# The Why Question—Which (if any) Interests Count as Compelling in SFFA?

“The End of Affirmative Action” was the title of many news reports and commentary in the days following the ruling in *Student for Fair Admissions v. Harvard* and *Student for Fair Admissions v. UNC* late June of 2023.[[1]](#footnote-1) And indeed, on June 29, 2023, the U.S. Supreme Court issued the *SFFA* landmark decision, severely limiting, if not entirely ending, the use of race-conscious affirmative action in college admissions. By a 6-3 vote, the conservative justices declared that the race-conscious admissions procedures of Harvard University and the University of North Carolina are in violation of Title VI of the Civil Rights Act of 1964 and, in the case of the public university, the Equal Protection Clause of the Fourteenth Amendment.[[2]](#footnote-2) This section does not provide a survey of everything written in the *SFFA* opinions, but rather provides a comprehensive account of the possible reasons the Justices present for allowing race-conscious admission policies and the distinct values some of them attribute to affirmative action in college admission. It shows that while the Majority seemingly upholds the educational benefits that flow from diversity as the sole interest that can justify the use of race in admissions, it also makes this rationale unworkable. The dissenters, on the other hand, no longer adhere to the narrow utilitarian interest in diversity, and instead remind universities, business, the United States government and the public at large that the interest in radical diversity is a far greater aspiration rooted in America’s past pf racial discrimination and necessary for America’s future as a multiracial democracy.

In the majority opinion, *Chief Justice John Roberts*, writing the opinion of the Court, stated that affirmative action is discriminatory and unconstitutional. “Eliminating racial discrimination means eliminating all of it,” he writes.[[3]](#footnote-3) He then clarified that college admissions programs may take race into consideration to enable applicants to illustrate how their racial background has influenced their character in a manner that has a tangible impact on the university, such as in their application essays. But, even then, schools cannot 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.[[4]](#footnote-4) The majority's ruling effectively, though not explicitly, overturned *Bakke*, *Grutter* and *Fisher*, where the court upheld use of race in admission policies as one of several factors to achieve a diverse student body. Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett joined Chief Justice Roberts' opinion. The court’s three liberal justices dissented. Both Justice Sonia Sotomayor and Justice Ketanji Brown Jackson wrote dissenting opinions, to which Justices Elena Kagan joined. “Today, this Court stands in the way and rolls back decades of precedent and momentous progress” Justice Sotomayor wrote.[[5]](#footnote-5) Justice Jackson added that “[b]ecause the majority’s judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.”[[6]](#footnote-6)

The Court, like in previous cases challenging the constitutionality of race-conscious affirmative action, applied a two-step examination of strict scrutiny, asking whether the specific admission program was used in a (1) narrowly tailored manner to achieve (2) a compelling state interest.[[7]](#footnote-7) The majority stated that it is not overruling *Bakke*, *Grutter* and *Fisher*, seemingly accepting diversity as a compelling state interest that can justify the use of race in university admissions, while finding that the that the universities’ admission programs were not narrowly tailored.[[8]](#footnote-8) However, closely reading the opinions in this case, shows that the majority is actually not affirming past precedents, and that the justices are also in deep disagreement as to which, if any, compelling state interest can justify the use of race in admission policies. In other words, for the first time since challenges to race-conscious affirmative action were brought to the Court, the justices were divided not only concerning the question of “how” to design affirmative action in a permissible way, but also with respect to the question of “why” to engage in affirmative action policies in the first place.

