# *Henderson* and the Objective Observer Standard: The Future of Race-Conscious Standards Post-*Students for Fair Admissions*

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*[The Supreme Court majority] upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.*

—Justice Sotomayor[1]

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1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 353 (2023) (Sotomayor, J., dissenting).

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## INTRODUCTION

On June 29, 2023, the Supreme Court of the United States decided *Students for Fair Admissions v. President & Fellows of Harvard College*, which struck down race-conscious admissions policies.[2] The decision erased over forty years of universities' efforts to recruit, select, and advance underrepresented students in higher education.[3] In part, the Court held that race-conscious admissions policies violated the Equal Protection Clause and "subvert[ed] the constitutional guarantee . . . by further entrenching racial inequality in education."[4] Race-conscious admissions policies were created to further diversity and equity initiatives in higher education.[5] But, the Supreme Court found that race-conscious admissions

2. *See id.*
3. *Id.* at 318.
4. *Id.*
5. Emily M. Czachor, *What Is Affirmative Action? History Behind Race-Based College Admissions Practices the Supreme Court Overruled*, CBS NEWS (June 29, 2023), https://www.cbsnews.com/news/what-is-affirmative-action-history-college-admissions-supreme-court/ [https://perma.cc/Z7W7-LGL4].

policies fuel inequality.[6] Overall, *Students for Fair Admissions* severely tightened the legal analysis of race-conscious policies and instead placed unrealistic trust in colorblind strategies.

Within just a year after its ruling, *Students for Fair Admissions* has already had a sweeping impact, reaching beyond higher education. In the employment sector, *Students for Fair Admissions* has been used by anti-race-conscious policy advocates as a pivotal argument against employer diversity initiatives.[7] Given the narrow lens of the Equal Protection Clause as interpreted under *Students for Fair Admissions*, the legality of diversity efforts in recruiting, retention, and mentorship in the legal field has been argued as unconstitutional.[8] Although the Supreme Court did not indicate whether *Students for Fair Admissions* applies to sectors beyond higher education, law firms, and other employers have already modified their diversity policies and initiatives, erasing race and company diversity considerations.[9] Given those dramatic changes, there is growing fear that *Students for Fair Admissions* will continue to have a ripple effect on other sectors,[10] including the judiciary. The same legal argument could be used to strike down laws and court rules that consider race as a factor in undoing historically discriminatory practices.[11] The potential for *Students for Fair Admission*'s effects to bleed from the classroom to the courtroom are a dangerous and looming reality.

In contrast, over the past decade, the Washington State Supreme Court has made a series of decisions and court rules to support race-conscious rulings.[12] The court's innovative approach enabled Washington State to consider the influence of racial bias in a trial when reviewing cases on appeal.[13] In 2022, the Washington State Supreme Court issued the pinnacle of its race-conscious decisions in *Henderson v. Thompson*, holding that a court must grant a new civil trial if an objective observer could view race as a factor in the verdict.[14] Subsequently, *Henderson v. Thompson*

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6. *Students for Fair Admissions*, 600 U.S. at 220.

7. Hoang Pham, Imani Nokuri, Fatima Dahir & Mira Joseph, Students for Fair Admissions v. Harvard *FAQ: Navigating the Evolving Implications of the Court's Ruling*, SLS BLOGS (Jan. 4, 2024), https://law.stanford.edu/2023/12/12/students-for-fair-admissions-v-harvard-faq-navigating-the-evolving-implications-of-the-courts-ruling/ [https://perma.cc/DY4M-K2CL].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Amy Radil, *With Rulings Against Racial Bias, WA Supreme Court Starts 'Hard Discussions'*, KUOW (Feb. 7, 2023), https://www.kuow.org/stories/with-racial-bias-rulings-wa-supreme-court-starts-hard-discussions [https://perma.cc/P9WV-G7Y5].

13. *Id.*

14. Henderson v. Thompson, 518 P.3d 1011, 1011 (Wash. 2022), *cert. denied*, 143 S. Ct. 2412 (2023).

was petitioned for certiorari to the Supreme Court of the United States.[15] In Justice Alito's statement respecting the denial of certiorari, the Justice placed special concern on a potential conflict with *Students for Fair Admissions*.[16] The Justice noted that *Henderson* "appear[ed] likely to have the effect of cordoning off otherwise-lawful areas of inquiry and argument solely because of race."[17] While the Supreme Court did not hear *Henderson*, its open skepticism left the possibility for similar race-conscious policies to be challenged and overturned.

This Comment will focus on the narrowing constitutionality of race-conscious policies under *Students for Fair Admissions*. Despite the Supreme Court's stringent interpretation under *Students for Fair Admissions*, there is still room for race-conscious policies such as *Henderson*. After the Introduction, discussing the importance of the constitutionality of race-conscious efforts, Part I of this Comment will discuss the history and background of the constitutional debate on race-conscious policies. Part II will elaborate on why Henderson's objective observer standard should remain constitutional, namely because (1) it identifies and remediates a specific instance of discrimination, (2) it is not a race-based classification, and (3) it is the exercise of state sovereignty, which ought to be preserved. Part III will address notable counterarguments to the objective observer standard. Finally, Part IV proposes that racial considerations, namely those made to remediate a specific instance of discrimination, like in *Henderson*, should be upheld as constitutional under the Equal Protection Clause of the Fourteenth Amendment.

