Students for Fair Admissions V. Harvard (2023) and the Memory Wars

Ofra Bloch[[1]](#footnote-1)\*

[Introduction 1](#_Toc158116562)

[I. Constitutional Memory—What is it and why does it Matter? 7](#_Toc158116563)

[II. Constitutional Memory in](#_Toc158116564) *[SFFA](#_Toc158116564)*[: Making Race Irrelevant 11](#_Toc158116564)

*[A.](#_Toc158116565)**[Color-blinding the Memory of the Equal Protection Clause](#_Toc158116565)* [14](#_Toc158116565)

*[B.](#_Toc158116566)**[Detaching Affirmative Action from its Historical Roots in the Civil Rights Era and Rewriting its Goals](#_Toc158116566)* [18](#_Toc158116566)

[III. Constitutional Memory in](#_Toc158116567) *[SFFA](#_Toc158116567)*[’s Amici Briefs: Making Affirmative Action seem Benign 21](#_Toc158116567)

[IV. Reconstructing Constitutional Memory—Two Possible Pathways Forward 27](#_Toc158116568)

*[A.](#_Toc158116569)**[The Dissenters’ Approach – Breaking from Precedent and Restoring the Remedial Rationale](#_Toc158116569)* [29](#_Toc158116569)

*[B.](#_Toc158116570)**[The](#_Toc158116570)* [Grutter](#_Toc158116570) *[Amici Approach – Reclaiming Diversity](#_Toc158116570)* [34](#_Toc158116570)

*[C.](#_Toc158116571)**[Why Diversity is Worth Saving and How: A Silver Lining of Making Memory Claims Without Overthrowing Precedent](#_Toc158116571)* [41](#_Toc158116571)

[V. Conclusion—](#_Toc158116572)*[SFFA](#_Toc158116572)* [and Anti-CRT 46](#_Toc158116572)

# Introduction

**Q**: “*What was the cause of the United States Civil War?”* a voter asked Republican presidential candidate Nikki Haley during a campaign event in New Hampshire.

**Haley**: “*… I think the cause of the Civil War was basically how government was going to run, the freedoms, and what people could and couldn’t do. What do you think the cause of the Civil War was?”*

**Q**: “*I’m not running for president. I wanted to hear your view on the cause of the Civil War.”*

**Haley**: *“I think it always comes down to the role of government… We need to have capitalism. We need to have economic freedom. We need to make sure that we do all things so that individuals have the liberties so that they can have freedom of speech, freedom of religion, freedom to do or be anything they want to be without government getting in the way.”*

**Q**: *“Thank you. In the year of 2023, it’s astonishing to me that you’d answer that question without mentioning the word slavery.”*

**Haley**: *“What do you want me to say about slavery? Next question*.”[[2]](#footnote-2)

Candidate Nikki Haley’s refusal to mention slavery when asked about the causes of the Civil War is part of the ongoing *memory wars* taking place across the United States. Wars over the nation’s *collective memory* and how it encompasses shared social commitments are becoming increasingly prevalent across the country.[[3]](#footnote-3) Law plays a part in these wars in several distinct ways. The most evident expression of the memory wars is so-called *memory laws*—laws and regulations designed to guide public interpretation of the past by prescribing a mandatory view of historical events or by prohibiting teaching and discussion of certain historical facts and their interpretation. As of 2023, more than half of the U.S. states had passed measures against the teaching of critical race theory, a framework for exposing systematic and institutionalized forms of racism.[[4]](#footnote-4)

The attack on collective memories of racial injustices and the acknowledgment of their continuing impact also takes place through subtler means. Constitutional interpreters help shape the nation’s collective memory, also termed *constitutional memory*, by making claims about the past that clarify the nation’s commitments and steer future decisions.[[5]](#footnote-5) While originalism is the dominant and well-studied force shaping constitutional memory,[[6]](#footnote-6) this article reveals that within the context of affirmative action, where originalism is seldom invoked even by justices who claim to adhere to it,[[7]](#footnote-7) the Court has played a significant role in molding constitutional memory. This influence, much like memory law, has worked to distort and manipulate the history of racism, while also downplaying its systemic and enduring impacts.[[8]](#footnote-8) The majority opinion in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. The University of North Carolina* (*SFFA*) exemplifies one of the most extreme instances of this trend to date.[[9]](#footnote-9)

Both anticipating and reacting to the *SFFA* result, recent literature on affirmative action has focused on the implications of a court ruling against race-conscious admission policies, exploring race-neutral alternatives.[[10]](#footnote-10) These analyses focused on *how* to maintain diversity after the end of race-conscious affirmative action, are important and likely to attract more institutional and scholarly attention in the near future. This article has a different purpose, aiming to clarify the Court’s role in the collaborative attack on the nation’s memories and recognition of past racial wrongs and their systemic repercussions, while also endeavoring to support the long-term struggle for racial justice amidst this assault. This article makes three distinct contributions. *First*, it provides an analysis of *SFFA*’s majority opinion through the lens of constitutional memory-making, connecting it to the broader issue of memory wars. As a *second* contribution, this article shows how universities and other proponents of affirmative action participated in forming the ahistorical narrative that was ultimately adopted and applied by the *SFFA* majority. *Third*, the article considers ways forward for reconstructing constitutional memory in ways that align with constitutional history and the experiences of Americans today.

On June 2023, in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. UNC* (*SFFA*), a majority of six justices severely limited, if not effectively ended, the use of race-conscious affirmative action in college admissions.[[11]](#footnote-11) The Court’s majority reshaped nearly fifty years of precedent, holding that Harvard College and the University of North Carolina, had violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 in their use of race in their admission programs. To support this conclusion, Chief Justice John Roberts, writing for the majority, made memory claims that delegitimate not only affirmative action but also racial remedies of all kinds, thereby undermining the struggle for racial justice. The Chief Justice was not engaged in a struggle over an historical narrative as a matter of disciplinary knowledge; instead, he supported ending race-conscious admissions by employing two complementary strategies of historical argument that, while factually true, are reconstructed in a way that systematically diverges from constitutional history.

First, Chief Justice Roberts is color-blinding the history of the Equal Protection Clause, making racial discrimination seem like a distant memory that has very little significance in contemporary American life. Much like Nikki Haley, Chief Justice Roberts is reluctant to mention slavery. Instead, his historical narrative starts with a contextless exposition of the ratification of the Fourteenth Amendment and continues with an exclusive focus on Jim Crow discrimination. According to his account, it appears that such de jure discrimination is the only form of racial discrimination that matters in law and that can warrant institutional redress. But, since this form of discrimination was “solved” by the Court in *Brown v. Board of Education* [*Brown*] in 1954,[[12]](#footnote-12) it can be inferred that there is neither a need nor legitimate reason for applying any racial remedies, such as affirmative action.[[13]](#footnote-13) The second complementary strategy of the Chief Justice’s constitutional historical argument is the reshaping of the very essence of affirmative action. Affirmative action, in his colorblind rendering, is completely divorced from its roots in the civil rights movement as a tool for redressing racial injustice. Instead, it is understood as a form of racial discrimination, justified only when promoting the utilitarian business-oriented benefits of student body diversity.[[14]](#footnote-14)

It is easy to see how this historical narrative supports the end of race-conscious affirmative action. But the stakes in this systematic divergence of constitutional memory are about much more than college admission policies. They are about the fading memory of a shared past that entails a commitment to racial justice. Constitutional memory shapes the citizenry’s commitments to one another and legitimates the exercise of authority in some contexts while restricting it in others.[[15]](#footnote-15) The way the history of race and racism in the United States is remembered makes some forms of institutional redresses to racial injustice legitimate and others not. And when historical narratives such as that of the *SFFA* majority come to dominate the United States’ constitutional memory, then the past becomes disconnected from present forms of racial inequality, and institutional redresses to those injustices become less justifiable, if not completely unjustified.[[16]](#footnote-16)

Can the constitutional memory of race be reshaped to more accurately reflect the past and its contemporary resonance? To address this query, the article delves into its *second objective*, seeking to comprehend the origins of the memory claims embraced by the *SFFA* Court. Analyzing the ninety-seven amicus curiae briefs submitted to the Court in *SFFA*,[[17]](#footnote-17) the article reveals the involvement of universities and other advocates of affirmative action in crafting the ahistorical memory claims subsequently adopted by the *SFFA* majority. Constitutional memories, much like other forms of constitutional interpretation, are often products of deliberation and contestation between citizens, officials, and courts.[[18]](#footnote-18) Constitutional memories, I argue, are constructed not only by overt rules strictly prohibiting some forms of history, but also through legal contestation, in which formal lawmaking and adjudication are platforms for public deliberation, through which changes in collective memories are forged.

While *SFFA*’s result overruled fifty years of precedent as a matter of doctrine, this article uncovers how memory claims supporting this result were actually forged in a conversation between universities and other proponents of affirmative action, public officials, and the Court. Analyzing the amicus curiae briefs in *SFFA*, the article shows how the universities and their amici in *SFFA* were complicit in framing this ahistorical constitutional memory of race and affirmative action. I show that the vast majority of supporters of affirmative action presented affirmative action in a way that is detached from its historical roots. This approach focused on the utilitarian, predominantly the market-driven benefits that flow from student body diversity.[[19]](#footnote-19) This utilitarian approach had proved plausible and even effective for advocates of affirmative action in the past when presenting arguments before a more evenly balanced Court.[[20]](#footnote-20) However, with the conservative supermajority now dominating the bench, this utilitarian approach has become a double-edged sword—one formally adopted by the *SFFA* majority, only to be deemed practically unworkable. The utilitarian vision for affirmative action is thus *losing by winning*, not only in courts, but also, I argue, in the realm of constitutional memory, with Americans losing sight of why affirmative action even mattered in the first place and why it still matters today.

The fight over race-conscious affirmative action as a matter of doctrine was lost in *SFFA*. Paradoxically, I argue that this doctrinal loss could be a liberating moment for advocates of racial justice. It should be seen as an opportunity to reclaim and reshape constitutional memories with respect to race by retelling the history of discrimination and racism and how it is very much still relevant to life of all Americans in 2023. But how can this be accomplished? Universities and proponents of affirmative action took part in shaping the ahistorical memory claims that were referred to in the *SFFA*’s majority opinion. This article suggests that universities and other proponents can and must work to reshape constitutional memory once again, but this time in a way that reflects their wider commitment to racial justice in the United States.

Embarking on its *third objective*, the article considers two possible paths forward for universities and others who make claims to courts, on campuses, or in public, about racial remedies. The first approach mirrors that of *SFFA’*s dissents written by Justice Sonia Sotomayor and Justice Ketanji Brown Jackson, who reject—sometimes explicitly and sometimes less so—the Court’s precedent that confined the goals of affirmative action to the diversity framework and reintroduce remedial interests in affirmative action.[[21]](#footnote-21) The second approach, drawn from past strategies employed by amici supporting affirmative action in the 2003 cases *Gratz v. Bollinger* (*Gratz*)*[[22]](#footnote-22)* and *Grutter v. Bollinger* (*Grutter*)[[23]](#footnote-23), operates within the confines of the diversity framework while infusing it with egalitarian values and memory assertions.[[24]](#footnote-24) The *SFFA* dissenters’ approach is inspiring, as dissenting opinions are often meant to be, but I contend that it poses too great a risk for universities bound by the Court’s past and current rulings. Conversely, the latter “*Michigan*-based” approach offers a safer alternative: it permits universities and their amici to assert memory claims and engage not only with the Court but also with their students and the broader public, all without openly defying precedent. Beyond strategic considerations, this article points to substantive reasons to reclaim diversity as a future-oriented democratic value that promises that opportunities and the pathways to leadership are open to all, while also remaining deeply rooted in history.[[25]](#footnote-25) Reclaiming diversity—on campuses, in public addresses or posts in social media, as well as in amici briefs—is an imperative, not because it might be raised in the Court again one day, but because it serves as a way to democratize constitutional memory and to reshape it—bottom-up—as a polity.

The paper proceeds in five parts. *Part I* delves into the relationship between history, law, and memory and explains why constitutional memory is important to contemporary discussions about racial inequality. *Part II* analyzes how the Court’s opinion in *SFFA* emphasizes certain historical narratives while omitting others in the process of constitutional memory-making. *Part III* provides an account of the amici briefs submitted in the *SFFA* cases to show how universities and other supporters of affirmative action participated in constructing the historical narratives that were later adopted by the *SFFA* majority. *Part IV* considers two possible paths forward: first, it provides an analysis of the dissenting opinions in *SFFA*; and second, it revisits the *Grutter and Gratz* amici to uncover a lost vision of diversity. It concludes by suggesting that the latter, more nuanced approach, might prove more successful for those who make claims for affirmative action both inside and outside of courts. *Part V* concludes with thoughts about affirmative action in the larger context of memory wars.

# Constitutional Memory—What is it and why does it Matter?

The interplay between law, history, and memory is complex and multidirectional.[[26]](#footnote-26) Historians often treat laws, regulations, judicial decisions, and trials as passive items of historical record. But law is also an active participant in constructing the collective memory.[[27]](#footnote-27) The term “collective memory” refers not to the aggregate of individual memories, but rather to “collectively shared representations of the past,”[[28]](#footnote-28) formed socially, through families, communities, and the law.[[29]](#footnote-29) One very direct method for law to control memory is through legal rules overtly prohibiting the teachings or discussions of some historical events, such as in the case of measures against the teaching of critical race theory (CRT), otherwise known as anti-CRT measures.[[30]](#footnote-30) The focus of this article is on another dimension through which law influences collective memory. I examine how constitutional arguments, inside and outside of courts, make claims on the past in a way that informs the nation’s *constitutional memory*—a form of collective memory forged through constitutional interpretation,[[31]](#footnote-31) in this case, in the context of race. Constitutional memory is not interchangeable for constitutional history as a matter of an accurate record of facts and events.[[32]](#footnote-32) Instead, constitutional memory often excludes some historical narratives and emphasizes others. The narrator—whether a judge in a judicial decision, a college president in the university’s diversity statement, or the United States government in their amicus brief in one of the affirmative action cases—decides which facts to present and in what context and tone.[[33]](#footnote-33)

But why does constitutional memory matter? Sarat and Keams explain that “[l]aw writes the past, not just its own past, but the past for those over whom law seeks to exercise its dominion.”[[34]](#footnote-34) Constitutional interpretation, Reva Siegel elaborates, make historical claims “to guide decisions about the future-as they tell stories about the nation’s past experience to clarify the meaning of the nation’s commitments, to guide practical reason, and to help express the nation’s identity and values.”[[35]](#footnote-35) Constitutional memory thus matters because it informs us about who we are and what ties the nation together; it also renders certain claims on the past as authoritative, while dismissing others.[[36]](#footnote-36) As Jack Balkin explains, “[w]hat is remembered and what is erased has powerful normative effects. It shapes our understanding of who we are and how things came to be . . ., what we owe to others and what they owe to us. . . What is erased from memory, by contrast, can make no claims on us.”[[37]](#footnote-37) Studying constitutional memory therefore involves examining how claims on the past are used to authorize and legitimate some forms of public power, while unauthorizing and delegitimating others.