Reviewing the universities policies under the strict scrutiny test, the Chief Justice adds that “universities operate their race-based admissions programs in a manner that is ‘sufficiently measurable to permit judicial [review]’”… rather than “amorphous.”[[9]](#footnote-9) Doing so, he examines the interests the universities view as compelling. The chief Justice lists all the benefits of diversity that the universities alluded to in their briefs, almost all of which are utilitarian. Harvard goals, he cites from their respondent brief, are : “(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.’”[[10]](#footnote-10) While UNC point to similar utilitarian objectives--“(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders,’” as well as a separate anti-stereotyping goal of “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”[[11]](#footnote-11) “

Although these are *commendable goals*,” the Chief Justice writes, “they are not sufficiently coherent for purposes of strict scrutiny.”[[12]](#footnote-12) He went on and explained that while these are compelling objectives, they are not “sufficiently coherent,” they are “standardless,” “imprecise” and cannot be measured. They are “plainly overboard.”[[13]](#footnote-13) According to the Chief Justice, the problem is not with diversity per se, but with its elusive nature in the educational mission. “[T]he question in this context,” the Chief Justice explains, “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.”[[14]](#footnote-14) “The interests that respondents seek,” he concludes, “though plainly worthy, are inescapably imponderable.”[[15]](#footnote-15)

This is a very sophisticated move that leaves universities who seek to enhance their student body diversity at an almost dead end. In deciding this way, the Chief Justice, seemingly upholds diversity as the only workable compelling state interests to possibly justify the use of race in schools’ admission policies, and at the same time, makes it nearly impossible to use. Doing so, he adopts the universities` utilitarian approach to diversity that was curved in years litigation over affirmative action and in response to the Court’s limitations, and at the same time shows how it is incoherent and not sufficiently compelling on its own. In other words, the Chief Justice is telling schools that while their interests in the educational and economic benefits of diversity are theoretically worthy, in practice they are not limited enough in scope (they are not “measurable and concrete”[[16]](#footnote-16)) and in time (“lack a logical end point”[[17]](#footnote-17)) to justify the use of race. And because this majority, like the ones before it, rejected the interest in remedying social discrimination, it seems to be leaving the universities with very little options.[[18]](#footnote-18) In that sense, the Chief Justice, is actually overruling decades of preceded that permitted the use of race in admission policies to promote student body diversity.[[19]](#footnote-19) In her dissent, Justice Sotomayor criticizes the majority and explains that “to avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. . . Members of this majority pay lip service to respondents’ “commendable” and “worthy” racial diversity goals, ante, […] they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them.”[[20]](#footnote-20) The majority, Justice Sotomayor clarifies, even rejects the narrower interest in the educational interests that flow from diversity.[[21]](#footnote-21)

*Justice Thomas* follows a seemingly different rout as he is flatly overturning past precedents that uphold race-conscious affirmative action. Doing so, he adhered to his long-standing view of a “colorblind” constitution that does not allow race classifications “regardless of whether intended to help or hurt”.[[22]](#footnote-22) For that reason, Justice Thomas, determined that all racial classifications are subject to the strictest of scrutiny. From here, his opinion converges more tightly to the one written by the Chief Justice. In *Grutter,* Thomas wrote, the Court “recognized ‘only one’ interest sufficiently compelling to justify race-conscious admissions programs: the ‘educational benefits of a diverse student body.’”[[23]](#footnote-23) But, in the yeas since Grutter, Justice Thomas explained that he had “sought to understand exactly how racial diversity yields educational benefits. With nearly 50 years to develop their arguments, neither Harvard nor UNC—two of the foremost research institutions in the world—nor any of their amici can explain that critical link.”[[24]](#footnote-24) The goals the universities listed, Justice Thomas asserts are vague and their causal connection to diversity is unclear.[[25]](#footnote-25) Furthermore, he questions the advantages of racial diversity opposed to other forms of diversity. “It may be the case that exposure to different perspectives and thoughts can foster debate, sharpen young minds, and hone students’ reasoning skills. But, it is not clear how diversity with respect to race, qua race, furthers this goal,” he wrote.[[26]](#footnote-26) To further the respondents’ and their amici educational goals and enhancing “creativity” and innovation”, Justice Thomas urges universities to sick “individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.”[[27]](#footnote-27) Citing himself concurring in Fisher I, Justice Thomas equates segregation affirmative action and states that “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination [in the 1950s], see Brown v. Board of Education, the alleged educational benefits of diversity cannot justify racial discrimination today.”[[28]](#footnote-28) Thus, unlike the Chief Justice that theoretically recognized the educational benefits that flow from diversity, compelling, Justice Thomas seems to reject the diversity rationale all together, objecting to the idea that anything can justify what he sees as racial discrimination.