## I. HISTORY AND BACKGROUND OF RACE-CONSCIOUS POLICIES

### *A. Supreme Court of the United States*

The Fourteenth Amendment aimed to incorporate into the Constitution a key principle—"the absolute equality of all citizens of the United States politically and civilly before their own laws."[18] Specifically, the Equal Protection Clause forbids states from denying any person equal protection of the laws.[19] By ratifying the Fourteenth Amendment, Congress aimed to eradicate "all official state sources of invidious racial

15. *See* Thompson v. Henderson, 143 S. Ct. 2412, 2412 (2023).

16. *Id.* at 2413.

17. *Id.* at 2413–14.

18. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 201 (2023) (citing Cong. Globe, 39th Cong., 1st Sess., 431 (1866) (statement of Rep. Bingham) (Cong. Globe)).

19. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citing U.S. CONST. amend. XIV, § 2).

discrimination in the States."[20] Through the Fourteenth Amendment, the United States established race as a protected class.[21]

Courts apply a legal framework with varying levels of "scrutiny" when faced with constitutional issues related to protected classes.[22] In determining a race-conscious policy's constitutionality under the Equal Protection Clause, strict scrutiny must be applied.[23] Under this standard of scrutiny, the government must prove two elements for a racial classification to survive.[24] First, the policy must be used to further a compelling government interest.[25] Second, if there is a compelling government interest, the government's use of race must be narrowly tailored or necessary to achieve that interest.[26] Additionally, the Supreme Court has held that a statute remediating specific and identified instances of past discrimination in violation of the Constitution or a statute satisfied strict scrutiny and permitted race-based government action.[27] Despite this, given the heightened standard of strict scrutiny, the Supreme Court has rarely upheld race-based policies.[28]

### 1. *Regents of the University of California v. Bakke*

The Equal Protection Clause sought to bring equality in laws and government policies.[29] However, the applicability of the Equal Protection Clause has faced extensive litigation, particularly as it applies to race-conscious admissions. Race-conscious admissions initiatives refer to policies "to ensure equal opportunity and prevent discrimination based on a broad range of identities, including race . . . ."[30] In the wake of desegregation in the 1960s and 1970s, higher education institutions sought ways to ensure

20. *Students for Fair Admissions*, 600 U.S. at 206.

21. *See id.* at 201–02.

22. *Id.* at 207.

23. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

24. *See also* Rana L. Freeman, Comment, *Admissions Denied: The Effects on Corporate America Jobs if Race Is Excluded As a Factor in University Admissions*, 50 S.U. L. REV. 111, 118 (2023).

25. Grutter, 539 U.S. at 326.

26. *Id.*

27. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (holding that schools that classified students by race and relied on the classification for school assignments violated the Equal Protection Clause).

28. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023) (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

29. *Id.* at 201.

30. Czachor, *supra* note 5.

diversity in their student bodies.[31] Higher education diversity initiatives included: special admissions programs to increase the representation of disadvantaged students; questions asking if an applicant identified as a member of a particular minority group; and special committees to evaluate applicants who identified as part of a minority group.[32] Colleges and graduate schools also developed policies to expand access to disadvantaged and underrepresented populations of society, mainly racial minorities.[33]

In 1978, the Supreme Court issued its first decision related to a race-conscious admission policy in *Regents of the University of California v. Bakke*, which centered on a student, Allan Bakke, who was denied admission and challenged the admissions policies of the University of California, Davis (UC Davis).[34] UC Davis reserved sixteen out of 100 admission seats for economically disadvantaged individuals, members of a minority group, or those who were both.[35] Furthermore, the university established a separate application and review system (referred to as the "special admissions program") for applicants who identified as part of an underrepresented group.[36] The student claimed that a special admissions program for applicants who identified as economically disadvantaged and minority students violated the Equal Protection Clause.[37]

The Supreme Court agreed, holding that correcting historical discrimination was not a compelling interest.[38] Instead, the Court held that the program was a preference for one racial group over another, which is unconstitutional.[39] Additionally, the quota of sixteen seats reserved for certain populations was found not to be narrowly tailored because it created a two-track system based on race.[40] However, besides the quota of sixteen seats and the compelling interest in rectifying discrimination, the Supreme Court held the policy constitutional.[41] Universities could consider race in admissions to obtain the educational benefits that flow from a racially and ethnically diverse student body.[42] The interest in student diversity satisfied strict scrutiny under the Equal Protection Clause, and the

31. Alicia Victoria Lozano, *California Ended Affirmative Action in the '90s but Retains a Diverse Student Body*, NBC NEWS (June 29, 2023), https://www.nbcnews.com/news/us-news/california-ended-affirmative-action-90s-retains-diverse-student-body-rcna91846 [https://perma.cc/62TC-NNLW].

32. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272–73 (1978) (plurality opinion).

33. *Id.* at 274.

34. *Id.* at 277.

35. *Id.* at 275.

36. *Id.* at 272–73.

37. *Id.* at 277–78.

38. *Id.* at 307.

39. *Id.*

40. *Id.* at 315–18.

41. *Id.* at 311–12.

