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COLORBLIND CAPTURE

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ABSTRACT

We are facing two converging waves of racial retrenchment. The first, which arose following the Civil Rights Movement, is nearing a legal milestone. This term, the Supreme Court is poised to prohibit affirmative action in higher education. When it does, the Court will cement decades of conservative jurisprudence that has systematically eroded the right to remedy racial inequality. The second wave is more recent but no less significant. Following 2020's global uprising for racial justice, right-wing forces launched a coordinated assault on antiracism. This campaign has enjoyed early success. As one measure, Republican Party ("GOP") officials have passed, proposed, or prefiled hundreds of bills designed to stymie antiracist discourse, activism, and organizing. To process this moment, scholars have highlighted patterns of racial retrenchment past and present. This includes decades of right-wing efforts to deny the relevance of race and racism in America following the fall of Jim Crow. These accounts are not wrong, but they obscure a key variable that has enabled racial backlash: the Left. Specifically, privileged voices on the Left continue to rehearse colorblind conceptions of race and racism—even while defending race-conscious reform. I term this phenomenon colorblind capture. *To illustrate its ubiquity and impact, I explore decades of affirmative action litigation. This analysis reveals an underappreciated trend. Even as the Left champions affirmative action, the Right sets the terms of debate. This includes the Left's pervasive reflex to defend affirmative action as a "racial preference." This framing is neither inevitable nor strategic. The Left could, for example, defend race-consciousness as essential* anti*discrimination—that is, a modest tool to mitigate existing racial (dis)advantage and, thereby, yield a more individualized, objective, and race-neutral process. But as the cases before for*

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the Supreme Court reveal, Harvard and the University of North Carolina ("UNC") continue to rehearse right-wing talking points—even as they defend their own admissions policies. Colorblindness, albeit a creature of the Right, has captured the Left.

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INTRODUCTION

We are facing two converging waves of racial retrenchment in the United States.[1] The first, which arose following the Civil Rights Movement, is nearing a legal milestone. This term, the Supreme Court is poised to prohibit race-conscious[2] university admissions.[3] When this occurs, the Court will cement a decades-long campaign to defuse antidiscrimination law's liberatory promise and potential.[4]

The second wave is more recent but no less significant. In 2020, George Floyd's viral murder catalyzed a global uprising for racial justice.[5] In its wake, individuals and entities across the nation embraced antiracism as a framework to guide our collective racial reckoning.[6] This antiracist turn signaled a commitment to racial justice unseen since the Civil Rights Movement. It also triggered near-immediate backlash. Then President Trump, mired in his slumping reelection campaign, focused on antiracism—among other targets like Critical Race Theory ("CRT") and the 1619 Project—as a potent foil.[7] From

[1] *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (observing that moments of racial progress are followed by backlash and retrenchment of the preceding racial quo).

[2] Within this Article, I employ the term *race-conscious* to describe policies that permit decision makers to consider the racial identity of individual applicants. This differs from *race-attentive*, which I use to describe policies that are attentive to racial outcomes but prohibit decision makers from considering the racial identity of individual applicants. Within this Article, I refer often to affirmative action—a term that encompasses a range of race-conscious and race-attentive practices. Unless stated otherwise, affirmative action refers to race-conscious policies as defined above.

[3] *See* Greg Stohr, *Supreme Court to Consider Banning Race in College Admissions (1)*, BLOOMBERG L. (Jan. 24, 2022, 10:42 AM), https://news.bloomberglaw.com/us-law-week/supreme-court-to-weigh-banning-use-of-race-in-college-admissions [https://perma.cc/RZY4-GPJM].

[4] *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 989 (2007) (noting that colorblindness "has been firmly read into the Fourteenth Amendment").

[5] *See* Jason Silverstein, *The Global Impact of George Floyd: How Black Lives Matter Protests Shaped Movements Around the World*, CBS NEWS (June 4, 2021, 7:39 PM), https://www.cbsnews.com/news/george-floyd-black-lives-matter-impact/ [https://perma.cc/T2DX-5VHG].

[6] *See* Will Jones, *1 Year After Murder of George Floyd, Anti-Racism Workshops Are Still in High Demand*, ABC 7 EYEWITNESS NEWS (May 24, 2021), https://abc7chicago.com/george-floyd-murder-death-anti-racism-workshop/10689146/ [https://perma.cc/3ZUK-VELU].

[7] *See What Trump Is Saying About 1619 Project, Teaching U.S. History*, PBS NEWS HOUR (Sept. 17, 2020, 6:20 PM), https://www.pbs.org/newshour/show/what-trump-is-saying-about-1619-project-teaching-u-s-history [https://perma.cc/Y8X9-9TLA].

Tweet to Executive Order, the former president ridiculed antiracism as "child abuse," "a sickness," "toxic propaganda," "offensive," and "anti-American."[8]

At the time, Trump's broadside garnered limited national attention. That disinterest has proven misplaced. A once-isolated attack metastasized into a nationwide campaign[9] of regressive discourse, legislation, and intimidation.[10] One sees this trend in the proliferation of rhetoric that demonizes antiracism as the new (antiwhite) racism.[11] Across the country, GOP officials have weaponized anti-antiracism rhetoric to justify an ever-growing host of laws

[8] Exec. Order No. 13950, 85 Fed. Reg. 60683, 60683 (Sept. 22, 2020) (characterizing Executive Order as necessary to "promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating"); Memorandum from Russell Vought, Director, to the Heads of Exec. Dep'ts & Agencies (Sept. 4, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf [https://perma.cc/7UU2-JQPT] (directing all agencies to identify and cancel "all contracts or other agency spending related to any training on 'critical race theory,' 'white privilege,' or any other training or propaganda effort that teaches or suggests either (1) that the United States is an inherently racist or evil country, or (2) that any race or ethnicity is inherently racist or evil"); Shannon Pettypiece, *Trump Calls for 'Patriotic Education,' Says Anti-Racism Teachings Are 'Child Abuse*,' NBC NEWS (Sept. 17, 2020, 5:19 PM), https://www.nbcnews.com/politics/white-house/trump-calls-patriotic-eduction-says-anti-racism-teachings-are-child-n1240372 [https://perma.cc/ML45-DVVB]; Evan Semones, *Trump Fumes over Troops Report, Amplifies Memo Against Anti-Racism Training at OMB*, POLITICO (Sept. 5, 2020, 10:39 AM), https://www.politico.com/news/2020/09/05/trump-military-the-atlantic-omb-report-409312 [https://perma.cc/AR47-Y6QZ].

[9] A well-funded and highly coordinated network of right-wing actors continues to seed the infrastructure, intellectual capital, and financing for this regressive campaign. Judd Legum & Tesnim Zekeria, *The Obscure Foundation Funding "Critical Race Theory" Hysteria*, POPULAR INFO. (July 13, 2021), https://popular.info/p/the-obscure-foundation-funding-critical [https://perma.cc/T94C-QFEA] (noting that between 2017 and 2019, Thomas W. Smith Foundation donated at least $12.75 million to twenty-one right-wing organizations that scrutinize CRT). The Heritage Foundation constitutes one of the intellectual arms of this movement. *See Critical Race Theory*, HERITAGE FOUND., https://www.heritage.org/crt [https://perma.cc/HVB4-XH87] (last visited Oct. 25, 2022).

[10] *See* JONATHAN FRIEDMAN & JAMES TAGER, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH 4 (2021), https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf [https://perma.cc/VGE8-UPR4] (last visited Oct. 25, 2022) ("Between January and September 2021, 24 legislatures across the United States introduced 54 separate bills intended to restrict teaching and training in K-12 schools, higher education, and state agencies and institutions.").

[11] *See Anti-Racist Is a Code for Anti-White*, ANTI-DEFAMATION LEAGUE (May 3, 2022), https://www.adl.org/education/references/hate-symbols/anti-racist-is-a-code-for-anti-white [https://perma.cc/VUV9-V9U2] (last visited Oct. 25, 2022) ("'Anti-Racist is a Code Word for Anti-White' is a racist slogan that became popular among white supremacists in the mid-2000s.").

designed to chill[12] basic conversations about race and racism in schools and beyond.[13] Closer to home, local officials have invoked similar rhetoric to discipline or terminate educators for assigning works written by Black authors,[14] proclaiming that Black Lives Matter,[15] or teaching a comprehensive and honest American history.[16]

This backlash shows little signs of abating.[17] To the contrary, we are facing a threat to civil rights and multiracial democracy unseen since the fall of Reconstruction.[18]

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[12] *See* FRIEDMAN & TAGER, *supra* note 10, at 8-11 (surveying bills passed in states that ban conversations about race and impose monetary penalties or grant private rights of action as enforcement mechanisms).

[13] *See Anti-Racist Is a Code for Anti-White*, *supra* note 11 (noting that slogan "Anti-Racist is a Code Word for Anti-White" originated from a short essay called "The Mantra," popularized by white supremacist Bob Whitaker and his followers in hopes of reframing racism); Ibram X. Kendi, *The Mantra of White Supremacy*, ATLANTIC (Nov. 30, 2021), https://www.theatlantic.com/ideas/archive/2021/11/white-supremacy-mantra-anti-racism/620832/ (discussing how Tucker Carlson, Blake Masters, and Glenn Youngkin have used anti-CRT rhetoric).

[14] *See* Hannah Natanson, *A White Teacher Taught White Students About White Privilege. It Cost Him His Job*, WASH. POST (Dec. 6, 2021, 8:00 AM), https://www.washingtonpost.com/education/2021/12/06/tennessee-teacher-fired-critical-race-theory/ (describing experience of high school teacher in Tennessee, Matthew Hawn, who was fired after assigning Ta-Nehisi Coates's essay *The First White President* and showing his students poetry performed by Kyla Jenée Lacey).

[15] Joe McLean, *Lee High Teacher Who Hung BLM Flag Outside Classroom Reassigned, Accused of Misconduct*, NEWS4JAX (Mar. 25, 2021, 7:10 PM), https://www.news4jax.com/news/local/2021/03/25/lee-high-teacher-who-hung-blm-flag-outside-classroom-reassigned-accused-of-misconduct/ [https://perma.cc/BF6M-E862].

[16] Brian Lopez, *North Texas Principal Resigns to End Fight over Whether He Was Teaching "Critical Race Theory,"* TEX. TRIB. (Nov. 10, 2021, 5:00 PM), https://www.texastribune.org/2021/11/10/colleyville-principal-critical-race-theory/ [https://perma.cc/6TPR-92FR].

[17] *See* Jonathan Feingold, *What the Public Doesn't Get: Anti-CRT Lawmakers Are Passing Pro-CRT Laws*, CONVERSATION (Nov. 30, 2021, 8:28 AM), https://theconversation.com/what-the-public-doesnt-get-anti-crt-lawmakers-are-passing-pro-crt-laws-171356 [https://perma.cc/CT7Q-MTZZ] (observing that Virginia Governor-elect Glenn Youngkin's pledge to "ban critical race theory on Day One" and his success "cemented CRT as a favorite foil in the Republican playbook").

[18] *See* Ishena Robinson, *The War on Truth: Anti-CRT Mania and Book Bans Are the Latest Tactics to Halt Racial Justice*, NAACP: LEGAL DEF. FUND, https://www.naacpldf.org/critical-race-theory-banned-books/ [https://perma.cc/PT3P-CY2V] (last visited Oct. 25, 2022) ("Honest and accurate discussions about this country's history, including shared knowledge about its sordid legacy of systemic racism and the accompanying use of fearmongering and political violence to maintain it, are key to building a more informed electorate who can make our democracy work for all Americans. Yet the realization of a truly functioning multiracial democracy, one in which even the most historically marginalized voices have power, is exactly what the ongoing war on truth aims to disrupt.").

This Article intervenes in this moment. But rather than focus on the right-wing forces stoking racial resentment, I turn to a critical but underappreciated source of backlash: privileged voices on the Left.[19] My claim is not that actors and institutions on the Left are consciously committed to racial retrenchment. Rather, I argue that many on the Left defend antiracist efforts on terms that reinforce colorblind conceptions of race.[20] And, in so doing, the same individuals and entities who celebrate antiracism imperil the legal and moral case for race-conscious policies.

On the surface, the Right and Left embrace competing theories of race and racism in America. Albeit reductionist, one can capture this divergence as follows: the Right says race no longer matters; the Left says it does. This split can be seen as a contest between color*blindness* and color*consciousness*. Colorblindness, at its core, reduces race to an otherwise arbitrary physical attribute and situates racism in an ignoble past. Colorconsciousness, in contrast, embraces a structuralist frame that locates racism within American society itself—even when laws prohibit racial discrimination.