While Justices Gorsuch’s and Kavanaugh’s concurrences do not add much to the debate over what might count as a compelling state interest for race-conscious admission policies, the dissenters, Justice Sotomayor and Jackson, definitely do. In a different manner, both dissenters, resuscitate the egalitarian legacy of affirmative action.

In her dissenting option, Justice Sotomayor, ties diversity closely together both to its *remedial roots* and to the *democratic vision* it transpires. Sיק he opens her opinion stating that “[t]he Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality,”[[29]](#footnote-29) and explaining that [t]his guarantee she then asserts, can constitutionally be enforced through race-conscious means. In *Brown*, Sotomayor further explains, the Court recognized, “the harm inflicted by segregation and the ‘importance of education to our democratic society.’”[[30]](#footnote-30) She then connects this long standing constitutional remedial legacy and its manifestation in *Brown* directly to diversity and its benefits by stating that “[f]or 45 years, the Court extended Brown’s transformative legacy to the context of higher education, allowing colleges and uni­versities to consider race in a limited way and for the lim­ited purpose of promoting the important benefits of racial diversity.”[[31]](#footnote-31) Bakke, Grutter, and Fisher, she writes, are an extension of Brown’s legacy. It is a compelling state interest of the highest order, Justice Sotomayor asserts, that “universities pursue the benefits of racial diversity and ensure that “the diffusion of knowledge and opportunity” is available to students of all races.”[[32]](#footnote-32) Justice Sotomayor asserts generally that “[e]quality requires acknowledgment of inequality” and adds that the context of racial exclusion informs Harvard’s and UNC’s admission policies and their racial diversity goals.[[33]](#footnote-33) It is after a long description of racial discrimination and exclusion in America’s higher education system that Justice Sotomayor writes that “acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion.”[[34]](#footnote-34)

As for the perspective role of diversity, Justice Sotomayor turns to the amici briefs filled to the Court and lists all the benefits of diversity as a “national security imperative,” as well as providing “equitable and effective public services,” better “healthcare access and health outcomes”, improves “academic achievement” and “business performance.”[[35]](#footnote-35) Yet, unlike most amici briefs that she cites, Justice Sotomayor, subjects these utilitarian benefits to a great good of equal citizenship in a democratic society, explaining that “today’s decision harms not just re­spondents and students but also our institutions and dem­ocratic society more broadly.”[[36]](#footnote-36) More broadly, it is important to notice that or Justice Sotomayor, diversity and equality are inseparable, sometime interchangeable. For instance, she notes 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.”[[37]](#footnote-37) Justice Sotomayor then ties this egalitarian vision of diversity, not just to the past, but to the democratic vision that depends 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. ‘[G]ross 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*.[[38]](#footnote-38)

Thus, for Justice Sotomayor, the interest in diversity is not and can not be understood without paying close attention to its historical roots in the struggle for racial justice, and it can not and should not be valued independently of its crucial role in sustaining American democracy.

Justice Jackson joins Sotomayor’s dissent without calcifications, but wrote separately as she takes a slightly different rout with respect to the question of which interests are compelling enough to allow race-conscious affirmative action. Justice Jackson provides a starling account of the history of racial discrimination in the United States—starting with slavery, through the civil war, through reconstruction and Jim Crow—explaining how this history is a history of the law of the land: “in so excluding Black people, government policies affirmatively operated—one could say, affirmatively acted—to dole out preferences to those who, if nothing else, were not Black.”[[39]](#footnote-39) Those preferences made by law and under the law, Justice Jackson explains, created the reality of racial inequality we face today in America, a reality of “[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. [Which] were created in the distant past but have indisputably been passed down to the present day through the generations.”[[40]](#footnote-40) It is very clear that in Justice Jackson’s view, history has everything to do with affirmative action. “History speaks.” She writes, “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.”[[41]](#footnote-41) History and present racial inequalities informs “how and why race matters to the very concept of who “merits” admission.”[[42]](#footnote-42)

