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Michael S. Ariens

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Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

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Insert in Chapter 1 § D.1.a. at page 77:

The Court heard and decided a number of cases concerning constitutional standing. The Court's three-part requirement, that the plaintiff suffered an injury in fact, that such injury was fairly traceable to the challenged action, and that the injury was redressable, remained as is. But the application of this test divided the Court in a number of cases.

First, the Court considered the standing of distinct plaintiffs seeking to invalidate the Secretary of Education's decision to forgive student debt. In *Department of Education v. Brown*, 600 U.S. ___, 143 S. Ct. 2343 (2023), a unanimous Court held that two borrowers, Myra Brown and Alexander Taylor, neither of whom qualified for the maximum relief available to borrowers, lacked standing to sue because any injury for not having their student loans forgiven was not "fairly traceable" to the Secretary's forgiveness plan. In the other case challenging the student loan forgiveness program, Biden v. Nebraska, 600 U.S. ___, 143 S. Ct. 2355 (2023), a divided Court held Missouri possessed standing to sue "through the Missouri Higher Education Loan Authority (MOHELA or Authority), a public corporation that holds and services student loans." It possessed standing because the loan forgiveness program would likely lead to a 50% decline in income to MOHELA, or $44 million. As MOHELA was an instrumentality of the state, Missouri had standing. This was so even though MOHELA could have sued on its own behalf, but decided not to. In dissent, Justice Kagan argued that Missouri "cannot ride on someone else's injury." MOHELA was "a legally and financially independent public corporation," and Missouri was riding on MOHELA's injury, not its own.

Second, in *Haaland v. Brackeen*, 599 U.S. ___, 143 S. Ct. 1609 (2023), the Court held no plaintiff possessed standing to challenge the Indian Child Welfare Act of 1978 on equal protection grounds. No member of the Court disagreed with this conclusion.

Third, in *United States v. Texas*, 599 U.S. ___, 143 S. Ct. 1964 (2023), the Court held Texas and Louisiana lacked standing to challenge guidelines to enforcement immigration laws. The guidelines, they argued, violated two statutes, and that violation cost the states money. The district court determined that the states "would incur costs," and thus they possessed standing. Though the Court agreed that monetary costs are an injury, the injury must be cognizable in law, one that is redressable. Texas and Louisiana offered nothing in the way of precedent, history, or tradition showing that federal courts may order the President to alter its prosecution policies. "In short, this Court's precedents and longstanding historical practice establish that the States' suit here is not the kind redressable by a federal court."

The lone dissenter, Justice Alito, argued ordinary standing precedent demonstrated the states were injured in fact, that this injury was fairly traceable to the challenged action, and that this injury was redressable in court.

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Insert in Chapter 1§ E. at page 92:

The Appendix to Chief Justice Roberts's 2022 Year-End Report on the Federal Judiciary noted the number of filings for the year ending September 30, 2022, was down 8%. This continued a downward trend. The number of filings for the year ending September 30, 2021 declined to 5,307, a drop of 104 from the previous Term. The total number of cases filed in the Court's paid docket ending September 30, 2022, decreased 12%, to 1,612. In fiscal year 2019-2020, a total of 1,481 paid cases were filed. The exception was fiscal year 2020-2021, when paid cases rose to 1,830. It is plausible this was a reaction to the COVID-19 pandemic. The Court heard arguments in 70 cases in October Term 2021, and disposed of 68 in 55 signed opinions. Seven cases were decided by *per curiam* opinion. All of these numbers were consistent with the data from the past several fiscal years.

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Insert in Chapter 4 § B.2.c. at page 390:

NATIONAL PORK PRODUCERS COUNCIL V. ROSS, 598 U.S. ___, 143 S. Ct. 1142 (2018)—By referendum ("Proposition 12") in 2018, the state of California banned the sale of any pork product "that comes from breeding pigs (or their immediate offspring) that are 'confined in a cruel manner.'" Confinement in a cruel manner generally included preventing a pig from "lying down, standing up, fully extending [its] limbs, or turning around freely" (quoting statute).

California imports almost all of its pork products. The costs of complying with Proposition 12 will thus fall on non-California based pig farms. Even so, the Court noted in an opinion by Justice Gorsuch, the Producers Council did "not allege that California's law seeks to advantage in-state firms or disadvantage out-of-state rivals." California was not engaged in protecting the businesses of in-state pig farms, or discriminating against out-of-state pig farms.

The Court then disposed of the Council's claim that the law was unconstitutional due to its extensive "extraterritorial effects." If it adopted such an approach, such a holding would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers." In § IV of Justice Gorsuch's opinion, joined by a majority only in § IV-A, the applicability of the *Pike* test to Proposition 12 was assessed and rejected.

In § IV-A, the majority found a "congruity" between the antidiscrimination principle and the *Pike* test: "In each of these cases [following *Pike*] and many more, the presence or absence of discrimination in practice proved decisive." As the Producers Council abjured any claim of discrimination, this left their claim "well outside *Pike*'s heartland." In the following subsections of § IV, a plurality concluded it lacked the authority to "strike down duly enacted state laws … based on nothing more than their own assessment of the relevant law's 'costs' and 'benefits.'" Such "balancing" was beyond the Court's expertise.

Justice Sotomayor, joined by Justice Kagan, concurred in all but parts IV-B-IV-D. Her opinion held *Pike* applicable in some cases in which the state law is nondiscriminatory.

For four members of the Court, Chief Justice Roberts, concurring in part and dissenting in part, concludes *Pike* remains good law, and the Council should be permitted to make such a claim in the court below. He wrote, "Although *Pike* is susceptible to misapplication as a freewheeling judicial weighing of benefits and burdens, it also reflects the basic concern of our Commerce Clause jurisprudence that there be 'free private trade in the national marketplace.'"

For himself, Justice Kavanaugh writes concurring in part and dissenting in part, arguing that claims such as those made by the Producers Council may also raise constitutional questions

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based on the Import-Expert Clause, the Privileges and Immunities Clause, and the Full Faith and Credit clause.

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Insert in Chapter 7 § D. at page 762:

Students for Fair Admissions, Inc. v. Harvard College
600 U.S. ___, 143 S. Ct. 2141 (2023)

[Students for Fair Admissions (SFFA) sued Harvard College for violating the Civil Rights Act of 1964, and the University of North Carolina, for violating the Act and the Equal Protection Clause of the Fourteenth Amendment. SFFA claimed the admissions decisions by the universities discriminated against Asian Americans applicants. SFFA argued Asian American applicants were admitted less often than should have been the case given their high school grades and scores on the standardized SAT and ACT exams, in comparison with applicants of other races and ethnicities. After trial in both cases, the universities' affirmative action programs, using race as a factor in at least some of their admissions decisions, were upheld by the federal district and circuit courts.]

Chief Justice Roberts delivered the opinion of the Court.

[The Court noted that the admissions offices of both Harvard College and the University of North Carolina used an applicant's race in making some admissions decisions. It concluded "'race is a determinative tip for' a significant percentage 'of all admitted African American and Hispanic applicants'" in Harvard's case, and that North Carolina admissions personnel "may offer [applicants] a 'plus' based on their race, which 'may be significant in an individual case.'"]

III
A

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. For almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy v. Ferguson* the separate but equal regime that would come to deface much of America.

[We overruled *Plessy* in the "seminal decision" of *Brown v. Board of Education*, which held a right to public education "'be made available to all on equal terms.'"]

In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race."

Eliminating racial discrimination means eliminating all of it.

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Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot.

Our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano* (quoting *Hirabayashi v. United States* (1943)). That principle cannot be overridden except in the most extraordinary case.

B

[The Court then looked at its 1978 decision in *Bakke*, particularly Justice Powell's opinion (for himself alone) concluding that a university's interest in diversity was compelling, and that an admissions quota based on race was impermissible. In Justice Powell's view, race could be a plus, as he suggested was the approach then taken by Harvard College.]