These competing visions of race and racism result in opposing diagnoses of, and prescriptions for, racial inequality. Whereas colorblindness prescribes race-blind remedies, colorconsciousness invites remedies that center race—often in open and explicit ways.

But it is at this site of contestation—where the Left defends race-consciousness—that the Left turns Right. More precisely, privileged voices on the Left often defend race-conscious policies on terms that reify colorblind conceptions of race and racism. I term this dynamic—whereby colorblindness penetrates earnest antiracist advocacy—*colorblind capture*. Affirmative action[21] is a salient example. Since the fall of Jim Crow, liberals have supported race-conscious hiring and admissions practices. But when doing so, advocates tend to frame affirmative action as an acceptable "racial preference"—that is,

[19] "The Left" is an admittedly obtuse term that captures a diverse set of individuals and entities that embrace a range of political philosophies, racial ideologies, and normative commitments. Still, I employ the term because the Left (as a catchall category juxtaposed with the Right) is generally viewed as (more) committed to racial justice and civil rights.

[20] A significant exception includes scholars and activists—many who identify with critical projects—who have critiqued standard liberal defenses of affirmative action. *See, e.g.*, Devon W. Carbado, *Footnote 43: Recovering Justice Powell's Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1149 (2019) ("Rather than defend affirmative action in lukewarm and defensive terms as a 'preference' whose costs are begrudgingly justifiable, liberal Supreme Court justices should defend affirmative action affirmatively as a structural corrective—or, as I have called it, a countermeasure—to the operation of implicit biases."); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 15-16 (1994) (critiquing how affirmative action defenders tend to characterize policy as "preferential treatment" nonetheless justified as "compensation" for past injuries).

[21] For a definition of affirmative action see *supra* note 2.

justifiable discrimination that harms otherwise deserving whites.[22] This framing, which suggests race-consciousness corrupts a race-neutral baseline, is neither inevitable nor strategic.[23] Moreover, it contravenes the structuralist theories of race and racism that the Left otherwise endorses. Nonetheless, most voices on the Left continue to frame affirmative action as a racial preference—even when doing so contravenes structuralist accounts of racism and erodes the moral and legal case for antiracist efforts.[24]

Litigation targeting Harvard and UNC's race-conscious admissions policies, now before the Supreme Court, embodies this dynamic.[25] In both cases, the university defendants, sympathetic judges, and third-party stakeholders exhibit colorconscious instincts.[26] One might expect these affirmative action advocates to defend race-conscious admissions as modest interventions that promote racial neutrality by countering racial advantages that benefit white applicants.[27] This

[22] *See* Carbado, *supra* note 20, at 1137 ("[W]hereas liberals believe that the costs of affirmative action are outweighed by its benefits (including diversity), conservatives perceive the costs of the policy ('reverse discrimination') too high a price to pay regardless of its benefits."); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1220 (2002) ("[A]n increasing source of frustration was the inadequacy of the liberal response that too often accepted the premise that race consciousness amounted to racism and that too often argued for race-conscious remediation as temporary, exceptional, and aberrational within an otherwise neutral legal frame.").

[23] *See infra* Sections III.A.2, III.A.3 (outlining empirical case for countermeasure framing); *see also* Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1463 (1998) ("Race-conscious, non-preferential affirmative action programs ensure enhanced and vigorous competition for benefits such as employment and housing, and seek to even what has historically been an extraordinarily skewed playing field. As such, these programs promote the American ideal of a truly colorblind society and are necessary to ensure equal opportunity for all its citizens.").

[24] *See* Carbado, *supra* note 20, at 1129; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA v. Harvard I*), 397 F. Supp. 3d 126, 202-03 (D. Mass. 2019) ("Race conscious admissions will always penalize to some extent the groups that are not being advantaged by the process, but this is justified by the compelling interest in diversity and all the benefits that flow from a diverse college population."), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

[25] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA v. Harvard II*), 980 F.3d 157, 170 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 585-86 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022).

[26] *See* discussion *infra* Section II.B.

[27] One way that race-conscious admissions render race less relevant in the admissions process is by countering racial advantages and disadvantages that arise before, during, and after the admissions process. I employ the term *racial (dis)advantage* to capture the constellation of racial advantages white applicants enjoy and the racial disadvantages that burden applicants of color. For an overview of racial (dis)advantages common to admissions regimes, see Carbado, *supra* note 20, at 1158-59 ("[R]elative to black students, white students

is not the story Harvard and UNC tell. Instead, they defend their own admissions practices as necessary departures from an otherwise race-neutral regime.[28] This framing treats an applicant's race as irrelevant until the moment it is named and accounted for. As a result, our formal affirmative action advocates reproduce a colorblind admissions story that insulates facially neutral[29] processes from critique and rationalizes the over-representation of white (and often wealthy) students in elite institutions.[30]

Harvard and UNC's affirmative action advocacy epitomizes colorblind capture. When it occurs in the context of litigation, the harm transcends weakening the legal case for race-conscious admissions. Affirmative action lawsuits have long served as proxies for broader public contestation over the enduring meaning of race and racism in America.[31] Litigation is where the parties, judges, and public debate what, if anything, is necessary to overcome a past defined by legalized white supremacy. Thus, when affirmative action advocates promulgate narratives that locate racism in the past (or otherwise outside the institution itself), it does more than undermine race-conscious remedies—it also facilitates regressive campaigns to discredit the legitimacy and moral authority of antiracism itself.

This Article proceeds as follows. In Part I, I introduce and unpack the concept of colorblind capture. In Part II, to concretize the theory, I review colorblind capture's presence within affirmative action litigation past and present. This review reveals how colorblindness, although a creature of the Right, has long "captured" the Left. In Part III, I outline how affirmative action advocates could defend race-conscious policies without reproducing colorblind conceptions of race and racism. This final section coalesces around three insights: (1) colorblind capture is pervasive, but avoidable; (2) colorblind capture obscures racial (dis)advantages embedded within facially neutral processes; and (3) colorblind capture enables racial retrenchment by eroding any meaningful legal or moral distinction between antiracism and racism.

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effectively experience a windfall from inhabiting learning environments in which their race raises no questions about their intellectual competence or social belonging. Consequently, those students can traverse educational environments with (at a minimum) the benefit of the doubt, realize their academic potential without race-based burdens, and thus reflect that potential more effectively in their admissions file." (footnote omitted)).

[28] *See* discussion *infra* Section II.B.

[29] For purposes of this Article, I employ the term *facially neutral* to encompass all admissions practices that are not race-conscious as defined above. *See supra* note 2.

[30] *See* Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 57-58 (2016) ("[P]ursuant to our thick understanding of racial justice, it is not enough that racial minorities merely are present at schools from which they have been excluded. Equally if not more important are the stories that we tell about *why* they are there.").

[31] *See* Haney López, *supra* note 4, at 1028 (highlighting foremost CRT scolar Neil Gotanda's recognition "that debates over the nature of equality and the scope of equal protection inescapably turned on competing understandings of race").

I. COLORBLIND CAPTURE: A CONCEPTUAL MODEL

A. *Competing Theories of Race and Racism*

1. Colorblindness (on the Right)

Colorblindness, which remains the leading racial ideology on the Right,[32] embodies specific conceptions about what race is and what racism entails.[33] On race, colorblindness adheres to what Neil Gotanda termed *formal race*—a concept that reduces race to "neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin."[34] Put differently, race is treated as an otherwise irrelevant biological fact or physical attribute—no different than eye color, handedness, or mayonnaise preference.[35] In short, colorblindness contends that race does not matter unless identifiable actors or entities consciously make it so.[36] One could depict this colorblind conception of race in the following equation.

The Colorblind Story
race = irrelevant

This presumption, which grounds conceptions of race, also shapes colorblind conceptions of racism. Broadly, it translates to the mantra that the government should not (morally), and may not (legally), distinguish between individuals

[32] *See id*. at 992 ("Contemporary colorblindness arises out of both the doctrinal flow of Supreme Court cases that washed away Jim Crow and the larger flood of changing racial ideas over the twentieth century.").

[33] There are other dimensions of colorblindness, including ostensible commitments to individualism, that transcend the immediate focus of this Article. *See, e.g.*, Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1603 (2020) (evaluating "central pillar" of colorblindness "that race-based state action wrongfully fails to treat people *as individuals*").

[34] Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind*," 44 STAN. L. REV. 1, 4 (1991); *see also* Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1170 (2019) (explaining that colorblindness reduces race to physical markers "that people just have and thereby obviously belong to a designated racial group").

[35] *See* Kohler-Hausmann, *supra* note 34, at 1170.

[36] *See* Trisha Powell Crain, *After CRT Complaint, Huntsville Teacher Training Investigated by Alabama State Officials*, AL.COM (Dec. 13, 2021, 10:13 AM), https://www.al.com/news/2021/12/after-crt-complaint-huntsville-teacher-training-investigated-by-alabama-state-officials.html [https://perma.cc/P2AB-A7EE] (describing parent complaint that "school should not be teaching anything race related because race doesn't matter").

based on their race.[37] From this backdrop, proponents of colorblindness decry race-consciousness—that is, seeing and considering race—as the primary source of twenty-first century racism.[38] U.S. Senator Rick Scott neatly captured this sentiment in his Plan to Rescue America, which states: "We are all made in the image of God; to judge a person on the color of their epidermis is immoral."[39]

To further unpack the foregoing, imagine it is 1955 and UNC formally excludes Black students from its campus.[40] When viewed through the lens of colorblindness, this exclusionary policy is legally suspect (and racist) because UNC distinguishes between Black and white students.[41] The racial harm of UNC's race-consciousness, in other words, is seeing and accounting for race—regardless of the purpose or consequence of that conduct.

The remedy, in turn, calls for facial neutrality—that is, a process that neither sees nor accounts for an applicant's racial identity. Once UNC stops "seeing race," colorblindness posits that race no longer operates in any material sense; candidates are no longer advantaged or disadvantaged because of their race.[42] The claim is that facial neutrality returns the admissions process to a race-neutral baseline.[43] The following equation, building on the first, advances this Colorblind Story.

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[37] *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION 1 (1992) ("The comfortable metaphor stands for an austere proposition: that American government is, or ought to be, denied the power to distinguish between its citizens on the basis of race.").

[38] *See* Haney López, *supra* note 4, at 989 ("[T]he underlying premise of reactionary colorblindness is not simply that race-conscious remedies raise moral and political and even constitutional problems, but that benign and invidious discrimination are indistinguishable and equally pernicious.").

[39] *12 Point Plan*, RESCUE AM., https://rescueamerica.com/12-point-plan/ [https://perma.cc/VV3C-4NBN] (last visited Oct. 25, 2022). Similar sentiment animates Chief Justice John Roberts's claim that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[40] Notwithstanding *Brown v. Board of Education*, 347 U.S. 483 (1954), which prohibited de jure racial segregation in public schools, UNC continued to formally exclude Black students until federal courts intervened in 1955. Frasier v. Bd. of Trs. of the Univ. of N.C., 134 F. Supp. 589, 592 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam).

[41] The same logic anchors the claim that antiracism is racist because it sees race.

[42] *See* Carbado, *supra* note 20, at 1134 (explaining that colorblindness equates facial neutrality with racial neutrality—in the sense that neither white nor Black applicants are favored or disadvantaged).

[43] By *racial neutrality*, I mean a system in which applicants neither enjoy racial advantages nor suffer racial disadvantages. One could define racial neutrality more broadly or narrowly. I employ the above definition because adherents of colorblindness tend to equate facial neutrality with the absence of racial (dis)advantage. *See supra* note 27 (defining racial (dis)advantages). As I explore below, that empirical claim is inaccurate—in part because common "colorblind" measures of merit systematically understate the existing abilities of people from negatively stereotyped groups. *See infra* Section III (outlining racial (dis)advantages within facially neutral processes).

The Colorblind Story
race = irrelevant
facial neutrality = racial neutrality

So it is 1956, and UNC no longer considers an applicant's race. Under a colorblind conception of race, facial neutrality equals racial neutrality. By extension, race will remain irrelevant unless UNC expressly makes it relevant. How could this occur? One possibility is that UNC recognizes that it cannot overcome the vestiges of its own racial exclusion without adopting a race-conscious admissions policy. But under the logic of colorblindness, the new policy—although designed to rectify the institution's own ignoble legacy—commits the same sin as the prior practice: it renders race relevant. And by departing from an ostensibly race-neutral baseline, this race-conscious admissions policy confers a racial "preference" that "injures" white applicants. One can capture the foregoing in the following equation, which builds on the Colorblind Story.