42. *Id.*

Court did not rule out properly constructed race-conscious admissions policies.[43] This plurality decision emphasized that policies with race considerations must be narrowly tailored.[44] Racial considerations can be made, so long as it is factored as a "plus" in an applicant's file rather than the sole reason they are admitted.[45]

### 2. *Grutter v. Bollinger*

In 2003, race-conscious admissions policies resurfaced in the highest court in *Grutter v. Bollinger*.[46] In this class action suit, the petitioners sued the University of Michigan and claimed the university's admissions policies[47] were unconstitutional.[48] *Grutter* solidified *Bakke* with a majority opinion that explicitly embraced the constitutionality of race considerations to promote diversity.[49] This decision established a national precedent to allow the consideration of race in higher education admissions.[50] *Grutter* upheld that evaluating the possible diversity contributions of all applicants does not "unduly harm nonminority applicants."[51] The Court stated that in limited circumstances where racial distinctions are permissible, the government's means must be narrowly tailored to achieve a compelling state interest.[52] The opinion did not unilaterally prohibit all racial classifications, instead emphasizing that each racial classification must be subjected to strict scrutiny.[53]

In the *Grutter* decision, the Court notably did not claim that race-conscious admissions policies were indefinitely constitutional.[54] The Court conveyed reservations that race-conscious admissions must have a termination point; it was concerned that these policies may lead to racial stereotyping.[55] *Grutter* reaffirmed that schools have a compelling interest in educational diversity and that race considerations in admissions are

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43. *Id.* at 320.

44. *Id.* at 317.

45. *Id.*

46. Grutter v. Bollinger, 539 U.S. 306, 304 (2003).

47. The university's admissions policies allowed the admissions committee to flag applicants that had a quality or characteristic important to the university's composition, such as underrepresented race or ethnicity groups. *Id.* at 315–16.

48. *Id.* at 308.

49. Genevieve Bonadies Torres, *Affirmative Action in Higher Education: Relevance for Today's Racial Justice Battlegrounds*, HUM. RTS. MAG. (Jan. 6, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/black-to-the-future-part-ii/affirmative-action-in-higher-education--relevance-for-today-s-ra/.

50. *Grutter*, 539 U.S. at 343–44.

51. *Id.* at 341.

52. *Id.* at 335.

53. *Id.* at 326–27.

54. *Id.* at 341–42.

55. *Id.*

permitted.[56] However, there were three prohibitions that the Court emphasized. First, race cannot be the single diversity factor, nor can a school seek racial diversity for its own sake.[57] Second, the Court emphasized that quotas or reserved seats for racial minorities were unconstitutional.[58] Third, *Grutter* prohibited any separate treatment of minority applicants.[59] In addition to the prohibitions, *Grutter* distinguished that race-conscious admission policies must be limited in time.[60] Racial considerations cannot be in perpetuity—they must have a logical endpoint.[61] The Court did not clarify or expand on what an endpoint looks like, but it expected that 25 years later, the use of racial preferences would no longer be necessary.[62]

Following *Grutter*, the Supreme Court decided *Fisher v. University of Texas at Austin*, further expanding the government's standard of review in an Equal Protection Clause claim.[63] Under *Fisher*, to withstand strict scrutiny, there must be an absence of race-neutral alternatives that produce the benefits of diversity.[64] *Grutter'*s time-restrained condition and *Fisher*'s narrowed strict scrutiny standard left legal openings for further reductions of race-conscious admissions policies in the future.

With the constitutional green light for race-conscious policies, higher education institutions' race-conscious initiatives flourished. Only nine states showed opposition by banning race-conscious admissions policies at public universities.[65] Specifically, in 1996, California banned race-conscious admissions policies at all public universities in the state.[66] Unsurprisingly, this had detrimental effects. In 1998, when the ban went into effect, enrollment among Black and Latino students at two of California's

56. Mark W. Cordes, *Affirmative Action After* Grutter *and* Gratz, 24 N. ILL. U. L. REV. 691, 692 (2004).

57. *Grutter*, 539 U.S. at 329–30.

58. *Id.* at 315–18.

59. *Id.* at 334.

60. *Id.*

61. *Id.* at 341.

62. *Id.* at 310, 342.

63. 570 U.S. 297, 312 (2013) (tightening the narrowly tailored prong of the strict scrutiny standard, "consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity").

64. *Id*. (holding that the University of Texas Austin's policy to admit all in-state students in the top 10% of their class and the remainder of the class would consider race in as a factor in admissions was constitutional because the policy was tailored to serve the compelling government interest of diversity).

65. Arizona, California, Florida, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington banned affirmative action policies at public universities. Czachor, *supra* note 5.

66. Lozano, *supra* note 31.

largest public universities fell by 40%.[67] The compounding effects of California's ban continued decades later. A 2020 study[68] found that Black and Latino students in California were less likely to earn graduate degrees and were discouraged from applying to universities where minority students were underrepresented.[69] To address this disparity, in the early 2000s, California public universities made sweeping changes to its admissions process, utilizing holistic reviews of applicants such as personal essays, academic achievements, and even eliminating the requirements to submit standardized test scores.[70] After twenty-five years of the ban and experimentation with race-neutral policies, California has only begun to catch up to the diversity numbers lost due to banning race-conscious admissions policies.[71] California's turbulent race-conscious ban displayed the unmistakable need for race-conscious admissions policies.