C

[The Court continued by discussing its 2003 decision in *Grutter*. It noted that *Grutter* was the first occasion in which the Court accepted Justice Powell's position that "'student body diversity is a compelling state interest that can justify the use of race in university admissions." That interest did not permit quotas, "separate admissions tracks," or similar means. This was to prevent "illegitimate stereotyping" and the use of race not simply as a plus, but "as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference." The Court also noted *Grutter* imposed some endpoint (25 years) to protect against the possibility that such "negatives" might be adopted.]

IV

Twenty years later, no end is in sight. Yet both [universities] insist that the use of race in their admissions programs must continue.

University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail each of these criteria.

A

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First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (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." UNC points to similar benefits, namely, "(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; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." Finally, the question in this context 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.

Comparing respondents' asserted goals to interests we have recognized as compelling further illustrates their elusive nature. In the context of racial violence in a prison, for example, courts can ask whether temporary racial segregation of inmates will prevent harm to those in the prison. When it comes to workplace discrimination, courts can ask whether a race-based benefit makes members of the discriminated class "whole for [the] injuries [they] suffered." And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students "compar[able] to what it would have been in the absence of such constitutional violations."

Nothing like that is possible when it comes to evaluating the interests respondents assert here. [T]he question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is standardless.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, UNC works to avoid the underrepresentation of minority groups, while Harvard [does] likewise. To accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or

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Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran, [and] Egypt," UNC's counsel responded, "[I] do not know the answer to that question."

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." None of the questions recited above need answering, they say, because universities are "owed deference" when using race to benefit some applicants but not others. It is true that our cases have recognized a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*. But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits," and that "deference does not imply abandonment or abdication of judicial review." Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. The programs at issue here do not satisfy that standard.

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

[T]he First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard.

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Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. [W]hile [Harvard] gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. How else but "negative" can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?

Respondents' admissions programs are infirm for a second reason. We have long held that universities may not operate their admissions programs on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." That requirement is found throughout our Equal Protection Clause jurisprudence more generally.

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." UNC is much the same. It argues that race in itself "says [something] about who you are."

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

[W]hen a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike," at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the

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Government by history and the Constitution." Such stereotyping can only "cause[] continued hurt and injury," contrary as it is to the "core purpose" of the Equal Protection Clause.

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*.

Respondents and the Government first suggest that respondents' race-based admissions programs will end when, in their absence, there is "meaningful representation and meaningful diversity" on college campuses. The metric of meaningful representation, respondents assert, does not involve any "strict numerical benchmark"; or "precise number or percentage"; or "specified percentage." So what does it involve?

Numbers all the same. At Harvard, each full committee meeting begins with a discussion of "how the breakdown of the class compares to the prior year in terms of racial identities." And "if at some point in the admissions process it appears that a group is notably underrepresented or has suffered a dramatic drop off relative to the prior year, the Admissions Committee may decide to give additional attention to applications from students within that group."

The results of the Harvard admissions process reflect this numerical commitment. For the admitted classes of 2009 to 2018, black students represented a tight band of 10.0%–11.7% of the admitted pool. The same theme held true for other minority groups:

Share of Students Admitted to Harvard by Race

	African-American Share of Class	Hispanic Share of Class	Asian-American Share of Class
Class of 2009	11%	8%	18%
Class of 2010	10%	10%	18%
Class of 2011	10%	10%	19%

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Class of 2012	10%	9%	19%
Class of 2013	10%	11%	17%
Class of 2014	11%	9%	20%
Class of 2015	12%	11%	19%
Class of 2016	10%	9%	20%
Class of 2017	11%	10%	20%
Class of 2018	12%	12%	19%

Harvard's focus on numbers is obvious.

UNC's admissions program operates similarly.

The problem with these approaches is well established. “[O]utright racial balancing” is “patently unconstitutional.” *Fisher I*. That is so, we have repeatedly explained, because “[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” By promising to terminate their use of race only when some rough percentage of various racial groups is admitted, respondents turn that principle on its head. Their admissions programs “effectively assure[] that race will always be relevant ... and that the ultimate goal of eliminating” race as a criterion “will never be achieved.”

Respondents’ second proffered end point fares no better. Respondents assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or “productive citizens and leaders” have been created. Nor is there any way to know whether those goals would adequately be met in the absence of a race-based admissions program. As UNC itself acknowledges, these “qualitative standard[s]” are “difficult to measure.”

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Third, respondents suggest that race-based preferences must be allowed to continue for at least five more years, based on the Court's statement in *Grutter* that it "expect[ed] that 25 years from now, the use of racial preferences will no longer be necessary." The 25-year mark articulated in *Grutter*, however, reflected only that Court's view that race-based preferences would, by 2028, be unnecessary to ensure a requisite level of racial diversity on college campuses. That expectation was oversold. Neither Harvard nor UNC believes that race-based admissions will in fact be unnecessary in five years, and both universities thus expect to continue using race as a criterion well beyond the time limit that *Grutter* suggested.

Finally, respondents argue that their programs need not have an end point at all because they frequently review them to determine whether they remain necessary.

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

VI

[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points. We have never permitted admissions programs to work in that way, and we will not do so today.

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

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Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

.

Justice Thomas, concurring.

In the wake of the Civil War, the country focused its attention on restoring the Union and establishing the legal status of newly freed slaves. The Constitution was amended to abolish slavery and proclaim that all persons born in the United States are citizens, entitled to the privileges or immunities of citizenship and the equal protection of the laws. Because of that second founding, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy* (Harlan, J., dissenting).

This Court's commitment to that equality principle has ebbed and flowed over time. [T]he Court finally corrected course in *Brown*. It pulled back in *Grutter*. Yet, the Constitution continues to embody a simple truth: Two discriminatory wrongs cannot make a right.

I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. Today, and despite a lengthy interregnum, the Constitution prevails.

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full. 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.

I

In the 1860s, Congress proposed and the States ratified the Thirteenth and Fourteenth Amendments. And Congress passed two landmark Civil Rights Acts. Throughout the debates on each of these measures, their proponents repeatedly affirmed their view of equal citizenship and the racial equality that flows from it. In fact, they held this principle so deeply that their crowning accomplishment—the Fourteenth Amendment—ensures racial equality *with no textual reference to race whatsoever*. The history of these measures' enactment renders their motivating principle as clear as their text: All citizens of the United States, regardless of skin color, are equal before the law.

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I do not contend that all of the individuals who put forth and ratified the Fourteenth Amendment universally believed this to be true. Some Members of the proposing Congress, for example, opposed the Amendment. And, the historical record—particularly with respect to the debates on ratification in the States—is sparse. Nonetheless, substantial evidence suggests that the Fourteenth Amendment was passed to "establis[h] the broad constitutional principle of full and complete equality of all persons under the law," forbidding "all legal distinctions based on race or color."

This was Justice Harlan's view in his lone dissent in *Plessy*, where he observed that "[o]ur Constitution is color-blind." It was the view of the Court in *Brown*, [a]nd it is the view adopted in the Court's opinion today.

[Justice Thomas then argues in favor of a "colorblind" constitution and against an "antisubordination" understanding of the Fourteenth Amendment, a view that laws harming African Americans violate the Equal Protection Clause, but laws benefitting African Americans do not.]

II

Three aspects of today's decision warrant comment: First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental discrimination must be closely tailored to address *that* particular past governmental discrimination.

A

To satisfy strict scrutiny, universities must be able to establish a compelling reason to racially discriminate.

Even in *Grutter*, the Court failed to clearly define "the educational benefits of a diverse student body." Thus, in the years since *Grutter*, I have 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.

Harvard, for example, offers a report finding that meaningful representation of racial minorities promotes several goals. Only one of those goals—"producing new knowledge stemming from diverse outlooks"—bears any possible relationship to educational benefits. Yet, it too is extremely vague and offers no indication that, for example, student test scores increased as a result of Harvard's efforts toward racial diversity.