The Colorblind Story
race = irrelevant
facial neutrality = racial neutrality
race-conscious = racial preference

It is worth noting that the empirical claim that affirmative action confers a racial preference flows from the two preceding presumptions: (1) race is irrelevant and (2) facial neutrality equals racial neutrality. The ensuing framing of affirmative action as a racial preference dominates public debates about affirmative action. Rarely, however, do we treat this framing as a contestable empirical claim that relies on multiple contestable assumptions about race and facial neutrality.[44]

One final piece of the Colorblind Story deserves mention. By decoupling race from racism and conflating facial neutrality with racial neutrality, colorblindness rationalizes and legitimizes systems that perpetuate white overrepresentation. By reducing race to an irrelevant physical attribute, the Colorblind Story suggests that racism is not the cause of enduring racial disparities. Some other cause—perhaps cultural inferiority or inadequate preparation—is to blame.[45] We can capture this final step with one more equation.

[44] *See* Carbado, *supra* note 20, at 1132 (arguing that advocates should treat "claim that affirmative action is a racial preference for what it is—a highly contestable claim, not an empirical fact").

[45] *See id.* at 1139-40 (describing culture arguments that "black parents, community leaders, and political figures should change the cultural habits of black teenagers, encourage them to study hard and stay in school, and persuade them to jettison the thinking that associates the

The Colorblind Story
race = irrelevant
facial neutrality = racial neutrality
race-conscious = racial preference
racial hierarchy = natural & legitimate

If you are writing the anti-affirmative action playbook, this is where you want to land: a narrative that (1) rationalizes existing inequalities, (2) discredits affirmative action as a racial preference that contravenes egalitarian norms, and (3) permeates public discourse so much that it appears natural and evades lay or legal scrutiny. To a significant degree, this is the narrative and framing that structures this nation's affirmative action ongoing discourse. Scholars, pundits, and the public tend to treat affirmative action as a departure from racial neutrality that harms innocent white (and, at times, Asian American) students. The primary disagreement is whether that discrimination is acceptable—not whether it is discrimination.

Colorblind capture helps explain why this narrative dominates our public discourse. But before turning to this phenomenon, I first outline the conceptions of race and racism that, at least on the surface, prevail on the Left.

2. Colorconsciousness (on the Left)

For decades, liberal Justices and advocates have criticized colorblind conceptions of race and racism. As for race, many on the Left reject the notion of formal race that anchors colorblindness.[46] Instead, liberals and progressives tend to emphasize that race is a social construct forged over "hundreds of years of historical practices starting with chattel slavery and colonization."[47] We might call this "structural race" because it recognizes the myriad ways in which race matters even when unnamed, unseen, or unaccounted for. We can visualize this conception of race by making one tweak to our Colorblind Story.

The Colorconscious Story
race ≠ irrelevant

Structural theories of race suggest that facial neutrality does not guarantee racial neutrality. Rather, race's omnipresence means that facially neutral policies and practices often reward and reproduce a range of racial (dis)advantages. This

pursuit of academics with 'acting white'" along with education arguments that "black students disproportionately attend poorly funded and underperforming schools" (footnote omitted)).

[46] Whereas formalists reduce race to an irrelevant physical trait, structuralists view race as "a central organizing theme of American society." john a. powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793 (2008).

[47] Kohler-Hausmann, *supra* note 34, at 1169.

dynamic is captured in terms such as "structural racism" or "institutional racism." We can update our Colorconscious Story accordingly.

The Colorconscious Story
race ≠ irrelevant
facial neutrality ≠ racial neutrality

Returning to our UNC example, the colorconscious account would presume that race remains relevant to UNC's admissions process *even after* the university eliminates its formal policy of racial exclusion. Why? Because race is more than some irrelevant personal trait. It is a socially constructed phenomenon that exerts force in myriad ways—regardless of whether UNC makes formal racial distinctions.[48] UNC's shift from de jure segregation to formal equality is insufficient to eradicate the racial (dis)advantages embedded within its admissions process. Accordingly, when UNC adopts an affirmative action measure, that act of race-consciousness does contravene an otherwise fair, balanced, and race-free baseline. Rather, it intervenes against a baseline that remains defined by racial (dis)advantage. Thus, by countering those racial (dis)advantages, the race-conscious policy renders race less relevant and constitutes no preference at all. We can integrate the above account into our Colorconscious Story as follows.

The Colorconscious Story
race ≠ irrelevant
facial neutrality ≠ racial neutrality
race-conscious ≠ racial preference

To complete our Colorconscious Story, the preceding equations invite a distinct theory about contemporary inequality. Contrary to colorblindness, which attributes racial inequality to something other than racism, the Colorconscious Story centers racism's enduring role. Even if the precise mechanisms remain underdefined, the lesson is clear: existing racial disparities

[48] To suggest that race is relevant is not to identify precisely how race shapes an admissions regime, nor precisely how an institution might reduce race's relevance. Race could, for example, shape (1) the credentials a university values, (2) the respective weight afforded a given credential, and (3) students' relative access to the resources necessary to acquire a given credential. Race-blind admissions regimes also privilege students for whom race has not been a salient feature of their lived experience. *See* Amici Curiae Students Proposed Findings of Fact and Conclusions of Law at 8-9, *SFFA v. Harvard I*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 14-cv-14176) [hereinafter Harvard Intervenors Posttrial Brief] ("Race-blind admissions is active erasure. To try to not see my race is to try to not see me simply because there is no part of my experience, no part of my journey, no part of my life that has been untouched by my race. And because of that, it would be nearly impossible for me to try to explain my academic journey, to try to explain my triumphs without implicating my race.").

are neither natural nor legitimate. Rather, they derive from racial (dis)advantages that continue to shape American society in ways that entrench racial hierarchy. We can capture this final proposition in our last equation.

The Colorconscious Story
race ≠ irrelevant
facial neutrality ≠ racial neutrality
race-conscious ≠ racial preference
racial hierarchy ≠ legitimate & natural

B. *The Colorblind Turn*

The above accounts are not meant to capture the full complexity and variance of racial ideologies that span the political spectrum. Nevertheless, this portrayal captures competing visions of race and racism in America. By extension, the foregoing helps to illuminate the phenomenon of colorblind capture.

In theory, the Colorconscious Story should preview how the Left defends affirmative action. One might expect, for example, an unapologetic defense that frames affirmative action as essential antidiscrimination that reduces race's relevance in admissions, hiring, and beyond. Advocates could borrow from Jerry Kang and Mahzarin Banaji, who championed affirmative action as a more "fair measure" of student talent and potential.[49] Or they could draw on Luke Harris and Uma Narayan, who framed affirmative action as a modest countermeasure that promotes racial neutrality.[50] At a minimum, one would expect affirmative action advocates to challenge the assertion that race-consciousness deviates from a race-neutral baseline and constitutes preferential treatment.

In practice, this rarely occurs.[51] Rather, affirmative action advocates often trade on colorblind conceptions of race and racism—even when defending antiracist efforts and resisting formalist visions of race.[52] This includes the overwhelming tendency to characterize affirmative action as a justifiable departure from an otherwise race-neutral baseline.[53]

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[49] *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1067-68 (2006) ("'Fair' connotes the moral intuition that being fair involves an absence of unwarranted discrimination, by which we mean unjustified social category-contingent behavior. The term also connotes accuracy in assessment. 'Measure' has the double meaning as well: measurement and an intervention intentionally taken to solve a problem.").

[50] *See* Harris & Narayan, *supra* note 20, at 14-26 ("[A]ffirmative action, at its core, is an attempt to promote equal opportunity, and full and unimpaired citizenship in the United States.").

[51] *See id.* at 14.

[52] *See* Carbado, *supra* note 20, at 1137.

[53] *See id.*

Due to its prevalence and impact, I term this common acquiescence to the logic of colorblindness *colorblind capture*. Colorblind capture takes different forms.[54] Nonetheless, as I detail below, this phenomenon often entails some combination of four discrete but interacting components. Affirmative action advocates tend to: (1) misdescribe affirmative action,[55] (2) extract race from facially neutral criteria,[56] (3) downplay race's general relevance in facially neutral selection processes,[57] and (4) transpose any racial advantage from white applicants to Black applicants.[58]

It behooves affirmative action advocates to avoid colorblind capture. First, advocates risk internal contradiction. By reverting to formalist conceptions of race and racism, advocates erode, if not abandon, the structural stories they otherwise endorse. Second, advocates concede contestable claims concerning the relationship between formal equality and racial neutrality. In so doing, advocates reify the presumption that affirmative action entails preferential treatment that violates norms of objectiveity and racial preference. Third, advocates miss opportunities to reframe affirmative action as essential—if insufficient—antidiscrimination necessary to yield more individualized, objective, and merit-based processes.

II. COLORBLIND CAPTURE: THEN AND NOW

A. *Colorblind Capture Then: Defending First-Wave Affirmative Action*

In a 2019 article, Devon Carbado observed that even heralded liberal Justices characterized affirmative action as a "racial preference."[59] This includes Justice William Brennan, who displayed an early manifestation of colorblind capture in *Regents of the University of California v. Bakke*,[60] the Supreme Court's first substantive engagement with race-conscious admissions.[61] Justice Brennan's preference-framing is notable, in part, because he simultaneously emphasized race's enduring relevance in post-Jim Crow America.[62]

This included the assessment that, by accounting for race, the University of California Davis School of Medicine ("U.C. Davis") "compensate[d] applicants, who . . . are fully qualified to study medicine, for educational disadvantages which . . . were a product of state-fostered discrimination."[63] The modern

[54] *See* discussion *infra* Sections II.A, II.B.

[55] *See* discussion *infra* Section II.B.1.

[56] *See* discussion *infra* Section II.B.2.

[57] *See* discussion *infra* Section II.B.3.

[58] *See* discussion *infra* Section II.B.4.

[59] *See* Carbado, *supra* note 20, at 1137.

[60] 438 U.S. 265 (1978).

[61] *See id.* at 375 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

[62] *See infra* notes 67-69 and accompanying text.

[63] *Bakke*, 438 U.S. at 375-76.

vernacular was absent, but Justice Brennan articulated a structuralist story: otherwise qualified students of color, because of "state-fostered [racial] discrimination," lacked an equal opportunity to attain academic credentials that U.C. Davis valued.[64] This was not a matter of qualifications or talent, but structural barriers that impeded certain students' ability to compile a competitive admissions file.[65] Justice Brennan recognized that U.C. Davis's standard admissions policy was facially neutral but far from racially neutral.

Justice Brennan also chastised colorblindness and its rising grip on the Supreme Court's race jurisprudence. Consider the following language:

> [C]laims that law must be "color-blind" or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. . . . [R]eality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.[66]

From this backdrop, one might expect Justice Brennan to characterize U.C. Davis's race-conscious policy as a countermeasure that mitigated preexisting racial (dis)advantages that artificially inflated the relative "merit" of white applicants. At a minimum, Justice Brennan would reject attempts to describe the school's modest intervention as a racial preference. And yet, colorblind frames intersperse Justice Brennan's opinion:

- [T]here is absolutely no basis for concluding that Bakke's *rejection as a result of* Davis' use of *racial preference* will affect him throughout his life in the same way as the segregation of the [Black] schoolchildren in *Brown I* would have affected them. Unlike discrimination against racial minorities, the use of *racial preferences* for remedial purposes does not inflict a pervasive injury upon individual whites . . . .[67]
- In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the *degree of preference* to be given is unavoidable, and *any given preference* that *results in the exclusion of a white candidate* is no more or less constitutionally acceptable than a program such as that at Davis.[68]

[64] *Id*.

[65] *See id*.

[66] *Id*. at 327.

[67] *Id*. at 375 (emphasis added).

[68] *Id*. at 378 (emphasis added).

- "This distinction does not mean that the *exclusion of a white* resulting from the *preferential use of race* is not sufficiently serious to require justification."[69]

Justice Brennan does not equate affirmative action with Jim Crow. Still, he undercuts the structuralist story that anchors his distrust of colorblindness. To begin, Brennan employed preference rhetoric. Whatever his intent, his language implied that U.C. Davis gave an unfair race-based advantage to students of color. We could map this onto standard colorblind capture dynamics as follows: Justice Brennan (1) misdescribed U.C. Davis's policy (as preferential); (2) downplayed race's relevance in facially neutral criteria; and (3) transposed racial advantage by suggesting that race, to the extent relevant, injured white students.

