of a critical mass to empower diverse voices. The programs thereby resembled prohibited quotas or racial balancing. As such, the programs at issue violated *Grutter*, which still governs race-based affirmative action in college admissions. More importantly, the Roberts court paved the way for more expansive diversity-based admissions programs by permitting institutions to value individual racial experiences, which authentically further an institution's mission and interests. After *SFFA*, the use of race as a factor could well face time limits. Contrastingly, individualized racial experiences may benefit college applicants at institutions that embrace diversity in an authentic way without facing any time limitation. Further, institutions with distinct missions may value diversity in a race-conscious way but without any racial preference. In sum, the Roberts Court guides the use of race in college admissions toward a race-neutral, diversity-based paradigm such that institutions may still unlock the empirically proven benefits of cultural

* Abner J. Mikva Professor of Law, Loyola University Chicago. Professors Barry Sullivan, Juan Perea and Sheldon Lyke each provided helpful insights to this article. All errors remain mine. Loyola University Chicago School of Law supported this project through a summer research stipend.

diversity with only *de minimus* interference from the courts. This approach rests upon a powerful policy basis that leads to superior innovation, macroeconomic outcomes, social cohesion and, therefore, superior national security for the United States. This approach thus could support a powerful interest convergence.

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INTRODUCTION

In *Students for Fair Admissions v. Harvard*,[1] the Supreme Court of the United States found that race-based affirmative action programs at Harvard University and University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment as well as Title VI of the Civil Rights Act of 1964.[2] The media widely reported that the Court in

1. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

2. *Id.* ("[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives

Students for Fair Admissions (*SFFA*) ruled that all affirmative action plans that took account of race in college admissions similarly violated the Constitution.[3] Even the highly esteemed Nina Totenberg, the veteran Supreme Court reporter at *NPR*, stated: "Chief Justice John Roberts, a longtime critic of affirmative action programs, wrote the decision for the court majority, saying that the nation's colleges and universities must use color-blind criteria in admissions."[4] This Article demonstrates that the Supreme Court's majority opinion leaves affirmative action open in accordance with the Court's prior precedents.[5] Further, the Article shows that the Court lays out a clear roadmap for colleges and universities to pursue expanded cultural or cognitive diversity,[6] furthering the compelling interests

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warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points.").

3. *See, e.g.*, Mark Sherman, *Divided Supreme Court Outlaws Affirmative Action in College Admissions, Says Race Can't Be Used*, ASSOCIATED PRESS (June 29, 2023), https://apnews.com/article/supreme-court-affirmative-action-college-race-f83d6318017ec9b9029b12ee2256e744 [https://perma.cc/WN57-JKAN] ("Chief Justice John Roberts said that for too long universities have 'concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.'"); German Lopez, *The End of Affirmative Action*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/briefing/affirmative-action-supreme-court-decision.html [https://perma.cc/8G9Q-KSVB] ("In a 6-3 decision, the court's six conservative justices declared that colleges' use of race as a factor in student admissions is unconstitutional."); Lawrence Hurley, *Supreme Court Strikes Down College Affirmative Action Programs*, NBC NEWS (June 29, 2023), https://www.nbcnews.com/politics/supreme-court/supreme-court-strikes-affirmative-action-programs-harvard-unc-rcna66770 [https://perma.cc/78MJ-S85C] ("The Supreme Court on Thursday struck down affirmative action programs at the University of North Carolina and Harvard in a major victory for conservative activists, ending the systematic consideration of race in the admissions process.").

4. Nina Totenberg, *Supreme Court Guts Affirmative Action, Effectively Ending Race-Conscious Admissions*, NPR (June 29, 2023), https://www.npr.org/2023/06/29/1181138066/affirmative-action-supreme-court-decision [https://perma.cc/CW7D-VKG8].

5. More expert analyses suggested that because the majority in *SFFA* did not overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court largely left affirmative action in place in higher education. Jeffrey S. Lehman, *Don't Misread* SFFA v. Harvard, INSIDE HIGHER ED. (July 17, 2023), https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion [https://perma.cc/8L8K-CRGN] ("The majority opinion in *SFFA* did not renounce [precedents holding] that universities have a compelling interest in providing such [a diverse learning] environment. . . . Instead of being designed in the manner of Michigan and Texas to break down racial stereotypes, the majority concluded that Harvard and UNC were reinforcing them."); *see also* John Fritze & Alia Wong, *Supreme Court Blocks Use of Affirmative Action at Harvard, UNC in Blow to Diversity Efforts*, USA TODAY (June 30, 2023), https://www.usatoday.com/story/news/politics/2023/06/29/supreme-court-decision-affirmative-action-harvard/11097694002/ [https://perma.cc/V2MZ-FS9S] (quoting Northwestern Professor Paul Anthony Gowder that the ruling is "pretty narrow")

6. Chief Justice Roberts clearly and appropriately divorced race (which always turns on heritable morphological features) from cognitive "experiences" that do not universally affect all raced individuals in the same way. *See Students for Fair Admissions*, 600 U.S. at 230–31. This tracks the approach of researchers of diversity. *See, e.g.*, Yuliya Ponomareva, Timur Uman, Virginia Bodolica & Karl Wennberg, *Cultural Diversity in Top Management Teams: Review and Agenda for Future Research*, 57 J. WORLD BUS. 101328, 1 (2022) (defining cultural diversity as cognitive impacts of culturally

of educational institutions in a robust and sustainable way while helping to dismantle the nation's festering racial hierarchy.[7] In fact, the Court in *SFFA* prescribed a broad avenue for healing America's racial scars for the first time in decades.

More specifically, this Article argues that while the Court in *SFFA* affirmed *Grutter*'s ban on open-ended racial preferences in college admissions, like those at Harvard and UNC,[8] race-based affirmative action cabined in accordance with *Grutter* remains lawful—at least for now.[9] Furthermore, race-conscious pursuit of cultural diversity itself (as its own goal), when tightly tied to a distinct institutional mission, also remains lawful—such that the United States military academies can seek to match our nation's cultural diversity with the officer corps they create.[10] Finally,

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important differences associated with race, ethnicity, nationality) (and authorities cited therein). This Article uses the terms cultural diversity and cognitive diversity to denote differences in perspective or experience arising from racioethnic categorization irrespective of morphological features that define race.

7. Many legal scholars address the meaning of the *SFFA* opinion on affirmative action. *E.g.*, David E. Bernstein, *Racial Classification in Higher Education Admissions Before and After* SFFA, SMU L. REV. (forthcoming) (arguing that *SFFA* imposes a new requirement and stating: "The relevant entities are going to need to show a much closer match between the classifications and the 'compelling' interests they are pursuing than they needed to before *SFSA*."); Bill Watson, *Did the Court in* SFFA *Overrule* Grutter*?*, 99 NOTRE DAME L. REV. REFLECTION 113, 113 (2023) ("in [*SFFA*], the Supreme Court held that affirmative action programs designed to comply with the precedent set in *Grutter v. Bollinger* were unlawful. Yet the Court nowhere said that it was overruling *Grutter* and, in fact, relied on *Grutter* as authority."); Lucy Williams, *American Exceptionalism and/in Affirmative Action*, 56 ARIZ. ST. L.J. (forthcoming 2024) (arguing that "the Court's affirmative action case law draws heavily on the tropes and themes of American exceptionalism" in predictable ways: "Pro-affirmative action Justices typically rely on aspirational exceptionalism, while anti-affirmative action Justices use the accomplished mode;" in *SFFA* "the Court invoked a new mode of exceptionalism—one that is not quite accomplished, not quite aspirational, but somewhere between the two."). This Article is the first to argue that *SFFA* expanded avenues for diversity in college admissions and thereby furthers core policy interests of the United States.

8. *Students for Fair Admissions*, 600 U.S. at 230.

9. *Id.* ("We have never permitted admissions programs to work in that way, and we will not do so today."). "The importance of an end point was not just a matter of repetition. It was the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection. The Court recognized as much: '[e]nshrining a permanent justification for racial preferences,' the Court explained, 'would offend this fundamental equal protection principle.'" *Id.* at 212 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)) (alteration in original).

10. For example, Chief Justice Roberts recognized the "distinct" mission of the United States military academies and excluded them from the scope of the *SFFA* opinion. 600 U.S. at 213 n.4 ("The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. . . . This opinion . . . does not address the issue, in light of the potentially distinct interests that military academies may present."). The military learned during the Vietnam era that a non-diverse officer corps leading a more racially and ethnically diverse enlisted force poses problems and challenges to military efficacy. Thus, the military academies "all currently employ holistic recruiting and admissions policies that consider race—along with many other factors—in an individualized review of applicants." The military academies find this "necessary to achieve the educational and military benefits of diversity." Brief for the United States as Amicus Curiae Supporting Respondent at 13–18, Students for Fair Admissions v. President & Fellows of Harv.

all institutions may authentically[11] pursue cognitive diversity when such race-conscious diversity furthers a given institutional mission through the empirically proven gains in cognition associated with such diversity—ranging from greater innovation to superior group functioning.[12] By permitting the race-conscious pursuit of cultural and cognitive diversity, *SFFA* rests on a powerful policy basis due to the proven cognitive gains associated with an authentic embrace of cultural or cognitive diversity and the challenges facing our nation.[13] Here, the interests of the nation in the general welfare, domestic tranquility, and national defense converge with the interests of disadvantaged college applicants.

On some levels, the Court's opinion in *SFFA* holds an unusual level of inscrutability even for Supreme Court opinions.[14] For example, the

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Coll., 600 U.S. 181 (2023) (No. 20-1199) [hereinafter United States Brief]. Other institutions may also hold distinct interests and missions from Harvard and UNC, as discussed in Part III.

11. Part III will more fully develop the concept that an authentic embrace of diversity centers not on simple racial balancing but creating an environment that facilitates the management of cultural diversity in accordance with emerging best practices. *See, e.g.*, Derek R. Avery, *Setting the Stage for Success: How Participation Diversity Can Help Teams Leverage Racioethnic Diversity*, 49 J. MGMT. 1187, 1187 (2023) (finding new pathways to leverage the power of diversity and minimize racioethnic conflict through participatory diversity management including clarification of roles and responsibilities).

12. *Students for Fair Admissions*, 600 U.S. at 230 ("all parties agree" that colleges and universities may consider individualized racial experiences that authentically support an institution's mission through diversity).

13. *E.g.*, Cristina Quintana-García, Macarena Marchante-Lara & Carlos G. Benavides-Chicón, *Boosting Innovation Through Gender and Ethnic Diversity in Management Teams*, 35 J. ORG. CHANGE MGMT. 54, 62 (2022) ("By studying a panel data of publicly traded US companies, we confirmed that gender and ethnic diversity in management positions produce net positive effects on innovation."); Udo Brixy, Stephan Brunow & Anna D'Ambrosio, *The Unlikely Encounter: Is Ethnic Diversity in Start-Ups Associated with Innovation?*, 49 RSCH. POL'Y 103950, at 10 (2020) ("[I]t is the ethnic unusualness of the firms' stakeholders that matters for innovation. The unusualness of the combination of ethnic backgrounds is robustly related with the probability that a newly founded firm introduces an innovation."); Roger C. Mayer, Richard S. Warr & Jing Zhao, *Do Pro-Diversity Policies Improve Corporate Innovation?*, 47 FIN. MGMT. 617, 618 (2018) ("We find that pro-diversity policies enhance firm value (as measured by Tobin's Q) via their positive effect on innovative efficiency.").

14. *See, e.g.*, Jeffrey Selingo, *How Elite Colleges Will Work Around the Supreme Court's Ruling*, WALL ST. J. (July 5, 2023), https://www.wsj.com/articles/how-elite-colleges-will-still-seek-diversity-despite-the-supreme-courts-rejection-of-affirmative-action-a2c7f340 [https://perma.cc/5VXB-CNU3] (suggesting that the *SFFA* decision leaves elite colleges mechanisms for achieving diversity in admissions); Heather Mac Donald, *Affirmative Action Was Hurting Black Students*, SPECTATOR (July 1, 2023), https://www.spectator.co.uk/article/affirmative-action-was-hurting-black-students/ [https://perma.cc/3XEC-BVD4] (stating that: "Though the future of racial preferences is by no means clear" and "Roberts crippled [affirmative action], he did not exterminate it. He left open a very large loophole, which may well swallow everything else. Colleges can still use what is known in the field as 'holistic admissions.' They can still consider how a student's race shaped his life and character, if the student brings up that effect in his college admissions essay, Roberts wrote."); Peter Wood, *Fair Admissions How the Harvard Case Will (and Won't) Change Higher Education*, NAT'L ASS'N OF SCHOLARS (July 11, 2023), https://www.nas.org/blogs/article/fair-admissions [https://perma.cc/M5BL-XP23] (noting that the Court did not overrule its affirmative action

Justices themselves quarrel within the various concurring and dissenting opinions over the meaning and consequences of the Court's decision.[15] Different Justices, as always, may hold an interest in portraying the majority opinion in more extreme terms.[16] Furthermore, the Roberts Court suffers from the perception that it pays little heed to precedent and actively seeks to pursue its own policy agenda.[17] In fact, many distinguished commentators predicted the Court would strike down affirmative action.[18] Chief Justice Roberts uses a rhetorical framework that may sow confusion by casting *Grutter* as a limited exception to the otherwise absolute bar against racial classifications.[19] All of these factors drive a kind of judicial caricature that seemingly infects the interpretation of the *SFFA* opinion.[20]

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precedents and created new ways that those suffering from racial oppression may achieve college admissions).

15. For example, Justice Thomas wants to portray the opinion as overruling *Grutter* for "all intents and purposes." *Students for Fair Admissions*, 600 U.S. at 287. Justice Sotomayor concurred in this assessment. *Id.* at 318 ("Today, this Court . . . rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits."). Each apparently wished to portray *Grutter* as overruled despite their opposite viewpoints regarding affirmative action.

16. *See supra* discussion accompanying note 15.

17. Ann Telnaes, *The Supreme Court's Crisis of Legitimacy*, WASH. POST. (June 30, 2022), https://www.washingtonpost.com/opinions/interactive/2022/ann-telnaes-supreme-court-crisis-legitimacy/ [https://perma.cc/L6AZ-5MPM] ("Just this term, in addition to eliminating constitutional protection for abortion, the conservative majority lowered the wall of separation between church and state, dramatically expanded the scope of gun rights, and hobbled the ability of regulators to deal with climate change and other challenges.").

18. *E.g.*, Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 852 (2022) (predicting the Supreme Court will strike down affirmative action with six votes).

19. For example, the Chief Justice views racial classifications as prima facie unconstitutional subject to narrow exceptions: "Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application.'" *Students for Fair Admissions*, 600 U.S. at 206 (alteration in original) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

20. Dean Onwuachi-Willig shows that Chief Justice Roberts' majority opinion suffers from predictable and repeated flawed narratives regarding the reality of race and racial mythology in America, our racial history, and judicial mythology in general. *See* Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 241 (2023) ("In *SFFA*, Chief Justice Roberts . . . offered a revisionist and whitewashed narrative about a color-blind Constitution, country, and Court that did not and does not at all comport with the lived realities of people of color in this nation."). This Article simply seeks to highlight pathways forward for institutions seeking to embrace cultural and cognitive diversity productively, without delving into the nature and reality of embedded White Supremacy in the Supreme Court and beyond. *See id.* at 202 ("[T]he [*SFFA*] opinion reflects an unconsciousness of whiteness and the general privileges attached to whiteness; more pointedly, it reveals an unawareness about the unearned advantages that may come to white individuals simply as a result of their race in the admissions process.").

On other levels, the Court in *SFFA* left its prior landmark decision on affirmative action, *Grutter v. Bollinger*,[21] fully intact.[22] It did not overrule any of its precedents.[23] It applied those precedents to find two affirmative action programs, at Harvard and North Carolina, violative of those very precedents—precedents *SFFA* treated as binding authority.[24] Justice Roberts's majority opinion neither overruled prior affirmative action cases nor added any substantive additional requirements not articulated in prior opinions.[25] While two Justices posited that the Court's majority opinion ruled that any consideration of race violated the Constitution, seven Justices said no such thing.[26]

In any event, while some argue or assume that *SFFA* abolished all race-conscious admissions policies[27] or fundamentally changed Supreme Court precedents governing affirmative action,[28] this Article takes the contrary position: *SFFA* expanded opportunities for diversifying American educational institutions.[29] Further, it will show that the majority opinion in *SFFA* ultimately rests upon a compelling policy basis and a powerful interest convergence between the macroeconomic and geopolitical stakes of race in America today and the nation's interest in the general welfare, domestic tranquility, and common defense.[30] Specifically, recent events

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21. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("In summary, the Equal Protection Clause does not prohibit the [University of Michigan School of Law's] narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

22. *E.g.*, Lehman, *supra* note 5 ("The decision in the *Students for Fair Admission* case did not overrule *Grutter*.").

