# The “Why” Question—Which (If Any) Interests Count as Compelling after *SFFA*?

“The End of Affirmative Action” shouted countless news and opinion piece headlines in the days following the ruling in *Student for Fair Admissions* v. *Harvard* and *Student for Fair Admissions v. UNC* (hereinafter: *SFFA*) in late June 2023.[[1]](#footnote-1) It was indeed on June 29, 2023, that 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. By a 6–3 vote spearheaded by the conservative justices, the Court declared that race-conscious affirmative action programs in college admissions are in violation of 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. [[2]](#footnote-2)

This section of the article does not survey everything written in the *SFFA* opinions but rather provides a comprehensive account of the justices’ permissible rationales for allowing race-conscious admission policies and the distinct values that some of them attributed to affirmative action in college admissions. It shows that while ostensibly recognizing the educational benefits of diversity as the sole interest that can justify the use of race in admissions, the majority also renders this rationale unworkable. The dissenters, in contrast, no longer adhere to the narrow utilitarian interest in diversity and instead remind universities, businesses, the United States government, and the public at large that the state interest in racial diversity reflects a much broader aspiration rooted in America’s past of racial discrimination and is vital for America’s future as a multiracial democracy.

Chief Justice Roberts wrote the opinion of the Court, to 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.”[[3]](#footnote-3) He then clarifies 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.[[4]](#footnote-4) The majority ruling effectively, though not explicitly, overturned *Bakke*, *Grutter*, and *Fisher*, in which the Court 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 Thomas, Alito, Gorsuch, Kavanaugh, and Coney Barrett joined the Chief Justice’s opinion. The Court’s three liberal justices dissented. Justices Sotomayor and Jackson both wrote dissenting opinions, with which Justice Kagan joined. “Today, this Court stands in the way and rolls back decades of precedent and momentous progress,” Justice Sotomayor writes,[[5]](#footnote-5) adding 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, 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.[[7]](#footnote-7) The Chief Justice emphasized that it was not overruling *Bakke*, ostensibly accepting diversity as a compelling state interest that may justify the use of race in university admissions; at the same time finding that the universities’ admissions programs were not narrowly tailored.[[8]](#footnote-8) A close reading of the opinions in this case, however, reveals that the majority actually deviates from precedent and that the justices are also deeply divided as to which, if any, compelling state interest can justify the use of race in admission policies. Thus, *SSFA* represents the first time since challenges to race-conscious affirmative actions were brought before the Court that the justices were divided not only on “how” to design affirmative action in a permissible way but also on “why” affirmative action should count as constitutionally permissible in the first place.

Before delving into the disagreement over the values the justices hold compelling enough to allow the use of race, it important to understand another fundamental issue that is under deep disagreement in this case: the right interpretation of the Equal protection clause of the Fourteenth Amendment. The majority promotes a vision of the constitution that is colorblind, picturing affirmative action as an attempt of the judiciary to “pick[] winners and losers based on the color of their skin.”[[9]](#footnote-9) In doing so, the Chief Justice creates complete symmetry between racial discriminatory acts and affirmative acts.[[10]](#footnote-10) Doing so, he invokes the legacy of Brown, writing that while the majority adheres to the “Separate but equal is ‘inherently unequal,’” ruling of Brown, for the dissent, it is contextual.[[11]](#footnote-11) Thomas added, “the Framers of the Fourteenth Amendment charted a way out: a colorblind Constitution that requires the government to, at long last, put aside its citizens’ skin color and focus on their individual achievements.”[[12]](#footnote-12) This is a manifestation of what scholars has long recognized as the “anti-classification” principle, according to which, the Equal Protection Clause prohibits all race-based classifications, regardless of their goal.[[13]](#footnote-13) The minority strongly disagrees vindicating a completely different interpretation of the Fourteenth Amendment and its legacy. Claiming too the mental of *Brown*, Justice Sotomayor states 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.”[[14]](#footnote-14) And that “[i]Ignoring race will not equalize a society that is racially unequal. What was true in the 1860s, and again in 1954, is true today: Equality requires acknowledgment of inequality.”[[15]](#footnote-15) The dissenters, hold what the literature often pictured an “anti-subordination approach, under which, the constitution does not prohibit race classifications per-se, but rather holds a promise for equal citizenship and that laws and government should work to fulfill that promise, not inhibit it.[[16]](#footnote-16) The strongly opposing world views about the constitution and what kind of equal protection it provides, fed, as this section shows the controversy over why, if at all, the constitution should allow race-conscious affirmative measures.