### 3. *Students for Fair Admissions v. President & Fellows of Harvard College*

Despite the Supreme Court issuing several decisions on race-conscious admissions policies, confusion remained as to the application of its holdings. The debate came to a head in 2022 when the Supreme Court granted certiorari to *Students for Fair Admissions*.[72] Students for Fair Admissions[73] sued the University of North Carolina and Harvard University, claiming both schools unconstitutionally allowed race considerations in admissions.[74] In the Supreme Court's decision, the Court reversed a substantial portion of *Grutter*, holding that race-conscious policies in

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67. University of California at Los Angeles and University of California at Berkley saw a 40% decline in Black and Latino students. Emma Bowman, *Here's What Happened When Affirmative Action Ended at California Public Colleges*, NPR (June 30, 2023), https://www.npr.org/2023/06/30/1185226895/heres-what-happened-when-affirmative-action-ended-at-california-public-colleges [https://perma.cc/KZ6B-V43B].

68. The University of California, Berkley's study analyzed the ban's impact on students who applied to the University of California from 1994 to 2002. The study followed the applicants' trajectories through college, course performance, degree attainment, and wages. The data showed that banning race-conscious policies in admissions exacerbated socioeconomic inequities. *See* Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q.J. ECON. 115, 115 (2022).

69. Bowman, *supra* note 67.

70. *Id.*

71. *Id.*

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

73. Students for Fair Admissions is a nonprofit organization aiming to "to defend human and civil rights secured by law, including the right of individuals to equal protection under the law." *Students for Fair Admissions*, 600 U.S at 197.

74. Debra Cassens Weiss, *SCOTUS Strikes Down Race-Conscious Admission Programs at Harvard, University of North Carolina*, ABA J. (June 29, 2023), https://www.abajournal.com/web/article/supreme-court-rules-on-affirmative-action.

admissions violated the Equal Protection Clause of the Fourteenth Amendment.[75] Previously, the Court maintained precedence that student diversity was a compelling government interest for race-conscious practices. However, *Students for Fair Admissions* revisited the constitutionality of race-conscious policies.[76] The Court held that the factors used to measure racial categories were overly broad, arbitrary, undefined, or underinclusive.[77] Because the defining factors of diversity were unclear, the Court questioned the connection between the goal of diversity and how race is used in the admissions process.[78]

Besides the ambiguity of the racial categories, the Court found that the objective of achieving diversity was immeasurable and unclear in determining when the goal was accomplished.[79] It critiqued the immeasurability and emphasized concern about the potential perpetuity of race-conscious admissions policies.[80] The colleges avoidably "employ[ed] race in a negative manner," and race-conscious admissions policies "lack[ed] meaningful end points."[81] Because *Grutter* stressed the time limit of race-conscious admissions policies, the Court held that there must be a concrete end to measure when the goals of race-conscious admissions policies have been met.[82]

While *Students for Fair Admissions* held that race-conscious admissions policies were unconstitutional, it preserved two key elements of race considerations. First, the Court acknowledged that colleges have the right to consider race if the applicant chooses to discuss how race has influenced their life, "through discrimination, inspiration, or otherwise."[83] Colleges could no longer ask applicants to list their race in their application, yet nothing in the decision prevented an applicant from discussing racial impacts in their narrative section of the application.[84] Secondly, and most importantly, the Court maintained that race could be considered for specific and distinct purposes.[85] The Fourteenth Amendment's equal-treatment principle applies only when necessary to "remediat[e] specific, identified instances of . . . discrimination that violat[e] the Constitution or a

75. *Id.*

76. *Students for Fair Admissions*, 600 U.S at 213.

77. *Id.* at 215–17.

78. *Id.* at 217.

79. *Id.* at 211–13.

80. *Id.*

81. *Id.* at 230. The Court found race was used as a negative factor because the programs lead to a decrease in Asian American students. *Id.* There was also an underlying stereotype that a Black student can bring qualities to a university that a white person cannot. *Id.*

82. *Id.* at 212–13.

83. *Id.* at 230.

84. *Id.*

85. *Id.* at 207.

statute."[86] The principle does not cover generalized past or ongoing discrimination.[87] Race considerations are generally unconstitutional, but if a statute aims to remedy specific discriminatory practices, these laws may still be constitutional. However, because *Students for Fair Admissions* held that diversity was not a sufficiently compelling interest,[88] it is unclear what type of race-conscious policies are still constitutional. *Students for Fair Admissions* negated decades of race-conscious efforts to further access to higher education, leaving colleges wondering how to constitutionally further their educational goals.

### *B. Washington State*

The debate on the constitutionality of race-conscious measures also continues in state courts. In Washington State, the state's constitution declares that the right to a civil trial "includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial."[89] In recent years, the Washington State Supreme Court has furthered this legal principle, deciding several cases that have shaped the legality of race-conscious policies.

#### 1. *State v. Monday*

Specifically, Washington has upheld the constitutionality of assessing prosecutorial misconduct through race-based factors.[90] In *State v. Monday*, the Washington State Supreme Court recognized that racial bias fundamentally undermines justice.[91] Consequently, the "right to a jury trial includes the right to an unbiased and unprejudiced jury."[92] Prior to *State v. Monday*, a judge had deference to determine whether a prosecutor's misconduct was improper and prejudicial through a harmless error review.[93] In this decision, the Court held that when appeals to racial bias affect a verdict, the decision is not reviewed under a harmless error standard.[94] Rather, decisions that are impacted by racial bias require reversal.[95] Furthermore, when prosecutorial misconduct based on racial bias is alleged by a defendant, the court evaluates whether the prosecutor

86. *Id.* at 306 (Gorsuch, J., concurring).

87. Thompson v. Henderson, 143 S. Ct. 2412, 2414 (2023).

88. *Students for Fair Admissions*, 600 U.S. at 214.