23. "I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education." *Students for Fair Admissions*, 600 U.S. at 311 (Kavanaugh, J., concurring).

24. Watson, *supra* note 7, at 114 ("The Court did decide that Harvard and UNC's admissions programs were unlawful, but it nowhere said that it was overruling *Grutter*. To the contrary, Chief Justice John Roberts's majority opinion relied heavily on *Grutter* as authority, and Justice Brett Kavanaugh wrote separately to 'explain why the Court's decision . . . is consistent with and follows from . . . the Court's precedents on race-based affirmative action.'") (footnote omitted).

25. Some scholars suggest that dicta in the Court's opinion amounts to a holding that colleges and universities must now explain racial categories. *See* Bernstein, *supra* note 7. I will address this point below.

26. *See Students for Fair Admissions*, 600 U.S. at 287, 318.

27. *E.g.*, Jack M. Beermann, *The Immorality of Originalism*, 72 CATH. U. L. REV. 445, 459 n.32 (2023) ("[The Court] has prohibited colleges and universities from considering race in their admissions processes even when it is employed to increase opportunities for historically disadvantaged groups.").

28. *E.g.*, Sean Beienburg & Benjamin B. Johnson, *Black Popular Constitutionalism and Federalism After* The Civil Rights Cases, 65 ARIZ. L. REV. 579, 580 (2023) ("In [*SFFA*], the Court struck down universities' ability to directly factor race into admissions.").

29. *SFFA* left *Grutter* fully intact and gave a green light to efforts to fully embrace cultural and cognitive diversity. *See infra* Part IV.

30. *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that *Brown* reflected the national security needs of the nation);

highlight (i) the fragility of the American Constitutional Republic,[31] (ii) the need to create more cohesive institutions,[32] and (iii) the need to empower the full spectrum of human resources within our nation to meet powerful foreign challenges.[33] According to a bi-partisan Congressional Commission, China and Russia seek to curtail American power and influence and to displace American influence in favor of a far more repressive and authoritarian world order.[34] The Biden Administration concurs, terming these threats as "existential."[35] Currently, China and Russia each use the American racial hierarchy to divide our nation at home and weaken its influence around the world.[36] Recent research suggests they now work in

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Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 123–24, 138 (2003) (book review) (suggesting that national security goals and racial justice may overlap).

31. The fragility of the Republic exacts an increasing cost internationally in ways that undermine our nation's ability to effectively conduct foreign policy. Gideon Rachman, *America and a Crumbling Global Order*, FIN. TIMES (Dec. 4, 2023), https://www.ft.com/content/b42c62f7-57e6-4899-affe-a376cc568d3d [https://perma.cc/4NQ6-CH5K] ("A chaotic and divisive US election—with Trump as the central figure—will contribute powerfully to that impression of US weakness and decline. China, Russia and Iran will relish asking how America can promise to defend democracies overseas, when its own democracy is in so much trouble at home."). I argue below that American political instability arises directly from the legal system's inability to resolve race as a mechanism of social division and a drag on human development in the United States.

32. Steven Simon & Jonathan Stevenson, *The Threat of Civil Breakdown Is Real*, POLITICO (Apr. 23, 2023), https://www.politico.com/news/magazine/2023/04/21/political-violence-2024-magazine-00093028 [https://perma.cc/X7BL-PU3N] ("As the 2024 election approaches, the threat of political violence and civil breakdown is only going to increase. And despite all that U.S. national security and law enforcement officials have learned since Jan. 6, the country is still not prepared for a far-right revolt.").

33. Press Release, Educ. Trust, School Districts That Serve Students of Color Receive Significantly Less Funding (Dec. 8, 2022), https://edtrust.org/press-release/school-districts-that-serve-students-of-color-receive-significantly-less-funding/ [https://perma.cc/YR8T-2CU4] ("Across the country, districts with the most Black, Latino, and Native students receive substantially less state and local revenue—as much as $2,700 per student—less than districts with the fewest students of color.").

34. CONG. COMM'N ON THE STRATEGIC POSTURE OF THE U.S., AMERICA'S STRATEGIC POSTURE 87 (2023) ("China and Russia seek to upend U.S. leadership and further their authoritarian agendas."). The Commission concluded that "while the current posture of the United States remains strong, it is ill-prepared for the potentially existential challenges of 2027–2035 and beyond." *Id.*

35. U.S. DEPT. OF STATE INT'L SEC. ADVISORY BD., REPORT ON DETERRENCE IN A WORLD OF NUCLEAR MULTIPOLARITY 1 (2023), https://www.state.gov/wp-content/uploads/2023/11/ISAB-Report-on-Deterrence-in-a-World-of-Nuclear-Multipolarity_Final-Accessible.pdf [https://perma.cc/W456-LK3M] ("This geostrategic competition is driven, fundamentally, by the ambition of Russian and PRC leaders to alter if not rewrite the global system. As the leaders of Russia and the PRC have consolidated political control through increasing repression, both have sought to justify their authoritarian systems as necessary to protect against purported threats from abroad.").

36. *E.g.*, Curt Anderson, *US Charges 4 Americans, 3 Russians in Election Discord Case*, ASSOCIATED PRESS (Apr. 18, 2023), https://apnews.com/article/russian-interference-florida-elections-americans-charged-32324ddc67b2f32b0cdab13db6f6acb4 [https://perma.cc/4T3N-MUJH] ("Four Americans affiliated with a Black empowerment and political organization have been charged along with three Russians with conspiring to covertly sow discord in U.S. society, spread Russian propaganda and interfere illegally in U.S. elections, according to an indictment unsealed Tuesday."); Michelle Nichols, *U.S. and China Spar Over Racism at United Nations*, REUTERS (Mar. 19, 2021),

concert to sow racial divisions and undermine trust in American institutions.[37]

The United States legal system must respond by opening more opportunity to the most disadvantaged communities in order to fully mobilize America's human resources.[38] Permitting the full embrace of cultural diversity can help do so, and its efficacy rests on a solid foundation of empirical evidence showing that diversity makes us smarter.[39] Ultimately, the Court in *SFFA* decided to allow colleges and universities sufficient latitude to help break down our festering racial hierarchy instead of permitting the social construction of race to splinter and weaken our nation.[40] Long-

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https://www.reuters.com/article/us-usa-china-un-idUSKBN2BB29E/ [https://perma.cc/59Q2-NUA3] ("The U.S. ambassador to the United Nations, who is Black, clashed with her Chinese counterpart on Friday when she described her own experience with racism as a challenge, but said for millions of people in countries like China and Myanmar it was deadly.").

37. *E.g.*, Laura Barrón-López, *Analysis Shows Russian and Chinese-Backed Efforts to Sow Division After Trump Indictment*, PBS NEWS HOUR (Apr. 12, 2023), https://www.pbs.org/newshour/show/analysis-shows-russian-and-chinese-backed-efforts-to-sow-division-after-trump-indictment (citing research showing that China and Russia use social media and other outlets to sow political and racial discord in the U.S.); David Bandurski, *China and Russia Join Forces to Spread Disinformation*, BROOKINGS (Mar. 11, 2022), https://www.brookings.edu/articles/china-and-russia-are-joining-forces-to-spread-disinformation/ [https://perma.cc/RND8-D5QZ] (showing that after invasion of Ukraine, Russia and China acted in concert to spread anti-American propaganda).

38. *See, e.g.*, Steven A. Ramirez, *A Law & Macroeconomics Critique of* San Antonio Independent School District v. Rodriguez, 55 LOYOLA U. CHI. L.J. 485, 494–511 (2023) (demonstrating the macroeconomic costs of underfunded education for disadvantaged children).

39. *E.g.*, Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014), https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/ [https://perma.cc/8MM2-FDDR] ("Diversity enhances creativity. It encourages the search for novel information and perspectives, leading to better decision-making and problem-solving. Diversity can improve the bottom line of companies and lead to unfettered discoveries and breakthrough innovations. Even simply being exposed to diversity can change the way you think.") (and authorities cited therein); *see also* Bas Hofstra, Vivek V. Kulkarni, Sebastian Munoz-Najar Galvez, Bryan He, Dan Jurafsky & Daniel A. McFarland, *The Diversity–Innovation Paradox in Science*, 117 PNAS 9284, 9284 (2020) ("By analyzing data from nearly all US PhD recipients and their dissertations across three decades, this paper finds demographically underrepresented students innovate at higher rates than majority students, but their novel contributions are discounted and less likely to earn them academic positions. The discounting of minorities' innovations may partly explain their underrepresentation in influential positions of academia."); Bedoor K. AlShebli, Talal Rahwan & Wei Lee Woon, *The Preeminence of Ethnic Diversity in Scientific Collaboration*, 9 NATURE COMM. 5163, 5163 (2018) ("[W]e analyze over 9 million papers and 6 million scientists to study the relationship between research impact and five classes of diversity: ethnicity, discipline, gender, affiliation, and academic age. . . . Remarkably, of the classes considered, ethnic diversity had the strongest correlation with scientific impact."); Sheen S. Levine, Evan P. Apfelbaum, Mark Bernard, Valerie L. Bartelt, Edward J. Zajac & David Stark, *Ethnic Diversity Deflates Price Bubbles*, 111 PNAS 18524, 18524 (2014) ("Market prices fit true values 58% better in diverse markets. In homogenous markets, overpricing is higher and traders' errors are more correlated than in diverse markets. . . . [O]ur findings suggest that diversity facilitates friction that enhances deliberation and upends conformity.").

40. "Today, the mainstream belief among scientists is that race is a social construct without biological meaning." Megan Gannon, *Race Is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue/ [https://perma.cc/C6KX-QYTD]. *See also infra* Part IV.

term, the United States needs to maximize the innovative and macroeconomic potential of its human resources to meet these existential challenges.

Consequently, perhaps the most important element of the *SFFA* decision is the Court's recognition that embracing cultural diversity need not entail racial preferences and that universities can pursue cognitive diversity through race-neutral means.[41] Chief Justice Roberts' majority opinion specified that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[42] For example, the majority opinion permits a college or university to rely upon and value a prospective student's manifest determination to overcome racial discrimination.[43] By similar logic, a school may accord an admissions benefit to a student whose individualized racial experience motivated the student to pursue a goal such as a more socially just system of justice or healthcare.[44] The key to such admissions benefits requires the identification of a student's unique ability to contribute to the mission of the university.[45] In other words, the student must be treated based on individualized racial experiences and not on the basis of race.[46] In sum, *SFFA*

41. Race revolves around morphological features and requires assiduous social construction under law. Cultural diversity focuses upon cultural experiences and perspectives that influence cognition. Cultural diversity necessarily entails cognitive diversity not mere racial diversity which always relied upon appearance to categorize (and oppress) individuals. *See* Steven A. Ramirez, *A General Theory of Cultural Diversity*, 7 MICH. J. RACE & L. 33, 37 (2001) ("This Article will show that discrimination based upon cultural insights or experiences is distinct from race discrimination."). Such cognitive diversity often proves to further a given institutional mission. *Id.* at 78 ("Essentially, this Article advocates a conservative retooling of Equal Protection so that discrimination based upon cultural facility or specific cultural expertise is widely permitted.").

42. Students for Fair Admissions v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

43. *Id*. at 230–31 ("A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination.").

44. *Id.* at 231 ("Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.").

45. *Id.* at 230–231.

46. A number of scholars long argued that individualized racial experiences and perspectives differed from race scientifically in that experiences and perspectives entail cognition and race entails superficial heritable characteristics that support the social construction of race. *See, e.g.*, Maureen Johnson, *"That Little Girl Was Me": Kamala Harris and the Civil Whites of 1964 and Beyond*, 44 CARDOZO L. REV. 577, 659 (2022) ("Studies uniformly prove that diversity enhances the educational experience not just for minorities, but for all students, as well as faculty and staff. Accordingly, schools naturally should and do aim for diversity. While it certainly is easier if racial identity is known, other race-neutral methods can accomplish this goal.") (and authorities cited therein); Eboni S. Nelson, Ronald Pitner & Carla D. Pratt, *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2197 (2017) ("[P]rivilege did not catapult many law students of color to law school. Many of them had to overcome the structural inequalities of public education,

suggests that admissions programs that primarily involve racial preferences face difficulty passing strict scrutiny, but race-conscious decisions to pursue cultural or cognitive diversity do not necessarily violate the Constitution.[47] "[A]n inherent benefit in race *qua* race—in race for race's sake" defines the constitutional prohibition according to the majority in *SFFA*.[48]

Part II of this Article will assess affirmative action as it operated under the Court's prior precedents—especially *Grutter v. Bollinger*. Part III will show that *SFFA* specifically permits affirmative action on par with its prior precedents, even while holding that programs at certain schools violated those precedents and opens the door for broad pursuit of cultural and cognitive diversity not based upon race. Part IV will articulate the powerful policy bases for this approach to college admissions that support the Court's majority opinion. The Article concludes that the Court's reaffirmation of its precedents rests on a sound empirical and policy basis while also shaping a new form of pursuing the power of cultural and cognitive diversity in college admissions. This does not diminish the need for affirmative action to address America's festering racial hierarchy; rather, *SFFA* simply represents an adequate (if imperfect) alternative. Unwinding the nation's racial hierarchy will require much more legal reform than *SFFA* and its express recognition of race-neutral means of achieving diversity. However, given the Supreme Court's reluctance to address racial inequities directly, it could form a part of a comprehensive package of anti-racist initiatives that satisfy concepts of race-neutrality while repairing the damage wrought by the nation's racial hierarchy.[49]

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poverty, and race to make it to law school" and "[e]xpanding opportunities for these [meritorious] … students will benefit not only legal education and the legal profession, but also society more broadly."); Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1240–41 (2003) (arguing that enhanced board diversity reduces the perils of groupthink); Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 521 (2001) ("In conclusion, we want to emphasize that these cultural markers are not proxies for race, but rather forward-looking methods to diversify institutions and most effectively incorporate the new diversity in America."); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 87 (2000) ("Put bluntly, the law has thus far failed to comprehend that properly managed diversity can bring merit in a facially neutral fashion, not merely act as a justification for preferential admissions programs or other racial classifications.").

47. *Students for Fair Admissions*, 600 U.S. at 220 ("Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much.").

48. *Id.*

49. *See, e.g.*, andré douglas pond cummings & Steven A. Ramirez, *Roadmap for Antiracism: First Unwind the War on Drugs Now*, 96 TUL. L. REV. 469, 500 (2022) ("[U]nwinding the harm from the [war on drugs] poses the best opportunity for anti-racist progress precisely because of the [war on drugs'] disparate impact on communities of color."); Carla D. Pratt, *Should Klansmen Be Lawyers?: Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 864–67, 909 (2003)

I. WHITHER *GRUTTER?*

The key to understanding the Supreme Court's affirmative action jurisprudence is *Grutter v. Bollinger*, where the Court upheld the University of Michigan's admissions program for its college of law.[50] Twenty years after *Grutter*, the meaning of the decision remains controversial.[51] Prior to *Grutter*, the Supreme Court failed to clarify whether affirmative action programs could comply with the Constitution.[52] After *Grutter*, the Supreme Court only addressed affirmative action in college admissions on a narrow, even *sui generis* basis.[53] *SFFA* relied extensively upon *Grutter* by

("[I]f color-blindness is the goal for our legal system . . . then persons who seek to use color as the basis to deny our citizens of color full participation in and protection under our legal system should be excluded from the bar.").

50. Grutter v. Bollinger, 539 U.S. 306, 343 (2003). In a companion case, the Court struck down the affirmative action program at the University of Michigan governing undergraduate admission because not sufficiently individualized and holistic. *See* Gratz v. Bollinger, 539 U.S. 244, 270, 275 (2003) ("We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.").

51. Some commentators, for example, conclude that the *Grutter* holding comes with a twenty-five-year expiration date. Thomas P. Crocker, *Equal Dignity, Colorblindness, and the Future of Affirmative Action Beyond* Grutter v. Bollinger, 64 WM. & MARY L. REV. 1, 5 (2022) ("*Grutter* established an equality standard good for a projected twenty-five-year period. The Court warned that '[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary.'") (citing *Grutter*, 539 U.S. at 343). Other commentators suggested that *Grutter* imposed excessive burdens on universities attempting to meet market demand for STEM graduates of color. Kevin S. Rabin, Fisher v. University of Texas at Austin*: The Legacy of* Grutter *and the Power of Diversity in Stem Degree Programs*, 18 J. TECH. L. & POL'Y 289, 312 (arguing that without racial diversity in the classroom, STEM students can become homogeneous, closed-minded, and unprepared for a more diverse world, and in "the STEM fields . . . diversity is necessary to foster a truly innovative mind that will push forward technologies and scientific discoveries that will keep the United States' edge over the international community in the twenty-first century."). Others suggest that *Grutter* took too narrow a view of the compelling interests underlying diversity, and should have focused on the needs of our democracy itself to benefit from diverse leadership and a population that appreciates our nation's diversity. Nancy Cantor, *From* Gutter *to* Fisher *and Beyond: The Compelling Interest of Diversity in Higher Learning*, 48 U.S.F. L. REV. 261, 270–271 (2013) ("Diversity in higher education is a compelling national interest because it will determine the fate of our democracy … [due to] the robustness of the nation's talent pool, the legitimacy of the leaders we educate, [and] their ability to work together in diverse groups that stimulate world class innovation.").