Justice Brennan's liberal colleagues displayed similar antipathy for colorblindness. Justice Harry Blackmun, for example, famously declared: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[70] Justice Thurgood Marshall, perhaps the most colorconscious Justice in history, invoked Reconstruction Era antiracist remedies. But when he did, he described those remedies as special treatment for Black people.[71] This language arises within Justice Marshall's robust and historically laden defense of race-conscious remedies.[72] Nonetheless, the phrase "special treatment"—akin to "racial preference"—invites the claim that an individual's racial identity is inoperative until the moment the government expressly considers it.[73] I do not mean to overstate the presence of colorblind frames within the liberal Justices' opinions. Rather, I mean to mark that even when these Justices foregrounded the enduring power of race and racism in American society, they also employed language that cast affirmative action as *special* treatment—as opposed to, for example, *equalizing* treatment.

In *Bakke*, colorblind capture extended beyond the Supreme Court's liberal Justices to U.C. Davis, the formal defendant. U.C. Davis also recognized that societal discrimination and racial subordination rendered their facially neutral

[69] *Id*. at 375 (emphasis added).

[70] *Id*. at 407 (Blackmun, J., concurring in part and dissenting in part).

[71] *Id*. at 397 (Marshall, J., concurring in part and dissenting in part) ("Despite the objection to the special treatment the bill would provide for [Black people], it was passed by Congress.").

[72] *See, e.g.*, *id*. at 396-98 (discussing connection between passage of 1866 Freedmen's Bureau Act—which "was regarded, to the dismay of many Congressmen, as 'solely and entirely for the freedmen, and to the exclusion of all other persons'"—and Fourteenth Amendment).

[73] Since the eve of the Civil War, Supreme Court Justices—among other legal and political actors—have deployed similar narratives to malign antiracist efforts. *See The Civil Rights Cases*, 109 U.S. 3, 25 (1883) ("When a man has emerged from slavery . . . there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .").

process unfair to students of color.[74] This was not some tangential observation. To appreciate how U.C. Davis presented a colorconscious story, consider this (very long) heading from the first section of its Supreme Court brief:

> The Legacy of Pervasive Racial Discrimination in Education, Medicine and Beyond Burdens Discrete and Insular Minorities, as Well as the Larger Society. The Effects of Such Discrimination Can Not Be Undone by Mere Reliance on Formulas of Formal Equality. Having Witnessed the Failure of Such Formulas, Responsible Educational and Professional Authorities Have Recognized the Necessity of Employing Racially-Conscious Means to Achieve True Educational Opportunity and the Benefits of a Racially Diverse Student Body and Profession.[75]

Simply put, U.C. Davis conceded that race-consciousness was necessary to mitigate the impact of race and racism that unfairly benefitted white applicants.[76] U.C. Davis further outlined how racial (dis)advantages compromised the goal of racial neutrality in standard medical school admissions processes.[77] In so doing, the U.C. Davis rejected the proposition that facial neutrality could produce racial neutrality.[78] Its race-conscious policy was accordingly designed to promote fairness by "alleviati[ng], in a modest but important way, . . . the suppression of racial minorities."[79]

At bottom, U.C. Davis framed its policy as a structural counterpreference that mitigated racial (dis)advantages that benefitted race- and class-advantaged white applicants over more talented applicants of color.[80] It is hard to imagine a more cogent Colorconscious Story. And yet, in the next sentence, colorblind capture crept in.

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[74] Brief for Petitioner at 69, *Bakke*, 438 U.S. 265 (No. 76-00811) (acknowledging "long and as yet unfinished road to the end of subordination of historically subjugated and alienated minorities").

[75] *Id*. at 17.

[76] *See id*. at 9-10 ("Yet toward the end of the last decade, many governmental and private institutions, including this Court, came concurrently to the realization that a real effort to deal with many of the facets of the legacy of past racial discrimination unavoidably requires remedies that are attentive to race, that color is relevant today if it is to be irrelevant tomorrow.").

[77] *Id*. at 10-11 ("The use of racially-blind admissions criteria resulted in near-total exclusion of historically disfavored minorities during a period when the competition for medical school places was only normally intense.").

[78] *Id*.

[79] *Id*. at 70-71.

[80] *See id*. at 56 n.62 (noting that individuals like Bakke are "correct[ly] characterize[ed]" as "incidental beneficiaries of past discrimination" against racialized groups). To appreciate the powerful pull of preference framing, one need only look to the source U.C. Davis cited for this proposition. *See id*. ("If [white applicants] are excluded because of preferential policies, they may be put in the position they would have been in if the discrimination had never occurred." (quoting Kent Greenwalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 585 (1975))).

As context, it is imporant to note that as of *Bakke*, the Supreme Court had not determined whether strict scrutiny should apply to remedial racial classifications.[81] To buttress its argument that strict scrutiny was inappropriate, U.C. Davis argued that "those who bear the *burdens* of such programs are neither members of *groups* especially susceptible to race-related injuries nor in need of protection from the results of normal political processes."[82] For present purposes, the key is U.C. Davis's suggestion that its programs burden certain groups (read: white applicants).

This framing, which U.C. Davis employed on multiple occasions,[83] implies that U.C. Davis unfairly harmed students who were not covered by the "special-admissions program."[84] This resembles the standard affirmative action critique—a narrative that centers affirmative action's purported "victims."[85] This story collides with U.C. Davis's own recognition that race-consciousness was necessary to "alleviat[e]" pervasive forces that "suppress[ed]" minority enrollment.[86] In other words, U.C. Davis recognized that the challenged policy was necessary to counter race- and class-based (dis)advantages that benefitted wealthy white applicants.[87] To the extent U.C. Davis's policy "burdened" wealthy white applicants, the "burden" comprised the loss of expected overrepresentation.[88] This was not, however, the "burden" that U.C. Davis's language implied.

[81] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287-88 (1978) (discussing applicability of strict scrutiny to affirmative action programs).

[82] Brief for Petitioner, *supra* note 74, at 70 (emphasis added); *see id*. at 68-73 (presenting reasons for inapplicability of strict scrutiny).

[83] *See, e.g.*, *id*. at 78 ("Likewise this is not a case of a preference for minorities that serves no purpose whatsoever.").

[84] *See id*. at 66 ("Rejection of the applications of some whites due to special-admissions programs is unavoidable.").

[85] *See* discussion *supra* Section I.A.1.

[86] Brief for Petitioner, *supra* note 74, at 70-72 ("Moreover, the spectrum of groups not included within special-admissions programs have a realistic recourse to political processes to protect themselves.").

[87] The "burden" description also obscures the mechanics of U.C. Davis's special-admissions program, which was open to applicants of *any* race that could establish social disadvantage. *See id*. at 44-47 (describing special admissions policy); *see also* JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 16-17 (1979) (describing Bakke's application to U.C. Davis and the admissions process).

[88] *See* Harris & Narayan, *supra* note 20, at 25 ("Compensation arguments treat affirmative action as involving the preferential treatment of those excluded, while we insist that affirmative action represents an attempt to treat people with greater equality than would otherwise be the case."). In fact, U.C. Davis marshaled a similar argument before the Supreme Court. *See* Brief for Petitioner, *supra* note 74, at 46 ("[Bakke's] position is that *any* diminution in his chances for admission brought about by any reliance on racial criteria is forbidden by the Fourteenth Amendment.").

This tension reflects an early manifestation of colorblind capture. On the one hand, U.C. Davis acknowledged that facially neutral practices rewarded inherited race- and class-based advantages. Yet by suggesting that its policy burdened whites, U.C. Davis acquiesced to an anti-affirmative action talking point that now dominates public discourse and stigmatizes even modest race-conscious practices.

Ongoing litigation involving Harvard and UNC presents a similar dynamic. The university defendants (and sympathetic judges) recognize race's enduring relevance. Yet they defend affirmative action on terms that reinforce colorblind conceptions of race and racism.

B. *Colorblind Capture Now: Defending Affirmative Action at Harvard and the University of North Carolina*

I now turn to litigation at Harvard and UNC presently before the Supreme Court.[89] Below I unpack how both defendants exhibit each of the four tendencies common to colorblind capture: (1) they misdescribe their own policies, (2) they extract race from facially neutral criteria, (3) they downplay race's relevance across their admissions process, and (4) they transpose the groups that benefit from racial (dis)advantages.[90]

1. Misdescribing Affirmative Action

For decades, many on the Left have misdescribed affirmative action as a racial preference.[91] This common framing *mis*describes most race-conscious admissions policies because it presumes a baseline free from racial (dis)advantage.[92]

Harvard and UNC have largely abandoned the term "racial preference,"[93] instead adopting terms such as "tip" or "plus factor."[94] This shift softens the rhetoric, but Harvard and UNC continue to convey the message that race-

[89] *SFFA v. Harvard II*, 980 F.3d 157, 170 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 585-86 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022).

[90] This dynamic is not unique to Harvard and UNC. *See supra* notes 45-47 and accompanying text.

[91] *See* Harris & Narayan, *supra* note 20, at 14 ("Few question the assumption that affirmative action involves the bestowal of preferences . . . .").

[92] *See infra* Part III (outlining how Harvard and UNC could more accurately defend their respective policies).

[93] Harvard and UNC largely avoid the term racial preference. *See infra* notes 96-100 and accompanying text (citing examples from parties' briefing). Yet, even in these limited instances, the defendants fail to note that the term misrepresents how race operates within their respective admissions processes.

[94] *See* Brief for Defendant-Appellee President and Fellows of Harvard Coll. at 14, *SFFA v. Harvard II*, 980 F.3d 157 (No. 19-02005).

conscious admissions grant preferential treatment to Black students and deviate from a race-free baseline.[95]

The following excerpts from Harvard and UNC illustrate this shift in terminology but continuity in meaning:

- "Admissions officers may consider an applicant's race or ethnicity as one factor among many; race or ethnicity may function as a 'tip' or 'plus' that contributes to admission."[96]
- "[The Department of Education's Office of Civil Rights] . . . found that . . . the 'tip' for race or ethnicity provided an 'opportunity for Asian American ethnicity to be positively weighed in the admissions process . . . .'"[97]
- "The court also rejected [Students for Fair Admissions, Inc.'s ("SFFA")] argument that Harvard uses race as more than a 'plus' factor, finding that Harvard does not consider race in a 'rigid and mechanical manner,' but rather permits admissions officers to consider race as a 'tip' . . . ."[98]
- "The lower courts found that Harvard considers race flexibly, only as one factor among many, and only as a plus.[99]
- "[A]ny factor (race or any other) may be enough in an *individual* case to properly tip the scales toward admission."[100]

On the surface, terms like "tip" and "plus factor" offer certain appeal. Both terms suggest a more innocuous process than one characterized as a racial preference or preferential treatment. Moreover, the terms imply that race is operative, but to a limited degree—thereby responding to the Supreme Court's

[95] The lower court opinions upholding the respective admissions policies, and the Biden Administration's brief objecting to certiorari, employ similar language. *See SFFA v. Harvard II*, 980 F.3d at 170 ("Harvard has used a system of '*tips*' in its application review process. Tips are *plus factors* that might *tip* an applicant into Harvard's admitted class." (emphasis added)); Brief for the United States as Amicus Curiae at 4, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA v. Harvard III*), 142 S. Ct. 895 (2021) (No. 20-01199) ("Harvard may award a '*tip*' that improves an applicant's chances of admission. Tips are given based on various characteristics, including . . . race. Harvard also gives '*tips*' to recruited athletes, legacy applicants, applicants on the Dean's Interest List, and children of faculty and staff . . . ." (emphasis added) (citations omitted)).

[96] Brief for Defendant-Appellee, *supra* note 94, at 14.

[97] *Id*. at 18.

[98] *Id*. at 25.

[99] Brief in Opposition at 23, *SFFA v. Harvard III*, 142 S. Ct. 895 (filed May 2021) (No. 20-01199).

[100] UNC Defendants' Proposed Findings of Fact and Conclusions of Law at 99, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-00954).

admonition that racial classifications "be employed no more broadly than the interest demands."[101]

That said, these terms reinforce colorblind logic. Whether a "tip" or a "preference," the language suggests that affirmative action departs from a race-neutral baseline and places a "racial thumb on the scale" for students of color.[102] Today's vernacular may be less charged, but it still (1) equates facial neutrality with racial neutrality, and (2) naturalizes the contestable claim that race-consciousness corrupts what would otherwise be a "racially neutral, merit-based competition."[103]

Terms like "tip" or "plus factor" do not necessarily connote a departure from racial neutrality. But to avoid this connotation, one must identify race-consciousness as a tool that promotes "objectivity" and "meritocracy" by countering racial (dis)advantages that benefit white applicants. Neither Harvard nor UNC do so. If anything, the defendants obscure how white racial advantages permeate facially neutral components of their respective admissions processes.[104] This has occurred, in part, through the process of racial extraction.