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More fundamentally, it is not clear how racial diversity, as opposed to other forms of diversity, uniquely and independently advances Harvard's goal. This is particularly true because Harvard blinds itself to other forms of applicant diversity, such as religion. If Harvard cannot even *explain* the link between racial diversity and education, then surely its interest in racial diversity cannot be compelling enough to overcome the constitutional limits on race consciousness.

UNC fares no better. It asserts, for example, an interest in training students to "live together in a diverse society." This is a *social* goal, not an educational one. And, again, UNC offers no reason why seeking a diverse society would not be equally supported by admitting individuals with diverse perspectives and backgrounds, rather than varying skin pigmentation.

Nor have *amici* pointed to any concrete and quantifiable *educational* benefits of racial diversity. Yet, when it comes to educational benefits, the Government offers only one study purportedly showing that "college diversity experiences are significantly and positively related to cognitive development" and that "interpersonal interactions with racial diversity are the most strongly related to cognitive development." [T]he link is, at best, tenuous, unspecific, and stereotypical. Other *amici* assert that diversity (generally) fosters the even-more nebulous values of "creativity" and "innovation," particularly in graduates' future workplaces. [N]one of those assertions deals exclusively with *racial* diversity—as opposed to cultural or ideological diversity.

To survive strict scrutiny, any such benefits would have to outweigh the tremendous harm inflicted by sorting individuals on the basis of race. [A]ll racial stereotypes harm and demean individuals.

B

The Court also correctly refuses to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling.

This judicial skepticism is vital. History has repeatedly shown that purportedly benign discrimination may be pernicious, and discriminators may go to great lengths to hide and perpetuate their unlawful conduct.

The Court today makes clear that, in the future, universities wishing to discriminate based on race in admissions must articulate and justify a compelling and measurable state interest based on concrete evidence. Given the strictures set out by the Court, I highly doubt any will be able to do so.

III

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A

The Constitution's colorblind rule reflects one of the core principles upon which our Nation was founded: that "all men are created equal."

Our Nation did not initially live up to the equality principle. The institution of slavery persisted for nearly a century. The period leading up to our second founding brought these flaws into bold relief and encouraged the Nation to finally make good on the equality promise. As Lincoln recognized, the promise of equality extended to *all people*—including immigrants and blacks whose ancestors had taken no part in the original founding.

As discussed above, the Fourteenth Amendment reflected that vision, affirming that equality and racial discrimination cannot coexist. Under that Amendment, the color of a person's skin is irrelevant to that individual's equal status as a citizen of this Nation. To treat him differently on the basis of such a legally irrelevant trait is therefore a deviation from the equality principle and a constitutional injury.

IV

A

[R]ace is a social construct; we may each identify as members of particular races for any number of reasons, having to do with our skin color, our heritage, or our cultural identity. And, over time, these ephemeral, socially constructed categories have often shifted. For example, whereas universities today would group all white applicants together, white elites previously sought to exclude Jews and other white immigrant groups from higher education. In fact, it is impossible to look at an individual and know definitively his or her race; some who would consider themselves black, for example, may be quite fair skinned. Yet, university admissions policies ask individuals to identify themselves as belonging to one of only a few reductionist racial groups. With boxes for only "black," "white," "Hispanic," "Asian," or the ambiguous "other," how is a Middle Eastern person to choose? Someone from the Philippines? Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters.

But, under our Constitution, race is irrelevant. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false. Members of the same race do not all share the exact same experiences and viewpoints; far from it. A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas. Yet, universities' racial policies suggest that racial identity "*alone constitutes the being* of the race or the man." That is the same

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naked racism upon which segregation itself was built. Small wonder, then, that these policies are leading to increasing racial polarization and friction. Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek.

The solution to our Nation's racial problems announced in the second founding is incorporated in our Constitution: that we are all equal, and should be treated equally before the law without regard to our race. Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law.

B

[Justice Thomas argues against Justice Jackson's "different view," which he concludes is antithetical to the Constitution's command. Though "I, of course, agree that our society is not, and has never been, colorblind, … under the Fourteenth Amendment, the law must disregard all racial distinctions."]

C

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in *Plessy*. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled. And, it sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colorblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional.

While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.

Justice Kavanaugh, concurring.

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I join the Court's opinion in full. I add this concurring opinion to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, including the Court's precedents on race-based affirmative action in higher education.

In 2003, 25 years after *Bakke*, five Members of this Court again held that race-based affirmative action in higher education did not violate the Equal Protection Clause or Title VI. *Grutter*. This time, however, the Court also specifically indicated—despite the reservations of Justice Ginsburg and Justice Breyer—that race-based affirmative action in higher education would *not* be constitutionally justified after another 25 years, at least absent something not "expect[ed]." And various Members of the Court wrote separate opinions explicitly referencing the Court's 25-year limit.

In allowing race-based affirmative action in higher education for another generation—and only for another generation—the Court in *Grutter* took into account competing considerations. The Court recognized the barriers that some minority applicants to universities still faced as of 2003. The Court stressed, however, that "there are serious problems of justice connected with the idea of preference itself." And the Court added that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."

The *Grutter* Court also emphasized the equal protection principle that racial classifications, even when otherwise permissible, must be a "'temporary matter,'" and "must be limited in time." The requirement of a time limit "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Grutter*.

Importantly, the *Grutter* Court saw "no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point." The Court reasoned that the "requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."

The *Grutter* Court's conclusion that race-based affirmative action in higher education must be limited in time followed not only from fundamental equal protection principles, but also from this Court's equal protection precedents applying those principles. Under those precedents, racial classifications may not continue indefinitely.

Consistent with those decisions, the *Grutter* Court ruled that race-based affirmative action in higher education likewise could not operate in perpetuity.

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As of 2003, when *Grutter* was decided, many race-based affirmative action programs in higher education had been operating for about 25 to 35 years. Pointing to the Court's precedents requiring that racial classifications be "temporary," the petitioner in *Grutter*, joined by the United States, argued that race-based affirmative action in higher education could continue no longer.

The *Grutter* Court rejected those arguments for ending race-based affirmative action in higher education in 2003. But in doing so, the Court struck a careful balance. The Court ruled that narrowly tailored race-based affirmative action in higher education could continue for another generation. But the Court also explicitly rejected any "permanent justification for racial preferences," and therefore ruled that race-based affirmative action in higher education could continue *only* for another generation.

[T]he 25-year limit constituted an important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*.

In short, the Court in *Grutter* expressly recognized the serious issues raised by racial classifications—particularly permanent or long-term racial classifications. And the Court "assure[d] all citizens" throughout America that "the deviation from the norm of equal treatment" in higher education could continue for another generation, and only for another generation.

A generation has now passed since *Grutter*, and about 50 years have gone by since the era of *Bakke* and *DeFunis v.Odegaard*, when race-based affirmative action programs in higher education largely began. In light of the Constitution's text, history, and precedent, the Court's decision today appropriately respects and abides by *Grutter*'s explicit temporal limit on the use of race-based affirmative action in higher education.

To reiterate: For about 50 years, many institutions of higher education have employed race-based affirmative action programs. [I]n 2003, the *Grutter* Court applied that temporal equal protection principle and resolved the debate: The Court declared that race-based affirmative action in higher education could continue for another generation, and only for another generation, at least absent something unexpected.

To be clear, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination. And governments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting.

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The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. For 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. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown*'s vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

I

A

Equal educational opportunity is a prerequisite to achieving racial equality in our Nation. From its founding, the United States was a new experiment in a republican form of government where democratic participation and the capacity to engage in self-rule were vital. At the same time, American society was structured around the profitable institution that was slavery, which the original Constitution protected. Because a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority, Southern States sought to ensure slavery's longevity by prohibiting the education of Black people, whether enslaved or free. Thus, from this Nation's birth, the freedom to learn was neither colorblind nor equal.

With time, and at the tremendous cost of the Civil War, abolition came.

Abolition alone could not repair centuries of racial subjugation. Following the Thirteenth Amendment's ratification, so-called "Black Codes" discriminated against Black people on the basis of race, regardless of whether they had been previously enslaved.