52. *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) ("We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment."), *with* Smith v. Univ. of Wash. L. Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) ("The district court correctly decided that Justice Powell's opinion in *Bakke* described the law and would require a determination that a properly designed and operated race-conscious admissions program at the law school of the University of Washington would not be in violation of Title VI or the Fourteenth Amendment.").

53. *See* Fisher v. Univ. of Tex., 570 U.S. 297, 312 (2013) (*Fisher I*) (holding that consideration of race to further diversity at state university must pass "strict scrutiny"; may only proceed in accordance with "educational benefits" to the university; and must be "narrowly tailored" to achieve such educational benefits). Uniquely, the University of Texas combined a holistic affirmative action plan with a policy of admitting any high school graduate in the top 10% of their graduating class across

citing to it as governing authority repeatedly; consequently, understanding *SFFA* requires a firm grip upon the meaning of *Grutter*.

A. An Overview of Grutter

In 2003, the Supreme Court held in *Grutter v. Bollinger*[54] that the limited and holistic use of race in admissions at the University of Michigan's law school (Michigan Law) complied with the Fourteenth Amendment's Equal Protection Clause.[55] As part of its reasoning, the Court effectively endorsed and clarified its splintered 1978 decision in *Regents of the University of California Regents v. Bakke*.[56] *Bakke* held that a "[s]tate has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[57] Justice Powell's controlling opinion recognized that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[58] Powell stressed that: "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[59] In *Grutter*, Justice O'Connor's majority opinion affirmed and extended the Powell opinion from *Bakke*.[60]

Texas. Fisher v. Univ. of Tex., 579 U.S. 365, 377–78 (2016) (*Fisher II*) ("The University's program is *sui generis*. . . .[I]t combines holistic review with a percentage plan. . . . The component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan.").

54. 539 U.S. at 343.

55. *Id.* ("In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

56. *Id.* at 325. ("[F]or the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."). Circuit courts split on the precedential effect of *Bakke*. *Compare* Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001) (Justice Powell's diversity rationale was not the holding of the Court), *with* Smith v. Univ. of Wash. L. Sch., 233 F.3d 1188, 1199 (9th Cir. 2000) (Justice Powell's opinion, including the diversity rationale, constitutes the holding of the Court). Justice O'Connor's majority opinion in *Grutter* found that Powell's opinion in *Bakke* constituted the key fifth vote needed to dissolve the lower injunction against the use of race in admissions. *Grutter*, 539 U.S. at 322–23 ("Justice Powell provided a fifth vote not only for invalidating the set-aside program [at issue], but also for reversing the state court's injunction against any use of race whatsoever."). O'Connor also noted that many higher education institutions modeled their programs upon *Bakke*. *Id.* at 323.

57. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

58. *Id.* at 313 (quoting Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967)).

59. 438 U.S. at 315.

60. 539 U.S. at 325 ("[F]or the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university

Justice O'Connor's analysis begins with a summary of the Michigan Law admissions policy concerning diversity:

> The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."[61]

Michigan Law offered only one compelling state interest in support of its consideration of race: "the educational benefits that flow from a diverse student body."[62]

In order to achieve these pedagogical benefits, Michigan Law sought to enroll a "critical mass" of diverse students.[63] To achieve the benefits of a diverse educational environment, diverse voices must feel empowered to speak up.[64] Given a voice, diverse classmates will often defy stereotypes about any particular group because heterogeneous perspectives within diverse communities will emerge.[65] Justice O'Connor highlighted that this creates superior learning environments rather than simply mirroring

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admissions."); *id.* at 328 ("Today, we hold that the Law School has a compelling interest in attaining a diverse student body.").

61. *Id.* at 315 (internal citations omitted).

62. *Id.* at 328.

63. *Id.* at 306. Notably, diversity in the Michigan Law admissions program cast a broad net far beyond race. *Id*. at 338 (the Michigan Law policy "makes clear '[t]here are many possible bases for diversity admissions,' and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.").

64. *Id.* at 318–19.

65. *Id.* at 333 ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.' To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.") (internal citations omitted). The Law School believed "that when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 319–20.

demographic realities as quotas might.[66] Importantly, the goal of diversity in the classroom under the Michigan Law approach could also be enhanced through diverse backgrounds of white, non-minority students.[67]

Justice O'Connor noted that these educational benefits of diversity enjoyed the support of substantial empirical evidence and expert opinions.[68] The classroom benefits of diversity "are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[69] Military leaders concurred with big businesses and added that consideration of race operated as the only avenue for a qualified and diverse officer corps.[70] Without diverse leaders our military, indeed all of our nation, would suffer a crisis of legitimacy.[71] Law schools, in particular, operate as leadership incubators.[72] As shown below, in Part IV, over the past twenty years the empirical record supporting the value of cognitive diversity strengthened.

The majority concluded that: "the Law School's admissions program bears the hallmarks of a narrowly tailored plan" because it entailed "truly individualized consideration" and "demands that race be used in a flexible, nonmechanical way."[73] Thus, the majority recognized that "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races."[74] Neither race nor any other factor operated in a determinative manner.[75] Instead, Michigan Law limited consideration of race to acting only as a "plus factor."[76]

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66. *Id.* (Michigan Law's "interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin . . .' which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.").

67. *Id.* at 341 ("Because the Law School considers 'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.").

68. *Id.* at 330–31.

69. *Id.* at 330.

70. *Id.* at 331.

71. *See id.* at 332.

72. *Id.*

73. *Id.* at 334.

74. *Id.* at 337. "All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School." *Id.* at 338.

75. *Id.* at 337.

76. *Id.* at 336–37 (internal quotation marks omitted). Justice O'Connor explained:

> When using race as a 'plus' factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an

As such, no candidate for admission enjoyed any insulation from competition with the entire applicant pool, as would occur under a quota.[77] Individualized consideration also precludes the mechanistic award of any sort of bonus due to race.[78]

Consequently, Justice O'Connor found that the Michigan Law program would achieve its goal of breaking down stereotypes and enriching educational discourse in and outside the classroom[79]:

> The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.[80]

Instead of perpetuating stereotypes, the Michigan Law admissions policies specifically aimed at breaking down stereotypes, and its aim held a reasonable and close connection to its means.

Finally, Justice O'Connor credited Michigan Law's commitment to reassess and modify its plan as needed to achieve its goals rather than pursuing its race-conscious policies indefinitely.[81] "[R]ace-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."[82] Michigan Law conceded this point in its own brief.[83] She

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> individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

Id.

77. *Id*.

78. *Id.* at 337.

79. *Id*. at 319 ("[T]he Law School seeks students with diverse interests and backgrounds to enhance classroom discussion and the educational experience both inside and outside the classroom.").

80. *Id.* at 333 (internal citations omitted).

81. *Id.* at 343 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.").

82. *Id.* at 342.

83. *Id*.

continued, saying: "In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[84] Given evidence that minority test scores and GPAs were increasing, Justice O'Connor stated that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" at Michigan Law.[85] Thus, she concluded that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[86] As such, the Michigan Law admissions program passed strict scrutiny and did not run afoul of the Equal Protection Clause.

Thirteen years later, in *Fisher v. University of Texas*,[87] the Supreme Court affirmed *Grutter* in a limited way.[88] Texas used an affirmative action plan to supplement its Top Ten Percent Law, which granted admission to all those graduating in the top ten percent of a Texas high school.[89] Justice Kennedy, writing for the Court, stated that "the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"[90] The Court noted that the plaintiff suffered more limited harm based upon race due to the Top Ten Percent Plan.[91] Justice Kennedy closed his opinion by emphasizing a key point from *Grutter*: "The Court's affirmance of the [Texas] admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies."[92]

Importantly, the University of Texas affirmative action plan relied upon a holistic review of each applicant and used a "personal achievement

84. *Id.*

85. *Id.* at 343.

86. *Id.*

87. 579 U.S. 365, 388 (2016) (*Fisher II*).

88. *Id.*

89. *Id.* at 370–72 ("As its name suggests, the Top Ten Percent Law guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class. Those students may choose to attend any of the public universities in the State.").

90. *Id.* at 381 (quoting Fisher v. Univ. of Tex., 570 U.S. 297, 310 (2013) (*Fisher I*)).

91. The Court noted that because the University admits students graduating in top 10% of their high school class, the plaintiff failed to qualify for three-fourths of the available slots for the freshman class. *Id.* at 378.

92. *Id.* at 388.

index" (PAI), which included a variety of race-neutral factors to assess each candidate for admission regardless of that candidate's race.[93] The Court allowed the consideration of race as a plus factor to address perceived short-comings in the otherwise race-neutral PAI to achieve a "critical mass" of diverse voices in the classrooms of the University.[94] The plaintiffs in *Fisher* challenged the addition of race as a plus factor after 2004.[95] The Court initially passed upon the ultimate disposition of the constitutional challenge to the post-2004 program and remanded to the lower court to apply strict scrutiny in *Fisher I*.[96] In *Fisher II*, the majority opinion affirmed the Fifth Circuit's finding that the Texas affirmative action program complied with *Grutter*.[97] It further noted, however, that the presence of the Ten Percent Plan at Texas rendered its opinion in the case "*sui generis*."[98]

B. Grutter *Turning 25*

Justice O'Connor stated in the *Grutter* majority opinion that the Court "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[99] Dean Johnson's contemporaneous observation that "[r]acism has existed for centuries in the United States and, although the most blatant forms of racial discrimination have been declared unlawful, racism's legacy has proven extremely difficult to remedy" demonstrates that Justice

93. *See Fisher I*, 570 U.S. at 304. The Court stated:

> This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address . . . minority enrollment . . . the University also expanded its outreach programs.

Id.

94. *Id.* at 306.

95. *Id.* The Court explained:

> To implement the [2004] Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Id.

96. *Id.* at 314–15.

97. Fisher v. Univ. of Tex., 579 U.S. 365, 388 (2016) (*Fisher II*).

98. *Id.* at 377–78 ("The University's program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan.").

99. 539 U.S. 306, 310 (2003).

O'Connor's expectation rested on an unreasonable foundation.[100] Johnson suggests that the Court's own precedent permitting states to underfund educational funding for children of color would foreseeably sabotage O'Connor's dicta regarding her twenty-five-year expectation.[101] In fact, twenty years later, neither the Court nor any other national authority requires equal educational funding across school districts, which predictably leaves children of color at a 20% per annum educational funding disadvantage.[102] Further elements of America's enduring racial hierarchy continue unabated, testing the determination, courage, and resilience of children of color regarding academic performance, including childhood poverty, racial disparities in health care, trauma related to mass incarceration, and single-parent households.[103]

More fundamentally, even if Justice O'Connor could exercise clairvoyance on racial conditions twenty-five years into the future,[104] the Court only holds "judicial power" under the Constitution to resolve "cases and controversies" between specific litigants.[105] Under the Constitution, it cannot legislate, bind future litigants of unknown identity, or influence future

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100. Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172–173 (2004) ("At first blush, the Court's pronouncement seemed overly optimistic, if not woefully out of place in a judicial opinion.").

101. *Id.* at 173 ("A crisis exists in the public elementary and secondary schools, which are racially segregated with a disproportionate number of minority children attending poorly financed schools.").

102. Ramirez, *supra* note 38, at 538 (citing studies showing dramatic funding disparities within states favoring White students over students of color to the tune of $150 billion per annum).

103. *Id.* at 536.

104. Professor Johnson notes:

> [T]he argument could be made that the Supreme Court lacked the institutional competence to arbitrarily create a time limit that is the legitimate province of the political branches. In this vein, Justice O'Connor, writing for the majority in *Grutter*, offered precious little justification or reasoning for the 25-year limit, but simply declared it to be.

Johnson, *supra* note 100, at 174.

105. This limitation dates to the Washington Administration:

> [J]udicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law.

Muskrat v. United States, 219 U.S. 346, 361 (1911). Muskrat relied in part upon an unreported decision by Chief Justice Jay declining to issue an advisory opinion to President Washington at the request of Thomas Jefferson:

> In 1793, by direction of the President, Secretary of State Jefferson addressed to the justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the Executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which '*do not give a cognizance of them to the tribunals of the country*.'

Id. at 354.

courts to adjudicate imagined disputes.[106] Future Supreme Courts certainly do not treat dicta from the past as binding and can simply rule that expected circumstances failed to materialize.[107] At the very least, such an exercise of judicial power (as opposed to legislative power) lacks any precedential foundation and appears gratuitous and even oxymoronic.[108] After all, if a given precedent limits itself to twenty-five years, then after twenty-five years, the holding would no longer hold any precedential weight.[109] It would simply invite re-litigation of the issue.[110] Viewed in this light, the *Grutter* dicta regarding affirmative action merely resembles no more than an expectation or prediction with no precedential value.[111] Certainly it cannot operate as an advisory opinion on a future imagined dispute binding upon future litigants not yet involved in any case or controversy.[112]

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106. *Id.*; *see also* J. SAMUEL MILLER, ON THE CONSTITUTION 314 (1891) (judicial power extends only to the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision").

107. The current Court greatly destabilized the doctrine of *stare decisis* such that even the holding of *Grutter* holds only very limited precedential value. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 261 (2022) ("We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."); Citizens United v. Fed. Election Comm'n, 558 U. S. 310 (2010) (finding bar on corporate electioneering under the Bipartisan Campaign Reform Act of 2002 violative of the First Amendment and overruling Austin v. Mich. Chamber of Com., 494 U.S. 652 (1990), and partially overruling McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)).

108. *See* David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 441, 482 (2020) (noting that judicial precedents "are meant to be 'sticky' by design" and "have binding effect unless and until they are overturned").

109. In other words, Justice O'Connor could not and did not rule that Michigan Law prevails but only for 25 years. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

110. Nor did Justice O'Connor rule that in 25 years the plaintiff could be admitted to Michigan Law. *Id.*

111. According to Professor Schraub:

> [T]he core mistake in Justice O'Connor's *Grutter* sunset—it declares its *expectation*, not just that the circumstances regarding racial inequality in America will change, but that they will change in a specific *direction* and *magnitude* such that affirmative action will not be necessary after twenty-five years. While Justice O'Connor had ample foundation to assume that the relevant facts about racial inequality could change in important ways over this time period, she had little basis to know that they will get better versus worse, much less sufficiently better so as to venture a prediction regarding affirmative action's future validity. It would have been better in these circumstances to note the need to reassess the case in twenty-five years without prejudging the direction the facts will take.

Schraub, *supra* note 108, at 497 (footnote omitted).

112. *See, e.g.*, Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948). The Court noted that:

> To revise or review an administrative decision, which has only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early

More soundly, the twenty-five-year period, created and expounded in a single sentence of the Court's opinion in *Grutter*, should relate only to the relevant party to the litigation at hand—Michigan Law.[113] In other words, Justice O'Connor's expectation related to Michigan Law's need for race-based diversity after twenty-five years.[114] This construction eliminates any concerns regarding possible advisory opinions or, worse, attempting to bind future imagined parties without any notice or opportunity to be heard.[115]

Linguistically, the sentence concludes an entire paragraph that focuses exclusively upon the efforts of the University of Michigan School of Law (a party to the litigation) to replace a racial classification with race-neutral ways to achieve its compelling state interest of a diverse educational environment.[116] As such, the twenty-five-year period that Justice O'Connor constructs and fabricates from thin air exists as a guideline to the parties of the litigation that narrow-tailoring requires Michigan Law to monitor and revise its affirmative action plan accordingly.[117] This interpretation finds further support in the *Fisher II* opinion, where Justice Kennedy expressly enjoined the University of Texas to continue and to monitor and adjust its affirmative action going forward, but made zero mention of any twenty-five-year time limit from *Grutter*.[118]

The next part of this Article will assess the impact of *SFFA* upon the authority of *Grutter* to permit colleges and universities to use race as one factor among many to achieve a critical mass of diverse voices in the classroom as well as the construction that the *SFFA* Court places upon the twenty-five-year language from *Grutter*. It will also assess the *SFFA* Court's recognition of the key role that an institution's mission plays in the assessment of a race-based affirmative action plan. More importantly, it will assess the new explicit permission the Court grants to institutions to pursue cultural diversity through valuing important mission-focused diverse perspectives and experiences.