2. Extracting Race

Harvard and UNC name structural racism. But they also reproduce colorblind conceptions of race and racism by extracting race from facially neutral criteria. In so doing, the universities (1) reduce race to racial identity, and (2) treat racial identity as a natural, fixed, independent, and isolated variable. Racial extraction is not limited to affirmative action debates; it reflects prevailing conceptions of race across public and academic discourse.[105]

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[101] Grutter v. Bollinger, 539 U.S. 306, 342 (2003).

[102] Carbado, *supra* note 20, at 1173.

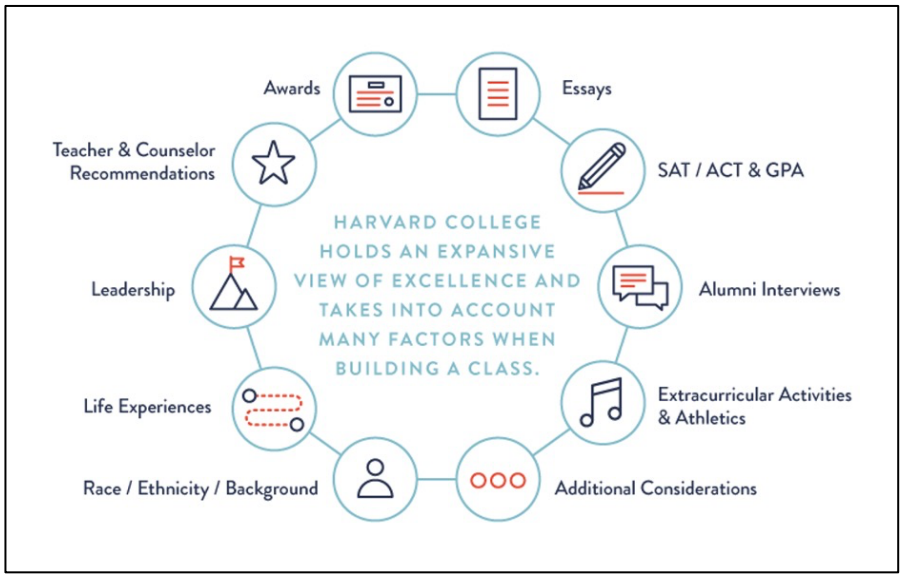
[103] *Id*. at 1129.

[104] Moreover, Harvard positions racial diversity against academic excellence, thereby reinscribing the proposition that affirmative action benefits academically inferior applicants. Brief in Opposition, *supra* note 99, at 8 ("It concluded that there currently are no workable alternatives that would allow Harvard to achieve the educational benefits of diversity while also maintaining its demanding standards of excellence."); *id*. at 24 ("And Harvard need not choose between pursuing academic excellence and the educational benefits of diversity.").

[105] Social scientists, for example, tend to treat race as a fixed and independent variable that can explain varied outcomes. *See* Angela James, *Making Sense of Race and Racial Classifications*, 4 RACE & SOC'Y 234, 244-45 (2001) ("I argue that social scientists, in particular those using statistical models that include race as an independent variable, have contributed to the conceptualization of race as a fixed characteristic."); Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 155 (2014) ("[T]he standard approach is to treat race (assumed to be an easily identified and 'natural' demographic variable) as an independent variable—the causal agent of some dependent variable or outcome (for example, test scores)."); Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 453, 453 (Austin Sarat ed., 2004)

The following graphic, which Harvard created to visualize its admissions process, illustrates this dynamic.

Figure 1. Harvard Admissions Process Graphic.[106]



On the surface, the graphic appears agnostic with respect to competing racial ideologies; it simply identifies race as one consideration among many.[107] But this portrayal is not agnostic. Rather, it employs a formalist conception of race that reduces racial identity to "an easily identified and 'natural' demographic variable"[108] that exists independent of the other admissions criteria.

("[M]any, if not most, law and society scholars conceive of race as a readily measurable, dichotomous (black/white) variable that affects the law at various points."). As a matter of doctrine, this standard conception of race informs the diversity rationale (which views "race as one factor among many") and the command that universities explore "race-neutral alternatives." *See SFFA v. Harvard II*, 980 F.3d 157, 180 (1st Cir. 2020) ("The court examined six race-neutral alternatives . . . (1) eliminating Early Action; (2) eliminating ALDC tips; (3) improving recruiting efforts and financial aid; (4) admitting more transfer applicants; (5) eliminating standardized testing; and (6) instituting place-based quotas."), *cert. granted*, 142 S. Ct. 895 (2022).

[106] *Admissions Process*, HARVARD ADMISSIONS LAWSUIT, https://www.harvard.edu/admissionscase/admissions-process/ [https://perma.cc/5MMU-8MUQ] (last visited Oct. 25, 2022).

[107] UNC describes race in similar terms. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 601 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022).

[108] Carbado & Roithmayr, *supra* note 105, at 157.

In certain respects, it would be difficult to tell a comprehensive racial story without isolating race from other social determinants and axes of identity.[109] The danger, however, is that well-intended attempts to isolate "race" can reinforce a Colorblind Story that reduces racial identity[110] to a natural and self-realizing personal trait. This, in turn, invites the false dichotomy between race-conscious practices (where race is ostensibly operative) and facially neutral practices (where race is ostensibly inoperative). Put differently, racial extraction silos race to the moment of race-consciousness.

Race does not operate uniformly across each of Harvard's admissions criteria. Even within a single criterion (e.g., standardized test scores), race often operates in multiple and distinct ways.[111] But the basic insight remains: racial (dis)advantages shape many, if not all, of Harvard's admissions criteria.[112] But Harvard obscures this reality by visually extracting race from other considerations. In so doing, Harvard reinforces the narrative that affirmative action is the moment when race "enters" the admissions process.

As one example, consider how Harvard discursively extracts race from its "academic rating"—a metric that "summarizes the applicant's academic achievement and potential based on factors including grades, standardized test scores, recommendation letters, academic work and prizes, and the strength of the applicant's academic program."[113] Harvard consistently treats these

[109] *See* Devon W. Carbado, *Critical What What?*, 43 CONN. L. REV. 1593, 1613-14 (2011) ("In describing racism as an endemic social force, CRT scholars argue that it interacts with other social forces, such as patriarchy, homophobia, and classism.").

[110] By racial identity, I refer to the racial categories (e.g., Black and white), the societal "rules" that determine who belongs in a given racial category (e.g., the rule of hypodescent), and the meanings associated with a given category (e.g., predisposed to criminality or law abiding).

[111] *See* Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMPLE L. REV. 513, 530, 537 (2019) (outlining how standardized test scores tend to undermeasure the existing academic talent and potential of students from stigmatized groups because (1) structural forces unevenly distribute access to critical test-taking resources and (2) pervasive racial stereotypes compromise the test performance of highly motivated, academically talented, and well-prepared students from negatively stereotyped groups).

[112] *See* Jonathan P. Feingold, "*All (Poor) Lives Matter": How Class-Not-Race Logic Reinscribes Race and Class Privilege*, U. CHI. L. REV. ONLINE (Oct. 30, 2020), https://lawreviewblog.uchicago.edu/2020/10/30/aa-feingold/ [https://perma.cc/CAR9-2U37] (disputing idea that admissions processes can, for example, "disentangle an applicant's race and class"); Devon W. Carbado, Kate M. Turetsky & Valerie Purdie-Vaughns, *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 174 (2016) (noting that variety of race-based disadvantages "can diminish the competitiveness of a black student's admissions file").

[113] Brief for Defendant-Appellee, *supra* note 94, at 9.

considerations as neutral, objective, and nonracial.[114] The following statement is illustrative:

> Comparing race to other factors in the admissions process, [plaintiff] relies principally on a rudimentary statistical analysis that the district court rejected because it "over emphasize[d] grades and test scores." As Professor Card showed and as the district court found, 'the magnitude of race-based tips is not disproportionate to the magnitude of other tips applicants may receive.[115]

Read together, this passage and the preceding graphic suggest that race operates within a single site of Harvard's admissions process: the formal consideration of race. Harvard's arguments for affirmative action dislocate race from its facially neutral criteria—and thereby reinforce the colorblind claim that university admissions are race-neutral *but for* affirmative action.

Consider, also, how Harvard discusses "Legacy+" preferences—the admissions boost Harvard extends to the children of alumni, athletic recruits, dean's list members, and the children of faculty and staff ("ALDC").[116] By most metrics, Legacy+ preferences confer an unearned race/class bonus to wealthy white applicants.[117] According to SFFA's own expert, 43% of Harvard's white

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[114] Exacerbating this tendency, Harvard and UNC objected to evidence that would have revealed how their admissions policies bestow unearned race and class privileges to wealthy white applicants. *See* Jonathan P. Feingold, *Ambivalent Advocates*, HARV. C.R.-C.L. L. REV. (forthcoming 2022) (manuscript at 21) (on file with author) ("Harvard and UNC defend their own policies on colorblind terms that delegitimize their own policies and discredit attempts to counter institutional arrangements that, in effect, lead to the admission of wealthy white students over more talented and deserving students from marginalized groups.").

[115] Brief for Defendant-Appellee, *supra* note 94, at 14 (citations omitted). UNC employed near-identical language. *See* Defendants' Proposed Findings of Fact and Conclusions of Law at 100, Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021) (No. 1:14-cv-00954) [hereinafter UNC Proposed Findings] (emphasis added) ("Professor Hoxby found that *race* and ethnicity *plays a smaller role than standardized test scores*—an analysis that Professor Arcidiacono made no effort to conduct.").

[116] The First Circuit portrayed Harvard's legacy preference in similar terms. *See SFFA v. Harvard II*, 980 F.3d 157, 171 (1st Cir. 2020) ("At the time, Harvard reviewed applications using a process like the one challenged in this lawsuit in the sense that it used a rating system and tips for race and [children of alumni, donors, faculty, or staff, known as] ALDC applicants."), *cert. granted*, 142 S. Ct. 895 (2022). Beyond legacy preferences, universities often value aspects of applicant identity untethered to academic ability that disparately benefit white applicants. *See* Tim Wise, *Whites Swim in Racial Preference,* RACE, RACISM & THE L. (Feb. 20, 2003), https://racism.org/articles/basic-needs/affirmative-action/1105-affirm20-1 [https://perma.cc/WGS5-P72U] (noting that fifty-eight out of a total of 150 points available to University of Michigan applicants disparately or exclusively benefitted white applicants).

[117] *See* Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. & ECON. 133, 147 (2020) (noting that for "a white typical applicant with a baseline probability of admission of 10%," applicant's admission probability would

admits are Legacy+ students.[118] For admitted students of color, the number does not exceed 16%.[119] Even among legacy applicants, Harvard admits white legacy applicants at a higher rate than Black legacy applicants.[120] SFFA's expert concluded that 75% of Harvard's white Legacy+ admits would have been rejected if Harvard judged them on their academic profile alone.[121] Put differently, were Harvard to eliminate all Legacy+ preferences, "[t]he admit rate for all white ALDC applicants would fall from 43.6% to 11.4%, a drop of more than thirty percentage points."[122] During the relevant period, this equated to over 1,600 white admits (underqualified per Harvard's own standards)—a number that exceeds *all* Black and Latinx admits over the same period.[123]

For present purposes, I provide these data points because they quantify the claim that legacy preference is racial preference. Given the histories of racial exclusion at elite universities, this is not surprising. Legacy preferences function as "grandfather clauses"—the facially neutral exemption that permitted poor whites to vote when the law would have otherwise prohibited it.[124] Harvard, in turn, could justify affirmative action as antidiscrimination that reduces the racial advantage it extends to wealthy white applicants.[125] Harvard does not take this route. If anything, Harvard evades any discussion or critique of its Legacy+ preferences.[126]

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increase to 49% "[i]f this applicant were switched to a legacy, holding all other characteristics fixed").

[118] According to the study, each of these "preferences primarily benefit white students." *Id*. at 153. While white applicants comprise 40% of Harvard's overall applicant pool, 70% of Harvard's ALDC applicants are white. *See id*. at 135. Some of these statistics made an appearance in the First Circuit's opinion. *See SFFA v. Harvard II*, 980 F.3d at 171 (noting higher admissions rates and white makeup of legacy applicants). Nonetheless, the panel did not treat legacy as a racial advantage for white applicants that affirmative action could counter.