Moreover, the criminal punishment exception in the Thirteenth Amendment facilitated the creation of a new system of forced labor in the South. Southern States expanded their criminal

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laws, which in turn "permitted involuntary servitude as a punishment" for convicted Black persons. States required, for example, that Black people "sign a labor contract to work for a white employer or face prosecution for vagrancy." State laws then forced Black convicted persons to labor in "plantations, mines, and industries in the South." This system of free forced labor provided tremendous benefits to Southern whites and was designed to intimidate, subjugate, and control newly emancipated Black people. The Thirteenth Amendment, without more, failed to equalize society.

Congress thus went further and embarked on months of deliberation about additional Reconstruction laws.

Congress adopted the Fourteenth Amendment. Proponents of the Amendment declared that one of its key goals was to "protec[t] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man." That is, the Amendment sought "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." *Plessy* (Harlan, J., dissenting).

To promote this goal, Congress enshrined a broad guarantee of equality in the Equal Protection Clause of the Amendment. Congress chose its words carefully, opting for expansive language that focused on equal protection and rejecting "proposals that would have made the Constitution explicitly color-blind." This choice makes it clear that the Fourteenth Amendment does not impose a blanket ban on race-conscious policies.

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. Consistent with that view, the Bureau provided essential "funding for black education during Reconstruction."

Black people were the targeted beneficiaries of the Bureau's programs, especially when it came to investments in education in the wake of the Civil War. Each year surrounding the passage of the Fourteenth Amendment, the Bureau "educated approximately 100,000 students, nearly all of them black," and regardless of "degree of past disadvantage." The Bureau also provided land and funding to establish some of our Nation's Historically Black Colleges and Universities (HBCUs). In 1867, for example, the Bureau provided Howard University tens of thousands of dollars to buy property and construct its campus in our Nation's capital. Howard University was designed to provide "special opportunities for a higher education to the newly enfranchised of the south," but it was available to all Black people, "whatever may have been

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their previous condition." The Bureau also "expended a total of $407,752.21 on black colleges, and only $3,000 on white colleges" from 1867 to 1870.

Indeed, contemporaries understood that the Freedmen's Bureau Act benefited Black people. Supporters defended the law by stressing its race-conscious approach. Opponents argued that the Act created harmful racial classifications that favored Black people and disfavored white Americans. President Andrew Johnson vetoed the bill on the basis that it provided benefits "to a particular class of citizens," but Congress overrode his veto. Thus, rejecting those opponents' objections, the same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education.

Congress also debated and passed the Civil Rights Act of 1866 contemporaneously with the Fourteenth Amendment. Because the Black Codes focused on race, not just slavery-related status, the Civil Rights Act explicitly recognized that white citizens enjoyed certain rights that non-white citizens did not. In other words, the Act was not colorblind. By using white citizens as a benchmark, the law classified by race and took account of the privileges enjoyed only by white people. President Johnson vetoed the Civil Rights Act in part because he viewed it as providing Black citizens with special treatment. Again, Congress overrode his veto. In fact, Congress reenacted race-conscious language in the Civil Rights Act of 1870, two years after ratification of the Fourteenth Amendment, where it remains today.

Congress similarly appropriated federal dollars explicitly and solely for the benefit of racial minorities. Several times during and after the passage of the Fourteenth Amendment, Congress also made special appropriations and adopted special protections for the bounty and prize money owed to "colored soldiers and sailors" of the Union Army. In doing so, it rebuffed objections to these measures as "class legislation" "applicable to colored people and not ... to the white people." This history makes it "inconceivable" that race-conscious college admissions are unconstitutional.

B

The Reconstruction era marked a transformational point in the history of American democracy. Its vision of equal opportunity leading to an equal society "was short-lived," however, "with the assistance of this Court." In a series of decisions, the Court "sharply curtailed" the "substantive protections" of the Reconstruction Amendments and the Civil Rights Acts. That endeavor culminated with the Court's shameful decision in *Plessy*. Therefore, with this Court's approval, government-enforced segregation and its concomitant destruction of equal opportunity became the constitutional norm and infected every sector of our society, from bathrooms to military units and, crucially, schools.

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It was not until half a century later, in *Brown*, that the Court honored the guarantee of equality in the Equal Protection Clause and Justice Harlan's vision of a Constitution that "neither knows nor tolerates classes among citizens."

Brown was a race-conscious decision that emphasized the importance of education in our society. Central to the Court's holding was the recognition that, as Justice Harlan emphasized in *Plessy*, segregation perpetuates a caste system wherein Black children receive inferior educational opportunities "solely because of their race," denoting "inferiority as to their status in the community." Moreover, because education is "the very foundation of good citizenship," segregation in public education harms "our democratic society" more broadly as well. In light of the harmful effects of entrenched racial subordination on racial minorities and American democracy, *Brown* recognized the constitutional necessity of a racially integrated system of schools where education is "available to all on equal terms."

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.

[T]his Court's post-*Brown* decisions rejected arguments advanced by opponents of integration suggesting that *Brown* only required the admission of Black students "to public schools on a racially nondiscriminatory basis." Relying on Justice Harlan's dissent in *Plessy*, they argued that the use of race "is improper" because the "'Constitution is colorblind.'" [The Court disagreed.]

Those rejected arguments mirror the Court's opinion today. The Court claims that *Brown* requires that students be admitted "'on a racially nondiscriminatory basis.'" It distorts the dissent in *Plessy* to advance a colorblindness theory. The Court also invokes the *Brown* litigators, relying on what the *Brown* "plaintiffs had argued."

If there was a Member of this Court who understood the *Brown* litigation, it was Justice Thurgood Marshall, who "led the litigation campaign" to dismantle segregation as a civil rights lawyer and "rejected the hollow, race-ignorant conception of equal protection" endorsed by the Court's ruling today. Justice Marshall joined the *Bakke* plurality and "applaud[ed] the judgment of the Court that a university may consider race in its admissions process." In fact, Justice Marshall's view was that *Bakke*'s holding should have been even more protective of race-conscious college admissions programs in light of the remedial purpose of the Fourteenth Amendment and the legacy of racial inequality in our society. The Court's recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.

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C

Since *Bakke*, the Court has reaffirmed numerous times the constitutionality of limited race-conscious college admissions. First, in *Grutter*, a majority of the Court endorsed the *Bakke* plurality's "view that student body diversity is a compelling state interest that can justify the use of race in university admissions," and held that race may be used in a narrowly tailored manner to achieve this interest.

Later, in the *Fisher* litigation, the Court twice reaffirmed that a limited use of race in college admissions is constitutionally permissible if it satisfies strict scrutiny.

Bakke, *Grutter*, and *Fisher* are an extension of *Brown*'s legacy. Racially integrated schools improve cross-racial understanding, "break down racial stereotypes," and ensure that students obtain "the skills needed in today's increasingly global marketplace ... through exposure to widely diverse people, cultures, ideas, and viewpoints." More broadly, inclusive institutions that are "visibly open to talented and qualified individuals of every race and ethnicity" instill public confidence in the "legitimacy" and "integrity" of those institutions and the diverse set of graduates that they cultivate. That is particularly true in the context of higher education, where colleges and universities play a critical role in "maintaining the fabric of society" and serve as "the training ground for a large number of our Nation's leaders." It is thus an objective of the highest order, a "compelling interest" indeed, that universities pursue the benefits of racial diversity and ensure that "the diffusion of knowledge and opportunity" is available to students of all races.

This compelling interest in student body diversity is grounded not only in the Court's equal protection jurisprudence but also in principles of "academic freedom," which "'long [have] been viewed as a special concern of the First Amendment.'" In light of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment," this Court's precedents recognize the imperative nature of diverse student bodies on American college campuses. Consistent with the First Amendment, student body diversity allows universities to promote "th[e] robust exchange of ideas which discovers truth out of a multitude of tongues [rather] than through any kind of authoritative selection."

In short, for more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. [T]his 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.