Originalism—a method openly searching for authority by claiming to restore a seemingly objective and expert-based interpretation of the Constitution rooted in the nation’s history and traditions—is, of course, the most prominent modality of constitutional interpretation by which constitutional memory is shaped.­[[38]](#footnote-38) Scholars explain that with regard to race, the original meaning of the Reconstruction Amendments actually affirms the constitutionality of affirmative action as well as expose a history of legal and institutional redressing of racial inequality.[[39]](#footnote-39) Indeed, with the exception of Justice Clarence Thomas’ recent concurrence in *SFFA*,[[40]](#footnote-40) the self-proclaimed originalist justices on the Court, have rejected affirmative action, while consistently overlooking the strong probability that an original investigation of the Fourteenth Amendment would likely lead to the opposite result.[[41]](#footnote-41) As Cass Sunstein has observed: “Fundamentalists have voted to strike down affirmative action programs without producing a hint of a reason to think that such programs are inconsistent with the original understanding of the ratifiers.”[[42]](#footnote-42) To the contrary, the original meaning of the Fourteenth Amendment, scholars explain, is not colorblind.[[43]](#footnote-43) Furthermore, an originalist account of the Fourteenth Amendment would probably entail an extensive historical review of Reconstruction, during which racial classifications were used to redress racial inequality.[[44]](#footnote-44)

Thus, there are other strategies of historical constitutional interpretation at play regarding race, each operating in a different manner to blur the connections between institutionalized racial discrimination in the form of slavery and Jim Crow laws to today’s racial reality in the United States. Ariela Gross explores three of these strategies: the first is a strategy of “depicting slavery as part of a teleological progression towards freedom, glossing over Jim Crow era and post-slavery racial injustice.”[[45]](#footnote-45) The second strategy Gross describes is portraying slavery, as well as Jim Crow laws, as mere “temporary deviations from the continuous American tradition of freedom and colorblindness.”[[46]](#footnote-46) A third strategy, according to Gross, is the ”decoupling of slavery from race and arguing that slavery was not caused by racism.”[[47]](#footnote-47) In the next section, this article demonstrates how in *SFFA*, Chief Justice Roberts employed a wide strategy that I term “color-blinding memory,” that ignores slavery altogether to portray Jim Crow laws, similarly to Gross’ second strategy, as a departure from the American tradition of “colorblindness” that was later rectified in *Brown*.[[48]](#footnote-48) I then reveal a fourth strategy that was used by Chief Roberts in *SFFA*: decoupling affirmative action from its historical roots of redressing past wrongs and recasting its history and future to revolve around the business case for diversity.[[49]](#footnote-49)

Constitutional memory is of paramount significance in the realm of race. Most immediately, as this article demonstrates in the context of *SFFA*, claims on the past work to legitimate some forms of racial remedies while denying and limiting others. But constitutional memory extends beyond any direct authorization of any specific racial remedy, serving more expansively as a reservoir of collective identity and shared commitments within a society. By preserving and interpreting the historical understanding of constitutional principles regarding race, constitutional memory fosters a sense of common identity and societal values. This memory informs a nation’s understanding of its past, including both achievements and injustices, thereby shaping its commitments toward addressing racial inequalities. While deeply rooted, constitutional memory is also flexible and open to debate, representing a realm where continuous negotiations define our collective identity and shared goals.[[50]](#footnote-50) Constitutional memory with respect to race helps rationalize hierarchical relationships and make some forms of exclusion seem natural. However, it can also inform civil commitment to break free from traditional hierarchies and work towards inclusion.

In what follows, this article uncovers the different claims on the past made by Chief Justice Roberts in *SFFA* that work to shape constitutional memory—both narrowly with respect to affirmative action and more broadly with respect to the history or race and racism—and how this memory informs present life in the United States.

# Constitutional Memory in *SFFA*: Erasing (some forms of) Discrimination and Making Race Irrelevant

Less than a decade after the Court upheld the use of race-conscious admission policies in *Fisher v. Texas* (2016) (*Fisher*), affirmative action in higher education was challenged once again in *SFFA*. The lawsuits were initiated by Students for Fair Admissions, Inc. (hereinafter: SFFA), a nonprofit organization based in Arlington, Virginia, established by the same Edward Blum who was involved in the lawsuit against the University of Texas in *Fisher*. In November 2014, SFFA filed separate lawsuits against Harvard College, Harvard University’s undergraduate division, and the University of North Carolina at Chapel Hill (hereinafter UNC and jointly the *SFFA* cases), arguing that their race-conscious admissions programs violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment, respectively. The initial lawsuit against Harvard College claimed that the college’s admissions policy, which took race into account, unfairly discriminated against Asian American applicants. SFFA argued that Asian Americans are notably less likely to be accepted to Harvard than are similarly qualified white, Black, or Hispanic applicants.[[51]](#footnote-51) The second lawsuit, filed against UNC, the state’s leading public university, claimed that the university’s use of race as a factor in its undergraduate admissions process violated both Title VI and the U.S. Constitution. Unlike Harvard, which is private, UNC, a public university, is subject to the Fourteenth Amendment’s mandate of equal protection.[[52]](#footnote-52) SFFA contended that neither Harvard’s nor UNC’s policies served a compelling state interest, nor were they sufficiently narrowly tailored due to their rejection of workable race-neutral alternatives.[[53]](#footnote-53) The district courts upheld both Harvard and UNC’s admission programs.[[54]](#footnote-54)

The Supreme Court granted certiorari to these cases in 2022. The timing here is important. Only six years had passed between the 2016 ruling in the second *Fisher* case and the Court’s decision to hear the *SFFA* cases. The composition of the Court had changed dramatically, three appointments by President Trump having placed control of the institution in the hands of a conservative supermajority of six justices against three liberal justices.[[55]](#footnote-55) At that point, it was clear that the Court was highly unlikely to allow the race-conscious admission policies of public and private universities to continue, at least not in any familiar form.[[56]](#footnote-56)

And indeed, as countless news and opinion pieces headlines shouted in the days following the *SFFA* ruling, the end of affirmative action as we know it arrived.[[57]](#footnote-57) On June 29, 2023, the Supreme Court of the United States issued the landmark *SFFA* decision, severely limiting, if not entirely terminating, the use of race-conscious affirmative action in college admissions. In a 6–3 decision spearheaded by the conservative justices, the Court declared that holistic affirmative action programs in college admissions that consider race as one factor among many violate the Equal Protection Clause of the Fourteenth Amendment and are thus unconstitutional as well as in violation of Title VI of the Civil Rights Act of 1964. [[58]](#footnote-58)

Chief Justice Roberts delivered the opinion of the Court, in which all six conservative justices joined. Race-conscious admission policies in higher education, the Chief Justice declared, are discriminatory and unconstitutional: “Eliminating racial discrimination means eliminating all of it.”[[59]](#footnote-59) He then specified that college admissions programs may take race into consideration to enable applicants to demonstrate—for example, in their application essays—how their racial background influenced their character in a manner that has a tangible impact on the university. Even then, however, schools may not use race in determining admissions: A student “must be treated based on his or her experiences as an individual—not on the basis of race,” Roberts wrote.[[60]](#footnote-60) The majority ruling effectively, albeit not explicitly, overturned *Regents of the University of California v. Bakke* (*Bakke*), *Grutter*, and *Fisher*, in which the Court had upheld the use of race in admission policies as one of several factors that may be considered in order to achieve a diverse student body. Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett joined the Chief Justice’s opinion. The Court’s three liberal justices dissented. Justices Sonia Sotomayor and Ketanji Brown Jackson both wrote dissenting opinions, in which Justice Elena Kagan joined. “Today, this Court stands in the way and rolls back decades of precedent and momentous progress,” Justice Sotomayor stated,[[61]](#footnote-61) adding that “[b]ecause the majority’s judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.”[[62]](#footnote-62)

The Court, examining the constitutionality of race-conscious affirmative action, as it did in previous cases, applied a two-step test of strict scrutiny, asking whether the specific admissions policies were used in (1) a narrowly tailored manner to achieve (2) a compelling state interest.[[63]](#footnote-63) The Chief Justice emphasized that it was not overruling *Bakke*, thus ostensibly accepting diversity as a compelling state interest that may justify the use of race in university admissions, while at the same time finding that the universities’ admissions programs were not narrowly tailored.[[64]](#footnote-64) A close reading of the opinions in this case, however, reveals that the majority actually deviated from precedent and that the justices were also deeply divided as to which, if any, compelling state interest can justify the use of race in admission policies in 2023. Thus, *SSFA* represents the first time since challenges to race-conscious affirmative actions were brought before the Court in *Bakke* that the justices were divided not only on “how” to design affirmative action in a permissible way but also on “why” affirmative action should be considered constitutionally permissible in the first place.

To arrive at this result, Chief Justice Roberts employed two types of interpretive methods, both working to shape constitutional memory by selectively overlooking or minimizing some episodes of constitutional history and overly stressing others. The first is the retelling of the history of the Fourteenth Amendment as revolving solely around Jim Crow discrimination. With the second method, Roberts disconnected affirmative action from its historical origins that addressed historical injustices and reshaped its narrative to center on the business rationale for diversity.

## *Color-blinding the Memory of the Equal Protection Clause*

Much like candidate Nikki Haley’s refusal to mention slavery in her campaign event in December 2023, Chief Roberts opened his narrative of the history of the Equal Protection Clause with the Civil War and the ratification of the Constitution, failing to acknowledge slavery as relevant to the meaning of the Fourteenth Amendment.[[65]](#footnote-65) Omitting two-hundred years of slavery is no coincidence. Without slavery, the Equal Protection Cause is free from its original purpose of seeking to transform the nation and overcome the longstanding effects of slavery: “to secure to a race recently emancipated, a race that through many generations [was] held in slavery, all the civil rights that the superior race enjoy.”[[66]](#footnote-66) Faling to mention slavery, Chief Justice Roberts also glossed over several race-conscious laws enacted by Congress to fulfill the Amendment Promise of equality.[[67]](#footnote-67) With the Chief Justice having remove slavery from consideration, the Equal Protection Clause assumes a colorblind meaning.

In his decision, Chief Justice Roberts explained that in the years following the 1868 ratification of the Fourteenth Amendment, the Court correctly interpreted the Equal Protection Claus as colorblind.[[68]](#footnote-68) From there, Justice Roberts focused on Jim Crow laws that mandated racial segregation in all public facilities. He described how “[f]or almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm.”[[69]](#footnote-69) He highlighted the Court’s contribution to this failure—permitting state-mandated segregation in the 1896 *Plessy v. Ferguson* case, which perpetuated a regrettable norm of separate but equal facilities.[[70]](#footnote-70)

State-sanctioned segregation, according to Chief Roberts’ historical account, was the only type of discrimination warranting the Court’s intervention. Indeed, over half a century later, the Chief described how the Court “invalidat[ed] all de jure racial discrimination by the States and Federal Government,”[[71]](#footnote-71) by which he refers, of course, to the Court’s decision in *Brown.[[72]](#footnote-72)* *Brown*, as indicated by Chief Roberts, ended de jure segregation, and the legal standard that emerged in that seminal decision was one of colorblindness: “[No state] has any authority under the Equal Protection Clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens.”[[73]](#footnote-73) “The time for making distinctions based on race,” the Chief Justice declared “had passed” in *Brown*.[[74]](#footnote-74) With this, Chief Justice Roberts depicted the legacy of *Brown* as one of “anti-classification,” according to which the Equal Protection Clause prohibits all race-based classifications, regardless of their goal.[[75]](#footnote-75) The wrong the Court abolished in *Brown*, according to the Chief in *SFFA*, was not segregation in itself, but state-sanctioned racial classifications.

Chief Justice Roberts described *Brown* as a success story. He emphasized the Court’s requirement of “full compliance,”[[76]](#footnote-76) and moved to relate how the Court had continued to abolish all “race-based state action.”[[77]](#footnote-77) At the same time, the Chief Justice failed to acknowledge the many ways in which the United States remained racial segregated and divided by color lines. Chief Roberts’ decision led the reader to the conclusion that *Brown* had resulted in integration and equality. This despite social scholars from various fields, including legal scholars, historians, and social commentators, having demonstrated that the Court’s immediate desegregation orders faced significant resistance in many parts of the United States.[[78]](#footnote-78) Furthermore, others have criticized *Brown* for its inability to swiftly eradicate segregation or address broader societal issues related to racial inequality.[[79]](#footnote-79) Focusing solely on de jure racial discrimination, Chief Roberts was able to represent *Brown* as a success story that “solved” the problem of racism the county was dealing with before the Court sent it on the rightful path of colorblindness.

By omitting slavery and starting anew with the ratification of the Fourteenth Amendment, the Chief Justice was able to present the Equal Protection Claus as being entirely and solely about de jure discrimination and not at all about systemic and institutional forms of racism that linger to this day. According to Chief Justice Robert’s opinion, Jim Crow laws were a departure from the nation’s tradition of freedom and color blindness, a departure that was “solved” in *Brown*. This narrative enabled the Chief Justice to create a complete symmetry between racially discriminatory acts and racially affirmative actions, declaring that by applying affirmative action, the universities are “pick[ing] winners and losers based on the color of their skin.[[80]](#footnote-80) Invoking his version of the *Brown* legacy, Roberts wrote that while the majority adheres to the “[s]eparate but equal is ‘inherently unequal,’” ruling of *Brown*, the dissent considered *Brown* contextual only.[[81]](#footnote-81) It is only when reading the dissents that one is reminded that “*Brown* was a race-conscious decision that emphasized the importance of education in our society.”[[82]](#footnote-82)

Beyond leading to the doctrinal result that race-conscious affirmative action is identical to Jim Crow discrimination because both are using racial classifications, Chief Justice Roberts made strong claims about the past that have wider implications for constitutional memory. The Chief Justice predominantly centered his attention on formal regulations rather than on tangible realities of race and rights in the United States, including the substantial persistence of racism and inequalities in the lives of Black, Latinx, Asian American, and Indigenous communities. By focusing solely on de jure discrimination, the Chief Justice deliberately overlooked the many ways in which race and racism still very much determine opportunity in the United States, thereby making racially-based forms of systemic discrimination unseen or irrelevant not only as a matter of constitutional law, but also as a matter of a shared commitment to a future of racial justice. Putting it differently, Chief Justice Roberts’ account of history leads not only to the conclusion that affirmative action is unconstitutional because of the use of racial classifications, but also to the conclusion that efforts to redress racial inequality are not needed (since racial discrimination was “solved” in *Brown*). Furthermore, according to his account, to the degree that racial disparities still exist , they are not connected to the past (again, because this form of discrimination was “solved” in *Brown*); they are therefore legitimate or to the very least, outside the scope of our shared commitments as a matter of both law and politics. Balkin explains that “[i]f the memory of the past tells us that current arrangements are the result of previous injustices that people contested and resisted, erasure of the past makes the present appear legitimate and the result of consent and free choice.”[[83]](#footnote-83)

Expunging something from history diminishes its ability to influence the future. When injustices are overlooked, individuals come to believe that the current situation is reasonable. Therefore, it is clear why the *SFFA* majority would downplay or even omit any reference to ongoing racism and discrimination. Nonetheless, erasing the memory of de facto discrimination and institutional racism is not so easy when writing a decision in a case dealing with affirmative action, one of the few institutional reactions to racial inequality. In the next subsection, the article demonstrates how Chief Roberts rewrote the history of affirmative action to fit with his colorblind historical narrative of the Equal Protection Clause, in which racism, or at least the type of racism that should be redressed by law, was a remnant of the past.