[119] *See* Arcidiacono et al., *supra* note 117, at 133.

[120] *See id*. at 138 (noting, for example, that "white and African American applicants on the dean's list have admit rates of 42% and 33%, respectively").

[121] *See id*.

[122] *See id*. at 149.

[123] *Id*. at 148 tbl.4.

[124] *See* Alan Greenblatt, *The Racial History of the "Grandfather Clause,"* NPR: CODE SWITCH (Oct. 22, 2013, 9:44 AM), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause [https://perma.cc/YNZ2-BLAZ] (explaining racist history of grandfather clauses).

[125] A comprehensive countermeasure would arguably include a policy that prohibits Harvard from admitting any legacy students.

[126] Harvard concedes that legacy bonuses are unrelated to an applicant's academic merit. *See SFFA v. Harvard II*, 980 F.3d 157, 178 (1st Cir. 2020) ("Preferencing legacy applicants 'helps to cement strong bonds between the university and its alumni,' fosters community-

This evasion manifests even within the above admissions graphic. That image portrays "race / ethnicity / background" as one of Harvard's nine discrete admissions considerations.[127] Legacy+ preferences do not appear as one of the eight other considerations. Rather, Harvard buries Legacy+ preferences—that account for 33% of Harvard's white admits—within an ellipsis that bears the name "Other Considerations."[128]

When Harvard discusses Legacy+ preferences, it describes the policy as just another "tip."[129] Even here, Harvard compromises the case for affirmative action. By employing the same term for affirmative action and Legacy+ preferences, Harvard invites a false equivalence both in kind and degree.

As for kind, the common language suggests that both considerations confer preferences that depart from objective measures of merit.[130] The only distinction concerns the class of beneficiaries.[131] Harvard thereby erodes any meaningful distinction between a policy that reproduces inequality by rewarding those who do less with more (Legacy+ preferences) and one that levels the playing field by rewarding those who do more with less (affirmative action). Harvard, in turn, reifies the same colorblind logic that denies any meaningful difference between Jim Crow and the policies designed to remedy that legacy.

But Harvard does more than conflate the policies' divergent functions. By applying the imprecise term "tip," Harvard understates the disproportionate advantage Legacy+ applicants enjoy.[132] Legacy+ "tips" weigh more than any

building, and encourages alumni to donate their time and money to support Harvard."), *cert. granted*, 142 S. Ct. 895 (2022).

[127] *Admissions Process*, *supra* note 106.

[128] *Id.*

[129] Brief in Opposition, *supra* note 99, at 5 (explaining that admissions officers "may give an applicant a 'tip' for unusual intellectual ability; strong personal qualities; the capacity to contribute to racial, ethnic, socioeconomic, or geographic diversity; outstanding creative or athletic ability; or excellence in other dimensions").

[130] UNC also confers legacy preferences for out-of-state applicants. *See Fact Check*, UNIV. OF N.C.: ADMISSIONS CASE, https://admissionslawsuit.unc.edu/lawsuit/fact-check/ [https://perma.cc/RW7D-S47D] (last visited Oct. 25, 2022) (observing that "[o]ut-of-state children of alumni receive narrow legacy consideration").

[131] A claim common to public discourse is that legacy preferences constitute "affirmative action" for whites. *See, e.g.*, T.H. Rawls, *Legacy Admissions: Affirmative Action for Whites*, N.Y. TIMES, Aug. 7, 2017, at A18 ("There is also one deliberate and robust admissions policy used at many colleges that in effect constitutes white affirmative action: That is the preference given in admissions decisions to the children of alumni of the college."). This framing reflects the widespread recognition that legacy preferences function as white racial preferences and the dominant presumption that affirmative action comprises "racial preferences" for people of color.

[132] A similar analysis extends to "low-income students." *See SFFA v. Harvard II*, 980 F.3d 157, 172 (1st Cir. 2020) (comparing tip received by low-income students to larger tip received by legacies and athletes).

other consideration.[133] By one account, the "typical" white applicant would see their admission probability increase from 10% to 65% if they were a double legacy.[134] In contrast, were this "typical" candidate covered by Harvard's affirmative action policy, their likelihood of admission would increase to 36%.[135]

To be clear, the foregoing statistics should not be taken as *the* authoritative account of Harvard's Legacy+ preferences. Among other concerns, the underlying analyses omit multiple variables that shape the actual admissions process.[136] Moreover, any counterfactual that asks "what if a white student were Black?" inaccurately assumes that one can simply alter race and hold all other variables constant. Even recognizing these limitations, the data suggest that Harvard misrepresents its Legacy+ preferences—both with respect to their substance and impact. At minimum, the power that Harvard's Legacy+ preferences hold over admissions outcomes reinforces the need to shift the question from *whether* race shapes admissions outcomes to *how* it does.

In its decision upholding Harvard's admissions process, the First Circuit seemed poised to make this turn when it "describe[d] the background against which Harvard's tip tak[es] race into account."[137] But rather than identify racial (dis)advantages—such as legacy preferences—embedded across Harvard's admissions process, the Court siloed race to the moment of formal race-consciousness. One is hard-pressed to fault the court; it did little more than follow Harvard's lead.

3. Downplaying Race

As noted above, many on the Left recognize that facial neutrality does not guarantee racial neutrality. But even if one recognizes that racial (dis)advantages pervade the admissions context, a different question concerns the magnitude of those (dis)advantages: Are they marginal or defining features of the admissions landscape?

One might expect affirmative action advocates to emphasize race's centrality within and across facially neutral criteria. Harvard might, for example, offer the following assessment: "[R]ace permeates the admissions process to such an extent that it must be a predominant factor as the University makes its

[133] *See* Rawls, *supra* note 131 (discussing magnitude of legacy preferences).

[134] *See* Arcidiacono et al., *supra* note 118, at 147.

[135] *See id.* ("Yet shifting this typical [white] applicant into the disadvantaged category only increases the admission probability to 36%.").

[136] *See SFFA v. Harvard II*, 980 F.3d at 172 ("This model . . . suffered from the same problems and limitations as [Harvard's Office of Institutional Research's] earlier models in that it omitted many variables that Harvard actually considered in its admissions process.").

[137] *Id.* at 172.

decisions."[138] On its face, this statement buttresses the claim that affirmative action functions as a counterpreference that renders race less relevant in admissions. It may be surprising, therefore, that the statement comes from neither Harvard nor UNC, but from SFFA, the plaintiff suing to eliminate affirmative action.[139]

Harvard and UNC could have leaned into this claim. For example, they could have conceded that race permeates their admissions process—*because* racial (dis)advantages shape most, if not all, of their facially neutral considerations. This includes a range of metrics—including interviews, test scores, and grades—that tend to understate the academic talent and potential of students of color. Affirmative action is necessary, in turn, to counter the racial advantages white applicants would otherwise enjoy.

Harvard and UNC have not taken this approach. Instead, they downplay race's overall impact on their respective admissions processes. The following statements are illustrative:

- "SFFA asserts . . . that '[r]ace is often the reason that someone gets lopped,' i.e., removed from the tentatively admitted class due to class size constraints. That too is false."[140]
- "Even SFFA's expert conceded that 'a large number of applicants to Harvard will be rejected without race ever becoming a factor.'"[141]
- "[R]ace 'never becomes the defining feature" [sic] of applications,'—consideration of race never results in the admission of unqualified applicants, race-based tips are 'not disproportionate to the magnitude of other tips,' and race-based tips 'are not nearly as large' as those approved by the Court in Grutter . . . ."[142]
- "Thus, no matter which preferred model is used—[Defendant's] or [Plaintiff's]—race and ethnicity is not the dominant factor in whether an applicant is admitted or rejected across the University's admissions process."[143]

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[138] Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 602 (M.D.N.C. 2021) ("Plaintiff contends that the consideration of race permeates the admissions process to a degree that suggests race is a predominant factor."), *cert. granted*, 142 S. Ct. 896 (2022).

[139] *See id.*; *see also* Jay Caspian Kang, *Where Does Affirmative Action Leave Asian-Americans?*, N.Y. TIMES MAG., Sept. 1, 2019, at 34 (quoting Edward Blum, founder of SFFA, as saying "[w]e believe that a student's skin color or ethnic heritage should not be used to help or harm that student's prospects of being admitted to a college or university").

[140] Brief in Opposition, *supra* note 99, at 16 (alteration in original) (citations omitted).

[141] *Id.* at 23.

[142] *Id.* (citations omitted).

[143] UNC Proposed Findings, *supra* note 115, at 44; *see also* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d at 634 ("[R]ace plays a role in a very small percentage

- "[T]aken as a whole, the record evidence establishes that race and ethnicity is not the dominant factor in the University's admissions process."[144]

One can understand why Harvard and UNC took the above approach. The Supreme Court requires universities to evaluate each applicant "as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[145] This admonition suggests that race may inform the admissions process, but may not become a "defining feature" of an applicant's file.[146] Even if one agrees that race should not define the admissions process, that principle does not answer whether facial neutrality or race-consciousness gets you there. Put differently, even if the Constitution condemns selection processes where race predominates, there is no inherent reason why the Constitution prefers facially neutral processes over affirmative action. That conclusion requires a factual backdrop in which race is inoperative until that moment universities consciously think about and act on race. Trading on this basic logic, Harvard and UNC could champion affirmative action as a tool to reduce race's predominance across facially neutral criteria. But doing so would require Harvard and UNC to foreground the myriad sites within their admissions processes that reward inherited white racial advantage. Neither university has done so.

This discursive shift might make no difference to a hostile and ideologically motivated Supreme Court. But it matters. Identifying race as a defining feature of ostensibly colorblind selection criteria counters predictable lines of legal and political attack. The alternative—that is, minimizing race's impact across facially neutral considerations—rationalizes enduring inequality and facilitates resurgent attacks on antiracism at large.

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of decisions: 1.2% for in-state students and 5.1% for out-of-state students."); *id*. at 627 ("[T]he evidence tends to show that race is not a predominate factor in the University's candidate evaluations."); *id*. at 602 ("Plaintiff has provided no evidence that UNC . . . has allowed race to become a predominant factor in the admissions process, or has failed to adequately reflect on the role race plays in admissions decisions.").

[144] UNC Proposed Findings, *supra* note 115, at 100*; see also id*. at 42-43 (comparing the relative impact of race and standardized test scores on admissions outcomes).

[145] Grutter v. Bollinger, 539 U.S. 306, 337 (2003); *see also SFFA v. Harvard II*, 980 F.3d 157, 190 (1st Cir. 2020) (citing first Gratz v. Bollinger, 539 U.S. 244, 271-72 (2003); and then Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2207 (2016) for proposition that race had not become "decisive factor in admissions"). This doctrinal backdrop helps to explain why the student intervenors, who otherwise employ a counterpreference framing, also downplay race's overall relevance. *See* Harvard Intervenors Posttrial Brief, *supra* note 48, at 30 ("To be clear, race may have played a limited role in the admissions of Ms. Cole and Ms. Vasquez-Rodriguez, but there is absolutely nothing suspect about a university ascribing value to an applicant's ability to contribute to campus diversity based, in part, on their race.").

[146] *Grutter*, 539 U.S. at 337.

4. Transposing Racial Advantage

There are moments when Harvard and UNC suggest that racial (dis)advantages impact the admissions competition. But rather than acknowledge how colorblind considerations confer racial advantages to white applicants, the defendants suggest that affirmative action bestows racial advantages to students of color. In so doing, Harvard and UNC do more than obscure how their respective admissions processes benefit white applicants. They also transpose racial advantage by suggesting that to the extent it exists, it flows to students of color.

This is another manifestation of preference framing. Harvard and UNC could frame the question as whether their affirmative action policy is robust enough to neutralize racial (dis)advantages that benefit white applicants. Yet by transposing racial advantage, the defendants distort the inquiry to whether their respective policies extend too much "preferential treatment" to students of color.

To appreciate how Harvard and UNC transpose racial advantage, consider the following four statements:

1. "The consideration of race only ever benefits students who are otherwise highly qualified, and it is not decisive even for those candidates."[147]
2. "[Plaintiff's expert] acknowledged that race makes a difference only for a 'competitive pool' of applicants that is 'defined by a variety of variables and factors' other than race."[148]
3. "Simply because race and ethnicity might tip the scale for some students who are 'on the bubble' of being admitted or rejected does not mean that race and ethnicity plays a dominant role in the admissions decision and across the entire pool of applicants."[149]
4. "[Plaintiff's expert] further admitted that race is 'not a dominant factor for white applicants.'"[150]

The foregoing statements suggest that race, to the extent it shapes admissions outcomes, benefits students of color. This is inconsistent with colorconscious

[147] Brief in Opposition, *supra* note 99, at 6.