*What is then a compelling state interest for applying race-conscious affirmative action in higher education according to the Chief Justice?* Reviewing the universities’ policies under the strict scrutiny test, the Chief Justice added that “universities operate their race-based admissions programs in a manner that is ‘sufficiently measurable to permit judicial [review]’” . . . rather than “amorphous.”[[17]](#footnote-17) On this basis, he examines the interests that the universities consider compelling, listing all the benefits of diversity to which the respondents referred in their briefs, almost all of which are utilitarian. Harvard’s goals, he states, citing its 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.’”[[18]](#footnote-18) UNC, the Chief Justice continues, has 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.”[[19]](#footnote-19)

Although these are *commendable goals* [emphasis added],” the Chief Justice writes, “they are not sufficiently coherent for purposes of strict scrutiny.”[[20]](#footnote-20) Continuing, he explains that the objectives, while compelling, are not “sufficiently coherent,” and are rather, “standardless,” “imprecise,” and unmeasurable: “plainly overboard.”[[21]](#footnote-21) 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 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.”[[22]](#footnote-22) “The interests that respondents seek,” he concludes, “though plainly worthy, are inescapably imponderable.”[[23]](#footnote-23)

This is a very sophisticated rationale that leads institutions of higher education that are seeking to enhance their student body diversity into an almost inescapable impasse. The Chief Justice’s reasoning, while appearing to validate diversity as the only compelling state interest justifying the use of race in schools’ admissions policies, at the same time makes its use nearly impossible. He achieves this result by adopting the utilitarian approach to diversity that the universities’ carved out in years of litigation over affirmative action and in response to the Court-imposed restraints, while simultaneously showing how the approach is incoherent and not sufficiently compelling on its own. In essence, the Chief Justice is telling 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”[[24]](#footnote-24)) or in time (“lack[ing] a logical end point”[[25]](#footnote-25)) to justify the use of race. And because the *SSFA* majority, like those preceding it, rejected the interest of remedying social discrimination as a valid basis for race-conscious admissions policies, its majority decision seems to be leaving the universities with very few options.[[26]](#footnote-26) In this sense, the Chief Justice is actually overruling decades of precedent that permitted the use of race in admission policies to promote student body diversity.[[27]](#footnote-27) 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.”[[28]](#footnote-28) The majority, Justice Sotomayor insists, even rejects the narrower interest in the educational interests that flow from diversity.[[29]](#footnote-29)

Justice Thomas follows an apparently different route, flatly rejecting precedents that uphold race-conscious affirmative action. In so doing, he adheres to his long-standing view of a “colorblind” Constitution that does not allow race classifications “regardless of whether intended to help or hurt.”[[30]](#footnote-30) For this reason, he determines that all racial classifications are subject to the strictest scrutiny. From this point of departure, his opinion converges more closely with that of the Chief Justice. In *Grutter,* Justice Thomas wrote, the Court “recognized ‘only one’ interest sufficiently compelling to justify race-conscious admissions programs: the ‘educational benefits of a diverse student body.’”[[31]](#footnote-31) In the years since *Grutter*, however, Justice Thomas explains that he has “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.”[[32]](#footnote-32) The goals the universities specified, Justice Thomas argues, are vague and their causal connection to diversity is unclear.[[33]](#footnote-33) Furthermore, he questions the advantages of racial diversity as 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 writes.[[34]](#footnote-34) To further the educational goals of the respondents and their amici and to enhance “creativity” and “innovation,” Justice Thomas urges universities to seek “individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.”[[35]](#footnote-35) Quoting his own concurring opinion in *Fisher I*, Justice Thomas equates segregation to 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.”[[36]](#footnote-36) Thus, unlike the Chief Justice, who theoretically recognized the educational benefits of diversity as compelling, Justice Thomas seems to reject the diversity rationale altogether, objecting to the idea that anything can justify what he sees as racial discrimination.

While Justices Gorsuch’s and Kavanaugh’s concurrences add little to the debate over what may be considered a compelling state interest in race-conscious admission policies, the dissents of Justices Sotomayor and Jackson definitely make a contribution, each resuscitating the egalitarian legacy of affirmative action in a different way.