Justice Jackson is ambivalent about the utilitarian values of diversity. She both makes the utilitarian case for diversity, and at the same time rejects the premise that it can be the sole compelling reason for engaging in race-conscious admission policies. Justice Jackson makes a very persuasive case for the benefits that floe from 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 writes.[[43]](#footnote-43) Justice Jackson then draws on amici briefs and on research to demonstrate how and why diversity matters. Justice Jackson shows how black doctors are much more likely to save the lives of black newborns and take a more accurate care of their black patients more generally.[[44]](#footnote-44) Justice Jackson does not stop there, with rather narrow utilitarian interest in diversity. It is those programs that diversify the medical profession, she writes, that also “open doors to every sort of opportunity—helps address the aforementioned health disparities (in the long run) as well.”[[45]](#footnote-45) Justice Jackson further explains how diversity in higher education helps everyone, as students will come to have “a greater appreciation and understanding of civic virtue, democratic values, and our country’s commitment to equality.”[[46]](#footnote-46) Diversity, she acknowledges, benefits the economy as well. But, all these utilitarian, educational and even economic benefits of diversity, seem to be 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*.[[47]](#footnote-47) But unlike Justice Sotomayor that at least formally adopts Justice Powell’s opinion in Bakke but reinterprets it in a way that reinfuses diversity with egalitarian and democratic values, Justice Jackson seems to be flatly rejecting the idea that this narrow of an interest can serve as the sole compelling interest for affirmative action. She writes that “[f]or one thing—based, apparently, on nothing more than Justice Powell’s initial say so—it 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.”[[48]](#footnote-48)In a short yet decisive passage, she denounces this majority, as well as past ones, for drastically undermining the primary rationale behind the need for racial diversity that can only be understood in their historical context of racial discrimination.

Both dissenters, each in her own manner, unsettles the conversation about why racial diversity is considered a good thing. In the past fifty years the answer to this question got narrower and more restricted, focused not only on diversity, but eventually on a very specific vision of diversity that is disconnected from the historical context of racial discrimination and from the prospective aspiration of overcoming those disparities. Justices Sotomayor and Jackson, both refuses to adhere to this utilitarian and ahistorical understanding of the affirmative action project. Justice Sotomayor reclaims the diversity rational and reinfuses it with both historical context and remedial interests, as well as prospective redistributive and democratic aspirations. Justice Jackson supported those same ideals, but thought they can directly serve as a compelling state interest for affirmative action, even outside the diversity framework.

Both Chief Justice Roberts and Justice Thomas strongly object to this move and attack the dissenters for breaking away from past precedents while wearing the mental of stare decisis.[[49]](#footnote-49) “Thomas write that “[t]The dissents too attempt to stretch the diversity rationale, suggesting that it supports broad remedial interests… [b]ut language—particularly the language of controlling opinions of this Court—is not so elastic.”[[50]](#footnote-50) He then asserts that “[t]he Court refuses to engage in this lexicographic drift, seeing these arguments for what they are: a remedial rationale in disguise.”[[51]](#footnote-51) But the dissenter do not write to convince any of their conservative peers on the bench, they write, this article argues, to remind us why race-conscious affirmative action ever mattered in the first place and why it still matters today.