## *Detaching Affirmative Action from its Historical Roots in the Civil Rights Era and Rewriting its Goals*

Affirmative action first emerged during the Civil Rights Era in the 1960s as a set of policies aimed at addressing historical discrimination and promoting equal opportunities for marginalized groups, particularly Black citizens. Initially, it was introduced through executive orders signed by President John F. Kennedy in the early 1960s. These orders aimed to prevent employment discrimination in federal contracting based on race, color, religion, sex, or national origin.[[84]](#footnote-84) Later, President Lyndon B. Johnson expanded these efforts with Executive Order 11246, which required federal contractors to take affirmative action to ensure that employment decisions were made without regard to race, color, religion, sex, or national origin.[[85]](#footnote-85) This policy soon extended beyond federal contracts to cover higher education and other spheres, aiming to provide opportunities and level the playing field for historically disadvantaged groups.[[86]](#footnote-86) In his famous commencement speech at Howard University, on June 4, 1965, President Johnson addressed the egalitarian efforts of the civil rights movement and explained why “opportunity” was not enough to ensure the civil rights of disadvantaged Americans:

But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.[[87]](#footnote-87)

Reading Chief Justice Roberts’ opinion in *SFFA*, one finds traces of these formative antecedents of affirmative action. Instead, the Chief links the history of affirmative action with that of diversity. Just as he omitted slavery from his account of the history of the Equal Protection Claus, the Chief Justice refrained from referring to societal discrimination and de facto segregation that lingered long after *Brown*  and created the need to adopt race-conscious affirmative measures in universities. This colorblind interpretation of the Equal Protection Clause creates a symmetry between the use of racial classifications for affirmative efforts and the use of race in discriminatory measures. Therefore, both receive the same legal treatment: the two-step strict scrutiny test that requires that every racial classification will (1) serve a compelling state interest, and (2) will be “narrowly tailored” to achieve that goal.[[88]](#footnote-88) Because racism and discrimination were “solved” in *Brown*, as the Chief Justice’s opinion in *SFFA* implies,the rationale for engaging in affirmative action cannot be rooted in egalitarian aspirations. Following the previous cases that dealt with affirmative action, the Chief Justice adopted diversity as the only rationale that can, at least theoretically, justify race-conscious affirmative action.[[89]](#footnote-89) But diversity, as I have shown in my previous work, is a very fluid term that can assume different meanings.[[90]](#footnote-90) The Chief Justice, following the universities themselves, adopted what I term *the business case for diversity*—arguing that fostering diversity results in various utilitarian benefits, particularly the students’ professional development and the economy at large.[[91]](#footnote-91)

Reviewing the universities’ policies under the strict scrutiny test, Chief Justice Roberts examined the interests that the universities consider compelling, listing all the benefits of diversity to which the respondents referred in their briefs, all of which are utilitarian. Harvard’s goals, he stated, citing its respondent brief, were: “(1) ‘training future leaders in the public and private sectors’; (2) preparing graduates to ‘adapt to an increasingly pluralistic society’; (3) ‘better educating its students through diversity’; and (4) ‘producing new knowledge stemming from diverse outlooks.’”[[92]](#footnote-92) UNC, the Chief Justice continued, had similar utilitarian objectives in mind: “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem solving; [and] (4) preparing engaged and productive citizens and leaders,’” as well as the separate anti-stereotyping goal of “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”[[93]](#footnote-93)

Chief Justice Roberts acknowledged these objectives as compelling, yet concurrently deemed them unworkable. “Although these are *commendable goals* [emphasis added],” the Chief Justice found that they are not “sufficiently coherent for purposes of strict scrutiny.”[[94]](#footnote-94) Continuing, he explained that the objectives, while compelling, are not “sufficiently coherent,” and are rather, “standardless,” “imprecise,” and unmeasurable: “plainly overboard.”[[95]](#footnote-95) According to Chief Justice Roberts, the problem lies not with diversity per se but with its elusive nature in the educational mission. “[T]he question in this context,” he explained, “is not one of no diversity or of some: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve.”[[96]](#footnote-96) “The interests that respondents seek,” he concluded, “though plainly worthy, are inescapably imponderable.”[[97]](#footnote-97)

I contend that this statement is misleading. Although the Chief Justice’s rationale seemingly acknowledged diversity as the sole compelling state interest, it simultaneously rendered its practical implementation nearly, if not completely, unfeasible. He achieved this result by adopting *the business case for diversity* as it was presented by the universities, while simultaneously showing how the approach is incoherent and not sufficiently compelling on its own. In essence, the Chief Justice was signaling to educational institutions that while their interests in the educational and economic benefits of diversity are theoretically worthy, in practice, they are not sufficiently limited in scope (not “measurable and concrete”[[98]](#footnote-98)) or in time (“lack[ing] a logical end point”[[99]](#footnote-99)) to justify the use of race. And because the *SSFA* majority, like those preceding it, rejected the interest of remedying societal discrimination as a valid basis for race-conscious admissions policies, its majority decision seems to be leaving the universities with very few options. In this sense, the Chief Justice overruled decades of precedent that permitted the use of race in admission policies to promote student body diversity.[[100]](#footnote-100) In her dissent, Justice Sotomayor criticized the majority and explained that “to avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation.” She added that: “Members of this majority pay lip service to respondents’ ‘commendable’ and ‘worthy’ racial diversity goals, [while] […] they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them.”[[101]](#footnote-101) The majority, Justice Sotomayor insisted, even rejects the narrower interest in the educational interests that flow from diversity.[[102]](#footnote-102)

By adopting the business case for diversity and ignoring any egalitarian and democratic interpretations of diversity which were prevalent in the past,[[103]](#footnote-103) the Chief Justice was able to convey a coherent yet incomplete history of race and law. This account skipped slavery all together and began with the enactment of the Equal Protection Clause, which, in his opinion, appeared almost out of thin air as a colorblind commitment to formal equality. It continued through the major departure from the constitutional standard of anti-classification, only to be “solved” in *Brown*. It ended by disconnecting affirmative action from its egalitarian-remedial antecedents and presenting it as another departure from the colorblind constitution that is meant to serve these demanding and unmeasurable interests in student body diversity.

# Constitutional Memory in *SFFA*’s Amici Briefs: Making Affirmative Action seem Benign

Despite the *SFFA* decision overturning fifty years of precedent, this article reveals how memory claims supporting this outcome were shaped through discussions between universities, affirmative action proponents, officials, and the Court. By examining the ninety-seven amicus curiae briefs submitted to the Court in *SFFA*, this section reveals the role of universities and other advocates of affirmative action in crafting the ahistorical memory claims later adopted by the *SFFA* majority.

The respondents in the *SFFA* case and their supporters who submitted amicus curiae briefs were trying to win the case and enable affirmative action to continue operating. They were therefore arguing within the constrains set by the Court in previous cases. Until *SFFA*, in each case that upheld the constitutionality of race-conscious affirmative action, the Court further restricted the measures that universities could use to promote the representation of people from different races in their student body—the *how*—while also constraining the interests that could justify the use of race classifications in school admissions—the *why*. For the purpose of this article, I focus on the latter.

In 1978, the Court first took up the why question in *Regents of the University of California v. Bakke.*[[104]](#footnote-104) In a plurality opinion, Justice Powell acknowledged that “[t] he State unquestionably possesses a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.”[[105]](#footnote-105) Nonetheless, Justice Powell drew a line between the legitimate and permissible interest in “redress[ing] the wrongs worked by specific instances of racial discrimination” and the invalid pursuit of “remedying the effects of ‘societal discrimination,’ an amorphous concept of injury that may be ageless in its reach into the past.”[[106]](#footnote-106)According to this distinction, the interest in rectifying past discrimination was considered compelling only if a university could specifically identify instances of institutional discrimination and was not seeking to address broader societal discrimination. Consequently, Justice Powell’s approach narrowed the remedial rationale to an extent that rendered its application impractical in higher education.[[107]](#footnote-107)

Justice Powell, instead, put forward the diversity rationale. He asserted that, “[T] he attainment of a diverse student body” is “of paramount importance” to the University’s mission and “compelling in the context of a university’s admissions program.”[[108]](#footnote-108) Powell positioned diversity as the primary justification for supporting race-conscious admissions policies, narrowing the legal and public discussions to the pursuit of diversity as the main interest. Yet, it was after *Bakke* that diversity took center stage in the debate on affirmative action. In the 2003 affirmative action cases *Gratz*[[109]](#footnote-109) and *Grutter*[[110]](#footnote-110) (hereinafter, jointly: “the *Michigan* cases”), Justice O’Connor, writing for the majority, formally adopted the *Bakke* diversity framework as a sole compelling rationale for affirmative action.[[111]](#footnote-111) In 2013, Justice Kennedy, writing for the majority in *Fisher*, reaffirmed diversity as the principal rationale that can justify the use of race in admission policies.[[112]](#footnote-112)

It is therefore not surprising that when it was time for Harvard and UNC to make their case defending the use of race classifications in college admissions, they argued within the diversity framework and did not refer to remedial rationales. What was surprising were the values that the respondents and most amici attributed to diversity. Their interest in diversity was divorced from the historical roots of affirmative action. Instead, it was overwhelmingly utilitarian and market oriented. It was *the business case for diversity, on steroids*: the universities and the majority of their amici adopted a utilitarian conception of diversity, invoking instrumental interests in diversity, focusing on its pedagogical benefits, predominantly on how diversity benefits the professional training of students and fosters the economy. UNC opened its brief by stating that:

On campus, diversity promotes the robust exchange of ideas, fosters innovation, and nurtures empathy and mutual respect. It also looks to the future, equipping students with the tools and experiences necessary for success in the modern world. In UNC’s academic judgment, diversity is central to the education it aims to provide the next generation of leaders in business, science, medicine, government, and beyond.[[113]](#footnote-113)

Similarly, in the opening of its brief, Harvard affirmed its belief that:

Harvard College seeks an exceptional student body diverse in many dimensions . . . [D]iversity “lead[s] to greater knowledge” for everyone, “as well as the tolerance and mutual respect that are so essential to the maintenance of our civil society.” . . . To achieve that objective, Harvard individually evaluates . . . the ways applicants might contribute to one another’s educational experience given their backgrounds, talents, interests, and perspectives.[[114]](#footnote-114)

Following this ultra-utilitarian approach to diversity, Harvard made it clear that for the university, race was no different than other attributes an applicant brings to the table. In its brief, the school asserted that “a person’s race—like their home state, national origin, family background, or interests—is part of who they are, and that in seeking the benefits of a diverse student body, universities may consider race as one among many factors, provided they satisfy strict scrutiny.”[[115]](#footnote-115) In one part of its brief, UNC did focus specifically on race and noted that it faces a unique challenge in admitting underrepresented minorities and that “[as] a Southern flagship university that for most of its history excluded racial minorities from admission altogether—[it] continues to have much work to do.”[[116]](#footnote-116) However, this lack of representation was deemed important because it “limits opportunities,” not only those of students of color who are underrepresented at the school, but “opportunities for exposure and learning” of all students.[[117]](#footnote-117)

The briefs of other academic institutions focused almost exclusively on the pedagogical and economic utility of diversity. Thirty-three selective private residential colleges made it clear in their amicus briefs that they value diversity because: “[s]tudies consistently show that diversity—including racial diversity—meaningfully improves learning experiences, complex thinking, and non-cognitive abilities. Diversity also generates pedagogical innovations and decreases prejudice. These benefits are especially pronounced at liberal arts colleges and small universities, where smaller class sizes lead to greater engagement among diverse students.”[[118]](#footnote-118) MIT and Stanford articulated their particular interest in diversity for the science, technology, engineering, and mathematics (STEM) field, asserting that: “[n]ot only does diversity promote better outcomes for students in STEM, it contributes to better science. As such, American businesses at the forefront of innovation in STEM depend on the availability of a diverse cross-section of talented graduates from the nation’s most rigorous and elite institutions.”[[119]](#footnote-119) Similarly, the Association of American Medical Colleges considered diversity in the education of physicians and other healthcare professions as “a medical imperative . . . Diversity literally saves lives by ensuring that the Nation’s increasingly diverse population will be served by healthcare professionals competent to meet its needs.”[[120]](#footnote-120) Brown University and other elite institutions of higher education strongly emphasized how “[d]iversity fosters a more robust spirit of free inquiry [,] . . . encourages dialogue that sparks new insights, . . . [and] prepares Amicis’ graduates to pursue innovation in every field.”[[121]](#footnote-121) For these and other academic amici, diversity is a means to achieve educational goals, such as better educational experience for their students and better preparing their graduates for the ever-changing global workforce.[[122]](#footnote-122)

In an amicus brief defending race-conscious affirmative action, the Biden administration focused primarily on the importance of diversity for the military.[[123]](#footnote-123) It did mention in its brief that the absence of diversity in the officer corps also undermined the military’s legitimacy by fuelling “perceptions of racial / ethnic minorities serving as ‘cannon fodder’ for white military leaders.”[[124]](#footnote-124) However, instead of connecting these ideas about legitimacy to a larger vision of multiracial democracy, it subordinated them to national security interests in “[the] overall readiness and mission accomplishment” of the military.[[125]](#footnote-125) Similarly, the Federal Bureau of Investigation, referenced in the brief, did recognize “the need to reflect the communities that we serve, because when people look at us, they need to see themselves. If they don’t see themselves, it’s harder for them to trust us . . .”[[126]](#footnote-126) The Biden administration thus went beyond the narrow business case for diversity but did not recognize these interests as beneficial in themselves. Instead, it subordinated those “civil” interests in diversity to instrumental causes, such as readiness of the military. Other public officials and civil society organizations took a similar approach, stressing the importance of diversity and, in some cases, its anti-stereotyping effects for the greater good of better preparing students for the “workforce of the world economy.”[[127]](#footnote-127)

The strong trend toward a utilitarian view of diversity was amplified by professional and business amici. A brief submitted by Microsoft and other technology companies emphasized that “[r]acial and other diversity improves scientific endeavors and the innovation of new technologies. A racially diverse workforce so helps guard against the possibility that science and technology companies will be out of touch with their increasingly diverse and global customer base.”[[128]](#footnote-128) The HR Policy Association added in its brief that “[a] diverse workforce is essential for successful business outcomes” and that “[d]iverse teams constituting individuals from a wide variety of backgrounds and perspectives perform better than their homogenous counterparts, particularly in an increasingly global consumer market.”[[129]](#footnote-129) Major American business enterprises wrote that “[d]iverse workforces improve Amici’s business performance—and thus strengthen the American and global economies.”[[130]](#footnote-130)

With a few exceptions that made remedial arguments for affirmative action and situated their plea within the ongoing reality of racism in the United States,[[131]](#footnote-131) the ahistorical business case for diversity dominated the arguments in favor of affirmative action. By abandoning the historical antecedents of affirmative action and a rich interpretation of diversity, UNC and Harvard, as well as their amici, thereby participated in creating a new constitutional memory, allowing certain chapters in the history of affirmative action and the Fourteenth Amendment to be forgotten. Jack Balkin observed that “‘diversity’ [is] a code word for representation in enjoyment of social goods by major ethnic groups who have some claim to past mistreatment.”[[132]](#footnote-132) Amicus briefs are indeed highly strategic documents, but they also signal to the public what matters and why. Indeed, over time, the utilitarian strategy appears to have grown to such an extent as to consume the essence of affirmative action and, in fact, to take over the discourse over the issue within courts as well as outside of courts and on campuses.[[133]](#footnote-133)

But is there an alternative? It must be borne in mind that amicus curiae briefs are strategic documents with the primary goal of winning a legal argument. Similarly, universities would not want to risk losing lawsuits by openly announcing that their affirmative action efforts are meant to serve their constitutional interests in remedying societal discrimination.[[134]](#footnote-134) In the next section, this article examines two possible pathways for jogging constitutional memory with forgotten chapters from our constitutional history.

# Reconstructing Constitutional Memory—Two Possible Pathways Forward

Only a few hours after the *SFFA* ruling was issued, the then President-elect of Harvard University, Claudine Gay, released a video in response. In it, Gay acknowledged that the decision would “change *how* we pursue the educational benefits of diversity,”[[135]](#footnote-135) adding that: “In the coming weeks, we will be working to understand the decision and its implications for our policies.”[[136]](#footnote-136) Other universities, public officials, and commentators began evaluating the implications of the *SFFA* decision, which ended the use of once permissible race-conscious admission programs.[[137]](#footnote-137) They joined a growing body of scholarship, which, having anticipated this outcome, was endeavoring to evaluate its implications for institutions of higher education as well as for the education system, government, and the workforce.[[138]](#footnote-138) This literature, focusing on the *how* question—the methods universities are still permitted to apply to increase racial diversity—is likely only to grow in the coming months and years.

A no less significant aspect of the *SFFA* decision that warrants public and scholarly attention is the *why* question and the radical reconstruction of constitutional memory by *SFFA*’s majority. The *SFFA*’s amici in support of affirmative action were strategic, trying to “sell” diversity as a harmless market-driven interest that everyone, including some of the conservative justices, can support. But this ultra-utilitarian approach became a double-edged sword—one formally adopted by the *SFFA* majority, only to be deemed practically unworkable. The utilitarian vision for affirmative action is *losing by winning*, not only in courts, but also, I argue, in the realm of constitutional memory, with Americans losing sight of why affirmative action even mattered in the first place and why it still matters today.

This section explores two possible alternative paths to those posed by the *SFFA*’s amici that can help to reconstruct constitutional memory so that it once again includes a collective recollection of the past of racism and racial discrimination and its lingering effects on the lives of Americans today. The first approach is the one taken by the *SFFA*’s dissenting justices, who declined to remain within the limits of the diversity framework and reintroduced remedial interests in affirmative action. The second, one retrieved from the past, and discussed in the amici briefs filed in support of affirmative action in the 2003 *Grutter* and *Gratz* affirmative action cases, works within the diversity framework and reinfuses it with egalitarian values and memory claims. While the former approach is inspiring, I argue that it is too risky an approach for universities, which must comply with the Court’s ruling. The latter approach, I suggest, offers a silver lining: it allows universities and their amici to make memory claims and address their arguments not only to the Court but also to their students and to the public at large, and without openly resisting precedent.