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D

Today, the Court concludes that indifference to race is the only constitutionally permissible means to achieve racial equality in college admissions. That interpretation of the Fourteenth Amendment is not only contrary to precedent and the entire teachings of our history, but is also grounded in the illusion that racial inequality was a problem of a different generation. Entrenched racial inequality remains a reality today. That is true for society writ large and, more specifically, for Harvard and the University of North Carolina (UNC), two institutions with a long history of racial exclusion. 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.

1

After more than a century of government policies enforcing racial segregation by law, society remains highly segregated. About half of all Latino and Black students attend a racially homogeneous school with at least 75% minority student enrollment. The share of intensely segregated minority schools (*i.e.*, schools that enroll 90% to 100% racial minorities) has sharply increased. To this day, the U. S. Department of Justice continues to enter into desegregation decrees with schools that have failed to "eliminat[e] the vestiges of *de jure* segregation."

Moreover, underrepresented minority students are more likely to live in poverty and attend schools with a high concentration of poverty. In turn, underrepresented minorities are more likely to attend schools with less qualified teachers, less challenging curricula, lower standardized test scores, and fewer extracurricular activities and advanced placement courses. It is thus unsurprising that there are achievement gaps along racial lines, even after controlling for income differences.

Systemic inequities disadvantaging underrepresented racial minorities exist beyond school resources. Students of color, particularly Black students, are disproportionately disciplined or suspended, interrupting their academic progress and increasing their risk of involvement with the criminal justice system. Underrepresented minorities are less likely to have parents with a postsecondary education who may be familiar with the college application process. Further, low-income children of color are less likely to attend preschool and other early childhood education programs that increase educational attainment. All of these interlocked factors place underrepresented minorities multiple steps behind the starting line in the race for college admissions.

In North Carolina racial inequality is deeply entrenched in K–12 education. State courts have consistently found that the State does not provide underrepresented racial minorities equal

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access to educational opportunities, and that racial disparities in public schooling have increased in recent years, in violation of the State Constitution.

`These opportunity gaps "result in fewer students from underrepresented backgrounds even applying to" college, particularly elite universities. Consistent with this reality, Latino and Black students are less likely to enroll in institutions of higher education than their white peers.

Given the central role that education plays in breaking the cycle of racial inequality, these structural barriers reinforce other forms of inequality in communities of color.

Put simply, society remains "inherently unequal." Racial inequality runs deep to this very day. That is particularly true in education. [O]nly with eyes open to this reality can the Court "carry out the guarantee of equal protection."

2

Both UNC and Harvard have sordid legacies of racial exclusion. Because "[c]ontext matters" when reviewing race-conscious college admissions programs, this reality informs the exigency of respondents' current admissions policies and their racial diversity goals.

i

For much of its history, UNC was a bastion of white supremacy. The university excluded all people of color from its faculty and student body, glorified the institution of slavery, enforced its own Jim Crow regulations, and punished any dissent from racial orthodoxy. It resisted racial integration after this Court's decision in *Brown*, and was forced to integrate by court order in 1955. It took almost 10 more years for the first Black woman to enroll at the university in 1963. Even then, the university admitted only a handful of underrepresented racial minorities, and those students suffered constant harassment, humiliation, and isolation. UNC officials openly resisted racial integration well into the 1980s, years after the youngest Member of this Court was born. During that period, Black students faced racial epithets and stereotypes, received hate mail, and encountered Ku Klux Klan rallies on campus.

To this day, UNC's deep-seated legacy of racial subjugation continues to manifest itself in student life. Buildings on campus still bear the names of members of the Ku Klux Klan and other white supremacist leaders. Students of color also continue to experience racial harassment, isolation, and tokenism. Plus, the student body remains predominantly white: approximately 72% of UNC students identify as white, while only 8% identify as Black. These numbers do not reflect the diversity of the State, particularly Black North Carolinians, who make up 22% of the population.

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UNC is not alone. Harvard, like other Ivy League universities in our country, "stood beside church and state as the third pillar of a civilization built on bondage." From Harvard's founding, slavery and racial subordination were integral parts of the institution's funding, intellectual production, and campus life. Harvard and its donors had extensive financial ties to, and profited from, the slave trade, the labor of enslaved people, and slavery-related investments. As Harvard now recognizes, the accumulation of this wealth was "vital to the University's growth" and establishment as an elite, national institution. Harvard suppressed antislavery views, and enslaved persons "served Harvard presidents and professors and fed and cared for Harvard students" on campus.

Exclusion and discrimination continued to be a part of campus life well into the 20th century. Harvard's leadership and prominent professors openly promoted "'race science,'" racist eugenics, and other theories rooted in racial hierarchy. Activities to advance these theories "took place on campus," including "intrusive physical examinations" and "photographing of unclothed" students. The university also "prized the admission of academically able Anglo-Saxon students from elite backgrounds—including wealthy white sons of the South." By contrast, an average of three Black students enrolled at Harvard each year during the five decades between 1890 and 1940. Those Black students who managed to enroll at Harvard "excelled academically, earning equal or better academic records than most white students," but faced the challenges of the deeply rooted legacy of slavery and racism on campus. Meanwhile, a few women of color attended Radcliffe College, a separate and overwhelmingly white "women's annex" where racial minorities were denied campus housing and scholarships. Women of color at Radcliffe were taught by Harvard professors, but "women did not receive Harvard degrees until 1963."

Today, benefactors with ties to slavery and white supremacy continue to be memorialized across campus through "statues, buildings, professorships, student houses, and the like." Black and Latino applicants account for only 20% of domestic applicants to Harvard each year. "Even those students of color who beat the odds and earn an offer of admission" continue to experience isolation and alienation on campus. For years, the university has reported that inequities on campus remain. For example, Harvard has reported that "far too many black students at Harvard experience feelings of isolation and marginalization," and that "student survey data show[ed] that only half of Harvard undergraduates believe that the housing system fosters exchanges between students of different backgrounds."

* * *

These may be uncomfortable truths to some, but they are truths nonetheless. "Institutions can and do change," however, as societal and legal changes force them "to live up to [their]

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highest ideals." It is against this historical backdrop that Harvard and UNC have reckoned with their past and its lingering effects. Acknowledging the reality that race has always mattered and continues to matter, these universities have established institutional goals of diversity and inclusion. Consistent with equal protection principles and this Court's settled law, their policies use race in a limited way with the goal of recruiting, admitting, and enrolling underrepresented racial minorities to pursue the well-documented benefits of racial integration in education.

II

The Court today stands in the way of respondents' commendable undertaking and entrenches racial inequality in higher education. The majority opinion does so by turning a blind eye to these truths and overruling decades of precedent.

B
1

The use of race is narrowly tailored unless "workable" and "available" race-neutral approaches exist, meaning race-neutral alternatives promote the institution's diversity goals and do so at "'tolerable administrative expense.'" Narrow tailoring does not mean perfect tailoring. The Court's precedents make clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*.

[SFFA's race-neutral proposals are "methodologically flawed" and "'largely impractical —not to mention unprecedented—in higher education.'" Neither university is required to adopt them "to satisfy strict scrutiny."]

III

The Court concludes that Harvard's and UNC's policies are unconstitutional because they serve objectives that are insufficiently measurable, employ racial categories that are imprecise and overbroad, rely on racial stereotypes and disadvantage nonminority groups, and do not have an end point. [T]he Court claims those supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework. In reality, however, [the Court] overrules its "higher-education precedents" following *Bakke*.

There is no basis for overruling *Bakke*, *Grutter*, and *Fisher*. The Court's precedents were correctly decided, the opinion today is not workable and creates serious equal protection problems, important reliance interests favor respondents, and there are no legal or factual developments favoring the Court's reckless course. At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in

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America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.

A

1

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. Consistent with that view, the Court has explicitly held that "race-based action" is sometimes "within constitutional constraints." The Court has thus upheld the use of race in a variety of contexts.