1. <https://www.nytimes.com/2023/06/30/briefing/affirmative-action-supreme-court-decision.html>; https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action [↑](#footnote-ref-1)
2. The SFFA decision. Justice Ketanji Brown Jackson recused herself from taking part in the Harvard case ue 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-2)
3. Id. at 15 [↑](#footnote-ref-3)
4. Roberts opinion, SFFA, p. 40 (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-4)
5. SFFA, Sotomayor, page 3 [↑](#footnote-ref-5)
6. SFFA, Justice Jackson, p 2 [↑](#footnote-ref-6)
7. Roberts, 15 [↑](#footnote-ref-7)
8. Roberts 19-20. In footnote 4 oh 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-8)
9. Roberts, 22 [↑](#footnote-ref-9)
10. Roberts ,23 [↑](#footnote-ref-10)
11. Roberts. Id. [↑](#footnote-ref-11)
12. Roberts. Id [↑](#footnote-ref-12)
13. Roberts. Id. [↑](#footnote-ref-13)
14. Roberts. Id. [↑](#footnote-ref-14)
15. Roberts. 24 [↑](#footnote-ref-15)
16. Id. at 26 [↑](#footnote-ref-16)
17. Id. at 30. [↑](#footnote-ref-17)
18. For a discussions of what should universities do next, see infra part \_\_\_. [↑](#footnote-ref-18)
19. SFFA, Sotomayor, 36 (“There is no better evidence that the Court is overrulingthe Court’s precedents than those precedents themselves.”) [↑](#footnote-ref-19)
20. Id. At 42-43 [↑](#footnote-ref-20)
21. Id. At 43. Sotomayor further explains that the majority’s objection to diversity efforts, seems to be, , that those tools actually work: “helps equalize opportunity and advances respondents’ objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students.” Id. At 45 [↑](#footnote-ref-21)
22. SFFA, Thomas, 2. See also. Id at 51 ("The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”) [↑](#footnote-ref-22)
23. Id. at 23 [↑](#footnote-ref-23)
24. Id. at 24 [↑](#footnote-ref-24)
25. Id. [↑](#footnote-ref-25)
26. Id. [↑](#footnote-ref-26)
27. Id. at 25-26 [↑](#footnote-ref-27)
28. Id. at 26 (citing his concurrence in Fisher, I 570 U. S., at 320) [↑](#footnote-ref-28)
29. SFFA, Sotomayor, 1 [↑](#footnote-ref-29)
30. Id. At 2 [↑](#footnote-ref-30)
31. Id. At 2. In another place Justice Sotomayor adds that “[f]rom Brown to Fisher, this Court’s cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment’s vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws.” See id. At 17 [↑](#footnote-ref-31)
32. Id. At 16 [↑](#footnote-ref-32)
33. Id. At 21-22/ [↑](#footnote-ref-33)
34. Id. At 25 [↑](#footnote-ref-34)
35. Id. At 65-66 (“Dozens 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-35)
36. Id. At 65 [↑](#footnote-ref-36)
37. Id. At 67 [↑](#footnote-ref-37)
38. Id. At 67 [↑](#footnote-ref-38)
39. Jackson. At 9. [↑](#footnote-ref-39)
40. Jackson at 1 [↑](#footnote-ref-40)
41. Id at 11 [↑](#footnote-ref-41)
42. Id. At 16 [↑](#footnote-ref-42)
43. Id. At 230 [↑](#footnote-ref-43)
44. Id. At 23 [↑](#footnote-ref-44)
45. Id. At 23 [↑](#footnote-ref-45)
46. Id 23 [↑](#footnote-ref-46)
47. Id at 26. Justice Jackson also establishes that what “really matters is the creation of “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.” Id. At 27/ [↑](#footnote-ref-47)
48. Id. At 28 [↑](#footnote-ref-48)
49. Chief Justice Roberts. At 36 (“There is a reason the principal dissent must invoke Justice Marshall’s partial dissent in Bakke nearly a dozen times while mentioning Justice Powell’s controlling opinion barely once (JUSTICE JACKSON’s opinion ignores Justice Powell altogether). For what one dissent denigrates as “rhetorical flourishes about colorblindness,” post, at 14 (opinion of SOTOMAYOR, J.), are in fact the proud pronouncements of cases like Loving and Yick Wo, like Shelley and Bolling—they are defining statements of law. We understand the dissents want that law to be different. They are entitled to that desire. But they surely cannot claim the mantle of stare decisis while pursuing it.”) [↑](#footnote-ref-49)
50. Thomas, at 30 [↑](#footnote-ref-50)
51. Is. At 30 [↑](#footnote-ref-51)