## *The Dissenters’ Approach – Breaking from Precedent and Restoring the Remedial Rationale*

A powerful alternative to the deeply flawed historical account presented by the *SFFA* majority is offered by the dissenters in *SFFA*. Joined by Justice Kagen, Justices Sotomayor and Jackson each offered her own historical account of both the Equal Protection Clause and of affirmative action, very consciously, it seems, filling in the gaps left by Chief Justice Roberts’ omissions. Without diverging from precedent, the dissenters completed the historical gaps regarding the events that led to the enactment of the Fourteenth Amendment and what transpired thereafter, the dissenters go well beyond the historical narratives presented in recent affirmative action cases. In fact, when describing affirmative action and its goals the dissenters did not try to look beyond the benefits that flow from student body diversity or diverge from precedent by reintroducing the now prohibited interest in remedying societal discrimination as a compelling interest in affirmative action cases.

*The Full(er) History of the Equal Protection Clause*.

The United States, as Justice Sotomayor opened her dissent, was built around “democratic participation and the capacity to engage in self-rule,” but “at the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected.”[[139]](#footnote-139) Similarly, Justice Jackson recognized that “[s]lavery should have been (and was to many) self-evidently dissonant with our avowed founding principles.”[[140]](#footnote-140) The Civil War and the Reconstruction Amendments that followed were aimed at resolving this dissonance and abolishing slavery.[[141]](#footnote-141) As such, both dissenting justices explained, there was nothing colorblind about the Fourteenth Amendment. According to the dissenters, the Equal Protection Clause was not about abolishing classifications, but about fighting subordination. From the outset, the Amendment was meant to secure the civil rights of the recently emancipated race.[[142]](#footnote-142) Congress at the time, working within the framework of the original meaning of the Equal Protection Clause, enacted along with it a number of race-conscious laws “to fulfill the Amendment’s promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal.”[[143]](#footnote-143) Therefore, Justice Sotomayor explained that “when the Court speaks of a “colorblind” Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause.”[[144]](#footnote-144)

Depicting the history of the Equal Protection Clause and its utilization by Congress in the years following its enactment, *SFFA*’s dissenting perspectives conveyed an approach that the literature commonly characterizes as an “anti-subordination” approach. Under this approach, the Constitution does not prohibit race-based classifications per se. Rather, the Constitution ensures that all citizens are treated equally and that the government and laws should work to fulfill that promise, not inhibit it.[[145]](#footnote-145) The dissenters explained that Jim Crow laws were not merely an isolated departure from colorblindness but it represented a significant failure to uphold the Reconstruction commitment of equal protection for all races.[[146]](#footnote-146) According to Justice Jackson, Jim Crow laws did not represent a departure from any American tradition but were a continuation of one, in the form of another chapter of economic exploitation of Black people.[[147]](#footnote-147)

Focusing on racial segregation and subordination rather than on de jure classifications, the dissenters clarified that one should interpret *Brown* as a race-conscious decision that underscored the impact of segregation on educational opportunities of people of color in the United States.[[148]](#footnote-148) Justice Sotomayor argued that in *Brown*, “the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the ‘importance of education to our democratic society.’”[[149]](#footnote-149) It is this “transformative legacy,” as illustrated below, that shapes the dissenters’ perspective on the history and future of affirmative action.[[150]](#footnote-150)

*Reintroducing the interest in rectifying societal discrimination and Resisting Doctrinal Limitations*:

For both the majority and the dissenters, the goal of affirmative action is ultimately connected to the historical context in—and against—which it grew. The majority in *SFFA* neglected to outline the numerous ways in which the United States continue to be racially segregated and divided by color lines, and was therefore able to present *Brown* as a success story, after which the problem of racial discrimination was largely solved.[[151]](#footnote-151) Here the dissenters were able to address what the majority had neglected—the ongoing reality of systemic racism and inequality in the United States. As Justice Jackson declared most compellingly, “[h]istory speaks. In some form, it can be heard forever. The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”[[152]](#footnote-152) Continuing that “deeming race irrelevant in law does not make it so in life,” Justice Jackson claimed that “[n]o one benefits from ignorance. Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways…”[[153]](#footnote-153) The majority opinion and the colorblind racial indifference it requires from colleges, is not only contrary to precedent, Justice Sotomayor explained, but “is also grounded in the illusion that racial inequality was a problem of a different generation.”[[154]](#footnote-154) Ignoring inequality enabled the majority in *SFFA* to require colleges to ignore race all together. In contrast, the dissenters strongly disagreed with both the description of the racialized reality of the United States today and with the legal conclusion about the constitutionality of race-conscious admission policies. They stressed that “[g]ulf -sized race-based gaps. . . created in the distant past but have indisputably been passed down to the present day through the generations,”[[155]](#footnote-155) and that “[e]quality requires acknowledgment of inequality.”[[156]](#footnote-156) This acknowledgment of race for the sake of promoting equality in society represents affirmative action for the dissenters.

Given what they viewed as the continued backdrop of systemic discrimination, the dissenters could not settle for the business case for diversity as an accurate description of the historical motivation for affirmative action nor as an important enough reason to pursue it the future. While both dissenters were clearly committed to the idea of diversity and even adopted the business case for diversity, they both resisted it serving as the sole rationale for affirmative action. Instead, they suggested expanding the goals of affirmative action to include the now prohibited interest of remedying social discrimination, Justice Jackson directly and explicitly and Justice Sotomayor taking a slightly more covert approach.

Justice Jackson made the utilitarian case for diversity, arguing very persuasively for the benefits of student body diversity. “The diversity that UNC pursues for the betterment of its students and society is not a trendy slogan. It saves lives,” she wrote.[[157]](#footnote-157) Justice Jackson then drew on amicus briefs and research to demonstrate how and why diversity matters. She showed how Black doctors are more likely to save the lives of Black newborns and provide their Black patients with more appropriate care overall.[[158]](#footnote-158) She does not, however, stop with a rather narrow utilitarian interest in diversity. It is these programs, she wrote, that diversify the medical profession and also “open doors to every sort of opportunity—[and] helps address the aforementioned health disparities (in the long run) as well.”[[159]](#footnote-159) Justice Jackson further explained how diversity in higher education helps everyone, enabling students to attain “a greater appreciation and understanding of civic virtue, democratic values, and our country’s commitment to equality.”[[160]](#footnote-160) Diversity, she acknowledged, benefits the economy as well. All these utilitarian, educational, and even economic benefits of diversity, however, seem to be but a bonus, the cherry on top of the cake, because what needs to be done, “the only way out of this morass—for all of us—is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march forward together, collectively *striving to achieve true equality for all Americans* [emphasis added].”[[161]](#footnote-161)

Justice Jackson apparently flatly rejected the idea that an interest as narrow as this can serve as the sole compelling interest for affirmative action. She opposed years of precedent that automatically adopted Justice Powell’s plurality opinion, arguing that “based, apparently, on nothing more than Justice Powell’s initial say so—[the Court] drastically discounts the primary reason that the racial diversity objectives it excoriates are needed, consigning race-related historical happenings to the Court’s own analytical dustbin.”[[162]](#footnote-162) For no better reason than “Justice Powell’s initial say so,” she continued, the Court “drastically discounts the primary reason that the racial-diversity objectives it excoriates are needed.”[[163]](#footnote-163) Justice Jackson then clarified that affirmative action matters because it creates “pathways to upward mobility for long excluded and historically disempowered racial groups. *Our Nation’s history more than justifies this course of action*. And our present reality indisputably establishes that such programs are still needed [emphasis added].”[[164]](#footnote-164)

Justice Sotomayor took a more cautious approach. She did not explicitly reject the *Bakke* precedent with respect to diversity. Instead, she adopted the utilitarian interest in student body diversity and explained, following the amici curiae briefs, how they benefit society and the economy.[[165]](#footnote-165) But, unlike most of the amici, she linked utilitarian benefits with another type of advantage to the society at large. Justice Sotomayor insisted that “today’s decision harms not just re­spondents and students but also our institutions and dem­ocratic society more broadly.”[[166]](#footnote-166) Furthermore, Justice Sotomayor viewed diversity and equality as inseparable if not interchangeable. For example, she remarked that “[t]oday’s decision further entrenches racial inequality by making these pipelines to leadership roles less diverse” and that “[a] less diverse pipeline to these top jobs accumulates wealth and power unequally across racial lines, exacerbating racial disparities in a society that already dispenses prestige and privilege based on race.”[[167]](#footnote-167) Justice Sotomayor then tied this egalitarian vision of diversity not just to the past but to the democratic vision that relies on diversity:

The Court ignores the dangerous consequences of an America where its leadership does not reflect the diversity of the People. A system of government that visibly lacks a path to leadership open to every race cannot withstand “scrutiny in the eyes of the citizenry. Gross disparity in representation” leads the public to wonder whether they can ever belong in our Nation’s institutions, including this one, and whether those institutions work for them . . .. *True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society* [emphasis added].[[168]](#footnote-168)

According to Justice Sotomayor, the importance of affirmative action cannot be understood without considering its historical roots in the struggle for racial justice. She also expressed the belief that diversity is crucial to sustaining American democracy, and should not be evaluated independently of this function. Justice Sotomayor thereby linked the utilitarian interests in diversity to a more egalitarian vision of affirmative action. As a result, her opinion is closer to the second approach presented next in this article, one that reclaims diversity and reinterprets its meaning.

The two dissenters, each in her own manner, rejected the narrow utilitarian value of diversity as a sole permissible goal of affirmative action and unsettle the legal, academic, and public debate about why racial diversity should be valued. Chief Justice Roberts and Justice Thomas strongly objected to this reasoning and (somewhat ironically) attacked the dissenters for breaking from precedent while availing themselves of the mantle of *stare decisis*.[[169]](#footnote-169) The dissenters, however, wrote not to convince any of their conservative peers on the bench but rather, I suggest, to correct the record of constitutional memory with respect to race in this country and its relationship to law. Doing so, the dissenters, rightly allowed themselves to break from precedent to make claims about the past and its systemic effects on the present and to remind the public why affirmative action in higher education really matters. Nonetheless, in the near future, universities and their amici that must comply with existing doctrine and avoid getting sued must be more careful with the kinds of claims they make for justifying their admission policies. In the following subsection, I explore a possible silver bullet that resists the erasure of past and present systemic racism, but at the same time does not reject fifty years of precedent narrowly focused on diversity.

## *The* Grutter *Amici Approach – Reclaiming Diversity*

An alternative approach, which challenges the limited business case for diversity and infuses it with memory claims without entirely dismissing the diversity framework can be found in the amici curiae briefs submitted in support of the University of Michigan in the 2003 affirmative action cases it faced. This perspective was ultimately reflected in Justice O’Connor’s opinion in those cases, which upheld race-conscious affirmative action. It was half a century after the *Bakke* decision that these challenges to race-conscious affirmative action policies in higher education reached the Supreme Court again in the two joint cases of *Gratz*[[170]](#footnote-170) and *Grutter*[[171]](#footnote-171) (jointly: “the *Michigan* cases”). In *Gratz,* the affirmative action admissions policy of the University of Michigan’s (hereinafter, U-M) undergraduate program was challenged, and *Grutter* adjudicated a challenge to the affirmative action admissions policy of the University of Michigan Law School. U-M’s initially implemented race-conscious affirmative admission measures during the 1960s. In 1991, Lee Bollinger, the university’s president at the time, initiated efforts to reframe these measures to focus on diversity in accordance with Justice Powell’s opinion in *Bakke*.[[172]](#footnote-172) At the undergraduate level, preference points were automatically assigned to applicants from disadvantaged minority groups. In contrast, the law school established an individualized holistic review process that considered race just one of several factors that were thought to enhance diversity.[[173]](#footnote-173) In 1997, plaintiffs, represented by the Center for Individual Rights brought legal challenges against both the undergraduate and the law school admissions policies of the University. The dispute culminated in two Supreme Court cases, *Gratz* and *Grutter,* that were jointly heard in 2003, with separate decisions issued the same day.[[174]](#footnote-174)

The *Michigan* cases ignited significant public engagement in both support of and opposition to affirmative action, leading to the submission of eighty-eight amicus briefs in *Grutter* (sixty-four in support of affirmative action) and sixty-two in *Gratz* (forty in support of affirmative action).[[175]](#footnote-175) These briefs addressed various aspects of the debate over the “how” of the matter, concerning the permitted practices of race-conscious admission policies. More relevantly, they went on to discuss the “why” question, debating the justifications for affirmative action. The discussions on which state interests merit ample justification for affirmative action were not isolated but largely asserted within the diversity framework established in the *Bakke* plurality. In *Bakke*, Justice Powell dismissed the objective of addressing societal discrimination through affirmative action but permitted a restricted consideration of race in admission decisions in order to enhance the educational benefits of diversity.[[176]](#footnote-176) U-M’s defence, as well as that of most amici in both cases, appeared to adhere to the limitations established in *Bakke* and refrained from explicitly offering direct remedial justifications. Upon closer examination of the amicus briefs, however, it becomes evident that their understanding of diversity, unlike Justice Powell’s, was infused with egalitarian concerns that linked the goal of affirmative action to the past of racial discrimination in the United States and expressed aspirations about its possible future.

In the wake of *Bakke*, universities aligned their admission policies with the standards and restrictions imposed by Justice Powell.[[177]](#footnote-177) University officials who once spoke about their race-conscious efforts in remedial terms changed course and began advocating for the benefits of student body diversity.[[178]](#footnote-178) Almost all amici that supported affirmative action adhered to the qualifications of diversity imposed in *Bakke* but reinterpreted it and infused it with new meanings. They broadened the concept of diversity beyond the limited pedagogical interpretation that Justice Powell had attributed to it in *Bakke*,[[179]](#footnote-179) augmenting it with retrospective and prospective egalitarian claims and democratic aspirations. Thus, by reinterpreting the diversity rationale, the amici challenged the limitations that the Court had imposed in *Bakke* and indirectly reintroduced the egalitarian history and the purpose of affirmative action. Critics of *Bakke* and the diversity rationale mourned the loss of the remedial rationale. Charles R. Lawrence wrote that “Powell’s restriction on backward-looking affirmative action incorporates the big lie into affirmative action doctrine,” explaining that “[d]espite overwhelming evidence of continuing racial discrimination, the Court tells us our nation has overcome its racism.”[[180]](#footnote-180) And Derrick Bell explained that diversity had been disconnected from the moral grounds that historically justified affirmative action, and that without a more sound justification, minorities would be left vulnerable, dependent on the grace of the universities and their benefits.[[181]](#footnote-181) But those critics overlooked how diversity itself was reshaped and repurposed.[[182]](#footnote-182) In what follows, I demonstrate how the value of diversity actually shifted dramatically in the interaction between Michigan University, their amici and the Court in the *Michigan* cases litigation.