89. Henderson v. Thompson, 518 P.3d 1011, 1023 (Wash. 2022), *cert. denied*, 143 S. Ct. 2412 (2023).

90. State v. Monday, 257 P.3d 551, 557–58(Wash. 2011).

91. *Id.*

92. State v. Zamora, 512 P.3d 512, 518 (Wash. 2022).

93. *Monday*, 257 P.3d at 555.

94. *Id.* at 557–58.

95. *Id.*

flagrantly, apparently, and intentionally appealed to racial bias in a way that undermines the defendant's creditability or the presumption of innocence (the "flagrant, apparent, and intentional" rule).[96] On appeal, the court must review if the racial bias affected a jury's verdict beyond a reasonable doubt.[97] If the flagrant, apparent, and intentional factors are met, the court must vacate the conviction.[98]

*State v. Monday* set a standard that appeals to racial bias were unacceptable in the courtroom. Although it was a step in the right direction, legal scholars questioned its effectiveness.[99] The court's use of *flagrant, apparent, and intentional* qualified the bias as explicit racism rather than implicit racism.[100] Since explicit racism was the only type of racism addressed, there was still room for bias and prejudice to seep into the courtroom through implicit bias.

Allowing implicit bias in the courtroom, which defendants are more likely to encounter than explicit bias, poses a danger to justice.[101] Legal scholars stress that individuals may not have intent to discriminate, yet, courts and judges systematically discriminate against people of color through implicit bias or stereotypes.[102] Researchers define stereotypes as well-learned sets of associations among groups and traits that children establish in their memories at an early age.[103] Because stereotypes develop early on in life, children have not developed the cognitive skills to decide upon the personal acceptability of the stereotype rationally.[104] Implicit bias differs from explicit bias because explicit biases are attitudes and stereotypes that are consciously accessible through introspection.[105] Implicit bias builds on explicit bias stereotypes and attitudes; this more complex type of bias is not consciously accessible through introspection.[106] These biases can come from society or upbringing and may be triggered by subtle references.[107] Furthermore, because implicit bias is unconscious, it may be incorrectly dismissed as not racist by justifying the actions or statements

96. *Zamora*, 512 P.3d at 518.

97. *Monday*, 257 P.3d at 558.

98. *Id.*

99. Michael Callahan, Note, *"If Justice Is Not Equal for All, It Is Not Justice": Racial Bias, Prosecutorial Misconduct, and the Right to a Fair Trial in* State v. Monday, 35 SEATTLE U. L. REV. 827, 844–45 (2012).

100. *Id.*

101. *Id.*

102. *See generally* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

103. Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1248.

104. *Id.*

105. *Id.*

106. *Id.* at 1247.

107. Callahan, *supra* note 99, at 845.

with other reasons not involving racial bias.[108] The subtle nature of implicit bias is as detrimental as explicit racial bias because the most basic racial cues in trial can trigger a jury to unknowingly associate the party with a racial stereotype.[109] In turn, that racial stereotype then impacts how a jury assesses evidence.[110] *State v. Monday* established an important standard to address racism in courtrooms; however, it left a gap in addressing one of the most complex forms of racism[111]—implicit bias.

### 2. General Rule 37

In 2018, Washington Courts took *State v. Monday* a step further by enacting General Rule 37 (GR 37) to prevent bias from influencing court decisions.[112] GR 37 aimed to protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of jurors.[113] Studies show that racial diversity within a jury improves the quality of decisions through information exchange and individual awareness.[114] The rule aimed to further this principle and lessen the opportunity for a party to exclude a person from serving on a jury based on their race.[115] The legal community viewed GR 37 as a groundbreaking rule that "reduce[d] the damage done by racial and ethnic bias" in the judicial system.[116] Through decisions and court rules, the Washington State Supreme Court has acknowledged that racial bias can significantly impact verdicts. Washington's laws and policies demonstrate a conscious effort to mitigate and correct instances of racial bias.

### 3. *Henderson v. Thompson*

In 2022, the Washington State Supreme Court provided a breakthrough dimension to the judicial evaluation of racial bias. In *Henderson v. Thompson*, Henderson claimed damages from a motor vehicle

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108. Amici Curiae Brief of ACLU-WA, Disability Rts. Wash., and Nat'l Laws. Guild at 1, Henderson v. Thompson, 518 P.3d 1011 (Wash. 2022) (No. 97672-4), *cert. denied*, 143 S. Ct. 2412 (2023) [hereinafter ACLU Brief].

109. Callahan, *supra* note 99 at 845; Thompson, *supra* note 103, at 1257.

110. Thompson, *supra* note 103, at 1257.

111. *See generally* State v. Monday, 257 P.3d 551 (Wash. 2011).