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and wisely determined that it would not give advisory opinions even when asked by the Chief Executive.

Id. at 113.

113. *See* 539 U.S. at 343.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 388 (2016) ("The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.").

II. *SFFA*: UPHOLDING *GRUTTER* AND PERMITTING THE USE OF INDIVIDUALIZED RACIAL EXPERIENCES

The Roberts Court earned its reputation as a deeply partisan, political, and activist Court.[119] It ignores statutory text and routinely rewrites statutes in accordance with its own political preferences.[120] It insists upon vindicating libertarianism as its sole judicial norm[121] while overturning long-standing precedent to serve the political needs of conservatism.[122] As previously noted, this could influence expectations and reactions to the *SFFA* decision.

Yet in *SFFA*, Chief Justice Roberts, writing for the Court, stated the holding of the case in rather narrow terms: the Court reversed lower court opinions upholding the Harvard and University of North Carolina affirmative action plans for admissions and found those regimes unconstitutional.[123] Roberts gave four reasons for his assessment: "the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause [because] [b]oth programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[124] Far from abandoning or limiting the framework for assessing affirmative action, Roberts applied that framework to strike down the North Carolina and Harvard admissions programs.

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119. According to Professor Eric Berger:

> [T]he Roberts Court sometimes interprets statutes with barely a nod to their texts. This trend is especially evident in recent cases involving highly politicized policies. In *National Federation of Independent Business (NFIB) v. Occupational Safety and Health Administration (OSHA)*, *West Virginia v. Environmental Protection Agency (EPA)*, and *Brnovich v. Democratic National Committee (DNC)*, the Supreme Court steered around broad statutory language to limit important federal programs. In so doing, the Court significantly curtailed the federal government's ability to tackle serious problems.

Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 481 (2023) (footnotes omitted).

120. *Id.* at 485 ("Viewed through any legal lens—statutory texts, constitutional doctrines, or constitutional canons of statutory interpretation—these cases reflect an unusually activist Court.").

121. *Id.* at 559 ("The cases also help advance conservative ideological goals more generally. Republicans today view skeptically the notion that government—especially the federal government—can ameliorate society's problems. The decisions, therefore, channel the contemporary Republican Party's libertarian agenda.").

122. *See, e.g.*, *supra* note 107; Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 53 (2022) ("[T]he Roberts Court does not appear to consider itself particularly bound by stare decisis. As a case in point, the Court in *Dobbs* was willing to discard a precedent that had existed for nearly half a century.").

123. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230 (2023).

124. *Id.*

A. Students for Fair Admissions *Applies* Grutter *as Authoritative*

A careful reading of *SFFA* reveals that Justice Roberts's majority opinion does not alter *Grutter* but rather endorses it as the authoritative approach to affirmative action. The opinion shows great deference and reliance on *Grutter* in its reasoning, and it strikes down Harvard and UNC's using the test in *Grutter*. In the first mention of *Grutter* in *SFFA*, Justice Roberts's majority opinion recognizes that *Grutter* and *Fisher* exemplified exceptions to the requirement of the Equal Protection Clause of color-blind government action.[125] In the second mention of *Grutter*, Chief Justice Roberts recognizes that *Grutter* determined that Justice Powell's opinion in *Bakke* served as "the touchstone for constitutional analysis of race-conscious admissions policies."[126] In the next two citations to *Grutter*, the Court's *SFFA* opinion recognizes that Justice O'Connor, writing for the Court in *Grutter*, "endorsed" Justice Powell's opinion in *Bakke* as if it constituted "binding precedent" even though circuit courts previously split on this question.[127] This reliance on *Grutter* suggests strongly that *Grutter* remains the foundational authority on the constitutionality of a given affirmative action program; in fact, the sheer volume of quotations and citations to *Grutter* logically implies that the majority in *SFFA* view *Grutter* as authoritative on affirmative action instead of limited in any material way.[128] Further, in its opening paragraphs addressing affirmative action, the Court's opinion cites the entire trilogy of Supreme Court rulings—*Grutter*, *Fisher*, and *Bakke*—addressing affirmative action in college admissions as authority and with seeming approval.[129] Harvard and UNC each clearly ran afoul of *Grutter*, and thus, violated the Constitution.[130] At

125. The majority opinion stated:

> "[T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." "If both are not accorded the same protection, then it is not equal. Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as "strict scrutiny." Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest.

Id. at 206–07 (citations omitted) (citing *Bakke*, *Grutter*, and *Fisher* with approval).

126. *Id.* at 208 (quoting Grutter v. Bollinger, 539 U.S. 306, 323 (2003)).

127. *Id.* at 211.

128. In fact, the majority opinion cited to *Grutter* countless times as governing authority. *See id.* at 207–27.

129. *See Students for Fair Admissions*, 600 U.S. at 206–09.

130. *Id.* at 213 ("[W]e . . . permitted race-based admissions only within . . . narrow restrictions. University programs must . . . never use race as a stereotype or negative, and—at some point—they must end. Respondents'. . . fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause.").

no point in the majority opinion does Chief Justice Roberts even suggest any limitation of, much less overruling, any part of *Grutter*.[131]

The Harvard and North Carolina affirmative action plans failed under the Supreme Court's framework for race-based admissions plans under *Grutter*, *Fisher*, and *Bakke*, not due to any new requirement.[132] For example, the *Grutter* opinion relied upon the concept of "critical mass" to support the creation of a diverse learning environment and to break down stereotypes on campus.[133] Shockingly, Harvard and UNC did not even discuss or apparently comprehend that concept, instead appearing to want to achieve a level of racial balance untethered to the notion that a critical mass of diverse voices empowers students to voice diverse experiences and perspectives.[134] As such, the programs appeared more concerned about racial balancing than unlocking the benefits of a diverse learning environment.[135] The majority found that both Harvard and UNC targeted certain levels of racial composition regardless of achieving critical mass.[136]

Further, this meant categorizing applicants by race and giving some students beneficial treatment based solely on race that other students did not qualify for and could not compete for;[137] Harvard and UNC both categorized applicants by race and allowed some students to benefit from their race and others to suffer a negative based on their race.[138] This flagrantly violated yet another element of the plan approved of in *Grutter*: that any benefit for diversity arising from race be competitively achieved against

131. *See supra* notes 123–129.

132. *See id.*

133. *Grutter*, 539 U.S. at 306 ("By enrolling a 'critical mass' of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession.").

134. *Students for Fair Admissions*, 600 U.S. at 228 ("But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means.") (citations omitted).

135. *Id.* at 223 ("The problem with these approaches is well established. '[O]utright racial balancing' is 'patently unconstitutional.'").

136. *Id.* "To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, while Harvard likewise 'guard[s] against inadvertent drop-offs in representation' of certain minority groups from year to year." *Id.* at 215–16.

137. *Id.* at 216. ("[T]he universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American."). The Court did not outlaw racial categorization *per se*; however, the use of racial categories must rationally harmonize with an institution's mission and means for achieving that mission. It cannot randomly assign categories nor force students into categories.

138. *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. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that 'a black student can usually bring something that a white person cannot offer.'").

applicants offering other dimensions of diversity.[139] In fact, neither institution worked much to comply with the *Grutter* framework, as will be further evidenced in the next section.

B. Students for Fair Admissions *and Time Limits*

SFFA's discussion of time limits exposed how the Harvard and UNC programs failed because they did not meet the *Grutter* standards, not because *Grutter* put a time limit on all race-based affirmative action. Commentators long ago recognized that affirmative action plans should face time limits and periodic review,[140] as Justice O'Connor articulated in *Grutter*.[141] Again, shockingly, neither the Harvard nor the North Carolina affirmative action programs featured these manifestly obvious requirements.[142] "This requirement was critical, and *Grutter* emphasized it repeatedly."[143] Chief Justice Roberts's majority opinion cites to *Grutter* no less than five times to emphasize how time limits must operate to mitigate the harm of any race-based government action.[144] More specifically, affirmative action programs must remain subjected to "continuing oversight" so

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139. *Compare Students for Fair Admissions*, 600 U.S. at 218 ("[O]ur cases have stressed that an individual's race may never be used against him in the admissions process."), *with* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. . . . Universities can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."), *and Grutter*, 539 U.S. at 334 ("In other words, an admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"). Harvard and UNC easily could avoid this defect in their admissions process by awarding each applicant a diversity score on a competitive basis.

140. *See, e.g.*, Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 611 (2002) ("Narrow tailoring requires that [an affirmative action] program be limited in time . . . . I am not aware that college or university plans include time limits, but they should, either by imposing a termination date or requiring periodic reviews of the need for affirmative action."); Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms*, 16 YALE L. & POL'Y REV. 59, 106 (1997) (stating that affirmative action programs with no time limit are "prima facie invalid" and that such limits facilitate regular political review and prevent the perpetuation of unnecessary racial preferences); *see also* Charles F. Abernathy, *Federalism and Anti-Federalism as Civil Rights Tools*, 39 HOW. L.J. 615, 626–30 (1996) ("[T]here must be some time limit on the benefits that are to be reallocated pursuant to a curative rationale. Otherwise, the benefits of the curative decree fall increasingly on a set of persons who are new to schooling and thus never actually suffered the harms of the school board's past segregation.").

141. *Grutter*, 539 U.S. at 342–43.

142. *Students for Fair Admissions*, 600 U.S. at 212. "Twenty years later, no end is in sight. 'Harvard's view about when [race-based admissions will end] doesn't have a date on it.' Neither does UNC's. Yet both insist that the use of race in their admissions programs must continue." *Id.* at 213 (citations omitted).

143. *Id.* at 212.

144. *Id.* ("[I]t cautioned that all 'race-based governmental action' should 'remai[n] subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.'") (alteration in original) (quoting *Grutter*, 539 U.S. at 342).

that courts know "when [the goals] have been reached, and when the perilous remedy of racial preferences may cease."[145] Harvard did not materially modify its affirmative action plan for over fifty years, and UNC admitted that in the future it intended to increase its reliance on race.[146] This approach of arrogant adherence to race-based affirmative action without assessment, modification, or any realistic probability of curtailment brazenly runs afoul of the Michigan Law approach approved of in *Grutter*.[147]

Otherwise, the Court in *SFFA* never intimated that the *Grutter* holding somehow imposed a time limitation on the use of race in college admissions through Justice O'Connor's expectation in dicta that the Michigan Law would no longer need to consider race in twenty-five years.[148] Chief Justice Roberts quoted *Grutter* with approval regarding the twenty-five-year limit.[149] Thereafter, Chief Justice Roberts refers to the twenty-five-year suggestion in a paragraph that applies the concept to the actual affirmative action programs under consideration before the Court—Harvard and UNC.[150] In fact, Justice Roberts seems to diminish the twenty-five-year suggestion rather than elevate it to a holding: "The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. That expectation was oversold."[151] On this point, the Chief Justice hits the mark: as demonstrated below, race bedevils the nation more, or as much as, now than twenty-five years ago.

In his concurring opinion, Justice Kavanaugh canvasses the comments of other Justices in *Grutter* with respect to the twenty-five-year expectation.[152] He concludes (in a concurring opinion that no other Justice

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145. *Id.* at 212, 214 (quoting *Grutter*, 539 U.S. at 341–42).

146. *Id.* at 225. Specifically, the Court stated,

> Harvard concedes that its race-based admissions program has no end point. And it acknowledges that the way it thinks about the use of race in its admissions process "is the same now as it was" nearly 50 years ago. UNC's race-based admissions program is likewise not set to expire any time soon—nor, indeed, any time at all. The University admits that it "has not set forth a proposed time period in which it believes it can end all race-conscious admissions practices." And UNC suggests that it might soon use race to a *greater* extent than it currently does. In short, there is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

Id. (citations omitted).

147. *See supra* notes 99–118.

148. *See supra* notes 121–131 and accompanying text.

149. *Students for Fair Admissions*, 600 U.S. at 213 ("*Grutter* thus concluded with the following caution: 'It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.'").

150. *Id.* at 224–25.

151. *Id.* at 224 (citation omitted).

152. *See id.* at 312–13.

joined) that the twenty-five-year expectation expressed in *dicta* somehow limits *all* college affirmative action programs, even while implicitly recognizing it did not constitute a part of the *Grutter* holding.[153] Even Justice Kavanaugh, however, recognizes that *Grutter* could (arguably) authorize affirmative action programs in college admissions until the collegiate class of 2032 and that college admissions officers could continue to rely upon *Grutter* for five more years.[154] It is noteworthy that, failing to impose any sunset date, Harvard and UNC could hardly contest whether and when *Grutter* may require an end to their programs, which explains the lack of arguments in favor of any particular deadline for affirmative action plans.[155]

C. The Critical Importance of Distinct Interests and Mission

Mission for any race-based admissions program critically influences the program's constitutionality, and Universities may select their own mission.[156] In an example of the power of mission, in footnote 4 of the Court's *SFFA* opinion, Chief Justice Roberts carves out the United States military academies from the applicability of the *SFFA* decision.[157] Chief Justice Roberts stated:

> The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however,

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153. *See id.* at 316 ("In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter's* explicit temporal limit on the use of race-based affirmative action in higher education."). This statement seemingly approves of Justice O'Connor's adventure in legislating rather than resolving disputes.

154. *Id.* at 316 n.1. Justice Kavanaugh stated:

> The Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted. Some might have debated how to calculate *Grutter*'s 25-year period—whether it ends with admissions for the college class of 2028 or instead for the college class of 2032. But neither Harvard nor North Carolina argued that Grutter's 25-year period ends with the class of 2032 rather than the class of 2028. Indeed, notwithstanding the 25-year limit set forth in Grutter, neither university embraced any temporal limit on race-based affirmative action in higher education, or identified any end date for its continued use of race in admissions.

Id.

155. *Id.*

156. Chief Justice Roberts wrote:

> The key is a fit between the mission and the means of reflecting that mission in admissions: Universities may define their missions as they see fit. . . . Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."

Id. at 217 (alteration in original).

157. *Id.* at 213 n.4.

> and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present.[158]

No justice took issue with this statement and its effective carve-out of military training academies.[159] This focus on "distinct interests" arises from the fundamentally different mission of the military academies, beyond simply providing higher education—that is, the common defense of the United States and providing leadership for an effective fighting force.[160] This amounts to the first express judicial recognition that mission matters when it comes to affirmative action.

The United States Department of Defense (among other instruments of U.S. foreign policy) desperately needs cultural and cognitive diversity to secure the common defense of the American people. The United States argued in its *amicus* brief to the Court that (in sum): The Nation's military leaders, for example, have learned through hard experience that the effectiveness of our military depends on a diverse officer corps that is ready to lead an increasingly diverse fighting force. The Armed Forces thus rely on *Grutter* both in admitting students to West Point and the Nation's other military academies and in recruiting officers from civilian universities like Harvard. Other federal agencies likewise depend on diversity in our Nation's universities to recruit highly qualified graduates from all segments of society who are equipped to succeed in diverse environments. And the educational benefits of diversity are validated by recent scholarship confirming the academic and civic benefits of racial diversity on university campuses.[161]

According to the United States: "During the Vietnam War, for example, the disparity between the overwhelmingly white officer corps and highly diverse enlisted ranks 'threatened the integrity and performance of the military.'"[162] Racial conflicts, unrest, and near-riots disrupted military operations on the battlefield, aboard ships, and at military installations.[163]

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158. *Id.*

159. The military carve-out triggered a prompt court action. *See* Erin Gretzinger, *The Supreme Court Excluded Military Academies from Its Admissions Ruling. Now SFFA Is Challenging It*, CHRON. HIGHER EDUC. (Sept. 19, 2023), https://www.chronicle.com/article/the-supreme-court-excluded-military-academies-from-its-admissions-ruling-now-sffa-is-challenging-it [https://perma.cc/FCV9-ALMY]. The Supreme Court declined to address the constitutionality of the military academies affirmative action plans. Students for Fair Admissions, Inc. v. U.S. Mil. Acad., 144 S. Ct. 716 (2024).

160. United States Brief, *supra* note 10, at 11–14.

161. *Id.* at 12.

162. *Id.* at 13–14 (quoting MIL. LEADERSHIP DIVERSITY COMM'N, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY xvi (2011)).

163. *Id.* at 14–15. A host of senior military leaders joined the arguments of the United States in a separate *amicus* brief. Brief of Adm. Charles S. Abbot, Adm. Dennis C. Blair, Gen. Charles F.