*Remedial interests and claims on the past*. In their briefs, the University of Michigan itself and its amici reintroduced the origins of affirmative action in the Civil Rights Era and its original remedial goal. But instead of challenging Justice Powells’ plurality decision that had become part of the universities’ lexicon about race at that point, they reinfused diversity with a remedial logic. In its brief, U-M explained that “[d]espite noble aspirations and considerable progress, our society remains deeply troubled by issues of race. Against that backdrop, there are important educational benefits—for students and for the wider society—associated with a diverse, racially integrated student body.”[[183]](#footnote-183) Other amici followed this path and linked diversity with the history of racial discrimination. In a resounding paragraph that could have been written in response to the Court’s recent ruling in *SFFA*, the Black Women Lawyers Association of Greater Chicago declared:

Certain amici have raised the question, when will this use of race to *achieve diversity end*? They suggest that there is no logical ending, However, they are wrong. The logical ending is when race no longer matters in America. We will know that we have reached that point when a child born black has the same opportunity in America as a child born white in America . . . Until the research reflects that the historic legacy of *slavery* and its continued discriminatory effect has disappeared, we must use race-conscious means to keep the doors of opportunity open to African-Americans in America.[[184]](#footnote-184)

Reclaiming diversity and imbuing it with historical context and remedial aspirations prevailed in the academic and other amici. The United Negro College Fund explained that “[t]he compelling nature of the governmental interest in fostering racial diversity … cannot be understood fully without consideration of the history of racial exclusion, segregation, and discrimination that, for centuries, permeated all aspects of the Nation’s educational system.”[[185]](#footnote-185) Northeastern University focused on its unique role in preparing members of minority groups as professionals and explained the importance of the goal of “ maximiz[ing] the effectiveness of its community policing strategy” and “remedy[ing] the effects of past discrimination.”[[186]](#footnote-186) Other amici in the *Michigan* cases, such as that of the National School Boards Association, focused on the “[r]acial and ethnic gaps in educational opportunity and achievement [that] persist across the nation,” declaring that “[c]losing these gaps is a compelling national priority that may necessitate race-conscious policies, including efforts to promote diversity or prevent racial isolation.”[[187]](#footnote-187) Other amici simply argued that “[the] interest in achieving student diversity and in remedying discrimination are closely related.”[[188]](#footnote-188) Yet others argued more explicitly that “[d]iscrimination is prevalent in our society, otherwise diversity would have occurred naturally . . .. [T]he present lack of diversity is a direct result of America’s history of racial and gender discrimination.” Therefore, they conclude, “[d]iversity cannot be completely separated from integration.”[[189]](#footnote-189)

*Prospective distributive and democratic ideals*. Diversity, for Justice Powell, was a future-oriented rationale meant to benefit the educational process of all students.[[190]](#footnote-190) Many were excited about the possibility of reorienting affirmative action and agreed that diversity is crucial for the future. However, when the *Michigan* amici reoriented their future aspirations, they were no longer solely focused on fostering creativity and exploration but also on the meaning of equal citizenship in the United States. Notably, the Bush administration submitted an amicus brief objecting to the use of race by the university but also maintaining that:

Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of all races and ethnicities, is an important and entirely legitimate government objective. Measures that ensure diversity, accessibility and opportunity are important components of government’s responsibility to its citizens.[[191]](#footnote-191)

With these words, the United States government linked its commitment to democracy to equal opportunity, and accessibility to diversity. The Bush administration further observed in its brief that “[i]f undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.”[[192]](#footnote-192) This amicus brief had a strong influence both on other briefs that quoted it and on the Court’s ruling.[[193]](#footnote-193)

Other official bodies and private organizations argued in their amici briefs that “[e]nsuring the continuation of our democracy is a compelling interest and diversity is essential to achieving that goal”[[194]](#footnote-194) and that “[t]he Equal Protection Clause was born of our belief in human equality and guarantees equal treatment and equal opportunity for all Americans regardless of race. At its heart, the Equal Protection Clause recognizes that the diversity of our Nation is one of its greatest strengths.”[[195]](#footnote-195) Similarly, the amici briefs of elite colleges, including Harvard, articulated their pedagogical interests in diversity but concurrently stressed their commitment “to make certain that no racial or ethnic group is excluded from that vital process[,] . . . ensuring that minorities are not excluded from the professions and positions of future leadership.”[[196]](#footnote-196) In a highly influential amicus brief submitted by retired military officers, the utilitarian benefits of diversity were similarly closely linked, their argument being that diversity is an absolute necessity for “the military’s ability to fulfill its principal mission to provide national security” and that an “indivisible link exist[s] between military efficiency and equal opportunity.”[[197]](#footnote-197)

The *Michigan* amici challenged Powell’s narrow interpretation of diversity, augmenting it with history and a commitment to remedying past wrongs, as well as an egalitarian-democratic vision of diversity and the means to achieve it: affirmative action. This reinterpretation of diversity was partly reflected in the *Grutter* ruling that upheld the law school’s holistic admissions approach. Justice O’Connor, writing for the majority in *Grutter*, adopted the reasoning of Powell’s plurality decision and the diversity framework,[[198]](#footnote-198) but inspired by some of the amicus briefs, she reinfused it with both utilitarian and egalitarian ends.

The *Grutter* Court recognized the utilitarian pedagogical rationales and augmented them with a more market market-driven objective of preparing students for the workforce. It emphasized that student body diversity “promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.[[199]](#footnote-199) . . .. Today’s increasingly global marketplace [requires skills that] can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”[[200]](#footnote-200) However, the *Grutter* Court saw far greater benefits in diversity than did the *SFFA*’s amici and majority; that is, safeguarding American democracy.

In an under-appreciated passage, Justice O’Connor set forth a democratic vision of diversity in higher education. According to this rationale, student body diversity is how we know—indeed, is the only way we can know—that institutions of higher education—the holders of “knowledge and opportunity”—are “accessible to all individuals regardless of race or ethnicity.”[[201]](#footnote-201) Education, Justice O’Connor explained, is tasked with a “fundamental role in maintaining the fabric of society[[202]](#footnote-202) [and] [n]owhere is the importance of such openness more acute than in the context of higher education.”[[203]](#footnote-203) Citing the government’s brief, the Court concluded that “[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.”[[204]](#footnote-204) Diversity in higher education, held the Court in *Grutter*, is a way to ensure that the “path to leadership” is “visibly open to talented and qualified individuals of every race and ethnicity.”[[205]](#footnote-205) According to the Court, without the openness that diversity represents, the legitimacy of the country’s leadership, institutions, and democracy is in jeopardy.[[206]](#footnote-206) Justice O’Connor concluded this section of the opinion by finding “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation . . . essential if the dream of one Nation, indivisible, is to be realized.”[[207]](#footnote-207)

“As lawyers and judges must,” Jack Greenberg wrote, Justice O’Connor “couched her opinion in categories of earlier cases, she ventured out of them to write about the world we live in and its needs,”[[208]](#footnote-208) focusing not necessarily on past discrimination but on the social conditions of inequality and “what affirmative action can do to help fix [them].” [[209]](#footnote-209) In this sense, Justice O’Connor’s rationale was based less on the history of racial discrimination in the United States but more on the role of affirmative action in ameliorating conditions of inequality, some of which stem from past and current discrimination and others not. Her forward-looking account of diversity is not symmetrical; rather, it appears to recognize the inequality of opportunities available to minority and majority groups. In *Grutter,* the Court expressed its expectation that: “[Twenty-five] years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”[[210]](#footnote-210) This time limit, as Robert Post explained, is evidence that the justices believed that affirmative action could play a role in a process of remedying these unequal conditions.[[211]](#footnote-211)

## *Why Diversity is Worth Saving and How: A Silver Lining of Making Memory Claims Without Overthrowing Precedent*

Clearly, the *SFFA* majority ended affirmative action as we know it. In his opinion, Chief Justice Roberts, who wrote for the majority, effectively distorted Americans’ constitutional memories about race—not only delegitimating affirmative action in higher education, but also questioning the need and legitimacy of racial remedies altogether. As this paper showed in *Section III*, the Chief did not have to reinvent the wheel to produce this historical narrative of the Fourteenth Amendment and of affirmative action that diverged dramatically from the constitutional history of race. Harvard and the supporters of affirmative action that submitted amicus curiae briefs took part in narrating these ahistorical memory claims. In an effort to win the case and enable race-conscious admissions to continue, they sought to present affirmative action in a more “digestible” light that could possibly win the support of the conservative justices on the bench. This was a plausible and even a successful strategy for supporters of affirmative action arguing in front of a more balanced Court in pursuit of the vote of Justice Kennedy, who was the swing justice in race cases.[[212]](#footnote-212)But, in *SFFA*, with the conservative super majority on the bench, the business case for diversity seems to be losing twice—both in the war over affirmative action and in the memory wars.

The composition of the Court is unlikely to change and reverse course with respect to affirmative action in the foreseeable future. In the meantime, universities and other public and private institutions must not lose sight of the memory wars. With the recollection of the history of race under attack by legislators and courts, and with knowledge about systemic racism compromised, the legitimacy and rationales for racial diversity are impaired. Paradoxically, losing the fight in Court can serve as a liberating moment for advocates of racial justice. It should be viewed as an opportunity to reshape the nation’s constitutional memory regarding the history of race and its relevance to the lives of all Americans in 2024. This section presented two possible pathways for reclaiming constitutional memory. In what follows, I argue that the latter, more nuanced approach, should be adopted, for two strategic reasons and one substantive one.

*Diversity policies under scrutiny*: *SFFA* makes it more difficult for universities to pursue equality and diversity-oriented goals, now that they are under scrutiny and pressure to comply with the Court’s ruling.[[213]](#footnote-213) Other efforts to promote racial diversity, both in government and in the private sector, are also now being challenged.[[214]](#footnote-214) In a recent article, Sonya Starr examines the post-*SFFA* world, in which ostensibly race-neutral strategies for promoting diversity and reducing racial disparities by universities and schools are challenged for their race-related motivations, with the litigation against public magnet schools leading the wave.[[215]](#footnote-215) These cases are likely to raise the question of whether the Constitution allows the pursuit of racial diversity and inclusion using colorblind methods, or whether race-related considerations must never be factored in, even when addressing long-term policy objectives. It is therefore highly risky for universities and other institutions aiming to promote a more diverse student body to resist precedent and make arguments that lie outside the diversity framework.

The *SFFA* dissenters follow this path—they resist the limiting diversity framework that was imposed by the Court fifty years ago and justify affirmative action in remedial terms.[[216]](#footnote-216) They do so to directly challenge the Court’s precedent and broaden their ability to make claims on the past and reconstruct the record of constitutional memory. Justice Jackson was particularly notable in this challenge. As dissenters facing a conservative supermajority, they viewed the loss of race-conscious admission policies as an opportunity to jog memories and infuse them with what had been erased and distorted by the *SFFA* majority. The dissenting justices stopped trying to persuade their fellow conservative justices on the bench and instead started speaking to the people, making claims that could resound in their memories. But universities, schools, and other institutions that pursue racial diversity cannot reject precedent without facing consequences. If universities were to follow the dissenters, abandon the doctrinal limitations set by the Court, and reject the diversity framework, they would open themselves to lawsuits and investigations. However, they need not overthrow precedent in order to make memory claims. Instead, universities can follow the *Michigan* amici and reclaim diversity, reinfusing it with historical context and demonstrating its continued relevance and role. Adopting the *Michigan* amici’s approach would enable universities to remind their faculty and students and the public at large why the pursuit of racial diversity in higher education is crucial and legitimate. At the same time, they can minimize, although not eliminate, the risk of being accused of not complying with the Court’s precedents.

*Diversity Enjoys a Consensual Status*. A second strategic reason for adopting the *Michigan* amici’s approach of infusing diversity with new meanings is diversity’s consensual status. “In the pantheon of unquestioned goods, diversity is right up there with progress, motherhood, and apple pie,” Peter Shuck observed.[[217]](#footnote-217) And Sandy Levinson found that “[1]t is becoming ever more difficult to find anyone who is willing to say, in public, that institutional or social homogeneity is a positive good and diversity a substantive harm.”[[218]](#footnote-218) As noted earlier, Diversity, Equity and Inclusion (DEI) programs are now coming under attack,[[219]](#footnote-219) yet the campaign against those programs is not denouncing diversity in itself. Instead, the arguments against DEI are arguably framed around the “leftist ideologies” and “critical race theory” these initiatives are alleged to convey.[[220]](#footnote-220) Although diversity no longer has the status of ‘apple pie,’ it is still the subject of a strong consensus, especially within the realm of higher education. Even the *SFFA*’s majority adopts diversity as a compelling ideal, but deems it, and, more specifically, the way in which the universities presented it, as insufficient compelling to warrant the use of racial classifications in college admissions.[[221]](#footnote-221) It thus seems pragmatic to retain diversity rather than abandon it and advocate for an alternative concept.

*Diversity as a Democratic Value*. This article argues that diversity’s moral value is perhaps even more important than the strategic reasons for reclaiming it rather than returning to an independent remedial rationale. The term diversity enjoys various interpretations, and the United States Supreme Court’s ruling in *Grutter* significantly broadened and altered the foundations of these meanings.[[222]](#footnote-222) Importantly, Justice O’Connor recognized the democratic value of diversity. The legitimacy of a democratic leadership, according to the *Grutter* Court, is established only if the “path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”[[223]](#footnote-223) Democracy, in its most basic sense, is the “rule of the people.” But how can the people rule themselves if the pathways for leadership, and higher education in particular, is open to only some of them? The democratic process gains legitimacy when it actively engages diverse voices, ensuring that decisions are reflective of the entire spectrum of society. Diversity becomes a cornerstone in the democratic legitimation process, affirming that policies and institutions are representative and accountable to the diverse citizenry they serve.

As a democratic ideal, diversity is a prospective ideal, but one that is strongly linked to this nation’s past, when the pathways to leadership were formally closed to some people based on their race. Unlike independent remedial rationales for affirmative action, which focus solely on the past and arguably foster a fault-oriented concept focused on ???, and were thus highly contested,[[224]](#footnote-224) the focus of diversity is openness and social mobility. Social mobility is essential if individuals from diverse backgrounds are to be able to actively participate in shaping their lives. Institutions that are diverse demonstrate that social mobility and equal opportunities are not an empty promise. in the words of the philosopher Jean-Francois Lyotard, “the idea that I think we need today in order to make decisions in political matters cannot be the idea of the totality, or of the unity, of a body” – “it can only be the idea of a multiplicity or of a diversity.”[[225]](#footnote-225)

Diversity then, goes beyond equality and liberation, as it requires representation and participation of all people and their differences. It is a celebration of differences rather than a form of assimilation.[[226]](#footnote-226) This vision, as eloquently expressed by John Dewey in *Democracy and Education*, goes beyond perceiving democracy merely as a system of governance. For Dewey, democracy is fundamentally a way of living together that involves shared and communicated experiences. Viewed in this way, diversity is a reflection of the democratic lifestyle.[[227]](#footnote-227) This concept of diversity, rooted in the democratic ethos, requires, in Amy Gutman’s words, that, “[a]ll citizens must be educated so to have a chance to share in self-consciously shaping the structure of their society.”[[228]](#footnote-228)

Diversity is multifaced in another important way as a democratic value. The story of affirmative action is often told through the lens of Black and white United States, with a focus on the history of oppression African Americans have faced. There is certainly little evidence of a focus on that history in the *SFFA* decision. To a large degree, the motivation behind this article was to combat efforts to erase it from public memory. However, the story of race and racism in the United States includes many other racial and ethnic identities that should be acknowledged and considered. Diversity can include these stories about the past and the present. As a democratic value, diversity not only incorporates differences in race and ethnicity, but also those of gender, acknowledging the spectrum of sexual orientations and gender identities.[[229]](#footnote-229)

# Conclusion—*SFFA*, Anti-CRT and the Memory Wars

“Critical race theory was yesterday’s scandal. Today, diversity-equity-and-inclusion initiatives are in the crosshairs of critics across the political spectrum who seek to dismantle any notion that racism is systemic and thus deserving of systemic remedies.”[[230]](#footnote-230) Indeed, the assault on critical race theory has recently been extended to encompass an attack on DEI programs in both academic institutions and workplaces,[[231]](#footnote-231) often portrayed as attempts to indoctrinate individuals in CRT ideologies.[[232]](#footnote-232)

Memory laws and prohibitions on DEI training, initiatives, and offices, are the openly declared aspect of the memory wars. Memory wars also take place more covertly, in courts and on campuses, when justices, administrators, deans, and other citizens and officials make claims about affirmative action and racial remedies more broadly. This article uncovers how the *SFFA* majority reconfigures the past in a way that diverges from the history of race in the United States. The majority thereby dismantled any understanding that racism is systemic and thus requires redressing.[[233]](#footnote-233) It also demonstrates how universities and other advocates of affirmative action, in their effort to make affirmative action seem benign, contributed to shaping this ahistorical narrative that was subsequently adopted by the majority in the *SFFA* case.[[234]](#footnote-234) Apparently, what began as a strategic turn to utilitarian claims for affirmative action, has, with time, grown to take over the discourse about affirmative action and racial diversity within and outside the courts.[[235]](#footnote-235) Uncovering the part of universities and other proponents of affirmative action is not about assigning blame, but finding a silver lining.