In her dissenting option, Justice Sotomayor closely ties diversity to both its *remedial roots* and the *democratic vision* it inspires. She opens her opinion by stating that “[t]he Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality”[[37]](#footnote-37) and explains that [t]his guarantee can constitutionally be enforced through race-conscious means. In *Brown*, Justice Sotomayor continues, the Court recognized, “the harm inflicted by segregation and the ‘importance of education to our democratic society.’”[[38]](#footnote-38) She then directly connects this long-standing constitutional remedial legacy and its manifestation in *Brown* to diversity and its benefits by observing 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.”[[39]](#footnote-39) *Bakke, Grutter,* and *Fisher,* she writes, are extensions 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.”[[40]](#footnote-40) Justice Sotomayor then makes the general claim 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.[[41]](#footnote-41) Following a lengthy description of racial discrimination and exclusion in America’s higher education system, she writes that “acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion.”[[42]](#footnote-42)

As for the prospective role of diversity, Justice Sotomayor turns to the amicus briefs filed with the Court, lists all the benefits of diversity as a “national security imperative,” and touts diversity as also providing “equitable and effective public services” and better “healthcare access and health outcomes,” “academic achievement” and “business performance.”[[43]](#footnote-43) Yet unlike most of the amicus briefs that she cites, Justice Sotomayor subjects these utilitarian benefits to the test of the greater 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.”[[44]](#footnote-44) More broadly, it is important to note that Justice Sotomayor views diversity and equality as inseparable if not interchangeable. For example, she remarks 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.”[[45]](#footnote-45) Justice Sotomayor then ties 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].[[46]](#footnote-46)

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

Justice Jackson joins Justice Sotomayor’s dissent without qualifications but writes separately because she takes a slightly different route with respect to the question of which interests are compelling enough to allow race-conscious affirmative action. She provides a remarkable account of the history of racial discrimination in the United States—starting with slavery, onward to the Civil War, and through Reconstruction and Jim Crow—explaining how this history is a history of the law of the land: “[I]n 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.”[[47]](#footnote-47) Those preferences, created by law and under the law, Justice Jackson explains, created the reality of racial inequality that Americans face today, a reality of “[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens [that] were created in the distant past but have indisputably been passed down to the present day through the generations.”[[48]](#footnote-48) It is very clear that, in Justice Jackson’s view, history is the root of the rationale for 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.”[[49]](#footnote-49) Both historical and present-day racial inequalities inform “how and why race matters to the very concept of who ‘merits’ admission.”[[50]](#footnote-50)

Justice Jackson is ambivalent about the utilitarian values of diversity. While making the utilitarian case for diversity, she rejects the premise that it can be the sole compelling reason for applying race-conscious admission policies. She argues 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 writes.[[51]](#footnote-51) Justice Jackson then draws on amicus briefs and research to demonstrate how and why diversity matters. She shows how Black doctors are much more likely to save the lives of Black newborns and provide their Black patients with more accurate care more generally.[[52]](#footnote-52) She does not, however, stop with a rather narrow utilitarian interest in diversity. It is these programs, she writes, 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.”[[53]](#footnote-53) Justice Jackson further explains 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.”[[54]](#footnote-54) Diversity, she acknowledges, 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].[[55]](#footnote-55) Unlike Justice Sotomayor, however, who 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 flatly reject the idea that an interest as narrow as this 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.”[[56]](#footnote-56) In a short yet decisive passage, she denounces the majority in this case, as well as in past ones, for drastically undermining the primary rationale behind the need for racial diversity, which can be understood only in the historical context of racial discrimination.

Both dissenters, each in her own manner, unsettles the legal, academic, and public debate about why racial diversity should be valued. During the past fifty years, the answer to this question has become increasingly narrow and restricted, focused not only on diversity but eventually on a very specific vision of diversity that is disconnected from the retrospective context of racial discrimination and the prospective aspiration of overcoming the disparities that it caused. Justices Sotomayor and Jackson both refuse to adhere to this utilitarian and ahistorical understanding of the affirmative action effort. Justice Sotomayor reclaims the diversity rationale and reinfuses it with both historical context and remedial interests as well as prospective redistributive and democratic aspirations. Justice Jackson supports the same ideals but believes they can serve directly as a compelling state interest for affirmative action, even outside the diversity framework.

Both Chief Justice Roberts and Justice Thomas strongly object to this reasoning and attack the dissenters for breaking from precedent while availing themselves of the mantle of *stare decisis*.[[57]](#footnote-57) Thomas writes that “[t]he 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.”[[58]](#footnote-58) 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.”[[59]](#footnote-59) The dissenters, however, write not to convince any of their conservative peers on the bench but rather, I suggest in this article, to remind us why race-conscious affirmative action ever mattered in the first place and why it still matters today.