Tellingly, in sharp contrast with today's decision, the Court has allowed the use of race when that use burdens minority populations. [F]or example, the Court held [in a 1975 case] that it is unconstitutional for border patrol agents to rely on a person's skin color as "a single factor" to justify a traffic stop based on reasonable suspicion, but it remarked that "Mexican appearance" could be "a relevant factor" out of many to justify such a stop "at the border and its functional equivalents." The Court thus facilitated racial profiling of Latinos as a law enforcement tool and did not adopt a race-blind rule. The Court later extended this reasoning to border patrol agents selectively referring motorists for secondary inspection at a checkpoint.

The result of today's decision is that a person's skin color may play a role in assessing individualized suspicion, but it cannot play a role in assessing that person's individualized contributions to a diverse learning environment. That indefensible reading of the Constitution is not grounded in law and subverts the Fourteenth Amendment's guarantee of equal protection.

2

The majority does not dispute that some uses of race are constitutionally permissible. Indeed, it agrees that a limited use of race is permissible in some college admissions programs. The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions.

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.

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Overruling decades of precedent, today's newly constituted Court singles out the limited use of race in holistic college admissions. It strikes at the heart of *Bakke*, *Grutter*, and *Fisher* by holding that racial diversity is an "inescapably imponderable" objective that cannot justify race-conscious affirmative action even though respondents' objectives simply "mirror the 'compelling interest' this Court has approved" many times in the past. At bottom, without any new factual or legal justification, the Court overrides its longstanding holding that diversity in higher education is of compelling value.

To avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity," an interest that "does not easily reduce to precise definition." Thus, the [Court] make[s] a clear value judgment today: Racial integration in higher education is not sufficiently important to them.

The majority offers no response to any of this. Instead, it attacks a straw man, arguing that the Court's cases recognize that remedying the effects of "societal discrimination" does not constitute a compelling interest. [W]hile *Bakke* rejected that interest as insufficiently compelling, it upheld a limited use of race in college admissions to promote the educational benefits that flow from diversity. It is that narrower interest that the Court overrules today.

B

The Court's precedents authorizing a limited use of race in college admissions are not just workable—they have been working. Today, the Court replaces this settled framework with a set of novel restraints that create troubling equal protection problems and share one common purpose: to make it impossible to use race in a holistic way in college admissions, where it is much needed.

1

Consistent with the Court's precedents, respondents' holistic review policies consider race in a very limited way. Race is only one factor out of many. That type of system allows Harvard and UNC to assemble a diverse class on a multitude of dimensions. Respondents' policies allow them to select students with various unique attributes, including talented athletes, artists, scientists, and musicians. They also allow respondents to assemble a class with diverse viewpoints, including students who have different political ideologies and academic interests, who have struggled with different types of disabilities, who are from various socioeconomic backgrounds, who understand different ways of life in various parts of the country, and—yes—

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students who self-identify with various racial backgrounds and who can offer different perspectives because of that identity.

That type of multidimensional system benefits all students. In fact, racial groups that are not underrepresented tend to benefit disproportionately from such a system. Harvard's holistic system, for example, provides points to applicants who qualify as "ALDC," meaning "athletes, legacy applicants, applicants on the Dean's Interest List [primarily relatives of donors], and children of faculty or staff." ALDC applicants are predominantly white: Around 67.8% are white, 11.4% are Asian American, 6% are Black, and 5.6% are Latino. By contrast, only 40.3% of non-ALDC applicants are white, 28.3% are Asian American, 11% are Black, and 12.6% are Latino. Although "ALDC applicants make up less than 5% of applicants to Harvard," they constitute "around 30% of the applicants admitted each year." Similarly, because of achievement gaps that result from entrenched racial inequality in K–12 education, a heavy emphasis on grades and standardized test scores disproportionately disadvantages underrepresented racial minorities. Stated simply, race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities. That is precisely why underrepresented racial minorities remain *under*represented. The Court's suggestion that an already advantaged racial group is "disadvantaged" because of a limited use of race is a myth.

The majority's true objection appears to be that a limited use of race in college admissions does, in fact, achieve what it is designed to achieve: It helps equalize opportunity and advances respondents' objectives by increasing the number of underrepresented racial minorities on college campuses, particularly Black and Latino students. This is unacceptable, the Court says, because racial groups that are not underrepresented "would be admitted in greater numbers" without these policies. Reduced to its simplest terms, the Court's conclusion is that an increase in the representation of racial minorities at institutions of higher learning that were historically reserved for white Americans is an unfair and repugnant outcome that offends the Equal Protection Clause. It provides a license to discriminate against white Americans, the Court says, which requires the courts and state actors to "pic[k] the right races to benefit."

Nothing in the Fourteenth Amendment or its history supports the Court's shocking proposition, which echoes arguments made by opponents of Reconstruction-era laws and this Court's decision in *Brown*. In a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law, including at Harvard and UNC. Quite the opposite: A racially integrated vision of society, in which institutions reflect all sectors of the American public and where "the sons of former slaves and the sons of former slave owners [are] able to sit down together at the table of brotherhood," is precisely what the Equal Protection Clause commands. Martin Luther King "I Have a Dream" Speech (Aug. 28, 1963).

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By singling out race, the Court imposes a special burden on racial minorities for whom race is a crucial component of their identity. Holistic admissions require "truly individualized consideration" of the whole person. The Court's approach thus turns the Fourteenth Amendment's equal protection guarantee on its head and creates an equal protection problem of its own.

There is no question that minority students will bear the burden of today's decision. Students of color testified at trial that racial self-identification was an important component of their application because without it they would not be able to present a full version of themselves.

[B]ecause the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.

Further, the Court's demand that a student's discussion of racial self-identification be tied to individual qualities, such as "courage," "leadership," "unique ability," and "determination," only serves to perpetuate the false narrative that Harvard and UNC currently provide "preferences on the basis of race alone." The Court's precedents already require that universities take race into account holistically, in a limited way, and based on the type of "individualized" and "flexible" assessment that the Court purports to favor. [N]either SFFA nor the majority can point to a single example of an underrepresented racial minority who was admitted to Harvard or UNC on the basis of "race alone."

Acknowledging that there is something special about a student of color who graduates valedictorian from a predominantly white school is not a stereotype. Nor is it a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students.

The absence of racial diversity, by contrast, actually contributes to stereotyping. When there is an increase in underrepresented minority students on campus, "racial stereotypes lose their force" because diversity allows students to "learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."

2

How much more precision is required or how universities are supposed to meet the Court's measurability requirement, the Court's opinion does not say. The Court is not interested in crafting a workable framework that promotes racial diversity on college campuses. Instead, it announces a requirement designed to ensure all race-conscious plans fail. [T]e majority's holding creates a legal framework where race-conscious plans *must* be measured with precision but also *must not* be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny "'fatal in fact.'"

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3

The Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they rely on racial categories that are "imprecise," "opaque," and "arbitrary."

The majority presumes that it knows better and appoints itself as an expert on data collection methods, calling for a higher level of granularity to fix a supposed problem of overinclusiveness and underinclusiveness. Yet it does not identify a single instance where respondents' methodology has prevented any student from reporting their race with the level of detail they preferred. To the extent students need to convey additional information, students can select subcategories or provide more detail in their personal statements or essays. Notwithstanding this Court's confusion about racial self-identification, neither students nor universities are confused. There is no evidence that the racial categories that respondents use are unworkable.

4

[T]he Court also holds that Harvard's and UNC's race-conscious programs are unconstitutional because they do not have a specific expiration date. This new durational requirement is also not grounded in law, facts, or common sense. *Grutter* simply announced a general "expect[ation]" that "the use of racial preferences [would] no longer be necessary" in the future.

True, *Grutter* referred to "25 years," but that arbitrary number simply reflected the time that had elapsed since the Court "first approved the use of race" in college admissions in *Bakke*. It is also true that *Grutter* remarked that "race-conscious admissions policies must be limited in time," but it did not do so in a vacuum. Rather than impose a fixed expiration date, the Court tasked universities with the responsibility of periodically assessing whether their race-conscious programs "are still necessary." *Grutter* offered as examples sunset provisions, periodic reviews, and experimenting with "race-neutral alternatives as they develop."