1. \* [↑](#footnote-ref-1)
2. Greg Hyatt & Summer Concepcion, *Nikki Haley backpedals amid criticism after omitting 'slavery' from Civil War causes*, NBC News (Dec. 28, 2023),https://www.nbcnews.com/politics/2024-election/nikki-haley-makes-no-mention-slavery-asked-name-cause-civil-war-rcna131407. [↑](#footnote-ref-2)
3. *See* Timothy Snyder, *The War on History Is a War on Democracy*, N.Y. Times (Jun. 29, 2021), <https://www.nytimes.com/2021/06/29/magazine/memory-laws.html> [↑](#footnote-ref-3)
4. Over 600 efforts to exclude “critical race theory” have bee identified at the local, state and federal levels. *See* UCLA School of Law Critical Race Studies, CRT Forward Tracking Project, https:// crtforward.law.ucla.edu/ [https://perma.cc/VSY3-Y8LA] (last visited Jan. 30, 2024); *see also* Leah M. Watson, *The Anti-'Critical Race Theory' Campaign-Classroom Censorship and Racial Backlash by Another Name*, 58 Harv. CR-CLL Rev. 487 (2023) (describing the executive Orders issues by President Trump aiming to control constitutional memory, and the state legislation and regulation that followed the 2020 elections that intruded differ measures of classroom censorship). [↑](#footnote-ref-4)
5. The term, constitutional memory was coined by Reva Siegel, *see* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 Geo. J.L. & Pub. Pol'y 19 (2022); *see also* infra Section I. [↑](#footnote-ref-5)
6. *See infra* notes \_\_ and accompanying text. [↑](#footnote-ref-6)
7. In four decades of affirmative action litigation, self-proclaimed originalist Justices have not provided an originalist justification for their commitment to colorblindness and opposition to affirmative action. This is probably due to the fact that a straightforward application of the originalist method would strongly affirm the constitutionality of racial remedies, including affirmative action. *See infra* notes \_\_ [rubenfel, sunstine…]\_ and accompanying text. [↑](#footnote-ref-7)
8. *See infra* Part I. [↑](#footnote-ref-8)
9. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023). [↑](#footnote-ref-9)
10. For primary examples, *see* Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76(1) Stan. L. Rev. (forthcoming Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4354321 (aiming to understand the broad implications of the Court’s ban of race-conscious admission policies in higher education beyond higher education and the implications of the Court’s commitment to colorblindness on facially race-neutral strategies for promoting diversity); Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 Harv. L. Rev. 23, 135-167 (2022) (assessing the *SFFA* cases and the potential threat to disparate-impact that might follow the colorblind approach); Jonathan Feingold, *The Supreme Court Did Not End Affirmative Action; But Universities Might*, J. College & Uni. L. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4645538.‏ (delineates a series of fundamental legal rights and obligations that universities still maintain post-SFFA, aiming to aid institutions in navigating the ruling);

    Cara McClellan, *When Claims Collide: Students for Fair Admissions v. Harvard and the Meaning of Discrimination*, 54 Loy. U. Chi. L.J. 953 (2022) (considering SFFA as a case of “*mirror*” claims of discrimination, in which allegations of discrimination are brought challenging both sides of an issue or policy decision, and suggesting strategies to tell them apart); More broadly, *see* *Series: Affirmative Action at a Crossroads*, The University of Chicago Law Review Online, <https://lawreviewblog.uchicago.edu/2020/10/30/aa-series/> (last visited Aug. 7, 2023) (a series of short essays dedicated to the current crossroad of affirmative action).

    The Exception to these more doctrinal and practical oriented articles, is a comment in the Harvard Law Review authored by Angela Onwuachi-Willig, discussing the SFFA decision in narratological lenses. The comment’s initial focus is on how the SFFA majority opinion reinforces the transparent racial lens, aiming to expose the unexamined cultural beliefs in the opinion. But, moving to focus on the more doctrinal aspects of the decision, Onwuachi-Willig shifts her attention to illustrate the reasons why failing to openly acknowledge race, and instead attempting to suppress its consideration, will render it impossible to eradicate both implicit and explicit racial bias from the admissions evaluation process. *See* Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 Harv. L. Rev. 192 (2023).‏ [↑](#footnote-ref-10)
11. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023). [↑](#footnote-ref-11)
12. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). [↑](#footnote-ref-12)
13. *See infra* Section II.A. For the narratological methods the Chief Justice employs to lead the reader to infer this historical narrative, *see* Onwuachi-Willig, *supra* note 9, at 192, 203-09. [↑](#footnote-ref-13)
14. *See infra* Section II.B. [↑](#footnote-ref-14)
15. Siegel, *supra* note 4, at 23. [↑](#footnote-ref-15)
16. *See infra* Part I. [↑](#footnote-ref-16)
17. *See* Order in Pending Cases, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199 & 21-707) (The Court decided to hear the cases separately to allow Justice Ketanji Brown Jackson to participate in the UNC case, while recusing herself from the Harvard case). [↑](#footnote-ref-17)
18. For the “democratic/popular constitutionalism” literature that developed these arguments with respect to constitutional understandings and interpretations, *see* Larry D. Kramer, The People Themselves: Popular Constitutionalism Andjudicial Review 172 (2004) (describing the rule of popular constitutionalism as a desirable methodology of constitutional interpretation, and arguing that the Court's interpretation should be reflecting the popular will); Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. L. Rev. 373, 374 (2007) (suggesting a framework of “*democratic constitutionalism*” for examining the historical processes and practices involved in the establishment of constitutional rights.). [↑](#footnote-ref-18)
19. *See infra* Part III. [↑](#footnote-ref-19)
20. Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 U. Pa. J. Const. L. 1145 (2017). [↑](#footnote-ref-20)
21. *See infra* Part IV, and especially *infra* notes \_\_\_. [↑](#footnote-ref-21)
22. 539 U.S. 244 (2003). [↑](#footnote-ref-22)
23. 539 U.S. 306 (2003). [↑](#footnote-ref-23)
24. *See infra* Part IV, and especially *infra* notes \_\_\_. [↑](#footnote-ref-24)
25. *See infra* Section IV.C. [↑](#footnote-ref-25)
26. Daphne Barak-Erez, *History and memory in constitutional adjudication*, 45(1) Fed. L. Rev. 1-16 (2017).‏ *See generally* History, Memory, and the Law (Austin Sarat & Thomas R. Kearns eds., 2009) [↑](#footnote-ref-26)
27. *See* Austin Sarat & Thomas R. Kearns, *Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, in History, Memory, and the Law1 (Austin Sarat and Thomas R Kearns eds., 1999). [↑](#footnote-ref-27)
28. Wulf Kansteiner, *Finding meaning in memory: A methodological critique of collective memory studies*, 41(2) Hist. & Theory 179, 181 (2002); Halbwachs Maurice, On Collective Memory (Lewis A. Coser trans., Lewis A. Coser eds., 1992). [↑](#footnote-ref-28)
29. Ariela Gross, *The Constitution of History and Memory*, *in* Law & The Humanities: An Introduction 418 (Austin Sarat, Matthew Anderson & Cathrine O. Frank eds., 2009) (“Sociologists were the first to name “collective memory” as distinct from individual memory. . . to emphasize the way even individual memories are formed socially”). [↑](#footnote-ref-29)
30. *See supra* note \_\_\_. For a comprehensive symposium on the subject of anti- Critical Race Theory (CRT) Movement, published in 2023 by the *Harvard Civil Rights-Civil Liberties Law Review, see* Francesca Procaccini, *(E)Racing Speech in School*, 58 Harv. C.R.-C.L. L. Rev. 457 (analysing the Anti-CRT wave as a First Amendment Issue); *see also* Leah M. Watson, *The Anti-“Critical Race Theory” Campaign – Classroom Censorship and Racial Backlash by Another Name*, 58 Harv. C.R.-C.L. L. Rev. 488 (2023) (exploring the rise of the antii-CRT” movement, arguing that it is backlash to progress towards racial justice); see also Aziz Rana, *Anti-“CRT,” A Century Old Tradition*, 58 Harv. C.R.-C.L. L. Rev. 552 (uncovering the historical roots of the anti-CRT movement, exploring why and when such attacks are made). [↑](#footnote-ref-30)
31. *See* Jack M. Balkin, *Constitutional Memories*, 31 Wm. & Mary Bill Rts. J. 307 (2022) (“The use of collective memory in constitutional argument is constitutional memory.”); s*ee also* Reva, *supra* note 4; *see also* [↑](#footnote-ref-31)
32. Ira Berlin, *American Slavery in History and Memory and the Search for Social Justice*, 90(4) J. Am. Hist. 1263 (2004) (describing the relationship between history as a form of disciplinary knowledge and collective memory, as one of conflict). [↑](#footnote-ref-32)
33. *See* E H Carr, What Is History? (2nd ed, 1986) (“[t]he facts speak only when the historian calls on them: it is he who decides to which facts to give the floor, and in what order or context’.”). [↑](#footnote-ref-33)
34. *See* Sarat & Kearns, *supra* note 16, at 3. [↑](#footnote-ref-34)
35. Siegel, *supra* note 4, at 21. [↑](#footnote-ref-35)
36. Laura Kalman, The Strange Career of Legal Liberalism 180 (1996). [↑](#footnote-ref-36)
37. Balkin, *supra* note 30, at 306-7. [↑](#footnote-ref-37)
38. *See* Reva B. Siegel, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism - and Some Pathways for Resistance*, 101 Tex. L. Rev. 1127, 1134 (2023) (Originalists claims on constitutional memory, Siegel explains, made the politics of originalism into law. “originalism's claims on constitutional memory too often present the interpreter's value judgments about the law as seemingly objective and expert claims of historical fact to which the public owes deference. Originalists disdain living constitutionalism yet practice living constitutionalism by expressing contested values as claims about the nation's history and traditions, as I have demonstrated”); *see also* Balkin, *supra* note 30, at 330 (“originalist argument creates authority through a selective remembering—foregrounding some people, positions, and events and not others. Conservative originalism is a practice of erasure, because it finds large portions of the American experience (and the American population) irrelevant to the Constitution's original public meaning.”). [↑](#footnote-ref-38)
39. *See* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 427 (1997); *see also* Cass R. Sunstein, Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America 131, 138 (2005). For a critique of this view, *see* Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 Notre Dame L. Rev. 71 (2013). [↑](#footnote-ref-39)
40. Fair Admissions v. Harvard, 600 U.S. 181, 232 (2023) (Thomas, J., concurrence & alternative holding) (“I write separately to offer an originalist defense of the colorblind Constitution; to explain further the flaws of the Court's Grutter jurisprudence; to clarify that all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution; and to emphasize the pernicious effects of all such discrimination.”). This attempt to demonstrate that the framers and ratifiers of the Fourteenth Amendment sought a colorblind constitution, as the dissenters show, was unconvincing. *See* Students for Fair Admissions v. Harvard, 600 U.S. 181, 356-7 (2023) (Sotomayor, J., dissenting( (“Justice Thomas offers an “originalist defense of the colorblind Constitution,” but his historical analysis leads to the inevitable conclusion that the Constitution is not, in fact, colorblind. . . In the end, when the Court speaks of a “colorblind” Constitution, it cannot really mean it, for it is faced with a body of law that recognizes that race-conscious measures are permissible under the Equal Protection Clause. Instead, what the Court actually lands on is an understanding of the Constitution that is “colorblind” sometimes, when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.”). [↑](#footnote-ref-40)
41. Sunstein, *supra* note 38, at 131-138 (“affirmative action policies were originally regarded as legitimate. Hence there is no historical warrant for the fundamentalist view that affirmative action is generally unconstitutional. On the contrary, history supports affirmative action. In the aftermath of the Civil War, Congress enacted programs that provided particular assistance to African Americans, and this makes it extremely difficult to attack affirmative action on fundamentalist grounds.”); Rubenfeld, *supra* note 7, at 427-431. [↑](#footnote-ref-41)
42. *See* Sunstein, *supra* note 38, at 140. [↑](#footnote-ref-42)
43. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 Fordham L. Rev. 545, 564 (2006). [↑](#footnote-ref-43)
44. Jack M. Balkin, Living Originalism 234-35 (2011) (“the Reconstruction Congress passed race-conscious laws that granted educational benefits to blacks, whether or not they themselves had formerly been held in slavery. These laws made racial classifications, but they did not subordinate or oppress whites or make them into second-class citizens.”) [↑](#footnote-ref-44)
45. Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96(1) Cal. L. Rev. 283, 285 (2008). [↑](#footnote-ref-45)
46. *Id.* [↑](#footnote-ref-46)
47. *Id.* [↑](#footnote-ref-47)
48. *See infra* Section II.A.\_\_. [↑](#footnote-ref-48)
49. *See infra* Section II.B.\_. [↑](#footnote-ref-49)
50. Eviatar Zerubavel, Time Maps: Collective Memory and The Shape of The Past (2003) (explaining that understanding the dynamics of collective memory is crucial for comprehending social identities and power structures); Balkin, *supra* note 30 (“In this way memory undergirds common sense and practical judgment. It tells members of the group who they are and what they stand for, what they regard as just and unjust, what they value and do not value”). [↑](#footnote-ref-50)
51. Students for Fair Admissions v. Harvard, 600 U.S. 181, 197-8 (2023) (Roberts, J.). [↑](#footnote-ref-51)
52. *Id*. [↑](#footnote-ref-52)
53. Brief for Petitioner at 23, Students for Fair Admissions v. Harvard 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-53)
54. Students for Fair Admissions v. Harvard, 980 F.3d 157 (1st Cir. 2020); Students for Fair Admissions v. Univ. of N. Carolina, 567 F. Supp. 3d 580 (M.D.N.C. 2021). [↑](#footnote-ref-54)