[148] Brief for Defendant-Appellee, *supra* note 94, at 63 (emphasis added). Harvard conveys a similar message when it denies imposing an "undue burden on any racial group." *See id*. at 66 ("Addressing Harvard's consideration of Asian-American applicants under the rubric of 'undue burden,' the court acknowledged that Asian-American (and white) students make up a smaller share of Harvard's class than they might under a race-neutral system.").

[149] UNC Proposed Findings, *supra* note 115, at 51; *see also id*. at 100 ("[R]ace explains, at most, a very small share of applicants' admissions outcomes.").

[150] *Id*. at 99; *see* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 630 (M.D.N.C. 2021) ("[Plaintiff's expert testimony] suggests that, while there might be a set of students who would see a sizable 'bump' in their admissions probability in the model because of their race, a typical student would see a very minimal difference in their odds of being admitted."), *cert. granted*, 142 S. Ct. 896 (2022).

conceptions of race and racism. But it is consistent with the other elements of colorblind capture. When a university (1) misdescribes affirmative action as a "racial preference," (2) extracts race from ostensibly "colorblind" considerations, and (3) downplays race's overall impact on admissions, it presents a world in which race is inoperative but for affirmative action. Against this backdrop, it naturally follows that racial advantage, if present, flows to affirmative action's direct beneficiaries.

Multiple aspects of the four preceding claims—all of which transpose racial advantage—deserve attention. To begin, Harvard and UNC conflate racial advantage with the formal recognition of race—a conceptual move that elides the race/class advantages wealthy white students enjoy in their respective admissions processes.[151] Note, as well, the suggestion that racial advantage only benefits "highly qualified" students of color. This phrasing obscures how race shapes the pool of "qualified" students long before the moment of admissions. By isolating racial (dis)advantage to the moment of admissions, Harvard and UNC erase how race shaped students' access to the social, political, and economic resources necessary to compile a competitive admissions file. From a different angle, the same language naturalizes the overrepresentation of white students within the pool of "highly qualified" students as the product of individual effort, not structural advantage.

The tendency to transpose racial advantage facilitates anti-affirmative action lay theories within public and legal discourse. Among other consequences, it fuels the narrative that affirmative action harms Asian Americans.[152] Harvard and UNC deny that they discriminate against Asian American applicants. But when they characterize affirmative action as the source of racial advantage, they obscure white racial advantages that harm all students of color—including many Asian Americans.[153] In so doing, Harvard and UNC reinforce the claim that

[151] When Harvard transposes racial advantage, the university obscures the racial advantage embedded in legacy preferences—a boost without which 75% of white legacy applicants would not gain admission. *See* Arcidiacono et al., *supra* note 117, at 147. When UNC transposes racial advantage, the university obscures how North Carolina's legacy of desegregation resistance continues to shape its admissions process and campus life.

[152] This narrative is not new. *See* Fisher v. Univ. of Tex., 579 U.S. 365, 410 n.4 (2016) (Alito, J., dissenting) ("The majority's assertion that UT's race-based policy does not discriminate against Asian-American students . . . defies the laws of mathematics. UT's program is clearly designed to increase the number of African-American and Hispanic students by giving them an admissions boost vis-à-vis other applicants . . . . Given a 'limited number of spaces,' . . . providing a boost to African-Americans and Hispanics inevitably harms students who do not receive the same boost by decreasing their odds of admission.").

[153] *See* Jonathan P. Feingold, SFFA v. Harvard*: How Affirmative Action Myths Mask White Bonus*, 107 CALIF. L. REV. 707, 727-28 (2019) ("In a case that ostensibly centers Asian vulnerability and victimhood, the one piece of SFFA's complaint that confronts anti-Asian bias runs up against steep doctrinal hurdles.").

affirmative action pits Asian Americans against other students of color.[154] As a result, entities targeting affirmative action need not construct a competing narrative; they can exploit the universities' own affirmative action story.

Colorblind capture is not inevitable. But to avoid it, affirmative action advocates must not lose sight of the colorconscious conceptions of race and racism they otherwise embrace. I next outline how universities, among other stakeholders, might do so.

III. EVADING COLORBLIND CAPTURE

I have explored how affirmative action advocates often traffic in colorblind conceptions of race and racism. Colorblind capture is ubiquitous. But it is not inevitable. To illustrate, I now explore how Harvard and UNC could more zealously defend their respective policies. My goal is modest: outline how advocates can defend race-conscious admissions without abandoning a colorconscious admissions story. Doing so starts with a basic reframe: rather than ask *whether* race operates within admissions, ask *how* race operates.

To start, I outline how affirmative action can reduce race's relevance before, during, and after admissions. By contextualizing the backdrop against which affirmative action intervenes, advocates can (1) fortify standard arguments (e.g., the diversity rationale), (2) leverage dormant insights (e.g., Justice Lewis Powell's antipreference rationale), and (3) challenge existing doctrine (e.g., applying strict scrutiny to remedial racial classifications).[155] From here, I identify two additional arguments that illuminate the predominance of race in most facially neutral policies.

Two notes before proceeding. First, the following is not a one-size-fits-all defense for race-conscious admissions. Advocates should tailor arguments to an institution's specific policy, local context, and history. For example, UNC spent decades actively resisting federal mandates to desegregate its campus. Over the same period, Harvard was among the first elite universities to adopt voluntary race-conscious admissions policies. Still, the following offers a roadmap to avoid the pitfalls of colorblind capture.

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[154] *See id*. at 718-19 (observing that positioning minority groups of color as victims of affirmative action "presumptively pits different groups of color against one another"); Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISCOURSE 590, 597-98 (2017).

[155] Such an approach would better approximate the multifront offensive that SFFA has marshalled against Harvard and UNC. SFFA has argued that (1) the universities violate existing law, and (2) the Supreme Court should overturn precedent in ways that render doctrine more hostile to affirmative action. *See* Complaint at 1-3, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass.), *aff'd*, 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176) (arguing Harvard violated Title VI of Civil Rights Act of 1964 and criticizing Supreme Court affirmative action cases); Complaint at 2-4, Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (arguing that UNC violated Fourteenth Amendment and federal civil rights laws).

Second, it is unlikely that any fact, argument, or rationale could persuade five current Supreme Court Justices to preserve race-conscious admissions.[156] But advocates should not let the Justices set the terms of engagement.[157] If there ever were a time to mobilize the most compelling case for race-conscious admissions, it is now.[158] Affirmative action fights remain a site where the public debates the enduring relevance of race and racism in America. In this moment of anti-antiracist backlash, defending affirmative action as a justifiable "preference" normalizes colorblindness and delegitimizes antiracism itself.[159]

A. *"Race Matters" Before, During, and After Admissions*

1. Before Admissions: Legacies of Racial Exclusion

In the wake of Jim Crow, federal courts recognized that the Constitution permits entities to employ race-conscious practices to remedy discrimination.[160] Within a generation, this remedial defense for affirmative action began to encounter "political and legal obstacles."[161] Over the same period, the Supreme

[156] Given the Supreme Court's current hostility to civil rights, advocates may be wary of marshaling novel arguments that the Court could reject—and thereby further restrict race-conscious practices. One strategy is to avoid litigation altogether. But as these cases reveal, it is unlikely universities will be able to avoid Supreme Court review without abandoning the challenged policy. And even if preemptively abandoning a policy prevented the creation of "bad" law, this strategy leads to the same result: the end of the challenged policy. A distinct set of questions might include the following: (1) How can universities rally public support around affirmative action without exposing race-conscious practices to unnecessary judicial scrutiny? (2) How might universities mitigate racial (dis)advantages even in the absence of affirmative action? (3) How might universities leverage high-profile litigation to defuse anti-affirmative action talking points that compromise broader antiracist efforts?

[157] *See* Carbado, *supra* note 20, at 1168 ("At the very least, liberal supporters of affirmative action, on the Supreme Court and elsewhere, ought to put their best foot forward when they defend the policy, which means reconceptualizing affirmative action as a countermeasure.").

[158] Moreover, the law is not static. Arguments unsuccessful today might bear future fruit. *See id*. at 1130 ("Given that the Court has grown even more conservative as a result of its recent additions, and the new challenges to affirmative action in the judicial pipeline, if ever there was a time for liberal Supreme Court justices to play racial justice offense, it is now.").

[159] *See id*. at 1173 ("It would be worrisome, to say the least, if such conflations and oversimplifications became the basis for the conservative Supreme Court justices to adjudicate affirmative action as unconstitutional per se. Whether liberal supporters of affirmative action realize it, they would be implicated in that outcome.").

[160] *See* Fisher v. Univ. of Tex., 570 U.S. 297, 317 (2013) (Thomas, J., dissenting) (reconizing that "remedying past discrimination for which [the defendant] is responsible" remains a compelling interest that justifies racial classifications).

[161] Kang & Banaji, *supra* note 49, at 1067-68 (describing argument that discrimination as tort is legal obstacle to remedial justification for affirmative action); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 92 (1986) (discussing challenges of remedial justification of affirmative action). Here, I use the

Court circumscribed the meaning of unlawful "discrimination"[162] and heightened the evidentiary burden affirmative action defendants must overcome.[163] These obstacles help to explain why Harvard and UNC have discarded remedial rationales to defend their race-conscious admissions policies.[164] These obstacles do not, however, justify abandoning remedial rationales.[165]

terms remedial defense and remedial justification interchangeably to capture the rationale that an entity may, consistent with the Constitution, employ race-conscious measures to remedy its own prior discrimination. This differs from remedial measures designed to ameliorate "societal discrimination," a rationale the Supreme Court has rejected. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination . . . . That goal was far more focused than remedying the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.").

[162] Given the Supreme Court's reluctance to find cognizable discrimination in cases spanning *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989); *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018); and *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2343 (2021)—all involving strong evidence of discriminatory intent or animus—one might question whether Harvard or UNC could fare any better.

[163] *See* Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 307 (1999) (explaining that successful remedial defense requires university to "demonstrate a 'strong basis in evidence for [its] conclusion that remedial action was necessary'"); Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 82 (2010) (finding that *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), protected "discriminatory testing that favors whites by doctrinally treating the City's efforts to avoid disparate impact liability as conclusive evidence of an impermissible racial motive that violates the statute's proscription against disparate treatment").

[164] *See* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 322 (2017) ("Because of the legal obstacles associated with articulating and maintaining a race-conscious affirmative action program for purposes of remedying past discrimination, those seeking to utilize a race-conscious affirmative action program are more likely to prevail in court if they instead choose to articulate a desire to achieve diversity as the rationale for such a program."). A separate explanation is that remedial rationales force universities to broadcast ugly institutional stories that could invite legal liability. *See* Feingold, *supra* note 114, at 57-60 (noting how "self-interest dissuades universities from gather [sic] facts that might reveal unlawful racial discrimination. Similar motivation can dissuade universities from endorsing theories of discrimination that, if legally cognizable, could implicate the university"); Jenkins, *supra* note 163, at 307-08 (discussing how "*Croson* standard places great weight on evidence that would raise an inference of liability against the government under the Equal Protection Clause and 1964 Civil Rights Act" and how "that same showing creates a prima facie case of unlawful discrimination against the affirmative action defendant vis-à-vis excluded minorities").

[165] Harvard incorrectly asserts that student body diversity is the only compelling interest available to defend race-conscious admissions. *See* Harvard's Response to Motion to

To begin, bridging past to present enables universities to tell a fuller story about why race still matters.[166] This act of truth-telling comprises an important intervention in itself—particularly against the backdrop of a growing campaign to erase the past through book bans and educational gag orders.[167] When elite schools deny or diminish the past's imprint on the present they sacrifice more than an opportunity to defend affirmative action. Such narratives also feed regressive talking points that seek to legitimize existing inequality by locating racism in an ignoble past.