1. *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. [↑](#footnote-ref-1)
2. Students for Fair Admissions v. Harvard 600 U.S. \_\_\_ (2023) (No. 20-1199), 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-2)
3. Students for Fair Admissions v. Harvard, No. 21-707, slip op. at 15 (U.S. Jun. 29, 2023) (Jackson, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-3)
4. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 40 (U.S. Jun. 29, 2023) (Roberts, J., plurality), https://www.supremecourt.gov/opinions/slipopinion/22. (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. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 3 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-5)
6. Students for Fair Admissions v. Harvard, No. 21-707, slip op. at 2 (U.S. Jun. 29, 2023) (Jackson, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-6)
7. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 15 (U.S. Jun. 29, 2023) (Roberts, J., plurality), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-7)
8. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 19-20 (U.S. Jun. 29, 2023) (Roberts, J., plurality), https://www.supremecourt.gov/opinions/slipopinion/22, 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-8)
9. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 38 (U.S. Jun. 29, 2023) (Roberts, J., plurality), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-9)
10. *Id.* (“While the dissent would certainly not permit university programs that discriminated against black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit.”) [↑](#footnote-ref-10)
11. *Id.* (“Separate but equal is “inherently unequal,” said Brown. 347 U. S., at 495 (emphasis added).It depends, says the dissent.”) [↑](#footnote-ref-11)
12. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 22 (U.S. Jun. 29, 2023) (Thomas, J., concurring), https://www.supremecourt.gov/opinions/slipopinion/22.

 *Id.* [↑](#footnote-ref-12)
13. Jack M. Balkin & Reva B. Siegel, *The American civil rights tradition: Anticlassification or Antisubordination*, 2(1) Issues Leg. Scholarsh. (2003). [↑](#footnote-ref-13)
14. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 17 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-14)
15. *Id.* [↑](#footnote-ref-15)
16. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107 (1976); *see also* Balink & Siegel, supra \_\_. [↑](#footnote-ref-16)
17. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 22 (U.S. Jun. 29, 2023) (Roberts, J., plurality), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-17)
18. *Id.* at 23. [↑](#footnote-ref-18)
19. *Id.* [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. *Id.* [↑](#footnote-ref-21)
22. *Id.* [↑](#footnote-ref-22)
23. *Id.* at 24. [↑](#footnote-ref-23)
24. *Id.* at 26 [↑](#footnote-ref-24)
25. *Id.* at 30. [↑](#footnote-ref-25)
26. For a discussion of what should universities do next, *see* infra part \_\_\_. [↑](#footnote-ref-26)
27. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 36 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22 (“There is no better evidence that the Court is overruling the Court’s precedents than those precedents themselves.”). [↑](#footnote-ref-27)
28. *Id.* at 42-43. [↑](#footnote-ref-28)
29. *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-29)
30. *See* Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 2 (U.S. Jun. 29, 2023) (Thomas, J., concurring), https://www.supremecourt.gov/opinions/slipopinion/22; *see also*, id. at 51 ("The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”). [↑](#footnote-ref-30)
31. *Id.* at 23. [↑](#footnote-ref-31)
32. *Id.* at 24. [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)
35. *Id.* at 25-26. [↑](#footnote-ref-35)
36. *Id.* at 26 (citing his concurrence in Fisher v. University of Texas, 570 U.S. 297, 320 (2013)). [↑](#footnote-ref-36)
37. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 1 (U.S. Jun. 29, 2023) (Sotomayor, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-37)
38. *Id.* at 2. [↑](#footnote-ref-38)
39. *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 also*, *id.* at 17. [↑](#footnote-ref-39)
40. *Id.* at 16. [↑](#footnote-ref-40)
41. *Id.* at 21-22. [↑](#footnote-ref-41)
42. *Id.* at 25. [↑](#footnote-ref-42)
43. *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-43)
44. *Id.* at 65. [↑](#footnote-ref-44)
45. *Id.* at 67. [↑](#footnote-ref-45)
46. *Id.* at 67. [↑](#footnote-ref-46)
47. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 9 (U.S. Jun. 29, 2023) (Jackson, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-47)
48. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 1 (U.S. Jun. 29, 2023) (Jackson, J., dissenting), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-48)
49. *Id.* at 11. [↑](#footnote-ref-49)
50. *Id.* at 16. [↑](#footnote-ref-50)
51. *Id.* at 230. [↑](#footnote-ref-51)
52. *Id.* at 23. [↑](#footnote-ref-52)
53. *Id.* [↑](#footnote-ref-53)
54. *Id.* [↑](#footnote-ref-54)
55. *See* *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.”; *see also id.* at 27. [↑](#footnote-ref-55)
56. *Id.* at 28. [↑](#footnote-ref-56)
57. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 36 (U.S. Jun. 29, 2023) (Roberts, J., plurality), <https://www.supremecourt.gov/opinions/slipopinion/22> (“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-57)
58. Students for Fair Admissions v. Harvard, No. 20-1199, slip op. at 30 (U.S. Jun. 29, 2023) (Thomas, J., concurring), https://www.supremecourt.gov/opinions/slipopinion/22. [↑](#footnote-ref-58)
59. *Id.* at 30. [↑](#footnote-ref-59)