Furthermore, unless our nation proactively addresses race, our enemies will use racial discord to defeat us—including by undermining the cohesion of our armed forces.[164]

Fifty-seven Catholic colleges and universities similarly filed a brief, arguing that they collectively held a distinct interest not shared by Harvard and UNC: "Catholic colleges and universities seek diversity in their student bodies, including racial diversity, not only to serve their academic mission but also to advance their religious mission. Catholic teachings emphasize the dignity of each individual and the importance of service to the underrepresented."[165] While Chief Justice Roberts did not address the point, the logic of his approach to the military academies holds with respect to the point raised by the Catholic colleges and universities: they were not parties to the litigation, none of the lower courts addressed the propriety of their race-based admissions systems, and they hold distinct interests from secular institutions because of their religious missions.[166] These institutions present claims for freedom of religion to pursue their unique religious missions in addition to claims raised in favor of racial diversity by other educational institutions.[167]

Other institutions, or other units of educational institutions, may fit the bill that Chief Justice Roberts and the entire Court laid out in footnote four. In 2003, the Court approved the Michigan Law affirmative action program while striking down the University of Michigan undergraduate affirmative action program, illustrating that each unit of an educational institution may implement variable affirmative action programs based upon the context each unit faces.[168] The key takeaway here: institutions or units of institutions with distinct missions from the general education

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Bolden, Jr., Gen. Thomas P. Bostick, Gen. Vincent K. Brooks, Adm. Walter E. Carter, Jr., et al., as Amici Curiae in Support of Respondents at 1, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023) (No. 20-1199) ("*Amici* include . . . four Chairmen of the Joint Chiefs of Staff; Chiefs of Staff of the Army and the Air Force; Chief of Naval Operations of the Navy; Commandant of the Marine Corps; Medal of Honor recipients; and other military leaders.") [hereinafter Military Brief].

164. *See supra* notes 10, 34–37; *infra* Part IV.

165. Brief of Georgetown University, Boston College, the Catholic University of America, College of the Holy Cross, DePaul University, Fordham University, Marquette University, University of Notre Dame, Villanova University and 48 Additional Catholic Colleges and Universities as Amici Curiae in Support of Respondents at 12–13, 20, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023) (No. 20-1199) [hereinafter Catholic Universities' Brief].

166. *See supra* note 158.

167. Catholic Universities' Brief, *supra* note 165, at 13 ("[A]s to Catholic colleges and universities . . . racial diversity in admissions additionally serves a compelling interest in freedom of religious practice and expression that is grounded in the First Amendment's Free Exercise Clause.").

168. *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding Michigan Law affirmative action program), *with* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down University of Michigan undergraduate affirmative action program).

mission of Harvard and UNC arguably are not bound by the *SFFA* decision due to their distinct mission.[169] For instance, the military argued that it depends not only upon the service academies for its corps of officers but also on ROTC programs, and any distinction between ROTC admissions programs and service academy admissions would be difficult to rationalize.[170] Institutions relying upon this avenue should not duplicate the racial preferences that Harvard and UNC employed.[171] They should instead follow the Court's approach in *Grutter*.[172] The key value to pursue revolves around individualized assessment of true cultural and cognitive diversity for each applicant rather than "race in itself."[173] Mission must be tied to the race-conscious admissions effort as tightly as possible.

It could take years for the courts to sort out the meaning of footnote four. Chief Justice Roberts did not provide any detail or substantial analysis to the Court's carve out. As explained in the next Section, the pursuit of cognitive diversity based upon culturally significant differential experiences and perspectives will not run afoul of Supreme Court scrutiny. In fact, so long as culturally significant experiences and perspectives can contribute to a given institutional mission, then such experiences and perspectives act as meritorious contributions, as discussed next.

D. Students for Fair Admissions *and Individualized Racial Experiences*

Perhaps the most significant part of Chief Justice Roberts's opinion revolves around his discussion of racial experiences. The majority opinion in *SFFA* finds value in diverse cognitive experiences and perspectives, which differ from race's focus on morphological features. The majority opinion in *SFFA* made this clear (without dissent), stating that:

> A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a

169. One expert in military leadership contends that the Court will need to expand the scope of footnote four to fully vindicate the need for a pipeline of able military leaders because the military recruits from colleges across the country and military efficacy is tied to economic performance which also demands diverse leadership. Jill Goldenziel, *Supreme Court Misunderstands Service Academies' 'Distinct' Diversity Interests*, FORBES (June 30, 2023), https://www.forbes.com/sites/jillgoldenziel/2023/06/30/supreme-court-misunderstands-service-academies-distinct-diversity-interests/?sh=349da18b6425 [https://perma.cc/EFT9-ZZ8J].

170. Military Brief, *supra* note 163, at 15 ("ROTC provides military education and training as well as scholarships, which include full tuition for up to four years in exchange for a five-year post-graduation service commitment. In fiscal year 2019, approximately 36% of active-duty officers were ROTC-commissioned.").

171. *See* discussion accompanying *supra* notes 134, 139, 142.

172. Critically, both the military and the Catholic Universities proclaim adherence to the holistic and individual assessment of diversity contributions of all applicants. *See* Catholic Universities' Brief, *supra* note 165, at 12; United States Brief, *supra* note 160, at 12.

173. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 220 (2023).

> benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[174]

Focusing on an individual's personal experience with race rather than race per se allows higher education institutions to continue to assure racial diversity in the classroom as well as focus on the meritorious efforts of individual applicants of all races to overcome race-associated impediments such as poverty, woefully underfunded schools, mass incarceration, and over-policing, among other racially-related impediments imposed upon disadvantaged persons in America.[175] The meritorious experiences and perspectives (not to mention the demonstration of skills such as persistence, tenacity, and work ethic) such students bring to the classroom would help assure success for all graduates in a more diverse society and better prepare graduates for service to important communities that support the institution.[176] Thus, even *SFFA*'s counsel admitted at oral argument

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174. *Id.* at 230–31.

175. According to a study of law school admissions undertaken by Professors Eboni Nelson, Ronald Pitner, and Carla Pratt:

> The findings presented herein suggest that considering certain race-neutral factors may equip law schools with a means to test whether they could use race-neutral admissions to assemble racially diverse classes. Because African-American and Hispanic students are significantly more likely than white students to [present] race-neutral factors such as qualifying for free or reduced lunch during elementary and secondary school, receiving a Pell Grant during college, and having a parent or guardian who received public assistance while he or she was growing up, law schools' consideration of these and similar factors in their admissions decisions may be a useful way for law schools to test, in a single admission cycle, whether using race-neutral means is sufficient to achieve their diversity goals. A law school could ask questions on its application regarding these race-neutral identity factors and weight them in the admissions process. In so doing, the law school would effectively expand the definition of merit beyond academic credentials to include applicants who have demonstrated determination to overcome structural challenges. Redefining merit in this way could help ensure that the enrolling class would be diverse, because not all applicants would have demonstrated merit merely through their Law School Admission Test ("LSAT") score and undergraduate grade point average ("UGPA"). Moreover, an admissions standard that seeks to admit students who have overcome structural inequality strikes at the heart of what proponents originally intended race-conscious affirmative action to do.

Eboni S. Nelson, Ronald Pitner, and Carla D. Pratt, *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2195–96 (2017) (footnotes omitted).

176. As Professor Johnson highlights:

> Studies uniformly prove that diversity enhances the educational experience not just for minorities, but for all students, as well as faculty and staff. Accordingly, schools naturally should and do aim for diversity. While it certainly is easier if racial identity is known, other race-neutral methods can accomplish this goal. For example, given the racial disparities in wealth and income, economic diversity often begets racial diversity. A higher percentage of students of lower economic means likely translates to a higher percentage of minority students. To stay in the constitutional clear, universities can award merit boosts based on

that such mission-driven merit cannot be attacked as a racial classification as applicants of all races may seek a beneficial admissions outcome based upon such factors.[177] *SFFA*'s counsel explicitly limited *SFFA*'s constitutional objections to "check the box" racial benefits.[178] Logic compels such an admission.[179]

To illustrate: The Department of Defense thus learned the hard way that managing diversity and leading diverse military units demands diversity among officers and leaders.[180] However, a white officer born and

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> overcoming "structural inequality." Put simply, whether Black or white, excelling in school is tougher for a student who faces economic hurdles (e.g., food insecurity) than for a pampered student of higher economic means. And intersectionality matters. Black students suffering economic hurdles likely have a more challenging path than similarly situated white students; the same holds true for affluent Black students when compared to their white counterparts.

Maureen Johnson, *"That Little Girl Was Me": Kamala Harris and the Civil Whites of 1964 and Beyond*, 44 CARDOZO L. REV. 577, 659 (2022) (footnotes omitted).

177. Transcript of Oral Argument at 7–11, Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023) (No. 20-1199), https://www.supremecourt.gov/oral_arguments/argument_transcript/2022 [hereinafter Harvard Oral Argument].

178. *Id.* at 8 ("So we really are, in this case, talking about the check box."). All other avenues by which race may enter the consciousness of the admissions personnel, including student essays, information from school counselors, letters of recommendation, and (presumably) beyond, did not raise an objection from counsel for SFFA at oral argument. *Id.* at 7–11.

179. To hold otherwise would directly assault an individual's own sense of identity and inherently privilege white experiences over those of people of color. As Thomas P. Crocker states:

> The law must grant the equality of individual persons' liberty to define and present their personal identities free from government actions that would enshrine forms of disrespect as a matter of law. Consistency would require that if law must respect a person's sexual orientation as a constitutive feature of personal identity, it must also respect a person's race as constitutive of identity too.

Crocker *supra* note 51, at 9. Such an extreme form of colorblindness rests on no valid precedent and even circumscribes First Amendment rights. *E.g.*, David Hinojosa & Genevieve Bonadies Torres, *The Absurd Reach of a Colorblind Constitution*, 72 AM. U. L. REV. 1775, 1779–80 (2023) (concluding that in an extreme form "*SFFA*'s colorblind regime raises serious First Amendment concerns. According to SFFA's complaint and its contradictory arguments presented to the Court, universities may need to gag students' reflections on race or otherwise censor admissions officers from merely becoming aware of a student's race in their application."). These issues emerged in the *SFFA* oral argument: "Justice Jackson asked [if] UNC could consider a white student's admissions essay, describing how the student is a fifth generation UNC alumni" but could not consider "a Black student's essay describing how the student is a fifth-generation descendant of enslaved peoples and will be the first in the family to attend UNC due to the past exclusionary practices of the university." *Id.* at 1779. "Quite remarkably, SFFA responded that the former would be appropriate under the Equal Protection Clause but the latter would not." *Id.* (citing Harvard Oral Argument, *supra* note 177, at 65–69).

180. According to high-level military leaders:

> The importance of maintaining a diverse, highly qualified officer corps has been beyond legitimate dispute for decades. History has shown that placing a diverse Armed Forces under the command of homogenous leadership is a recipe for internal resentment, discord, and violence. By contrast, units that are diverse across all levels are more cohesive, collaborative, and effective. The importance of diverse leadership has risen to new heights in recent years, as international conflicts and humanitarian crises require the military to perform civil functions that call for heightened cultural awareness and sensitivity to ethnic and

raised in the Englewood neighborhood on Chicago's Southside may inspire greater trust in, and hold greater affinity with, their troops than a privileged Mexican-American hailing from wealthy (and overwhelmingly white) Wilmette, Illinois.[181] This suggests that applicants of all races could provide the military the needed cultural and cognitive diversity the military needs so desperately according to both the United States Government[182] and experienced military leaders.[183] This embrace of cultural differences does not entail the use of race as a proxy for cultural diversity; instead, it involves a search for precisely the cultural diversity the military seeks.[184] Given the mission of the military academies, courts should grant them greater latitude to consider race in order to attain needed cultural diversity.

These individualized racial experiences need not suffer from strict judicial scrutiny nor narrow tailoring because any individual can claim individualized experiences and perspectives regardless of racial identity or assignment.[185] In the words of Chief Justice Roberts, "as all parties agree," colleges and universities may consider "how race affected" an applicant's life.[186] Such experiences affect cognition and perspective and are not a function of only skin color or other morphological features.[187] Nevertheless, institutions embracing cultural and cognitive diversity must do so authentically and should assure that their missions tightly fit the race-neutral means chosen to advance such missions.[188] Race-based affirmative action can supplement these efforts to embrace cultural and cognitive diversity

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> religious issues. All service members—minority or otherwise—are better equipped to meet these challenges if they are educated in a racially diverse environment and guided by diverse leadership in the field.

Military Brief, *supra* note 163, at 2.

181. Wilmette, Illinois boasts median household income of $173,967 and its population consists of 80.9% Whites, 0.38% African-Americans, and about 1.2% non-White Hispanics. Wilmette, Il., DATA USA, https://datausa.io/profile/geo/wilmette-il [https://perma.cc/4AYD-NWFH] (last visited Dec. 14, 2023).

182. United States Brief, *supra* note 160, at 12 ("The United States Armed Forces have long recognized that the Nation's military strength and readiness depend on a pipeline of officers who are both highly qualified and racially diverse-and who have been educated in diverse environments that prepare them to lead increasingly diverse forces.").

183. Military Brief, supra note 163, at 2 ("History has shown that placing a diverse Armed Forces under the command of homogenous leadership is a recipe for internal resentment, discord, and violence" and "units that are diverse across all levels are more cohesive, collaborative, and effective.").

184. This is key because the use of diversity as a subterfuge for racial preferences is violative of the Constitution. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 230–31 (2023) (citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1867)).

185. *See supra* notes 174–179.

186. *Students for Fair Admissions*, 600 U.S. at 230 ("At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.").

187. *See supra* notes 174–184.

188. *See supra* notes 157–173.

but only if shown to be necessary for a given distinctive mission or in accordance with *Grutter* (at least for now).[189] Institutions should forego racial categorization and any kind of "check the box" approach in favor of an authentic embrace of cultural and cognitive diversity.[190] This forms the essential teaching of *SFFA v. Harvard*, and this approach to diversity rests upon powerful evidentiary and national policy foundations.

III. THE POLICY FOUNDATIONS OF CULTURAL DIVERSITY AND INDIVIDUALIZED RACIAL EXPERIENCES

The Court in *SFFA* applied the *Grutter* framework governing affirmative action rather than materially limiting it. Nevertheless, all educational institutions need to heed an essential message from *SFFA*: the days of mechanistic use of race as a proxy for diverse perspectives and experiences are numbered for many institutions.[191] While colleges and universities must now increasingly target actual experiences and perspectives rather than simple racial identification or assignment and allow all applicants to compete on the issue of diverse contributions, the benefits this process will yield could prove far more powerful because, in the end embracing cultural diversity requires authenticity and by extension adherence to best practices such as seeking a critical mass of diverse voices.[192] This part of the Article will demonstrate how embracing cultural diversity will

189. *See supra* notes 140–155.

190. *See supra* notes 174–189. Racial categories are fraught with all the problems inherent with the social construction of race: i) humanity does not fit well into any set of baskets; ii) even if such categorization could rest on a principled basis, any cross-breeding would instantly require a new category; iii) race categorization always relied on observable morphological features that resulted from recent environmental adaptation with no deeper genetic basis; iv) geography not morphological features carries more genetic significance; and, v) racial categories hold greater in-group genetic variation than out-group genetic variation. Thus, anthropologists of yesteryear tried but failed to create defensible racial groupings. And a black person from Los Angeles is more apt to hold more genetic similarity to a white from Los Angeles than a black person from the East Coast. *See* Steven Ramirez, *Race in America 2021: A Time to Embrace* Beauharnais v. Illinois?, 52 LOY. U. CHI. L.J. 1001, 1019–21 (2021). Others critique racial categories on other grounds. *See* Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008) (questioning lumping all Black applicants into a single category for admissions decisions and directing attention to the changing ancestry of Black students on college campuses because many have a white parent or are foreign-born Black immigrants). One solution to the manifest shortcomings of any categorization scheme may lie in reliance on self-identification.

191. *Grutter* signaled the end of "check the box" racial preferences. *See supra* Part II. Today, the Court's patience with *Grutter* wears thin. *See supra* Part III.

192. Without basing admissions on any preset racial categorization, schools can completely avoid any need to rationalize the inherent irrational concept of racial categories, as suggested by Professor Bernstein. *Supra* notes 7, 25. An easy alternative road could prove a simple inquiry regarding applicant self-identification.

strengthen the educational institutions that pursue it to its logical ends, and the nation generally.