112. WASH. GEN. R. 37.

113. *Id.* Under GR 37, judges are directed to deny peremptory challenges when an objective observer could see race as a factor in the challenge. *Id.*

114. ACLU Brief, *supra* note 108, at 8.

115. *Id.*

116. *Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU OF WASH. (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury [https://perma.cc/J2PY-RQRD].

collision.[117] At trial, the defense attacked Henderson's credibility, suggesting that Henderson sought a financial windfall when she asked for $3.5 million.[118] The defense further attacked Henderson, a Black woman, by characterizing her as "confrontational" and "combative."[119] The jury awarded Henderson $9,200, and Henderson appealed, claiming the defense's repeated appeals to racial bias affected the verdict.[120] The Washington State Supreme Court agreed with Henderson, holding that prejudice tainted the jury's award.[121] The court reasoned that the defense's portrayal of Henderson may have invoked a stereotype of Black women.[122] The court did not stop there. To ensure that future petitioners could bring claims based on racial bias, the court implemented the *objective observer standard*.[123] When determining whether there should be a new civil trial, the court must ask "whether an objective observer . . . could view race as a factor in the verdict."[124] If the court found that racial bias impacted the verdict, the court must grant an evidentiary hearing to determine if there should be a new trial.[125] The objective observer standard was monumental, filling a significant gap in courts' ability to consider the effects of implicit bias.

The new objective observer standard received mixed reactions. Some legal scholars claimed the rule was unworkable, criticizing that it limited attorneys.[126] Critics were concerned that lawyers would have to strongly scrutinize every argument or question against minority parties or witnesses for fear that anything could be construed as bias.[127] Supporters applauded it as an important new strategy to eradicate bias.[128] Overall, the legal community saw the *Henderson* decision as a clear sign from the Washington State Supreme Court that race is a serious factor in trials.[129]

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117. *Henderson*, 518 P.3d at 1016–17.

118. *Id.*

119. *Henderson*, 518 P.3d at 1018.

120. *Id.*

121. *Id.*

122. *Id.* at 1023–24.

123. *Id.* at 1017.

124. *Id.* (quoting State v. Berhe, 444 P.3d 1172, 1181 (Wash. 2019)). The court defined an objective observer as "one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." *Id.*

125. *Id.* at 1023.

126. Brief of the Chamber of Com. of the U.S. and the Am. Tort Reform Ass'n as Amici Curiae in Support of Petitioner at 8, Thompson v. Henderson, 143 S. Ct. 2412 (2023) (No. 22-823) [hereinafter Chamber of Commerce Brief].

127. *Id.* at 4.

128. Radil, *supra* note 12.

129. *See id.*

*Henderson v. Thompson*'s controversial reactions resulted in a petition for a writ of certiorari to the Supreme Court of the United States.[130] On June 30, 2023, the Supreme Court denied certiorari due to lack of federal issue.[131] Justice Alito rationalized that it was unclear whether there was any federal issue "that has been finally decided by the Washington Supreme Court."[132] Furthermore, the Justice opined that *Henderson v. Thompson* was a new decision, and it was questionable how the objective observer standard would be applied.[133] Although the appeal was not heard by the Supreme Court, the Justice's statement explained some concern for the rule within the context of the recent *Students for Fair Admissions* decision.[134] Justice Alito expressed concern that the objective observer standard conflicts with the Equal Protection Clause.[135] Furthermore, the Justice's statement noted that the objective observer standard "threatens to inject racial considerations into every [litigation] decision parties make."[136]

## II. *HENDERSON*'S CONSTITUTIONALITY UNDER *STUDENTS FOR FAIR ADMISSIONS*

In the *Henderson* denial, Justice Alito raised concerns about the constitutionality of the objective observer standard given the recent *Students for Fair Admissions* decision. However, *Henderson* differs from *Students for Fair Admissions* in both compelling interest and policy implications. In applying *Students for Fair Admissions*, the *Henderson* decision and objective observer standard remain constitutional because (1) *Henderson's* objective observer standard identifies a specific instance of discrimination that it intends to remediate; (2) the objective observer standard is not a race-based classification; and (3) state sovereignty should be preserved.

### *A. Remediating Courtroom Bias*

First, the objective observer standard is constitutional because it aims to remediate a specific instance of discrimination. Justice Alito raised concerns that *Henderson*'s justification of general racism and bias threatened to make race a consideration in every trial.[137] The Justice emphasized that race-conscious practices are only constitutional when used to remediate

130. Thompson v. Henderson, 143 S. Ct. 2412 (2023).
131. *Id.*
132. *Id.* (internal quotation marks omitted).
133. *Id.*
134. *Id.* at 2413–14.
135. *Id.* at 2414.
136. *Id.* (alteration in original) (internal quotation marks omitted).
137. *See id.*

identified instances of discrimination.[138] Though the Washington State Supreme Court recognized racism as a global problem, it also identified racism's influence on jury verdicts.[139] Therefore, the specific and compelling interest of remediating racism and bias in the courtroom protects the *Henderson* decision under the Equal Protection Clause.

In the *Henderson* decision, the Washington State Supreme Court emphasized "that racial bias . . . affect[s] litigants' ability to receive a fair and impartial civil trial."[140] To support the finding that racial bias impacts trials, the court cited the Loren Miller Bar Association (LMBA)'s amicus brief.[141] The LMBA vocalized that their Black attorney members must consider the jury's perception of clients and biases that opposing counsel may use to undermine a person's creditability.[142] Additionally, acts of racial bias, such as microaggressions, are often unconscious or automatic.[143] Repeated microaggressions throughout a trial can have a cumulative effect psychologically and physiologically,[144] causing bias to influence verdicts dangerously. Implicit bias can impact decisions, however it is so subtle and often escapes review from the court.[145]

Implicit bias naturally transcends into the courtroom. Case analysis across over thirty years found that "prosecutors often make overt and improper racial references based on the victim or defendant's race."[146] Courts may have noted these inappropriate racial references; however, decisions are rarely overturned because of bias.[147] The lack of influence that racial comments have in decisions could be attributed to the absence of guidelines. Legal scholars criticize that the Federal Rules of Evidence do not acknowledge the evidentiary value of bias.[148] Because implicit bias remains unhindered in the courtroom, it has the potential to increase the prejudicial effect of a party's race.[149] As a result, rulings could be based on

138. *Id.* (alterations in original) (citing Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023)).