55. Amy Howe, *Court will hear challenges to affirmative action at Harvard and University of North Carolina*, ScotusBlog (Jan. 24, 2022, 11:44 AM), <https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina/> (“The composition of the court has changed significantly since then: […] Kennedy retired in 2018 and was replaced by Justice Brett Kavanaugh, while Justice Amy Coney Barrett succeeded Ginsburg, who died in 2020. It was therefore a much more conservative court that considered the latest petitions asking the justices to revisit the issue.”) [↑](#footnote-ref-55)
56. John Kroger, *The End of Affirmative Action: The legal context and likely impact of the coming ruling*, Inside Higher Ed. (Oct. 30, 2022), <https://www.insidehighered.com/blogs/leadership-higher-education/end-affirmative-action> (“Even if Roberts gets only two of these three votes, affirmative action will be a thing of the past in higher education admissions”); Greg Stohr, *Harvard Race Case Punctuates Supreme Court’s Turn to Right*, Bloomberg News (Jan. 24, 2022), <https://www.bloomberg.com/news/articles/2022-01-24/harvard-race-case-punctuates-supreme-court-s-sharp-turn-to-right?sref=qZlN2rKN#xj4y7vzkg> (As Melissa Murray explains: “They really are in this sort of moment where they can do whatever they like . . . . The decision to hear the admissions case[s] suggests that ‘they’re just checking things off their list and affirmative action will be next.’) [↑](#footnote-ref-56)
57. *See e.g,* German Lopez, *The End of Affirmative Action*, N.Y. Times (Jun. 30, 2023), <https://www.nytimes.com/2023/06/30/briefing/affirmative-action-supreme-court-decision.html>; Jelani Cobb, *The End of Affirmative Action*, The New Yorker (Jun. 29, 2023), <https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action>; *supra* note 8. [↑](#footnote-ref-57)
58. Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023), Justice Ketanji Brown Jackson recused herself from taking part in the Harvard case due to her previous role as a member of Harvard’s Board of Overseers while the case was in progress in lower federal courts. However, she joined the dissenting opinion concerning the companion case involving UNC. Jackson wrote a separate dissent about the UNC case, joined by Sotomayor and Kagan. [↑](#footnote-ref-58)
59. *See* *Harvard*, 600 U.S. at 397-8 (2023) (Jackson, J., dissenting). [↑](#footnote-ref-59)
60. *Harvard*, 600 U.S. at 231­­ (Roberts, J.) (he explained that “[a] benefit to a student who overcame racial discrimination, for example, must be tied to that student’s courage and determination”). [↑](#footnote-ref-60)
61. *Harvard*, 600 U.S. at 319-20 (Sotomayor, J., dissenting). [↑](#footnote-ref-61)
62. *Harvard*, 600 U.S. at 384-5 (Jackson, J., dissenting). [↑](#footnote-ref-62)
63. *Harvard*, 600 U.S. at 206-7 (Roberts, J.). [↑](#footnote-ref-63)
64. Students for Fair Admissions v. Harvard, 600 U.S. 181, 210-212 (2023) (Roberts, J.), in footnote 4 of his opinion, Roberts wrote that the decision does not address “the potentially distinct interests that military academies may present” and actually exempts the military academies from this ruling. [↑](#footnote-ref-64)
65. *Harvard*, 600 U.S. at 201-204 (Roberts, J.). [↑](#footnote-ref-65)
66. *Harvard*, 600 U.S. at 320-322 (Sotomayor, J., dissenting) (citing Plessy v. Ferguson, 163 U.S. 537, 555–556, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (Harlan, J., dissenting) (internal quotation marks omitted)). [↑](#footnote-ref-66)
67. For an account of these laws, *see* *Harvard*, 600 U.S. at 322-324 (Sotomayor, J., dissenting) (“Simultaneously with the passage of the Fourteenth Amendment, Congress enacted a number of race-conscious laws to fulfill the Amendment’s promise of equality, leaving no doubt that the Equal Protection Clause permits consideration of race to achieve its goal. One such law was the Freedmen’s Bureau Act, enacted in 1865 and then expanded in 1866, which established a federal agency to provide certain benefits to refugees and newly emancipated freedmen. See Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Act of July 16,”); Rubenfeld, Affirmative Action, 427 (“although it is a matter of public record, most lawyers and judges are unaware that Congress in the 1860s repeatedly enacted statutes allocating special benefits to blacks on the express basis of race”) [↑](#footnote-ref-67)
68. *Harvard*, 600 U.S. at 201-204 (Roberts, J.). [↑](#footnote-ref-68)
69. *Id.* [↑](#footnote-ref-69)
70. *Id.* Referring to Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). [↑](#footnote-ref-70)
71. Students for Fair Admissions v. Harvard, 600 U.S. 181, 183-205 (2023) (Roberts, J.). [↑](#footnote-ref-71)
72. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). [↑](#footnote-ref-72)
73. Students for Fair Admissions v. Harvard, 600 U.S. 181, 218-220 (2023) (Roberts, J.) (quoting from Tr. of Oral Arg. in Brown I, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952)). [↑](#footnote-ref-73)
74. *Harvard*, 600 U.S. at 183-205(Roberts, J.). [↑](#footnote-ref-74)
75. Jack M. Balkin & Reva B. Siegel, *The American civil rights tradition: Anticlassification or Antisubordination*, 2(1) Issues Leg. Scholarsh. (2003). [↑](#footnote-ref-75)
76. *Harvard*, 600 U.S. at 204-205(Roberts, J.). [↑](#footnote-ref-76)
77. *Id.* [↑](#footnote-ref-77)
78. *See* Richard Kluger, Simple justice: The History of Brown v. Board of Education & Black America's struggle for equality (2011) (delves into the complexities of the Brown decision, the legal battles, and the challenges in enforcing desegregation orders); *see also* Michael J. Klarman, From Jim Crow to Civil rights: The Supreme Court and the struggle for racial equality (2004) (Klarman highlights the discrepancy between the lofty aspirations of the Brown decision and the challenging realities of its enforcement). [↑](#footnote-ref-78)
79. Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1989) (Bell questions the notion that substantial advancements in social, political, and economic realms resulted from the civil rights movement following the landmark 1954 Brown v. Board ruling.) [↑](#footnote-ref-79)
80. Students for Fair Admissions v. Harvard, 600 U.S. 181, 228-230 (2023) (Roberts, J.). [↑](#footnote-ref-80)
81. *Id.* at 229*.* (“Separate but equal is “inherently unequal,” said Brown. 347 U. S., at 495 (emphasis added). It depends, says the dissent.”). [↑](#footnote-ref-81)
82. *Harvard*, 600 U.S. at 327-329 (Sotomayor, J., dissenting). [↑](#footnote-ref-82)
83. Balkin, *supra* note 30, at 316. [↑](#footnote-ref-83)
84. Exec. Order No. 10925, 3 C.F.R. § 10925 (1961). [↑](#footnote-ref-84)
85. Exec. Order No. 11246, 3 C.F.R. § 11246 (1965). [↑](#footnote-ref-85)
86. Hugh Davis Graham, *The origins of affirmative action: Civil rights and the regulatory state*, 523(1) Annals Am. Acad. Pol. & Soc. Sci. 50(1992). [↑](#footnote-ref-86)
87. Office of the Federal Register, General Services Administration, Public Papers of the Presidents of the United States: Lyndon B. Johnson (1965, Book II), govinfo, (June 1, 1965), <https://www.govinfo.gov/app/details/PPP-1965-book2>. [↑](#footnote-ref-87)
88. Students for Fair Admissions v. Harvard, 600 U.S. 181, 208-209 (2023) (Roberts, J.) (citing Grutter v. Bollinger, 539 U. S. 306, 326 (2003)). [↑](#footnote-ref-88)
89. *Harvard*, 600 U.S. at 211 (Roberts, J.) (seemingly adopting the precedent set in Grutter v. Bollinger, 539 U.S. 306, 325 (2003)). [↑](#footnote-ref-89)
90. *See* Bloch, *supra* note 13,at 1157. The concept of the “business-case for diversity” is frequently applied to elucidate the justifications used by companies to embrace diversity initiatives, primarily emphasizing economic efficiency. I adopt this notion within higher education, employing it to illustrate market-oriented reasons for diversity, particularly focused on shaping students' professional growth and bolstering an efficient workforce. [↑](#footnote-ref-90)
91. *Id.* [↑](#footnote-ref-91)
92. *Id.* at 214. [↑](#footnote-ref-92)
93. *Id.* [↑](#footnote-ref-93)
94. *Id.* [↑](#footnote-ref-94)
95. *Id. At 215.* [↑](#footnote-ref-95)
96. *Id.* [↑](#footnote-ref-96)
97. *Id.* [↑](#footnote-ref-97)
98. *Id.* at 217. [↑](#footnote-ref-98)
99. *Id.* at 221. [↑](#footnote-ref-99)
100. Students for Fair Admissions v. Harvard, 600 U.S. 181, 352 (2023) (Sotomayor, J., dissenting( (“There is no better evidence that the Court is overruling the Court’s precedents than those precedents themselves.”). [↑](#footnote-ref-100)
101. *Harvard*, 600 U.S. at 357-8 (Sotomayor, J., dissenting). [↑](#footnote-ref-101)
102. *Harvard*, 600 U.S. at 358-9 (Sotomayor, J., dissenting). [↑](#footnote-ref-102)
103. *See infra* Section \_\_\_. [↑](#footnote-ref-103)
104. *See* Regents of the University of California v. Bakke, 438 U.S. 265 (1978). [↑](#footnote-ref-104)
105. *Bakke*, 438 U.S. at 307. [↑](#footnote-ref-105)
106. *Id.* [↑](#footnote-ref-106)
107. *See* Richard A. Posner, *The* *Bakke Case and the Future of “Affirnzative Action”*,67Calif. L. Rev. 171, 178-80 (1979). *See also* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 511 (1989) (although not in the context of higher education, the Court further distanced affirmative action from the project of remedying past wrongs. While acknowledging that addressing specific instances of past discrimination, supported by statistical evidence, was valid, the *Croson* court, echoing the *Bakke* decision, prohibited remedying “societal discrimination.”). [↑](#footnote-ref-107)
108. *Bakke,* 438 U.S. at 311, 313-14 (plurality opinion). [↑](#footnote-ref-108)
109. Gratz v. Bollinger, 539 U.S. 244 (2003). [↑](#footnote-ref-109)
110. Grutter v. Bollinger, 539 U.S. 306 (2003). [↑](#footnote-ref-110)
111. *Grutter,* 539 U.S. at 331 (O'Connor, J.). [↑](#footnote-ref-111)
112. Fisher v. University of Texas, 570 U.S. 297 (2013). [↑](#footnote-ref-112)
113. Brief by University Respondents at 1, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 21-707). [↑](#footnote-ref-113)
114. Brief for Respondent at 1, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-114)
115. *Id.* at 2. [↑](#footnote-ref-115)
116. *Id.* at 7. [↑](#footnote-ref-116)
117. *Id.* [↑](#footnote-ref-117)
118. Brief of Amherst, et al., at 3, 5-1, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-118)
119. Brief amici curiae of Massachusetts Institute of Technology, et al., at 11, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-119)
120. Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents at 3-4, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-120)
121. Brief amici curiaefor Massachusetts Institute of Technology, et al., at 28, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-121)
122. *See e.g.,* Brief amici curiae of American Educational Research Association, et al. as Amici Curiae in Support of Respondents at 10, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“Student Body Diversity Leads to Educational Benefits such as Improvements in Cognitive Abilities, Critical Thinking, and Self-Confidence”); Brief of Amici Curiae Deborah Cohen & 67 other Professors in Support of Respondents at 9, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“Scholarly research supports the conclusion that all students benefit from racial and ethnic diversity on college campuses and demonstrates that those benefits outlast a student’s time on a college campus and have proven positive impacts on American business and our society”); Brief Amicus Curiae of the University of Michigan in Support of Respondents at 7–8, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“exchange of ideas and viewpoints “is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds”); Brief Amici Curiae of the American Council on Education & 39 Other Higher Education Groups at 14, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“Student diversity, including racial and ethnic diversity, improves learning outcomes and promotes academic success.”) [↑](#footnote-ref-122)
123. Brief amicus curiae of United States Supporting Respondents at 12, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“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”). [↑](#footnote-ref-123)
124. *Id.* at 13. [↑](#footnote-ref-124)
125. *Id.*  [↑](#footnote-ref-125)
126. *Id.* at 19. [↑](#footnote-ref-126)
127. *See e.g.,* Brief of Southern Governors as Amici Curiae in Support of Respondents at 6, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“Students learn to accept and appreciate traditions and backgrounds different than their own. By broadening their horizons in this way, students become better prepared to join the workforce of the world economy.”); Brief amici curiae of Adm. Charles S. Abbot, et al., in Support of Respondents at 2, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (Thirty-five top former military leaders write that “[t])he 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.”). [↑](#footnote-ref-127)
128. Brief for Amici Curiae Applied Materials, Inc., et al., in Support of Respondents at 3-4, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-128)
129. Brief for Amicus Curiae HR Policy Association in Support of Respondents at 4, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-129)
130. Brief amici curiae of Major American Business Enterprises as Amici Curiae Supporting Respondents at 1, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199). [↑](#footnote-ref-130)
131. *See e.g.* Brief amici curiae of Black Women Law Scholars in Support of Respondents at 22-23, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) ((This group asserted that while diversity is “a sufficient basis on which to reaffirm the constitutionality of race-conscious admissions programs, [there is a] far more compelling justification for race-conscious admissions programs [:] remedying the lasting and lived effects of centuries of racial discrimination against Black people and other historically underrepresented groups.”); Brief of Amici Curiae 25 Harvard Student and Alumni Organizations in Support of Respondent President and Fellows of Harvard College, at 45, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (No. 20-1199) (“The absence of equal educational opportunities undermines democracy because it allow[s] a subset of the population to either hoard or be deprived of the kinds of educational opportunities that allow for social mobility, better life outcomes, and the ability to participate equally in the social and economic life of the democracy.”).