A. The Myriad of Cultural Diversity Benefits for Macroeconomic Growth

The evidentiary foundation for the broad embrace of cognitive diversity—including, but not limited to, individualized racial experiences—increases in sturdiness as time goes by.[193] Diversity, if defined broadly to include socially significant differences in acculturation, education, community realities, and socioeconomic conditions, equates to differential experiences and perspectives that can improve group cognition.[194] It creates pressure on group members to perform and prepare better—making groups smarter.[195] Specifically, empirical studies show that well-managed, culturally diverse groups outperform homogenous groups in terms of creativity and innovation.[196] Cognitive diversity can break down groupthink,[197] which may cause groups to mindlessly adhere to group norms.[198]

193. *E.g.*, Cristina Quintana-García, Macarena Marchante-Lara & Carlos Benavides-Chicón, *Boosting Innovation Through Gender and Ethnic Diversity in Management Teams*, 35 J. ORGAN. CHANGE MGMT. 54, 62 (2022) (exploring the effect that women and ethnic minorities, in management and at the CEO level, have on the ability to develop outstanding innovation performance and confirming that gender and ethnic diversity in management positions produce net positive effects on innovation); Bas Hofstra, Vivek V. Kulkarni, Sebastian Munoz-Najar Galvez & Daniel A. McFarland, *The Diversity-Innovation Paradox in Science*, 117 PNAS 9284, 9284 (2020) ("By analyzing data from nearly all US PhD recipients and their dissertations across three decades, this paper finds demographically underrepresented students innovate at higher rates than majority students, but their novel contributions are discounted and less likely to earn them academic positions.").

194. As experts explained:

> From the information/decision-making perspective, on the other hand, diverse groups outperform homogeneous groups. Individuals may benefit from group-level cognitive diversity if this brings a richer mix of ideas and perspectives. In general, more heterogeneous groups have different perspectives and knowledge, distinct and nonredundant skills and abilities. This allows a more comprehensive set of solutions to be considered and to debate one another's points of view more dynamically which can lead to higher quality decisions.

Quintana-García, *supra* note 193, at 56 (citations omitted).

195. Phillips, *supra* note 39.

196. David Rock, *Why Diverse Teams Outperform Homogeneous Teams*, PSYCH. TODAY (June 4, 2021), https://www.psychologytoday.com/us/blog/your-brain-work/202106/why-diverse-teams-outperform-homogeneous-teams [https://perma.cc/U4XS-QMAZ] ("Dozens of studies and decades of research have found that diverse teams tend to be smarter than homogeneous teams: they often think more logically, are more creative, and are more adept at identifying errors in thinking.").

197. *See* IRVING L. JANIS, VICTIMS OF GROUPTHINK 192 (1972) (undertaking intensive case studies of "groupthink" and finding: "Groups of individuals showing a preponderance of certain personality and social attributes may prove to be the ones that succumb most readily to groupthink."). Janis later argued in favor of cultural heterogeneity to combat groupthink. IRVING L. JANIS, GROUPTHINK 250 (2d ed. 1982) (concluding that group heterogeneity can trigger "constructive multiple advocacy" stemming a premature consensus and leading to deeper consideration of alternatives).

198. *See, e.g.*, Daniel P. Forbes & Frances J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 ACAD. MGMT. REV. 489, 494–99 (1999) (stating that heterogeneous boards benefit from cognitive conflict that results in a more thorough consideration of problems and solutions); Marlene A. O'Connor, *The Enron Board:*

Cultural diversity also encourages individual effort and preparation as group members realize that they cannot rely upon affinity bias to ease their path.[199] Even the exposure of individuals to cultural diversity operates to break down stereotypes and implicit bias.[200] Ethnic diversity—the reality-based version of socially constructed race[201]—proves particularly powerful.[202] These benefits of cognitive diversity rest on rigorous proof from an array of interdisciplinary scholars.

For example, cultural diversity changes behavior as groups cognitively recognize and respond to the presence of diversity in a group setting. In one sophisticated study, a large group of business school professors constructed trading markets to trade assets subject to conventional valuation techniques.[203] They assembled markets in Southeast Asia and North

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The Perils of Groupthink, 71 U. CIN. L. REV. 1233, 1306 (2003) (stating that "social homogeneity on corporate boards harms critical deliberation" and that "the best way to avoid groupthink is to prevent enclaves of like-minded people from making group decisions," therefore, "reform proposals should discourage groupthink by promoting more diversity on boards in terms of gender, race, class, ethnicity, age, national origin, sexual orientation, and socio-economic background, as well as expertise and temperament").

199. A recent study found that best practices can maximize benefits from cultural diversity and minimize racial conflict. *See* Avery, Rhue & McKay, *supra* note 11, at 1314–15 (showing that when properly managed "the mere presence of racioethnically dissimilar teammates can prove motivating, as individuals seek to represent their in-groups well to affirm their racioethnic identity").

200. *See*, *e.g.*, Antonya Marie Gonzalez, Jennifer R. Steele, Evelyn F. Chan, Sarah Ashley Lim & Andrew Scott Baron, Developmental Differences in the Malleability of Implicit Racial Bias Following Exposure to Counterstereotypical Exemplars, 57 DEV. PSYCH. 102, 111 (2021) (undertaking studies of the malleability of implicit bias and finding that "combined with those from previous research . . . , [show] counterstereotypical exemplar exposure can successfully reduce implicit racial bias in children") (citation omitted).

201. Mainstream science including medicine, genetics, and biology overwhelmingly recognizes that race is a social construct without scientific basis. *E.g.*, NAT'L ACADS. OF SCIS., ENG'G, & MED., USING POPULATION DESCRIPTORS IN GENETICS AND GENOMICS RESEARCH 1 (2023) ("In humans, race is a socially constructed designation, a misleading and harmful surrogate for population genetic differences, and has a long history of being incorrectly identified as the major genetic reason for phenotypic differences between groups."); Am. Med. Ass'n, *Elimination of Race as a Proxy for Ancestry, Genetics, and Biology in Medical Education, Research and Clinical Practice H-65.953*, AMA POLICY FINDER (2020), https://policysearch.ama-assn.org/policyfinder/detail/racism?uri=%2FAMADoc%2FHOD.xml-H-65.953.xml [https://perma.cc/9PJE-5ZKU] ("AMA recognizes that race is a social construct and is distinct from ethnicity, genetic ancestry, or biology."); Am. Soc'y of Hum. Geneticists, *ASHG Denounces Attempts to Link Genetics and Racial Supremacy*, 103 AM. J. HUM. GEN. 636, 636 (2018) ("Genetics demonstrates that humans cannot be divided into biologically distinct subcategories" and "[a]lthough a person's genetics influences their phenotypic characteristics, and self-identified race might be influenced by physical appearance, race itself is a social construct."). Skin color, in particular, impacts social construction of race but it proves genetically insignificant. Kelly Owens & Mary-Claire King, *Genomic Views of Human History*, 286 SCIENCE 451, 453 (1999) (finding that skin color arises from very modest genetic differences and concluding that "prejudice does not require a rational basis, let alone an evolutionary one, but the myth of major genetic differences across 'races' is nonetheless worth dismissing with genetic evidence").

202. AlShebli, Rahwan & Woon, *supra* note 39, at 5163.

203. Sheen S. Levine, Evan P. Apfelbaum, Mark Bernard, Valerie L. Bartelt, Edward J. Zajac & David Stark, *Ethnic Diversity Deflates Price Bubbles*, 111 PNAS 18524, 18524 (2014).

America—each reflecting the socially constructed racial realities within that geographical location.[204] Market participants consisted of trained market professionals.[205] Diverse markets far outperformed homogenous markets in valuation accuracy, and homogenous markets often devolved into asset bubbles.[206] As the authors explained:

> In our experiments, ethnic diversity leads all traders, whether of majority or minority ethnicity, to price more accurately and thwart bubbles. Ethnic diversity was valuable not necessarily because minority traders contributed unique information or skills, but their mere presence changed the tenor of decision making among all traders. Diversity benefited the market.[207]

The authors controlled for trader skill by testing this attribute ex ante.[208] Thus, the "mere presence" of observed ethnic diversity changed behavior and broke down well-recognized cognitive biases such as herding, peer effects, social contagion, and other biases that drive not just bubbles but also riots, disinformation, and social myths.[209]

Similarly, scholars show that racial or ethnic diversity supports superior cognitive outcomes in contexts where preparation and open-mindedness influence outcomes.[210] One such study focused upon mock jury

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204. *Id.* at 18525 ("To study the effects of diversity on markets, we created experimental markets in Southeast Asia . . . and North America. . . .We selected those locales purposefully. The ethnic groups in them are distinct and nonoverlapping—Chinese, Malays, and Indians in Southeast Asia, and Whites, Latinos, and African-Americans in North America.").

205. *Id.* ("We recruited skilled participants, trained in business or finance. . . . We surveyed their demographics in advance and randomly assigned them to markets," and "[i]n the homogeneous markets, all participants were drawn from the dominant ethnicity in the locale; in the diverse markets, at least one of the participants was an ethnic minority.") (citations omitted).

206. *Id.* at 18527 ("Across markets and locations, pricing accuracy is 58% higher in diverse markets.").

207. *Id.* at 18528.

208. *Id.* at 18527.

209. *Id.* at 18528 ("Diversity facilitates friction. In markets, this friction can disrupt conformity, interrupt taken-for-granted routines, and prevent herding. The presence of more than one ethnicity fosters greater scrutiny and more deliberate thinking, which can lead to better outcomes.").

210. According to one landmark study:

> Consistent with a traditional information exchange prediction, heterogeneous groups deliberated longer and considered a wider range of information than did homogeneous groups. However, these differences did not simply result from Black participants adding unique perspectives to the discussions. Rather, White participants were largely responsible for the influence of racial composition, as they raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group. Moreover, the influence of racial diversity was not limited to processes of information exchange, as Whites' predeliberation judgments also varied by group composition. This conclusion that there are multiple processes through which racial diversity is influential is a novel contribution to the investigation of group composition and decision making.

deliberations and the differences between racially diverse juries and homogenous juries.[211] It found that racially diverse juries deliberated longer and considered a wider array of evidence in their deliberations.[212] Further, the presence of diversity pushed white participants to make more accurate contributions to group deliberations and avoid misstatements,[213] particularly with respect to race.[214] In the context of business, scholars conducted an array of studies designed to pinpoint not just superior outcomes but to understand underlying mechanisms.[215] On the basis of three different experimental business problems, they determined that racioethnic diversity, when properly managed in terms of temporal and task responsibility, led to superior outcomes with less conflict.[216] This empirically-based reality holds profound implications for the United States: we can either use our diversity as a strategic strength or allow it to divide us to an ever-increasing weakness.[217]

Much evidence also supports the proposition that racial/ethnic diversity supports superior cognition through information elaboration.[218] Specifically, group heterogeneity will likely include a wider array of perspectives and experiences leading to a multidimensional analysis of a given

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Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. & SOC. PSYCH. 597, 606 (2006).

211. *Id.* at 600 ("The chief objective of the present research was to utilize a mock jury paradigm to examine the processes through which racial diversity influences group decision making. Participants were shown the trial of a Black defendant, and the decision making of racially heterogeneous and homogeneous 6-person mock juries was compared.").

212. *Id.* at 605.

213. *Id.* at 606–07 ("White participants . . . made fewer inaccurate statements when in diverse versus all-White groups, despite the fact that they actually contributed more information when deliberating in a diverse setting. This result suggests that White jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group.").

214. *Id.* at 607 ("Such a conclusion is consistent with previous findings that motivations to avoid prejudice lead Whites to a more systematic and thorough processing of information conveyed by or about Black individuals.").

215. Avery, Rhue & McKay, *supra* note 11, at 1339 ("[W]e contended and found that participation diversity helps determine the nature and strength of the racioethnic diversity–performance relationship.").

216. *Id.* at 1312 ("Results from a field study and two archival datasets indicated that when there are more clearly differentiated temporal roles, greater racioethnic diversity corresponded with higher performance. Cooperation helped to account for this relationship, as greater differentiation facilitated the positive effect of racioethnic diversity on cooperation, thereby enhancing team performance.").

217. The United States will, in fact, be more diverse in the future. *See infra* Section B.

218. *E.g.*, David A. Carter, Betty J. Simkins & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 36 (2003) ("[D]iversity produces more effective problem solving. While heterogeneity may initially produce more conflict . . . the variety of perspectives that emerges cause decision makers to evaluate more alternatives and more carefully explore the consequences of these alternatives."); Poppy Lauretta McLeod, Sharon Alisa Lobel & Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. 248, 252 (1996) (finding that ethnically diverse workgroups, including Asian, African and Hispanic Americans, produced higher quality ideas than all-Anglo groups).

problem.[219] A study of nine million scientific papers authored by a total of six million scientists assessed diversity, including ethnicity, discipline, gender, affiliation, and academic age found that ethnic diversity among authors had the strongest correlation with scientific impact, measured by citations.[220] A similar study used a form of artificial intelligence (machine learning) to evaluate 1.2 million doctoral recipients and to measure the scientific impact of their dissertations through textual analysis.[221] The study found that ethnic diversity fueled scientific innovation and impact, but the recipients' contributions often failed to achieve recognition, thereby impeding the academic careers of non-white individuals.[222] This is in accordance with much other evidence showing that the contributions of minorities systematically suffer from implicit bias.[223]

Many business researchers and scholars identify similar innovation benefits in diverse senior management teams. In a recent study of start-ups in Germany, scholars found that deep level ethnic diversity—consisting of unusual levels of cultural diversity relative to society generally—is robustly associated with superior firm innovation.[224] Consistent with this finding of deep or unusual diversity driving innovation are studies from economists finding that firms located in urban areas with greater diversity

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219. McLeod, Lobel & Cox, Jr., *supra* note 218, at 250.

220. AlShebli, Rahwan & Woon, *supra* note 39, at 5163 (analyzing "over 9 million papers and 6 million scientists to study the relationship between research impact and five classes of diversity: ethnicity, discipline, gender, affiliation, and academic age" and finding that "[r]emarkably, of the classes considered, ethnic diversity had the strongest correlation with scientific impact").

221. Bas Hofstra, Vivek V. Kulkarni, Sebastian Munoz-Najar Galvez, Bryan He, Dan Jurafsky & Daniel A. McFarland, *The Diversity-Innovation Paradox in Science*, 117 PNAS 9284, 9284 (2020) ("We study [scientific innovation] by utilizing a near-complete population of ∼1.2 million US doctoral recipients from 1977 to 2015 and following their careers into publishing and faculty positions. We use text analysis and machine learning" to assess scholarly impact and professional recognition.).

222. The authors found:

> [We] show that underrepresented groups produce higher rates of scientific novelty. However, their novel contributions are devalued and discounted: For example, novel contributions by gender and racial minorities are taken up by other scholars at lower rates than novel contributions by gender and racial majorities, and equally impactful contributions of gender and racial minorities are less likely to result in successful scientific careers than for majority groups.

Id.

223. *See* Onwuachi-Willig, *supra* note 20, at 223–25 (citing ARIN N. REEVES, NEXTIONS, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS 2–5 (2014)).

224. Brixy, Brunow & D'Ambrosio, *supra* note 13, at ("Employing the unusualness index allows us to more accurately attribute the underlying mechanism to the expansion in the pool of knowledge and abilities that derives from different knowledge and cultural approaches.").

(including high levels of migrant workers) enjoy superior levels of innovation.[225]

Of course, none of these gains in cognition and innovation arise from skin color or morphological features, but rather differences in experiences and perspectives—mandating management of cognitive diversity to achieve maximum benefits.[226] Practitioners and scholars of the emerging science of diversity management discovered early on that climates that do not empower diverse voices—by failing to assure a critical mass of diverse voices, for example—will not achieve the benefits of diversity.[227] Predictably, businesses first developed cutting-edge practices, and today, the most advanced firms in diversity management score impressive gains in competitive marketplaces.[228] Those gains arise from innovative efforts aimed at new products and services, marketing, customer and investor relations, and all contexts where firms seek to tap into value creation stemming from innovation.[229]

Organizations that embrace diversity, often through programs called Diversity, Equity, and Inclusion (or DEI), also attract superior human resources. For example, workers think employers should appropriately embrace diversity by a margin of 56–16%.[230] This preference seems destined

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225. *See* Neil Lee, *Migrant and Ethnic Diversity, Cities and Innovation: Firm Effects or City Effects?*, 15 J. ECON. GEOG. 769, 770 (2015) (finding that deep-level diversity associated with migration drives higher innovation).

226. *See* Adam D. Galinsky, Andrew R. Todd, Astrid C. Homan, Katherine W. Phillips, Evan P. Apfelbaum, Stacey J. Sasaki, Jennifer A. Richeson, Jennifer B. Olayon & William W. Maddux, *Maximizing the Gains and Minimizing the Pains of Diversity*, 10 PERSP. ON PSYCH. SCI. 742, 745 (2015) ("The practices of inclusive multiculturalism and perspective taking also help catalyze the innovation and decision-making benefits of diversity. For example, organizational climates that value diversity increase information processing and exchange and thus produce better decisions . . . . Similarly, when team members consider one another's perspectives, diverse teams are more creative.") (citation omitted).

227. Both *Grutter* and *SFFA* emphasized the importance of critical mass to any program of race-based affirmative action. *See supra* notes 133–135.