139. Henderson v. Thompson, 518 P.3d 1011, 1019–20 (Wash. 2022), *cert. denied*, 143 S. Ct. 2412 (2023).

140. *Id*. at 1021.

141. *Id.*

142. *Id.*; *see generally* Turner v. Stime, 222 P.3d 1243 (Wash. Ct. App. 2009) (recognizing juror misconduct involving racial bias directed at an attorney likely affected the verdict).

143. DANIEL G. SOLÓRZANO & LINDSAY PEREZ HUBER, RACIAL MICROAGGRESSIONS: USING CRITICAL RACE THEORY TO RESPOND TO EVERYDAY RACISM 34 (James A. Banks ed., 2020).

144. *Id.*

145. Thompson, *supra* note 103, at 1254.

146. *Id.* at 1255.

147. *Id.*

148. Montré D. Carodine, *"The Mis-Characterization of the Negro": A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 536 (2009).

149. *Id.*

unfounded racial stereotypes and bias rather than the merits of the argument.[150]

Specifically, stereotypes and implicit bias impact the type of characteristics associated with parties of color. Research indicates that people tend to associate people of color with undesirable qualities such as laziness, incompetence, and hostility.[151] Additionally, there is a common ill-informed perception that Black women are untrustworthy, criminal, or dangerous.[152] *Henderson* was a prime example of relying on stereotypes of Black women in the courtroom. The opposing party invoked stereotypes of Black women by claiming Henderson sought a windfall and that she was combative.[153] The Washington State Supreme Court found that these characterizations called on racist tropes that ultimately impacted the jury's verdict.[154]

The national discourse and Washington State Supreme Court's findings on implicit bias in the courtroom demonstrate a compelling justification for the objective observer standard. Under the Equal Protection Clause, race-conscious policies are constitutional if they remediate a specific statute or instance of discrimination. Here, this threshold is met. The objective observer standard does not aim to remedy generalized racism,[155] as criticized by Justice Alito. The Washington State Supreme Court identified racial bias in the courtroom as a specific instance of discrimination and provided data to support the extent of the problem. Racial bias in the courtroom is much narrower than generalized racism, thus the decision is constitutional.[156]

### *B. Lacking Race-Based Classifications*

Secondly, the *Henderson* decision does not conflict with *Students for Fair Admissions* because the objective observer standard is not a race-based classification. Justice Alito raised concerns because under the Equal Protection Clause, "the law must be the same for the black as for the white."[157] *Students for Fair Admissions* held that race-based classifications were unconstitutional, in part because equal protection cannot have

150. *See id.*

151. *Id.*

152. *Id.* at 569.

153. Henderson v. Thompson, 518 P.3d. 1011, 1018 (Wash. 2022), *cert. denied*, 143 S. Ct. 2412 (2023).

154. *Id.* at 1016.

155. *See supra* Part II.

156. Thompson v. Henderson, 143 S. Ct. 2412, 2414 (2023).

157. *Id.* (internal quotation marks omitted).

different meanings when applied to white individuals versus people of color.[158] The Supreme Court saw distinguishing perceptions of white applicants versus applicants of color in college admissions.[159] It found that when a student is admitted because of their race, universities further stereotypes based on the student's race.[160] The Court claimed that schools would treat students as products of their race instead of treating students as individuals.[161] These classifications were considered unconstitutional in *Students for Fair Admissions*.

Both *Students for Fair Admissions* and *Henderson* assess the importance of considering race. However, Justice Alito's statement misinterprets the objective observer standard as classifying parties based on their race, but nothing in *Henderson* actually classifies people by their race. The racial categories in college admissions and racial bias in the courtroom are two different progressions. In *Students for Fair Admissions*, all college applicants were required to designate their race in their application.[162] That designation was then used, in part, to determine whether the student was offered admission to the university.[163] On the other hand, in *Henderson*, there are no racial classifications considered by the court.[164] Nothing in the decision classified people by their race, nor did it designate any advantages to a person based on their race.[165] Rather, in *Henderson*, race was a factor in determining whether a post-trial evidentiary hearing was justified.[166] The post-trial hearing allows the petitioner to detail how their trial was impacted by racial bias or prejudice. Similarly, *Students for Fair Admissions* found narrative responses on the impact of an individual's race on their life experience are still constitutional.[167] The objective observer standard should be equated to a college applicant's narrative rather than a racial classification. Like a college applicant's narrative describing how race has impacted their lives, the objective observer standard looks at how race impacted a jury's verdict. In this way, the objective observer standard allows the court to account for how race affected a party's ability to receive a fair trial. Ultimately, the objective observer standard is not a racial

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

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *See generally* Henderson v. Thompson, 518 P.3d 1011 (Wash. 2022), *cert. denied*, 143 S. Ct. 2412 (2023).

165. *See generally id.*

166. *Id.* at 1023.

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

classification because litigants do not have to report their race and there are no preferences given based on race.