Grutter's requirement that universities engage in periodic reviews so the use of race can end "as soon as practicable" is well grounded. That is, it is grounded in strict scrutiny. By contrast, the Court's holding is based on the fiction that racial inequality has a predictable cutoff date. Equality is an ongoing project in a society where racial inequality persists. A temporal requirement that rests on the fantasy that racial inequality will end at a predictable hour is illogical and unworkable. There is a sound reason why this Court's precedents have never imposed the majority's strict deadline: Institutions cannot predict the future.

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C

Significant rights and expectations will be affected by today's decision. Those interests supply “added force” in favor of *stare decisis*.

Respondents and other colleges and universities with race-conscious admissions programs similarly have concrete reliance interests because they have spent significant resources in an effort to comply with this Court's precedents.

IV

The use of race in college admissions has had profound consequences by increasing the enrollment of underrepresented minorities on college campuses. This Court presupposes that segregation is a sin of the past and that race-conscious college admissions have played no role in the progress society has made. The fact that affirmative action in higher education “has worked and is continuing to work” is no reason to abandon the practice today.

Experience teaches that the consequences of today's decision will be destructive. Superficial colorblindness in a society that systematically segregates opportunity will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's colleges and universities, turning the clock back and undoing the slow yet significant progress already achieved.

* * *

True equality of educational opportunity in racially diverse schools is an essential component of the fabric of our democratic society. It is an interest of the highest order and a foundational requirement for the promotion of equal protection under the law. *Brown* recognized that passive race neutrality was inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist. In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold.

Today, this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored.

Notwithstanding this Court's actions, however, society's progress toward equality cannot be permanently halted. Diversity is now a fundamental American value, housed in our varied and multicultural American community that only continues to grow. The pursuit of racial diversity

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will go on. Although the Court has stripped out almost all uses of race in college admissions, universities can and should continue to use all available tools to meet society's needs for diversity in education. Despite the Court's unjustified exercise of power, the opinion today will serve only to highlight the Court's own impotence in the face of an America whose cries for equality resound. As has been the case before in the history of American democracy, "the arc of the moral universe" will bend toward racial justice despite the Court's efforts today to impede its progress. Martin Luther King "Our God is Marching On!" Speech (Mar. 25, 1965).

Justice Jackson, with whom Justice Sotomayor and Justice Kagan join, dissenting.

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter*, are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "intergenerational transmission of inequality" that still plagues our citizenry.

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all.

I

A

[Justice Jackson begins with a thought experiment explaining why UNC might use race as a factor in deciding to admit an applicant to UNC. She posits two hypothetical North Carolina residents applying to UNC, one white and one Black, the former who "would be the seventh generation to graduate from UNC," and the latter who "would be the first." Quoting Justice Oliver Wendell Holmes, she noted "a page of history is worth a volume of logic." She then discusses the history of race in America, including the Court's *Plessy* decision, and explains the concussive effects of Jim Crow, particularly the "inability to build wealth" by Black Americans. She notes, "[s]harecropping is but one example of race-linked obstacles that the law (and private parties) laid down to hinder the progress and prosperity of Black people." Another such obstacle was the exclusion of Blacks from the federal Homestead Act of 1862. Thus, "it is no surprise

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that, when the Great Depression arrived, race-based wealth, health, and opportunity gaps were the norm."

The Federal Housing Administration (FHA), created in 1934, "insured highly desirable bank mortgages. Eligibility for this insurance required an FHA appraisal of the property to ensure a low default risk. But, nationwide, it was FHA's established policy to provide 'no guarantees for mortgages to African Americans, or to whites who might lease to African Americans,' irrespective of creditworthiness. No surprise, then, that '[b]etween 1934 and 1968, 98 percent of FHA loans went to white Americans.' The Veterans Administration operated similarly."

During "'the suburban-shaping years between 1930 and 1960, fewer than one percent of all mortgages in the nation were issued to African Americans.' Thus, based on their race, Black people were '[l]ocked out of the greatest mass-based opportunity for wealth accumulation in American history.'"

"The point is this: Given our history, the origin of persistent race-linked gaps should be no mystery."

Justice Jackson then notes the disparities in the median wealth of Black families and white families. In 2019, Black median wealth was about $24,000; white median wealth was $188,000. Health gaps between white and Blacks indicated similar disparities.

Returning to our two hypothetical applicants, Justice Jackson argues UNC "ought to be able to consider why" the Black applicant would be the first in his family to attend UNC, while the white applicant would be the seventh generation to do so. To forbid UNC to look at "race as one of many factors" thwarted the "core promise" of the Fourteenth Amendment. More generally, such a ban "condemns our society to never escape the past that explains *how and why* race matters to the very concept of who 'merits' admission."]

The majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants will inevitably widen that gap, not narrow it. It will delay the day that every American has an equal opportunity to thrive, regardless of race.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

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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. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts much more difficult to accomplish.

AFTERWORD

The Court does not formally overrule its 2003 *Grutter* decision, and views its *Fisher II* (2016) decision as irrelevant. The Chief Justice, writing for the Court, reiterates its adoption of strict scrutiny. Additionally, universities "may never use race as a stereotype or negative," and such affirmative action programs "must end." The admissions programs at Harvard and North Carolina, the Court decides, "fail each of these criteria."

The Court first holds that the claimed compelling interests the universities seek (see § IV.A.) "cannot be subjected to meaningful judicial review." They include "training future leaders," "producing new knowledge stemming from diverse outlooks," and "promoting the robust exchange of ideas," among other goals These "commendable goals … are not sufficiently coherent for purposes of strict scrutiny." First, it was "unclear" how courts should measure such goals. Second, even if measurable, how would court know when such goals have been achieved. Third, the "question [is one] of degree:" "How many fewer leaders would Harvard create without racial preferences"?

The Court distinguished university admissions from the two specific cases in which it was constitutional for the government to use race as a factor: 1) as a remedy to racial discrimination by the government; and 2) "in the context of racial violence in prison."

Next, it concluded the universities "fail[ed] to articulate a meaningful connection" between its means (using specific racial categories when considering admission of an applicant) and the goals they pursued. The Court claimed a failure to understand how the educational goals sought by them was promoted by putting students into discrete racial and ethnic categories. It then went further, concluding "use of these opaque racial categories undermines" the goals.

Unlike the Court's decisions in *Grutter* and *Fisher II*, the Court gave very little deference to the universities' approach to the use of "race to benefit some applicants but not others."

Finally, the Court interpreted Justice O'Connor's statement in *Grutter* that it expected an end to "the use of racial preferences" in 25 years as a deadline, not a hope. This is the purpose of Justice Kavanaugh's concurring opinion.

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The concurrence by Justice Thomas supports a "colorblind" constitution, and the dissent by Justice Jackson, contrariwise, bring into relief the disagreement in the Court regarding affirmative action.

The dissent by Justice Sotomayor begins with a long historical assessment of issues of race, including some history of the racially discriminatory actions taken by UNC and Harvard. Section III argues the Court has effectively overruled its *Bakke*, *Grutter*, and *Fisher II* opinions, and has done so contrary to the Court's own criteria for deciding whether to apply *stare decisis*. Those decision were not only correctly decided, but workable, and decisions on which persons could rely. Instead of following precedent, the Court to the "reckless course" of overturning them. This was, in her view, a lawless opinion, one based on the "policy preferences" of six members of the Court, not the law.

Justice Sotomayor closes with an appeal to passion, quoting Dr. Martin Luther King, Jr., that "'the arc of the moral universe' will bend toward racial justice despite the Court's efforts today to impede its progress."

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Insert in Chapter 8 § A.5.b. at page 818:

UNITED STATES V. HANSEN, 599 U.S. ___, 143 S. Ct. 1942 (2023)—Helaman Hansen claimed he could obtain a path to American citizenship for noncitizens through "adult adoption." This was a "scam." Hansen was convicted of violating a federal law forbidding a person from "encourag[ing] or induc[ing] an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such [action] is or will be in violation of the law."