228. *See* Kimberly M. Ellis & Phyllis Y. Keys, *Workforce Diversity and Shareholder Value: A Multi-Level Perspective*, 44 REV. QUANTITATIVE FIN. & ACCT. 191, 209–10 (2015) (finding enhanced firm value for diverse workforces in firms that garner Fortune "Diversity Elite" recognition).

229. According to Ellis and Keys:

> Having a diverse group of employees from different ethnic groups is likely to enhance the firm's ability to identify unmet customer needs, develop more creative products or services, uncover new distribution strategies, build stronger relationships with key stakeholders, and make better firm level decisions among a host of other factors that drive firm performance. For those firms already engaging in actions that foster diversity, our findings shed some light on how ethnic diversity at different levels of the organization is more important within certain contexts as it may allow a firm to tap into varying sources of value creation stemming from innovation.

Id. at 210.

230. Rachel Minkin, *Diversity, Equity and Inclusion in the Workplace*, PEW RSCH. CTR. (May 17, 2023), https://www.pewresearch.org/social-trends/2023/05/17/diversity-equity-and-inclusion-in-the-workplace/ [https://perma.cc/P6B3-LVX6].

to increase as younger workers displace older workers in decades to come, as 68% of workers 18–29 think embracing diversity "is a good thing," and only 8% think it "is a bad thing."[231] "Views also differ by educational attainment, with 68% of workers with a postgraduate degree saying focusing on DEI at work is a good thing, compared with 59% of those with a bachelor's degree only and 50% of those with some college or less education."[232] Given that younger and more highly-educated employees value firms that pursue DEI, the workplace of the future will more likely embrace DEI and feel more pressure from workers to embrace DEI.

Moreover, as greater numbers of employers value cognitive diversity and pursue DEI initiatives, more workers will likely accept and appreciate these efforts, as research shows that exposure to cultural diversity breeds acceptance and an ability to think in more nuanced and deeper ways.[233] Researchers have found that: "Multicultural experience is positively related to performance in solving a problem that requires insight and to producing creative ideas without being confined to the widely known."[234] Individuals exposed to diversity in their youth do not fall prey to implicit bias compared to those not exposed to diversity.[235] These findings prove that cognitive diversity arises from experiences and perspectives and is in no way heritable like skin color and other morphological features inherently associated with the social construct of race.

Naturally, educational institutions must conform to the needs of the society they ultimately serve. The pursuit of knowledge is always driven by the most pressing needs of the cultural context in which the educational institution exists. Today, those challenges include climate change,[236] rising fascism, and challenges to the rule-based international order put in place

231. *Id.*

232. *Id.*

233. *See* Christine S. Lee, David J. Therriault & Tracy Linderholm, *On the Cognitive Benefits of Cultural Experience: Exploring the Relationship Between Studying Abroad and Creative Thinking*, 26 APPLIED COGNITIVE PSYCH. 786, 775–76 (2012) ("Our findings indicate that studying abroad supports cognitive processes involved in developing innovative solutions in response to demands that arise in culturally diverse environments.").

234. Angela K. Y. Leung, William W. Maddux, Adan D. Galinsky, Chi-yue Chiu & Norman B. Anderson, *Multicultural Experience Enhances Creativity: The When and How*, 63 AM. PSYCH. 169, 177 (2008).

235. Jasmin Cloutier, Tianyi Li & Joshua Correll, *The Impact of Childhood Experience on Amygdala Response to Perceptually Familiar Black and White Faces*, 26 J. COGNITIVE NEUROSCIENCE 1992, 1992 (2014) ("Controlling for a number of well-established individual difference measures related to interracial attitudes, the results reveal that perceivers with greater childhood exposure to racial outgroup members display greater relative reduction in amygdala response to familiar Black faces.").

236. Gary Shilling, *Human Ingenuity Will Prevent Climate Catastrophe*, BLOOMBERG (Dec. 8, 2021), https://www.bloomberg.com/opinion/articles/2021-12-08/climate-change-human-ingenuity-will-prevent-catastrophe.

after World War II.[237] Higher-level thinking associated with increased cultural and cognitive diversity will prove crucial to the ability of the United States to meet these existential threats. The value of the modern college and research university ultimately rests upon the extent to which it serves the needs of the people who fund, attend, and employ the product of the university and that is our society generally.

B. The National Security Policy Bases for Expansive Permission for Cultural Diversity

The United States needs to avail itself of the benefits of cultural diversity now more than ever. The macroeconomic and financial benefits of embracing cultural diversity established in the Sections above create a compelling national and business interest in the maximum embrace of cultural diversity—especially the need for social cohesion and national security.

First, consider the demographic realities facing the nation. Today, the United States enjoys greater demographic diversity than ever before. By 2045, white individuals will no longer constitute a majority of the population.[238] America's children are already a majority non-white.[239] This means that more Americans than ever will suffer the hardship of the American racial hierarchy, starting with childhood poverty rates[240] and continuing with racial disparities in educational funding.[241] The combination of

237. *E.g.*, Chauncey DeVega, *The US Army's World War II Warning Comes Back to Haunt Us*, SALON (Dec. 17, 2023), https://www.salon.com/2023/12/17/the-us-armys-world-ii-warning-comes-back-to-haunt-us/ [https://perma.cc/XC86-MA5P] ("The fascist tide is rising in America and around the world."); Will Marshall, *Dictators Stalk the Free World Again*, HILL (Mar. 3, 2023), https://thehill.com/opinion/international/3882303-dictators-stalk-the-free-world-again/ [https://perma.cc/8B38-GU3T] ("Putin wants to reverse his country's Cold War losses. Xi wants a free hand to absorb Taiwan and project power throughout Asia. Both bridle at a U.S.-led liberal order that presents legal, moral, and military obstacles to their expansive ambitions.").

238. Daniel De Visé, *America's White Majority Is Aging Out*, HILL (Aug. 23, 2023), https://thehill.com/homenews/race-politics/4138228-americas-white-majority-is-aging-out/ [https://perma.cc/4AF5-B2EW] ("Generational data from the 2020 census shows the upward march of racial diversity by age group. Non-Hispanic white people make up 77 percent of the over age 75 population, 67 percent of the age 55–64 population, 55 percent of the 35–44 cohort, and barely half of the 18–24 age group.").

239. William H. Frey, *New 2020 Census Data Shows an Ageing America and Wide Racial Gaps Between Generations*, BROOKINGS (Aug. 1, 2023), https://www.brookings.edu/articles/new-2020-census-data-shows-an-aging-america-and-wide-racial-gaps-between-generations/#:~:text=By%202020%2C%20although%20both%20older,racial%20gap%20grew%20to%2027.5%25. [https://perma.cc/P6LC-5AD9].

240. Madison McVan, *Child Poverty Doubled in 2022 as Pandemic Benefits Ended*, MINN. REFORMER (Sept. 12, 2023), https://minnesotareformer.com/author/madisonmcvan/ [https://perma.cc/Z3UT-35JH] (showing poverty rate for White children at about 7% and poverty rate for Black, Hispanic and Native children at 18%, 19%, and 26%, respectively).

241. IVY MORGAN, EDUC. TRUST, EQUAL IS NOT GOOD ENOUGH: AN ANALYSIS OF SCHOOL FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 11 (2022), https://edtrust.org/wp-

childhood poverty and educational funding disparities means that increasing numbers of American children from diverse backgrounds will not enjoy the same privileged access to higher education as white children.[242] It also means that all institutions facing the challenges of learning to operate and thrive in an increasingly diverse environment will ultimately demand more diverse college graduates, leading to chronic shortages of workers with tertiary education from diverse backgrounds.[243] As I previously demonstrated, a shortage of well-prepared students from disadvantaged backgrounds already plagues our nation's macroeconomic performance.[244] These demographic realities mean that now more than ever, the United States holds a compelling state interest in the dismantling of the socially constructed racial hierarchy prevailing in our nation.[245] We as a nation face a demographic time bomb.

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content/uploads/2014/09/Equal-Is-Not-Good-Enough-December-2022.pdf [https://perma.cc/LW2Z-P8VK] (showing that school districts with most students of color suffer a 16% funding shortfall relative to districts with the most white students).

242. Experts estimate that America underfunds the educational needs of children of color to the tune of $150 billion per year. *See, e.g.*, *Closing America's Education Funding Gaps*, CENTURY FOUND., July 22, 2020, https://tcf.org/content/report/closing-americas-education-funding/ [https://perma.cc/JFP3-5Q9S].

243. Powerful empiric al data already suggests such a shortage is holding back U.S. macroeconomic performance. *See* Ramirez, *supra* note 38, at 502 (citing Flavio Cunha, *Human Capital and Long-Run Economic Growth*, *in* PROSPECTS FOR ECONOMIC GROWTH IN THE UNITED STATES 41–77, 71 (John W. Diamond & George R. Zodrow eds., 2021)) ("[T]he reduction in the growth rate of the supply of skilled labor . . . partially and simultaneously explains the reduction in productivity growth and the increase in inequality during the same period" and "to increase productivity growth and to reduce inequality it is important to foster the formation of skilled labor. This will require increasing the number of disadvantaged children who are college ready.").

244. *Id*.

245. According to the American Anthropological Association:

> The "racial" worldview was invented to assign some groups to perpetual low status, while others were permitted access to privilege, power, and wealth. The tragedy in the United States has been that the policies and practices stemming from this worldview succeeded all too well in constructing unequal populations among Europeans, Native Americans, and peoples of African descent. Given what we know about the capacity of normal humans to achieve and function within any culture, we conclude that present-day inequalities between so-called "racial" groups are not consequences of their biological inheritance but products of historical and contemporary social, economic, educational, and political circumstances.

Statement on Race, AM. ANTHROPOL. ASS'N (May 17, 1998), http://www.americananthro.org/ConnectWithAAA/Content.aspx?ItemNumber=2583 [https://perma.cc/YH65-X43H]; *see also* Jayne O. Ifekwunigwe, Jennifer K. Wagner, Joon-Ho Yu, Tanya M. Harrell, Michael J. Bamshad & Charmaine D. Royal, *A Qualitative Analysis of How Anthropologists Interpret the Race Construct*, 119 AM. ANTHROPOL. 422, 423 (2017) (stating that a "new anthropological synthesis" views "race as a dynamic, historically situated, culturally constructed folk concept that derives symbolic meaning from specific . . . phenotypic differences, such as skin color, hair texture, nose width, lip thickness, and body type"; and, that these differences "are ranked hierarchically and provide social justifications for inequalities and injustices, such as differential access to power, privilege, and opportunities") (citations omitted).

Second, the United States faces urgent foreign policy challenges and needs to attract higher quality, more educated soldiers. China,[246] Russia,[247] and others[248] do not hide their hostility to the United States and regularly threaten war or urge their troops to prepare for war against the U.S. and its allies.[249] The U.S. military struggles to recruit qualified youth for military service.[250] Our schools simply do not produce enough physically and mentally fit recruits—only 23% of 18–24-year-olds meet military standards for enlistment.[251] This shrinking pool also increasingly declines to serve based upon a loss of trust in our institutions generally and the military in particular after long unsuccessful wars in Iraq and Afghanistan.[252] Increasingly,

246. John Pomfret & Matt Pottinger, *Xi Jinping Says He Is Preparing China for War*, FOREIGN AFFS., (Mar. 29, 2023), https://www.foreignaffairs.com/united-states/xi-jinping-says-he-preparing-china-war [https://perma.cc/6BRT-DPQW] ("Chinese leader Xi Jinping says he is preparing for war. At the annual meeting of China's parliament and its top political advisory body in March, Xi wove the theme of war readiness through four separate speeches, in one instance telling his generals to 'dare to fight.'"). China also rapidly increased defense spending in recent years. *Id.*; *see also Chinese president Xi Jinping Has Ordered His Military to Be Ready to Invade Taiwan in 2027, CIA Director Says*, NEWS.AU.COM (Feb. 23, 2023), https://www.news.com.au/world/asia/chinese-president-xi-jinping-has-ordered-his-military-to-be-to-invade-taiwan-in-2027-cia-director-says/news-story/06aa78c2cfcf8dfd6dc420392114dc23 [https://perma.cc/7QUK-L9GJ].

247. Stephen Fidler & Michael R. Gordon, *Russia, China Challenge U.S.-Led World Order*, WALL ST. J. (Feb. 23, 2023), https://www.wsj.com/articles/russia-china-challenge-u-s-led-world-order-3563f41d ("With strains worse than any time since the Cold War, Mr. Putin's threat to [suspend] arms control in a speech in Moscow came a day after President Biden traveled to Ukraine and vowed 'unending support.'").

248. On October 7, 2023, Hamas brutally conducted a terrorist raid inside Israel, killing over 1,000 innocent civilians, with the apparent support of Iran. Maayan Lubell & Nidal Al-Mughrabi, *Israel Retaliates After Hamas Attacks, Deaths Pass 1,100*, REUTERS (Oct. 8, 2023), https://www.reuters.com/world/middle-east/israeli-forces-clash-with-hamas-gunmen-after-hundreds-killed-2023-10-08/.

249. China and Russia increasingly cooperate to impose a new, more totalitarian, world order. Simone McCarthy & Nectar Gan, *Putin Touts Solidarity with China in Xi's Pitch for New World Order as Crisis Grips Middle East*, CNN (Oct. 18, 2023), https://www.cnn.com/2023/10/18/china/china-bri-forum-opening-ceremony-intl-hnk/index.html [https://perma.cc/8G3S-N35H] ("Russia and China share an 'aspiration for equal and mutually beneficial cooperation,' which includes 'respecting civilization diversity and the right of every state for their own development model'—he added, in an apparent push back against calls for authoritarian leaders to promote human rights and political freedoms at home."). In fact, neither dictator saw fit to condemn the brutal terrorist attack on Israel on Oct. 7, 2023. *Id*.

250. The military now needs to expend resources addressing the academic deficiencies of its recruits, as less than 25% of America's youth otherwise qualifies for service. Doug G. Ware, *Army Prep Course Has Seen 95% Grad Rate, $15M in Bonuses in 1st Year*, STARS & STRIPES (Aug. 23, 2023), https://www.stripes.com/branches/army/2023-08-07/army-recruiting-prep-course-enlistment-10975470.html [https://perma.cc/U3AQ-SKQJ].

251. Manuela López Restrepo, *The U.S. Army Is Falling Short of Its Recruitment Goals. She Has a Plan for That*, NPR (Oct. 5, 2023), https://www.npr.org/2023/10/05/1203766333/us-army-military-recruit-pentagon-air-force-navy [https://perma.cc/8ZYF-JER7].

252. Ben Kesling, *The Military Recruiting Crisis: Even Veterans Don't Want Their Families to Join*, WALL ST. J. (June 30, 2023), https://www.wsj.com/articles/military-recruiting-crisis-veterans-dont-want-their-children-to-join-510e1a25.

the military depends upon our educational system to produce fit students of color to meet recruiting needs, but these students suffer at the hands of underfunded schools that fail to adequately prepare them for service.[253] According to military leaders, colleges and universities operate as key recruiting grounds for future military officers.[254] And, as shown above, the military recognized long ago the utility of having a diverse officer corps leading the troops of a diverse nation.

Third, our foreign adversaries do not hesitate to use our racial divisions against us,[255] creating a compelling need to create more cohesive institutions as a source of geopolitical and strategic strength.[256] Recently, the United States Department of Justice indicted Russian agents and American activists for trying to sow domestic discord and interfering in our elections.[257] The Chinese use covert agents to exploit racial discord to divide the United States from its most key allies.[258] As Lieutenant General H.R. McMaster (a former Trump Administration National Security Advisor) highlights, the United States faces a new kind of battlefield that entails full-spectrum warfare including cyber attacks, attacks on our democracy

253. Amanda Barroso, *The Changing Profile of the U.S. Military: Smaller in Size, More Diverse, More Women in Leadership*, PEW RSCH. CTR. (Sept. 10, 2019), https://www.pewresearch.org/short-reads/2019/09/10/the-changing-profile-of-the-u-s-military/ [https://perma.cc/FM5P-92U4].

254. "[D]iversity in the Armed Forces is both a national imperative and an invaluable asset. Achieving such diversity requires the continuing modest use of race-conscious policies at universities . . . which serve as vital pipelines to the service branches." Military Brief, *supra* note 163, at 32.