     *Id.* at 23-24. [↑](#footnote-ref-131)
132. *See* Sanford Levinson, Wrestling with Diversity 16 )2003) (quoting a letter from Jack Balkin). [↑](#footnote-ref-132)
133. For examples of the contemporary utilitarian interpretation in university documents, *see e.g.* *Columbia Issues Statement on Affirmative Action Cases*, Columbia University News (Jul. 05, 2023), <https://news.columbia.edu/news/columbia-issues-statement-affirmative-action-cases> (“The Columbia University community represents a wide array of experiences and backgrounds. This diversity is central to our identity -- it reflects the cultural richness of New York City as well as our mission to foster meaningful interactions and prepare students to make a difference in the world.”); *see also* Santa J. Ono & Laurie K. McCauley, *Statement on Supreme Court’s Affirmative Action ruling*, Office of the President University of Michigan (Jun. 29, 2023), <https://president.umich.edu/news-communications/messages-to-the-community/statement-on-supreme-courts-affirmative-action-ruling/> (“We believe racial diversity benefits the exchange and development of ideas by increasing students’ variety of perspectives, promoting cross-racial understanding and dispelling racial stereotypes. It helps prepare students to be leaders in a global marketplace and increasingly multicultural society.”); Sian Leah Beilock, *Letter From the President on Affirmative Action*, Dartmouth News (Jun. 29, 2023), <https://home.dartmouth.edu/news/2023/06/letter-president-affirmative-action> (“diversity, including racial diversity, is vital to our mission of knowledge creation in service to society. Research… shows that diverse teams lead to better outcomes”). [↑](#footnote-ref-133)
134. *See supra* note \_\_. [↑](#footnote-ref-134)
135. *See* minute 0:05 *in*, Harvard University, President-Elect Claudine Gay Message to the Community, YouTube (Jun. 29, 2023), <https://www.youtube.com/watch?v=AoGjh3tbPm4>. [↑](#footnote-ref-135)
136. *Id.* (minute 1:29). [↑](#footnote-ref-136)
137. *See e.g.,* Letter from Peter Salovey, *President of Yale University* (Jun. 29, 2023), <https://president.yale.edu/president/statements/supreme-court-decisions-regarding-admissions-higher-education> (“it will take some time to fully consider the implications of the Court’s decisions and review our admissions policies in light of them. As we do this work, I write today to reaffirm Yale’s unwavering commitment to creating and sustaining a diverse and inclusive community. This principle is core to our mission of teaching aspiring leaders to serve all sectors of society and improving the world through research and scholarship, education, preservation, and practice.”); Letter from Robert A. Brown, *President of Boston University* (Jun. 29, 2023), <https://www.bu.edu/marcom/html-emails/projects/president/supreme-court-decision/index.html> (“The ruling limits powerful tools… Boston University is committed to inclusive excellence, built on a diverse student body. To the extent permitted by law, we will sustain this commitment.”). [↑](#footnote-ref-137)
138. See *supra* note \_\_.. [↑](#footnote-ref-138)
139. Students for Fair Admissions v. Harvard, 600 U.S. 181, 319 (2023) (Sotomayor, J., dissenting( [↑](#footnote-ref-139)
140. *Harvard*, 600 U.S. at 386 (Jackson, J., dissenting(. [↑](#footnote-ref-140)
141. *Harvard*, 600 U.S. at 386-7 (Jackson, J., dissenting(. [↑](#footnote-ref-141)
142. *Harvard*, 600 U.S. at 321-322 (Sotomayor, J., dissenting(; *Harvard*, 600 U.S. at 386-7 (Jackson, J., dissenting(. [↑](#footnote-ref-142)
143. *Harvard*, 600 U.S. at 322 (Sotomayor, J., dissenting(. [↑](#footnote-ref-143)
144. *Harvard*, 600 U.S. at 357 (Sotomayor, J., dissenting(. [↑](#footnote-ref-144)
145. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976); *see also* Balkin & Siegel, *supra* note 67. [↑](#footnote-ref-145)
146. Students for Fair Admissions v. Harvard, 600 U.S. 181, 327 (2023) (Sotomayor, J., dissenting( (citing from Justice Harlen’s dissent in Plessy). [↑](#footnote-ref-146)
147. *Harvard*, 600 U.S. at 389 (Jackson, J., dissenting(. [↑](#footnote-ref-147)
148. *Harvard*, 600 U.S. at 327-8 (Sotomayor, J., dissenting( (“Brown was a race-conscious decision that emphasized the importance of education in our society. . . The desegregation cases that followed Brown confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness.”). [↑](#footnote-ref-148)
149. *Harvard*, 600 U.S. at 318 (Sotomayor, J., dissenting((citing *Brown* 492-495). [↑](#footnote-ref-149)
150. *Id.* [↑](#footnote-ref-150)
151. *See supra* Part \_\_\_. [↑](#footnote-ref-151)
152. Students for Fair Admissions v. Harvard, 600 U.S. 181, 393 (2023) (Jackson, J., dissenting(. [↑](#footnote-ref-152)
153. *Id.* at 407. [↑](#footnote-ref-153)
154. *Harvard*, 600 U.S. at 333 (Sotomayor, J., dissenting(. [↑](#footnote-ref-154)
155. *Harvard*, 600 U.S. at 384-5 (Jackson, J., dissenting(. [↑](#footnote-ref-155)
156. *Harvard*, 600 U.S. at 334 (Sotomayor, J., dissenting(. [↑](#footnote-ref-156)
157. *Harvard*, 600 U.S. at 405 (Jackson, J., dissenting(. [↑](#footnote-ref-157)
158. Students for Fair Admissions v. Harvard, 600 U.S. 181, 405 (2023) (Jackson, J., dissenting( (citing from Brief for Amici Curiae Association of American Medical Colleges et al. in Support of Respondents, Students for Fair Admissions v. Harvard 600 U.S. 181 (2023) (No. 20-1199)). Some of the statistical claims made in the amicus brief and then by Justice Jackson, were later refuted. *See* Ted Frank, *Justice Jackson’s Incredible Statistic*, WSJ (July 5, 2023)https://www.wsj.com/articles/justice-jacksons-incredible-statistic-black-newborns-doctors-math-flaw-mortality-4115ff62. [↑](#footnote-ref-158)
159. *Id.* [↑](#footnote-ref-159)
160. *Id.* at 405-6. [↑](#footnote-ref-160)
161. *Id.* at 408. [↑](#footnote-ref-161)
162. *Id.* at 410. [↑](#footnote-ref-162)
163. Students for Fair Admissions v. Harvard, 600 U.S. 181, 410 (2023) (Jackson, J., dissenting(. [↑](#footnote-ref-163)
164. *Id.* at 409. [↑](#footnote-ref-164)
165. *Harvard*, 600 U.S. at 379-81 (Sotomayor, J., dissenting(. (for example, [d]ozens of *amici* from nearly every sector of society agree that the absence of race-conscious college admissions will decrease the pipeline of racially di­verse college graduates to crucial professions.). [↑](#footnote-ref-165)
166. *Id.* at 379-80. [↑](#footnote-ref-166)
167. *Id.* at 382. [↑](#footnote-ref-167)
168. *Id.*  [↑](#footnote-ref-168)
169. Students for Fair Admissions v. Harvard, 600 U.S. 181, 227 (2023) (Roberts, J.). [↑](#footnote-ref-169)
170. Gratz v. Bollinger, 539 U.S. 244 (2003). [↑](#footnote-ref-170)
171. Grutter v. Bollinger, 539 U.S. 306 (2003). [↑](#footnote-ref-171)
172. Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, *in* Education Law Stories 83, 86- 87 (Michael A. Olivas & Ronna G. Schneider eds., 2007) [↑](#footnote-ref-172)
173. *See* *Grutter*, 539 U.S. at 337 (“Here, the Law School engages in a highly individualized, holistic review of each applicant’s file [...] Unlike the program at issue in Gratz [...] the Law School awards no mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity.” (citing *Gratz*, 539 U.S. at 271-72)). [↑](#footnote-ref-173)
174. *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306. [↑](#footnote-ref-174)
175. *Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)*, Supreme Court of the United States, https://www.supremecourt.gov/search.aspx?filename=/docketfiles/02-241.htm (last visited Aug. 7, 2023); *Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516)*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/02-516.htm> (last visited Aug. 7, 2023). There were forty-five overlapping amicus briefs, thus the data set for these cases together, include 45 amicus briefs. [↑](#footnote-ref-175)
176. Regents of the University of California v. Bakke, 438 U.S. 265, 310-12 (1978). [↑](#footnote-ref-176)
177. Earl M. Maltz, *Ignoring the Real World: Justice O'Connor and Affirmative Action in Education*, 57 Cath. U. L. Rev. 1045, 1047 (2008). [↑](#footnote-ref-177)
178. *Id.* at 1048; *see also* Sanford Levinson, *Diversity*, 2 U. Pa. J. Const. L. 573, 577 (2000) (“[B]ecause of Justice Powell's emphasis on the almost unique legitimacy of 'diversity' as a constitutional value, it has become the catchword-indeed, it would not be an exaggeration to say 'mantra'-of those defending the use of racial or ethnic preferences.”); Post, *infra* note 116. (“In the years since Bakke, elite universities have become ever more committed to the goal of achieving a racially diverse student body.”). [↑](#footnote-ref-178)
179. Justice Powell focused on the “*educational benefits that flow from an ethnically diverse student body*” and explained that “*the right to select those students who will contribute the most to the 'robust exchange of ideas' is important to the academic freedom of a university.*” He added that [t]he atmosphere of “*speculation, experiment and creation'-so essential to the quality of higher education-is widely believed to be promoted by a diverse student body.*” *See* Regents of the Univ. of Cal. v. Bakke, 438 **U.S. 265, 306-313 (1978)** (plurality opinion). Recognizing this approach, *see* Pamela S. Karlan, Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants, 54 UCLA L. Rev. 1613, 1624 (2006) (“Justice Powell's articulation, grounded as it was in earlier cases involving academic freedom and autonomy, involved a largely intrinsic perspective in the sense that academic diversity was valuable to the university's distinctive mission of promoting the robust exchange of ideas and the advancement of knowledge.”). [↑](#footnote-ref-179)
180. Charles R. Lawrence, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F.L. Rev. 757, 767-8 (1997); Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, 25(13) N.Y. Rev. Books 20, 21-25 (1978) (Diversity “*does not supply a sound intellectual foundation for the compromise the public found so attractive.*”). *See also* Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 Cardozo L. Rev. 1689, 1723 (2005) (“Powell allowed universities to admit members of previously disadvantaged groups without having to state directly that they were remedying past societal discrimination.”). [↑](#footnote-ref-180)
181. Derrick A. Bell, Jr., *Introduction: Awakening after Bakke*, 14 Harv. C.R.-C.L. L. Rev. 1, 5 (1979) (“[P]ost-Bakke minorities must rely on the interest of schools in exercising their discretion to admit a small number of minority students whose numbers will be dictated by the school’s interest in diversity, rather than on either the magnitude of past racial wrongs or on the minority students’ potential for future achievement.”). [↑](#footnote-ref-181)
182. For my previous work on diversity has never been a fixed measure. Its meaning has been subject to contestation, renegotiation, and resignification, *see* Bloch, *supra* note 13. [↑](#footnote-ref-182)
183. *See* Brief for Respondents at 12, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); *see also* Brief for Respondents at 25, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter *Brief for Respondents, Gratz*]. U-M further stressed the remedial logic asserting that contemporary inequalities are “rooted in centuries of racial discrimination” and that these “inequalities will eventually be eliminated.”; *Id.* at 33. [↑](#footnote-ref-183)
184. Brief Amicus Curiae of the Black Women Lawyers Association of Greater Chicago, Inc., in Support of Respondents at 14, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516). [↑](#footnote-ref-184)
185. Brief for the United Negro College Fund and Kappa Alpha PSI as Amici Curiae in Support of Respondents at 8, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-185)
186. Amicus Curiae Brief of Northeastern University Supporting the Respondents at 3, Gratz v. Bollinger, 539 U.S. 244 (2003)(No. 02-516). [↑](#footnote-ref-186)
187. Brief of Amici Curiae National School Boards Association, et al., in Support of Respondents at 8, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-187)
188. Brief of Latino Organizations as Amici Curiae in Support of Respondents at 23, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-188)
189. Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents at 7, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241); for more examples, focusing specifically on the academic amici, *see e.g.,* Bloch, *supra* note 13, at 1170-1172. [↑](#footnote-ref-189)
190. *See supra* Part II.A. [↑](#footnote-ref-190)
191. Brief for the United States as Amicus Curiae Supporting Petitioner at 5, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-191)
192. *Id.* at 7. [↑](#footnote-ref-192)
193. *See e.g.*, Brief of King County Bar Association as Amicus Curiae in Support of Respondents, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-193)
194. Brief of Members of the United States Congress as Amici Curiae in Support of Respondents at 20, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-194)
195. Brief of Representative Richard A. Gephardt et al. as Amici Curiae Supporting Respondents at 3, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241). [↑](#footnote-ref-195)
196. Brief of Harvard University as Amici Curiae Supporting Respondents at 3, 12, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241); for a broad account of the academic amici, *see* Bloch, *supra* note 13, at 1183-86. [↑](#footnote-ref-196)
197. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, 10-13, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241). According to Douglas Laycock, it's crucial to recognize that this brief isn't asserting solely the necessity for military officers to undergo education within a diverse classroom. Rather, it presents a broader and seemingly democratic assertion that emphasizes the importance of racial diversity within the officer corps itself, *see* Douglas Laycock, *The* *Broader Case for Affirmative Action. Desegregation, Academic Excellence, and Future Leadership*, 78 Tul. L. Rev. 1767, 1772 (2004). [↑](#footnote-ref-197)
198. Grutter v. Bollinger*,* 539 U.S. 306, 325 (2003) (O'Connor, J. majority) (“More important, for 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.”). [↑](#footnote-ref-198)
199. *Id.* at 330 (quoting Brief of the Am. Educ. Research Ass’n et al. as Amici Curiae in Support of Respondents at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)). [↑](#footnote-ref-199)
200. *Id.* [↑](#footnote-ref-200)
201. *Id.* at 331. [↑](#footnote-ref-201)
202. *Id.* [↑](#footnote-ref-202)
203. *Id.*;citing *see* Brief for the United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger*,* 539 U.S. 306 (2003) (No. 02-241) [hereinafter *US Grutter Brief*]. [↑](#footnote-ref-203)
204. Grutter v. Bollinger*,* 539 U.S. 306, 332 (2003) (O'Connor, J. majority) (citing *id.* at *US Grutter Brief*). [↑](#footnote-ref-204)
205. *Id.* at 332. [↑](#footnote-ref-205)
206. *Id.* at 332-3 (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training”.). [↑](#footnote-ref-206)
207. *Id.* at 332. [↑](#footnote-ref-207)
208. Jack Greenberg, *Diversity, the university, and the world outside*, 103(6) Colum. L. Rev. 1610, 1611 (2003). [↑](#footnote-ref-208)
209. *Id.* at 1621. [↑](#footnote-ref-209)
210. Grutter *v.* Bollinger, 539 U.S. 306, 343 (2003). [↑](#footnote-ref-210)
211. Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 Harv. L. Rev. 4, 64 (2003) (“Grutter's requirement that affirmative action programs be temporary […] remains committed to affirmative action programs primarily for remedial reasons […] The implicit logic of remedy actually pervades much of the rhetoric of Grutter.”). [↑](#footnote-ref-211)
212. Bloch, *supra* note 13. [↑](#footnote-ref-212)
213. Feingold, *supra* note 9. [↑](#footnote-ref-213)
214. *See e.g.*, Steve Schuster, *State Bar of Wisconsin sued over diversity program in new federal lawsuit*, Wis. L. J. (2023) (federal lawsuit concerning a diversity program by the State Bar of Wisconsin was initiated at the end of 2023. The Wisconsin Institute for Law & Liberty contends that the State Bar of Wisconsin's endorsement of purportedly discriminatory Diversity, Equity, and Inclusion (DEI) practices, notably its prominent "Diversity Clerkship Program," is unconstitutional.). [↑](#footnote-ref-214)
215. *See* Sonya Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 Stan. L. Rev. 161. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022); *see also* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023). [↑](#footnote-ref-215)
216. *See supra* Part \_\_ and especially accounting footnotes \_\_. [↑](#footnote-ref-216)
217. Peter H. Schuck**,** Diversity in America: Keeping Government at a Safe Distance12 (2003). [↑](#footnote-ref-217)
218. Sanford Levinson, *Diversity*, 2 U. PA. J. Const. L. 573, 578 (2000). [↑](#footnote-ref-218)
219. *See supra* note \_\_\_. [↑](#footnote-ref-219)
220. Michael Tesler, *Americans support DEI – for now, at least*, GoodAuthority (Jan. 8, 2024), <https://goodauthority.org/news/americans-support-dei-for-now-at-least/>. [↑](#footnote-ref-220)
221. *See supra* note \_\_. [↑](#footnote-ref-221)
222. *See* *supra* Part \_\_. [↑](#footnote-ref-222)
223. Grutter v. Bollinger, 539 U.S. 306,332 (2003). [↑](#footnote-ref-223)
224. [↑](#footnote-ref-224)
225. Jean-François Lyotard & Jean-Loup Thébaud, Just Gaming 94 (Wlad Godzich trans., 1985). [↑](#footnote-ref-225)
226. Iris Marion Young, Justice and the Politics of Difference 158 (1990). For the importance of diversity for a deliberative democracy, *see* James Bohman, *Deliberative democracy and the epistemic benefits of diversity*, 3(3) Episteme 175 (2006). [↑](#footnote-ref-226)
227. John Dewey, Democracy and Education: An Introduction to The Philosophy of Education 101 (1916). [↑](#footnote-ref-227)
228. *See* Amy Gutmann, Democratic Education 46 (1987); *see also* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705, 713-14 (explaining that as a culturally pluralist society, we should deliberately structure institutions in a diverse way). [↑](#footnote-ref-228)
229. [↑](#footnote-ref-229)
230. Keeanga-Yamahtta Taylor, *The Campaign Against D.E.I.*, New Yorker (Jan. 22, 2024), https://www.newyorker.com/news/our-columnists/the-campaign-against-dei [↑](#footnote-ref-230)
231. Nicholas Confessore, *‘America Is Under Attack’: Inside the Anti-D.E.I. Crusade*, N.Y. Times (Jan. 20, 2024), https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html [↑](#footnote-ref-231)
232. Diversity, Equity, and Inclusion (D.E.I.) refers to an organization's focus on several key aspects: diversity, which encompasses the demographics of both the organization's members and those who are not part of it; equity, entailing fair treatment for all while considering the unique circumstances that may necessitate differential treatment; and inclusion, which gauges the extent to which an organization welcomes all its members and empowers them to make meaningful contribution. *See* Tanya Kateri Hernandez, Can CRT Save DEI: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action25 (Dec. 28, 2023) (unpublished manuscript(, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4666156. [↑](#footnote-ref-232)
233. *See supra* Part \_\_. [↑](#footnote-ref-233)
234. *See supra* Section \_\_\_. [↑](#footnote-ref-234)
235. For examples of the contemporary utilitarian interpretation in university documents, *see e.g.,* *Columbia Issues Statement on Affirmative Action Cases*, Columbia University News (Jul. 05, 2023), <https://news.columbia.edu/news/columbia-issues-statement-affirmative-action-cases> (“The Columbia University community represents a wide array of experiences and backgrounds. This diversity is central to our identity -- it reflects the cultural richness of New York City as well as our mission to foster meaningful interactions and prepare students to make a difference in the world.”); Santa J. Ono & Laurie K. McCauley, *Statement on Supreme Court’s Affirmative Action ruling*, Office of the President University of Michigan (Jun. 29, 2023), <https://president.umich.edu/news-communications/messages-to-the-community/statement-on-supreme-courts-affirmative-action-ruling/> (“We believe racial diversity benefits the exchange and development of ideas by increasing students’ variety of perspectives, promoting cross-racial understanding and dispelling racial stereotypes. It helps prepare students to be leaders in a global marketplace and increasingly multicultural society.”); Sian Leah Beilock, *Letter From the President on Affirmative Action*, Dartmouth News (Jun. 29, 2023), <https://home.dartmouth.edu/news/2023/06/letter-president-affirmative-action> (“diversity, including racial diversity, is vital to our mission of knowledge creation in service to society. Research… shows that diverse teams lead to better outcomes”). [↑](#footnote-ref-235)