On appeal, Hansen argued the statute was unconstitutionally overbroad. The Court, in an opinion by Justice Barrett, rejected Hansen's claim. It interpreted Congress's use of "encourage" and "induce" by reference to criminal laws on solicitation and facilitation, not as those words were understood in ordinary conversation. The Court noted encourage and induce were commonly used in criminal laws. Thus, the use of those words in the criminal law challenged by Hansen were to be understood in context, as applying to a narrow subset of speech.

The Court noted the unusual incentives in overbreadth cases: First, it allowed an accused to assert the constitutional rights of third parties. Second, it allowed one to challenge a criminal law on facial grounds even though the law "has lawful applications." Overbreadth challenges are intended to "provide[] breathing room for free expression." But such challenges must prove the law prohibits a substantial amount of protected speech, and the Court should invalidate the law only if the unconstitutional applications are both substantially disproportionate to its lawful application, and those applications are "realistic, not fanciful."

Once the Court held "encourage" and "induce" were terms of art, Hansen's overbreadth challenge was doomed.

In dissent, Justice Jackson, joined by Justice Sotomayor, argued in support of an ordinary understanding of "encourage" and "induce." The law was thus substantially overbroad; the majority's conclusion had the effect of "undermin[ing]" the overbreadth doctrine.

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Insert in Chapter 8 § B.1.a. at page 847:

COUNTERMAN V. COLORADO, 600 U.S. ___, 143 S. Ct. 2106 (2023)—Defendant Billy Counterman sent hundreds of messages to a Colorado-based musician, C.W. Though C.W. did not respond, and though she attempted repeatedly to block his social media messages to her, he created new accounts and continued to send C.W. messages. In fear of physical harm from Counterman, C.W. contacted law enforcement and Counterman was charged with send repeated messages to C.W. in "a manner that would cause a reasonable person … to suffer serious emotional distress." Counterman moved to dismiss the charges on Free Speech grounds. He argued the messages did not constitute "true threats," and thus could not be the subject of a criminal charge. The trial court held a reasonable person would consider the messages a true threat. On appeal, Counterman argued the state was required to prove both that the messages were objectively threatening and that the accused was aware of the threatening nature of the messages.

In a 7-2 opinion written by Justice Kagan, the Court agreed with Counterman. The Court made it clear that "true threats" are unprotected speech. But the First Amendment required the government to "prove the that defendant was aware in some way of the threatening nature of his communications." This requirement of the First Amendment existed because "the absence of such a *mens rea* requirement will chill protected, non-threatening speech." To protect such speech, the Court has regularly "insisted on protecting even some historically unprotected speech," including true threats.

The Court then held that "in some way" required the state to prove "recklessness" on the part of the defendant. The Court first analogized its creation of "breathing room" by looking at defamatory speech. Such speech was not protected, but the Court, in order to prevent "self-censorship" by those who were unsure whether some speech was defamatory, had created a rule that required a public figure plaintiff in a defamation case to prove the defendant had "acted with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" Some falsehoods were protected to "protect speech that matters." It then found the same approach taken in obscenity and incitement to unlawful conduct cases. Of the three possible types of subjective knowledge, "purpose," "knowledge," and "recklessness," the Court found the last "offers the right path forward." It did so because the competing value to free expression, protecting "against the profound harms, to both individuals and society, that attend true threats of violence," was strong. "In advancing past recklessness, we make it harder for a State to substantiate the needed inferences about *mens rea* (absent, as is usual, direct evidence)." A "reckless defendant" has "done more than make a bad mistake. [He has] consciously accepted a substantial risk of inflicting serious harm."

Justice Sotomayor concurred in part and concurred in the judgment. She agreed with the Court's conclusion, but thought it wrote too broadly. "Where I part ways with the Court is that I

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would not reach the distinct and more complex question whether a *mens rea* of recklessness is sufficient for thre-threats prosecutions generally." This was a case in which Counterman "stalked" C.W. In such cases, recklessness was the appropriate constitutional standard to prosecute him. But whether that standard fit all other types of true threats cases was unnecessary to decide.

Justice Thomas dissented. He criticized the Court's reliance on the public figure defamation standard created in *New York Times v. Sullivan*. He reiterated his criticism of *Sullivan*, as a "policy-driven decision[] masquerading as constitutional law."

Justice Barrett also dissented, which Justice Thomas joined. She concluded an objective standard was sufficient; indeed, "nearly every other category of unprotected speech may be restricted using an objective standard." Because the creation of a subjective standard for use in true threats cases "unjustifiably grants true threats preferential treatment," she dissented.

Following the Court's decision in *Chaplinsky v. New Hampshire*, Justice Barrett argued that, in a true threats case, "[n]either its 'social value' nor its potential for 'injury' depends on the speaker's subjective intent." She then argued the Court's interest in avoiding chilling protected speech, by creating a "buffer zone," was wrong. In addition to preferencing true threats in comparison with other unprotected speech (she notes fighting words, false or misleading commercial speech, obscenity, and "a single, cherry-picked strand" of defamation law), the Court's buffer zone failed in light of the "silence in the historical record."

In her assessment, nothing in the history of the First Amendment indicated anything in regard to regulating true threats in such a way as to threaten protected speech. Finally, the Court's rationale for its adoption of a recklessness standard "is, at best unclear." In an effort to balance the interests of persons to speak, and the competing interest of persons to protection against true threats, the "optimal balance strikes me as a question best left to the legislature." For Justice Barrett, "recklessness is not grounded in law, but in a Goldilocks judgment. Recklessness is not too much, not too little, but instead 'just right.'"

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Insert in Chapter 8 § E.3. at page 1010:

303 CREATIVE LLC V. ELENIS, 600 U.S. ___, 143 S. Ct. 2298 (2023)—Lorie Smith planned to open a business designing wedding websites. In this pre-enforcement action, she alleged a fear that the state of Colorado would apply its Anti-Discrimination Act against her in violation of her Free Speech rights. Colorado would do so, she claimed, by "forc[ing] her to express views with which she disagrees." The facts, as stipulated by the parties, included Smith's willingness to "work with all people regardless of classifications such as race, creed, sexual orientation, and gender," to create websites "for clients of any sexual orientation," and to refuse to produce any content contrary to "biblical truth." The state also stipulated that Smith has a sincere religious belief that marriage is "a union between one man and one woman," and that her website design services are "expressive." All wedding websites she would create "will be expressive in nature," are collaborative, will express Smith's beliefs and incorporate her "artwork." Finally, the parties stipulated that other website designers are available should she decline work due to her sincerely held beliefs.

The Court, in a 6-3 opinion written by Justice Gorsuch, held Smith's Free Speech rights would be violated by enforcement of Colorado's Anti-Discrimination Act in light of these stipulated facts. The Court relied on the compelled speech cases of *West Virginia Board of Education by Barnette* (1943) (barring state from suspending public school student from school for refusing to recite the Pledge of Allegiance), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) (barring government from requiring private association to include LGBT organization in private parade), and *Boy Scouts of America v. Dale* (2000) (prohibiting government from requiring private association to continue adult membership of gay scout leader) to justify its conclusion. For the Court, this was a case of expression, of "pure speech," not conduct, as declared by the stipulations of the parties. More particularly, Smith's intended websites, though designed for the couples, constituted "*her* speech," not merely the speech of the couples.

In dissent, Justice Sotomayor framed the case in terms of conduct, and thus as an outlier: "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class." She concluded Smith was engaging in an "*act* of discrimination," and such act "has never constituted protected expression." She concluded that the Anti-Discrimination Act simply required a person who served the public to "serve all members of the public on equal terms." The law "does not directly regulate [Smith*'s*] speech at all." Additionally, the Court was wrong in declaring the Act to compel speech with which Smith disagreed. Instead, Colorado applied the Act only when Smith "chooses to offer 'such speech' to the public," but not all of the public. In such circumstances, "any burden on [Smith's] speech is 'plainly incidental' to a content-neutral regulation of conduct."