255. *See* Richard Engel, Kate Benyon-Tinker & Kennett Werner, *Russian Documents Reveal Desire to Sow Racial Discord—and Violence—in the U.S.*, NBC NEWS (May 20, 2019), https://www.nbcnews.com/news/world/russian-documents-reveal-desire-sow-racial-discord-violence-u-s-n1008051 [https://perma.cc/KP3W-Z78C] ("The unfortunate reality is that we're seeing an adversary that will consider virtually anything to get what it wants, and if it means violence or splitting America along racial lines or eroding our trust in institutions, they'll do it."); Jason Sattler, *Trump and Russia Used Race to Divide America. Now It's a National Security Problem*, USA TODAY (July 19, 2018), https://www.usatoday.com/story/opinion/2018/07/19/putin-trump-race-divide-americans-2016-election-interference-column/799765002/ [https://perma.cc/527T-TGDR] ("The roughly 3,500 Facebook ads created by the Russian-based Internet Research Agency 'consistently promoted ads designed to inflame race-related tensions,' a USA TODAY analysis found. . . . Race is our Achilles' heel. Putin and Trump have grabbed us by it.").

256. The entire Senate Select Committee on Intelligence found that Russia uses social media to incite racial and other animosity within the U.S. *See* S. REP. NO. 116-290, at 6 (2019), https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf [https://perma.cc/8FCF-FFDE] ("[T]he Russian information warfare campaign exploited . . . divisive issues—such as race, immigration, and Second Amendment rights—in an attempt to pit Americans against one another and against their government.").

257. Press Release, U.S. Dep't of Just., U.S. Citizens and Russian Intelligence Officers Charged with Conspiring to Use U.S. Citizens as Illegal Agents of the Russian Government (Apr. 18, 2023), https://www.justice.gov/opa/pr/us-citizens-and-russian-intelligence-officers-charged-conspiring-use-us-citizens-illegal [https://perma.cc/D365-QT4X].

258. Dustin Volz, *China-Linked Internet Trolls Try Fueling Divisions in U.S. Midterms, Researchers Say*, WALL ST. J. (Oct. 22, 2022), https://www.wsj.com/articles/china-linked-internet-trolls-try-fueling-divisions-in-u-s-midterms-researchers-say-11666777403.

and system of government, and countless other efforts to undermine us and divide us against each other. Our racial divisions fuel their efforts.[259] China and Russia use the continuing reality of the American racial hierarchy to denigrate the United States internationally in a world receptive to attacks on perceived white supremacy.[260] Given the divisions within the United States today, the threat of rising fascism at home and abroad rivals the threat of communism at the height of the Cold War.[261]

Fourth, the United States today desperately needs more cohesive institutions—that is laws, processes, and mechanisms that bring our people together to create greater social unity. Racial hatred and violence threaten domestic tranquility and imperil Americans across the nation.[262] Recent surveys suggest high economic inequality and poor education threatens the nation with civil war—as a divided and ignorant population falls prey to outrageous conspiracy theories.[263] On January 6, 2020, an insurrection occurred in Washington, D.C., that sought to disrupt the constitutional transfer of power.[264] The founders understood this need for social cohesion and took affirmative steps to address the challenge of creating a union of previously independent states.[265] High economic inequality frays the very

259. H.R. MCMASTER, BATTLEGROUNDS: THE FIGHT TO DEFEND THE FREE WORLD 47–48 (2020) (recognizing how Russia attempted to discredit Hilary Clinton during her presidential campaign by creating racial and political polarization that favored Donald Trump).

260. Michelle Nichols, *U.S. and China Spar Over Racism at United Nations*, REUTERS (Mar. 19, 2021), https://www.reuters.com/article/us-usa-china-un-idUSKBN2BB29E ("'If the U.S. truly cared about human rights, they should address the deep-seated problems of racial discrimination, social injustice and police brutality, on their own soil,' [Chinese Deputy UN Ambassador] Dai [Bing] told the 193-member General Assembly."); Andrew Higgins, *Putin Says U.S. Is in 'Deep Internal Crisis'*, N.Y. TIMES (July 26, 2020), https://www.nytimes.com/2020/06/14/world/europe/putin-interview-united-states.html?smid=nytcore-android-share [https://perma.cc/R2YL-URAH] (quoting Vladimir Putin as criticizing the U.S. over race and stating that the nation faced "deep internal crisis").

261. OFF. OF THE DIR. OF NAT'L INTEL., 2023 ANNUAL THREAT ASSESSMENT OF THE US INTELLIGENCE COMMUNITY 4–5 (2023) ("Efforts by Russia, China, and other countries to promote authoritarianism and spread disinformation is helping fuel a larger competition between democratic and authoritarian forms of government" and contributes "to democratic backsliding, threats of political instability, and violent societal conflict through misinformation and disinformation.").

262. Ramirez, *supra* note 190, at 1025 ("[T]he campaign and presidency of Donald Trump led directly to more race-based violence in general in America, the inflammation of social divisions, and domestic terrorism. This furthered the plans of Vladimir Putin according to the unanimous view of the entire national intelligence community of the Trump administration.") (footnote omitted).

263. Rodrigo Perez Ortega, *Half of Americans Anticipate a Civil War Soon, Survey Finds*, SCIENCE (July 19, 2022), https://www.science.org/content/article/half-of-americans-anticipate-a-us-civil-war-soon-survey-finds [https://perma.cc/5WKN-E3UB].

264. Mary Clare Jalonick, Eric Tucker, Farnoush Amiri, Jill Colvin, Michael Balsamo & Nomaan Merchant, *Jan. 6 Report: Trump 'Lit That Fire' of Capitol Insurrection*, ASSOCIATED PRESS (Dec. 23, 2022), https://apnews.com/article/jan-6-committee-final-report-trump-bcfea6162fe9cfa0d120e86d069af0e4 [https://perma.cc/2WLQ-UJQZ].

265. As I previously stated:

> America's founders recognized the compelling need to forge unity among the people of the new republic. George Washington spent much time and thought about ways to bind the

fabric of our society and fuels wider divisions among our people.[266] Social unrest, political instability, and crime reflect these divisions.[267] Universities must operate as centers of cosmopolitan interaction, not elite resorts for the privileged few.

C. The Societal Importance of Embracing Diversity

Those opposing the embrace of diversity do not address these manifest policy concerns and the constitutional level threats accompanying them.[268] Diversity backlash rests upon a very real, but clearly backwards, legal foundation: no person should experience discrimination or a hostile environment based upon race, ethnicity, gender, disability or sexual orientation.[269] And, many firms, including Target and Anheuser-Busch, suffered from alienated consumers after appearing "woke."[270] "These recent events show that resistance to civil rights progress for members of marginalized or underrepresented groups remains entrenched, and opponents

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> new nation together—advocating for roads, canals, a national university, and a new capital city of splendid grandeur. Alexander Hamilton led a brilliant effort to forge a national economy and to facilitate commerce through a unified national credit, a national bank, and a federal policy of encouraging manufacturing. This encouraged investors to bind their fortunes to the stability of the new nation. Thomas Jefferson favored public education and a national military academy to promote social unity. He also greatly expanded the nation to spread the ideals of self-government and facilitate the growth of a population bound to such unifying ideals.

Ramirez, *supra* note 190, at 1004 (internal citations omitted).

266. *See* Jolanda Jetten, Kim Peters, Belén Álvarez, Bruno Gabriel Salvador Casara, Michael Dare, Kelly Kirkland, Ángel Sánchez-Rodríguez, Hema Preya Selvanathan, Stefanie Sprong, Porntida Tanjitpiyanond, Zhechen Wang & Frank Mols, *Consequences of Economic Inequality for the Social and Political Vitality of Society: A Social Identity Analysis*, 42 POL. PSYCH. 241, 259 (2021) (noting that "it is clear that economic inequality has a range of (mostly negative) consequences for the social and political vitality of a society," and "our social identity analysis suggests that growing inequality undermines not only known outcomes such as an individual's health, but also the sustainability and vitality of society as a whole").

267. Christian Houle, Damian J. Ruck, R. Alexander Bentley & Sergey Gavrilets, *Inequality Between Identity Groups and Social Unrest*, 19 J. ROYAL SOC. 1, 1 (2022) ("Economic, social and political inequality between different identity groups is an important contributor to violent conflicts within societies."); Benoit DeCourson & Daniel Nettle, *Why Do Inequality and Deprivation Produce High Crime and Low Trust?*, 11 SCI. REP. 1937 (2021) ("Comparing across industrialised societies, higher inequality—greater dispersion in the distribution of economic resources across individuals—is associated with higher crime and lower social trust.") (and authorities cited therein).

268. *See* Michael Z. Green, *(A)woke Workplaces*, 2023 WIS. L. REV. 811, 812 (entry-level racial awareness training sparks backlash and rarely improves diversity).

269. *See, e.g.*, *id.* at 834, 837. (Florida's "Stop WOKE Act" aims to protect Florida workers against a hostile work environment when exposed to CRT-inspired "indoctrination."). Title VII of the Civil Rights Act of 1964 long operated to protect whites from a hostile environment. Banning private speech violates the First Amendment. Honeyfund.com, Inc. v. Desantis, 622 F. Supp. 3d 1159, 1179–80 (N.D. Fla. 2022).

270. Victor Ray & Tsedale M. Melaku, *Countering the Corporate Diversity Backlash*, MIT SLOAN MGMT. REV. (Aug. 9, 2023), https://sloanreview.mit.edu/article/countering-the-corporate-diversity-backlash/ [https://perma.cc/FRX4-N7J9].

of efforts to improve equity have been emboldened."[271] Part of this backlash relies upon a misinterpretation of *SFFA*—that the Supreme Court somehow abolished race-conscious admissions without overturning *Grutter*.[272] As shown above, that conclusion relies upon a misreading of *SFFA*; instead, Justice Roberts gives the green light to weighing individualized racial experiences.[273] Thus, diversity backlash in the end rests upon an infirm foundation regarding the law and the fact that proper diversity management always focused upon inclusion of all regardless of race.[274]

Furthermore, it cannot provide our nation a path forward in light of the demographic and historic realities highlighted above nor the challenges the nation now faces, discussed above. The demographic reality facing the United States will not change anytime soon as the nation will become more diverse over time.[275] Nor will anti-discrimination laws disappear.[276] Talent pipelines need to remain open to the maximum extent possible to all firms, universities, and the nation as a whole.[277] Equitable workplaces will enjoy higher productivity.[278] Diverse classrooms and campuses will operate as superior centers of learning.[279] Thus, the best organizations see diversity backlash as a calling to improve their diversity practices, particularly with respect to inclusion and adhering to the evidence-backed best practices for making diversity pay to the maximum extent possible.[280] All of this will require the best colleges and universities to graduate the most diverse classes possible and to adjust their missions to include meeting the needs of a more diverse society.[281] Alternatives do not exist to meet the existential threats to the common defense, general welfare, and domestic tranquility outlined above.

As previously demonstrated, diversity management really revolves around maximizing the benefits from a diversifying population and

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271. *Id.*

272. *Id.*

273. *See generally supra* notes 173–189.

274. Green, *supra* note 268 at 866–67.

275. De Visé, *supra* note 238.

276. "Demographics are changing, with nonWhites making up an increasing portion of the coveted youth market, and legal protections for LGBTQ+ Americans have broad support. Rooting out discrimination and increasing access to opportunity is essential to ensuring a rich talent pipeline. And for many individual managers and employees, anti-discrimination is simply a moral imperative." Ray & Melaku, *supra* note 270.

277. *Id.*

278. *Id.*

279. *Id.*

280. Paolo Gaudiano, *Why the Backlash Against DEI Is an Opportunity to Get Better*, FORBES (Oct 9, 2023), https://www.forbes.com/sites/paologaudiano/2023/10/09/why-the-backlash-against-dei-is-an-opportunity-to-get-better/?sh=442b9d70ff67. [https://perma.cc/GA58-YB83].

281. *See supra* text accompanying notes 156–173.

minimizing the potential downsides of increased diversity.[282] Countering and preventing backlash simply mandates that colleges and universities follow the evidence on best practices developed in the world of business.[283] These evidence-based initiatives with track records of success include voluntary diversity training, mentorship programs, imposing accountability for real organizational equity, targeted recruitment, self-managed teams, and diversity task forces.[284] These lessons from business can help colleges and universities create dynamic learning environments imbued with all the rich cultural diversity our nation offers.

Basing admissions decisions upon cultural and cognitive diversity, including individualized racial experiences, creates an opportunity to achieve such learning environments while helping to mitigate the social reality of the American racial hierarchy. That hierarchy produces children who must face childhood poverty, suboptimal healthcare, poor nutrition, underfunded schools, the family and community trauma of racialized mass incarceration, stereotype threat, pervasive implicit bias, under-resourced families and communities, and a dearth of employment opportunities.[285] Each of these key elements of the racial hierarchy inculcates, in high school graduates who successfully navigate this gauntlet, tenacity, determination, insight, dedication, and a thirst for social justice that is bound to illuminate college campuses and help the nation overcome its history of racism.[286] Valuing these attributes fully accords with the majority opinion of Chief Justice Roberts in *SFFA*.[287] Preferences for those enduring the most destructive elements of our racial hierarchy will effectively target those most oppressed by the social realities of race.

As a nation, our adversaries and dictators from around the world use our socially racial hierarchy to divide us, and either the law can respond with pro-cohesive legal frameworks or the law can grant our adversaries an advantage that may prove to facilitate our demise.[288] Domestically, the United States can either resolve the challenges presented by its racist history or allow racial divisions to fester and ultimately contribute to a civil

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282. *See supra* text accompanying notes 227–229.

283. *See, e.g.*, Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July–Aug. 2016), https://hbr.org/2016/07/why-diversity-programs-fail [https://perma.cc/V6PM-E2WF] ("In analyzing three decades' worth of data from more than 800 U.S. firms and interviewing hundreds of line managers and executives at length, we've seen that companies get better results when they ease up on the control tactics."). Instead of top-down approaches: "It's more effective to engage managers in solving the problem, increase their on-the-job contact with female and minority workers, and promote social accountability—the desire to look fair-minded." *Id.*

284. *Id.*; *see also* Ray & Melaku, *supra* note 270.

285. Ramirez, *supra* note 38, at 530–34.

286. *See supra* text accompanying notes 175–176.

287. *See supra* text accompanying notes 174–179.

288. *See supra* text accompanying notes 31–35, 248–261.

war that could destroy our constitutional republic.[289] On the other hand, unlocking the benefits of cultural and cognitive diversity will certainly extend a powerful strategic benefit to our nation.[290] Courts should read *SFFA* expansively to outlaw unlimited racial preferences but allow race-based admissions until no longer needed while permitting the broadest pursuit of the benefits of cognitive diversity based upon racial experiences possible, even if incidentally race-conscious.

CONCLUSION

The Supreme Court did not overrule nor materially limit its prior cases permitting race-conscious admissions policies. It did, however, open broad avenues for the embrace of cultural and cognitive diversity—at least when such efforts enjoy an authentic relationship to a given institutional mission. Fitting efforts to mission signifies authenticity rather than merely using such diversity as a proxy for race. This means educational institutions can make an orderly and deliberate transition from race-based admissions to a culturally and cognitively conscious approach that can still yield robust diversity within a given enrolled class. In fact, such direct and mission-focused diversity efforts may deliver greater benefits than the use of race as a proxy for cultural diversity can deliver. In all events, direct embrace of cultural diversity may prove more politically sustainable and thereby more efficacious in dismantling the American racial hierarchy.

Indeed, because our racial hierarchy imposes such widespread damage and barriers upon children of color, many candidates of color for admission will demonstrate an ability to overcome and navigate childhood trauma, childhood poverty, substandard healthcare, underfunded schools, disproportionate law enforcement pressure, disparate school discipline and expulsion, family problems arising from mass incarceration, undereducated parents, underfunded childhoods and young adulthood arising from wealth disparities, discounted achievements, and constricted employment prospects. The entire spectrum of encumbrances arising from the racial hierarchy will translate into more dedicated, determined, resilient, and tenacious applicants who will demonstrate first-hand the betrayal of America's promise in terms of race as well as the ability to overcome these obstacles. Disadvantaged white individuals may similarly benefit, and all students will enjoy a superior educational experience. Educational institutions can determine the degree to which diverse students will populate each college and university campus or whether privilege will displace

289. *See supra* text accompanying notes 262–267.

290. *See supra* text accompanying notes 193–225.

merit. All students will benefit if educational institutions pick merit over privilege.

Moreover, the entire nation will benefit from a more educated corps of leaders and citizens. Educational institutions that feature a broader spectrum of American society than the traditional privileged elite will help create a more cohesive and tolerant society. More culturally and cognitively diverse students attending selective colleges and universities will foster more innovation, creativity, and critical thinking. Diversity will make our higher education system and, by extension, our nation smarter. More diverse graduates will fuel greater economic growth and innovation. It will also enhance national security. In short, the full embrace of cultural and cognitive diversity can both break down the long-festering American racial hierarchy and strengthen our society economically and internationally. As such, the majority approach in *SFFA* to expand cultural and cognitive diversity on college campuses rests upon a powerful policy basis and interest convergence between oppressed populations and the nation as a whole.