### *C. Maintaining State Sovereignty*

Third, the objective observer standard is constitutional because it upholds the tradition of state sovereignty. The Supreme Court has long held that states are "independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees."[168] States have the power "to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways."[169] State sovereignty gives state courts the authority to create their practices separate from the federal system.[170] This flexibility allows state courts to launch novel social and economic experiments without risk to the rest of the country.[171] As long as statutes are not arbitrary, capricious, or unreasonable, the Supreme Court generally allows states to innovate within its court systems.[172] The novelty of state courts, which are seen as laboratories of democracy and in virtue of their own sovereignty, has been a fundamental principle of our judicial system. [173] The power of states to create their own laws allows a breadth of solutions among the states when the best solution may be unclear.[174]

Upholding *Henderson*'s objective observer standard would continue to promote state sovereignty. It furthers the principle that the Constitution is a floor, not a ceiling, for state law. States must maintain the power to create policies to meet the judicial needs of its people and advance its values. Through several decisions in the past decade, the Washington State Supreme Court has established a judicial base to rectifying racism in Washington courts. It is not unreasonable or arbitrary for Washington to further its value in recognizing racism through another dimension of analysis. *Henderson* is the modern example of a state acting as a laboratory for democracy; this constitutional advancement of the law should be celebrated.

168. Danforth v. Minnesota, 552 U.S. 264, 280 (2008).

169. *Id.*

170. *Id.*

171. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

172. *Id.*

173. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015); *see, e.g.*, Miranda v. Arizona, 384 U.S. 436, 490 (1966) ("States are free to develop their own safeguards" concerning constitutional rights).

174. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49–50 (1973).

## III. COUNTERARGUMENTS TO THE SUPREME COURT'S DENIAL OF CERTIORARI IN *HENDERSON*

The Supreme Court's main critique of *Henderson* is that litigants or witnesses identifying as part of a racial minority group will nearly always be able to establish a prima facie case of racial bias.[175] Supporters of this concern argue that the objective observer "broadly threatens the fairness and predictability of civil trials."[176] They argue that in any case between a white party and a Black party, the white party may be subject to crippling rules or expect to face an evidentiary hearing where racism is presumed.[177] Although supporters may recognize that unconscious bias exists in the judicial system,[178] they believe it is easily cured through court instructions and deliberations based on honesty and common sense.[179]

These arguments fail to account for the fact that racial bias is persistent in the courtroom and throughout the country's history. Studies show that juries in tort actions regularly consider a party's race when calculating damages.[180] These racially biased considerations result in systemically lower awards to Black plaintiffs versus white plaintiffs. [181] Research invalidates critics' assumptions that the current judicial system will naturally cure racial bias. Eliminating the longstanding influence of racial bias will require innovation by courts. As Justice Jackson's dissent in *Students for Fair Admissions* stresses:

> [t]he only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively striving to achieve true equality for all Americans.[182]

Washington State's approach takes a bold step in the direction of justice, allowing courts to recognize what society has known for centuries. The Constitution, as currently interpreted, continues to protect this bold approach through remediation, protection of race-based narrative responses, and the fundamental principle of state sovereignty.

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175. Thompson v. Henderson, 143 S. Ct. 2412, 2414 (2023).

176. Chamber of Commerce Brief, *supra* note 126, at 1.

177. *Henderson*, 143 S. Ct. at 2414.

178. Chamber of Commerce Brief, *supra* note 126, at 1.

179. *Id.*

180. Maytal Gilboa, *The Color of Pain: Racial Bias in Pain and Suffering Damages*, 56 GA. L. REV. 651, 651 (2022).

181. *Id.*

182. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 305 (2023) (Jackson, J., dissenting).

## IV. THE FUTURE OF RACE-CONSCIOUS POLICIES

As *Students for Fair Admissions* is still a new decision, the legal impact of this case is ever evolving. Even in the decision's infancy, the Supreme Court has signaled *Students for Fair Admissions* as a dramatic, and premature, warning flag for the diminishing constitutionality of race-conscious measures.

However, the majority in *Students for Fair Admissions* fails to recognize the racialized reality of America and the essential role that race-conscious policies play in eradicating inequities. Even today, after over forty years of race-conscious admissions policies, there are still achievement gaps along racial lines,[183] society remains highly segregated,[184] and minority communities are more likely to live in poverty.[185] Progress has been made in closing racial gaps, but the Court errs in concluding that racial disparities have been eliminated completely. Continued time and substantial effort are needed to ensure racial justice is furthered. By reversing the constitutionality of race-conscious admissions policies, the Court stunts any chance of achieving equality.

If *Students for Fair Admissions* had deemed *Henderson* unconstitutional, the application of *Students for Fair Admissions* would be boundless. *Students for Fair Admissions* would dangerously seep into all legal provisions concerning or contemplating race. If our Constitution does not support these types of intentional and distinct policies, the legal path to racial equity will become more attenuated and obscure.

Although *Students for Fair Admissions* limits the powers of the Fourteenth Amendment, it is not impossible to make small steps toward justice. Targeted approaches such as the objective observer standard are greatly needed to recognize, address, and solve historic racial inequities. While the degree of specificity for an instance of discrimination to pass the Court's scrutiny is uncertain, the Supreme Court must continue to uphold the values of the Equal Protection Clause. The essence of using specific strategies to combat racism should remain constitutional. The objective observer standard advances the core purpose of the Fourteenth Amendment's Equal Protection Clause: equality in the eyes of the law.

183. *Id.* at 334–35.
184. *Id.* at 334.
185. *Id.*