But even as a matter of law, the remedial justification enjoys a stronger constitutional mooring than other viable defenses—including the diversity rationale.[168] Even Justice Clarence Thomas, arguably the Court's most vocal

Intervene at 5, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass.), *aff'd*, 807 F.3d 472 (1st Cir. 2015) (No. 14-cv-14176) ("Harvard has long sought to admit a diverse student body precisely because of the beneficial effects of diversity that it has witnessed among its students from all backgrounds. . . . The compelling interest that the Supreme Court has recognized as permitting universities to consider race in admissions is the pursuit of diversity, not the remediation of past injustices."). Some lower federal courts have adopted this misplaced position, which appears to derive from imprecise language in Justice Anthony Kennedy's *Fisher I* opinion. *See* Memorandum and Order on Proposed Defendant–Intervenor's Motion to Intervene, 308 F.R.D. 39, 51 n.6 (2015) ("The Court, however, has also suggested that a university may not employ racial classifications to remediate past instances of discrimination or injustice, because a 'university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification.'" (alteration in original) (citations omitted)). Reading Justice Kennedy's opinion in *Fisher I* alongside Justice Clarence Thomas's dissent, the most plausible reading is that Justice Kennedy was reiterating that "societal discrimination" does not justify affirmative action—not that a university cannot employ race-conscious admissions to remedy its own discrimination.

[166] Tom Foreman Jr., *UNC Protesters Cite Ongoing Frustrations Amid Tenure Dispute*, U.S. NEWS (June 25, 2021, 10:28 PM), https://www.usnews.com/news/best-states/north-carolina/articles/2021-06-25/amid-tenure-dispute-blacks-at-unc-cite-ongoing-frustrations (noting demonstrators' message of similarities between Black students' treatment on campus in 2021 and that of Black people in 1619 in context of protest around failure to grant Nikole-Hannah Jones tenure).

[167] *See* Jeffrey Sachs, *Scope and Speed of Educational Gag Orders Worsening Across the Country,* PEN AM. (Dec. 13, 2021), https://pen.org/scope-speed-educational-gag-orders-worsening-across-country/ [https://perma.cc/LG24-HAFL] (observing trend of state bills restricting education on race, sex, and gender throughout U.S. schools and state agencies); Kimberlé Williams Crenshaw, *King Was an Early Critical Race Theorist*, L.A. TIMES Jan. 17, 2022, at A1 ("[CRT] has become the target of coordinated efforts to stigmatize and erase generations of antiracist knowledge, advocacy and history. The objective is both to disappear antiracism's history and to deny its contemporary salience.").

[168] *See* Jenkins, *supra* note 163, at 323 n.221 ("[*Croson* and *Adarand*] reaffirmed . . . that 'government bodies . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination.'" (quoting United States v. Paradise, 480 U.S. 149, 166 (1987)).

affirmative action opponent, recognizes that the remedial justification remains constitutionally sound:

> [T]he Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a government wishing to use race must provide a "strong basis in evidence for its conclusion that remedial action [is] necessary."[169]

It is one thing for Justice Thomas to identify a valid theoretical defense and another for him to uphold an affirmative action policy on that basis. Only a naïve reader would confuse Justice Thomas's endorsement of the remedial rationale with an earnest commitment to uphold affirmative action when a record reveals past discrimination.[170] That said, there is little reason to believe the diversity rationale—where Harvard and UNC place their litigation eggs—will fare any better before the current Court.

In short, the remedial rationale offers a doctrinal anchor to invoke and implicate histories of racial exclusion that compromise racial inclusion in the present.[171] By extension, litigation affords universities an elevated platform to publicly address their own legacies of racialized segregation and subordination—thereby countering narratives that deny how racism shaped our past and shapes our present.[172]

Neither Harvard nor UNC have embraced this opportunity. In fact, both have resisted intervenor attempts to develop a record necessary to support a remedial defense.[173] This reluctance to highlight the past is not limited to today's

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[169] Fisher v. Univ. of Tex., 570 U.S. 297, 317 (2013) (Thomas, J., concurring in part and dissenting in part) (alteration in original) (citation omitted).

[170] *See* Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 12-13 (2002) ("Even then, it was clear that the defense of an ongoing legal obligation to take affirmative steps to integrate a particular university's student body was undoubtedly limited to a very small subset of the leading institutions that engage in affirmative action. Moreover, as reflected in the recent University of Georgia litigation, even once-segregated institutions are increasingly removed from that formal discriminatory past.").

[171] The District Court, relying on an intervenor's expert witness, noted that UNC's discriminatory past might support its admissions policy. Notably, the court linked this evidence to the diversity rationale. *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 590 n.5 (M.D.N.C. 2021) ("[The intervenor's] expert report—which details UNC's reckoning with race over the full course of its history and illuminates the history of racial discrimination in North Carolina's K-12 public schools—is an important contribution to the Court's understanding of the context of this case."), *cert. granted*, 142 S. Ct. 896 (2022).

[172] How a university discusses racism can constitute an important intervention. *See* Adam Harris, *This Is the End of Affirmative Action: What Are We Going to Do About It?*, ATLANTIC (July 26, 2021), https://www.theatlantic.com/magazine/archive/2021/09/the-end-of-affirmative-action/619488/ (describing introspective projects at elite universities).

[173] The UNC intervenors sought to "present evidence showing that UNC-Chapel Hill's current admissions policy is necessary in part because it helps remedy the long history of

affirmative action litigants; university defendants have long resisted intervenor efforts to foreground the university's own history of racial discrimination.[174]

To concretize how foregrounding the past can buttress the case for affirmative action in the present, I turn to UNC, whose history of de jure segregation and desegregation resistance invites a remedial defense.[175]

Prior to 1951,[176] the UNC system formally barred Black students from every campus.[177] In 1951, student plaintiffs prevailed in litigation that forced UNC to

segregation and discrimination in North Carolina, including within the University itself." Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 15, Students for Fair Admissions v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (No. 14-cv-00954); *see also id*. ("This [unfavorable] outcome could result if the Court does not consider or weigh . . . the history of discrimination at UNC-Chapel Hill, the inextricable link between that history and UNC's current compelling interest in student body diversity, and the adverse effect that elements of the current admissions process have on the diversity of the student population.").

[174] *See* William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research*, 12 BERKELEY LA RAZA L.J. 173, 175 (2001) ("Despite these clear conflicts of interest, [regarding affirmative action between students of color and universities] and while for decades leading scholars and advocates have recognized the importance of student intervention in affirmative action cases, it has been a real struggle to get minority student voices heard."); *see also* Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1244 (11th Cir. 2001) ("Although UGA argues loosely that its use of race is 'supported' by the university's history of discrimination, UGA does *not* identify remediating past discrimination as the compelling interest justifying its policy; indeed, it has repeatedly disavowed that interest.").

[175] For records detailing UNC's desegregation resistance, see *Desegregation of the University of North Carolina at Chapel Hill: Archival Resources*, UNC UNIV. LIBS., https://guides.lib.unc.edu/desegregation-unc/archival [https://perma.cc/FWV4-Q4EC] (last updated May. 4, 2022, 5:32 PM) (noting how in 1970, UNC was "in violation of the 1964 Civil Rights Act for maintaining a racially dual system of public higher education").

[176] The following overview is inexhaustive. Among other limitations, I focus on admissions policies in the years following *Brown v. Board of Education*. Excluded, in turn, are myriad manifestations of racial discrimination at UNC and the surrounding area. *See* Daniel H. Pollitt, *Legal Problems in Southern Desegregation: The Chapel Hill Story*, 43 N.C. L. REV. 689, 691 (1965) (commenting that in 1963 "[t]he three motels (although not the University-owned Carolina Inn), the only bowling alley, all the barbershops except the one located in the campus student union, approximately a third of the restaurants (especially those ringing the town), two grocery stores fronting the highways leading into the community, and several service stations were segregated; some with 'White Only' signs in prominent display"). Moreover, my focus omits UNC's much longer legacy of white supremacy—including the university's entanglement with, and support for, the Confederacy and slavery. *See generally* GEETA N. KAPUR, TO DRINK FROM THE WELL: THE STRUGGLE FOR RACIAL EQUALITY AT THE NATION'S OLDEST PUBLIC UNIVERSITY (2020) (introducing work as exposing long-concealed and dark history of university).

[177] Donna L. Nixon, *The Integration of UNC-Chapel Hill—Law School First*, 97 N.C. L. REV. 1741, 1742 (2019) (describing battle to admit five Black students to UNC School of

admit Black students to its law school and medical school.[178] Yet this decision was limited; it neither compelled nor prompted corresponding changes across the state's public university system. Even after *Brown v. Board of Education*,[179] which prohibited de jure segregation in public schools, UNC continued to bar students of color from its undergraduate campuses.[180] This resistance occurred in the face of public protest and legal challenges.[181]

Not until 1955, following a federal court order, did UNC formally desegregate its undergraduate campuses.[182] But abolishing de jure segregation did not translate to racial inclusion. Among other factors, UNC's leadership lacked a commitment to remedy the university's legacy of racial segregation.[183] In fact,

Law, noting "their enrollment and attendance at [UNC School of Law] was the result of years of effort to desegregate higher education in the United States").

[178] *See* McKissick v. Carmichael, 187 F.2d 949, 950 (4th Cir. 1951) (reversing dismissal of case seeking injunction prohibiting UNC School of Law from denying admission to Black applicants); *Oscar Diggs and James N. Slade*, THE CAROLINA STORY: A VIRTUAL MUSEUM OF UNIVERSITY HISTORY, https://museum.unc.edu/exhibits/show/medschool/oscar-diggs-and-james-n--slade [https://perma.cc/J7YU-GAAG] (last visited Oct. 25, 2022) ("Anticipating a similar ruling for the medical school, the trustees removed racial barriers to admission there. Later that year, Oscar Diggs . . . enrolled as the first African American in the medical school.").

[179] 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place.").

[180] Frasier v. Bd. of Trs. of the Univ. of N.C., 134 F. Supp. 589, 590 (M.D.N.C. 1955), *aff'd*, 350 U.S. 979 (1956) (per curiam).

[181] *Id.* (challenging UNC's orders denying undergraduate admission to university). A 1955 statement from UNC's Board of Trustees captures the university's commitment to racial exclusion: "The State of North Carolina having spent millions of dollars in providing adequate and equal educational facilities in the undergraduate departments of its institutions of higher learning for all races, it is hereby declared to be the policy of the Board of Trustees of the Consolidated University of North Carolina that applications of Negroes to the undergraduate schools of the three branches of the Consolidated University be not accepted." *Id.*

[182] Bd. of Trs. of the Univ. of N.C. v. Frasier, 350 U.S. 979, 979 (1956) (per curiam); *see also* Hannah McMillan, *Challenging Jim Crow: Desegregation at the University of North Carolina at Chapel Hill*, 2 TRACES 112, 123 (2013).

[183] JENNIFER B. AYSCUE, BRIAN WOODWARD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, CIV. RTS. PROJECT/PROYECTO DERECHOS CIVILES, SEGREGATION AGAIN: NORTH CAROLINA'S TRANSITION FROM LEADING DESEGREGATION THEN TO ACCEPTING SEGREGATION NOW 2 (2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/segregation-again-north-carolina2019s-transition-from-leading-desegregation-then-to-accepting-segregation-now/Ayscue-Woodward-Segregation-Again-2014.pdf [https://perma.cc/B45N-NPBU] ("Unlike other Southern states that used more overtly defiant tactics to oppose the federal government, North Carolina's state and local politicians implemented a subtle legal strategy to delay integration as long as possible.").

in the decades since *Brown*, one could argue that UNC has done more to resist desegregation than to achieve integration.[184]

Throughout the 1960s, North Carolina resisted desegregation through a strategy of "moderation."[185] Breaking from other post-Confederate states that outright defied federal mandates, North Carolina's white elite employed a subtler approach that privileged token representation and moderated rhetoric.[186] Moderation proved an effective strategy.[187] As late as 1969, fifteen years after *Brown* and five years after Congress passed the Civil Rights Act of 1964,[188] UNC remained, in all meaningful respects, an all-white institution.[189]

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[184] North Carolina has a more nuanced history of desegregation at the K-12 level, in which the state saw meaningful racial integration before a period of resegregation. *See id*. at xi (noting resegregation of North Carolina schools, stating "North Carolina, a state that has long prided itself on its educational success, no longer lays claim to successfully desegregated schooling"). But even the period of increased racial integration is a mixed story; it often involved the closure of successful Black schools and the termination of successful Black educators. *See* Irving Joyner, *Pimping* Brown v. Board of Education*: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160, 194 (2013) ("From 1963 to 1970, the number of Black principals in the state's elementary schools plunged from 620 to only 170. Even more striking, 209 Black principals headed secondary schools in 1963, but less than 10 still held that crucial job in 1970. By 1973, only three had survived this wholesale displacement." (quoting DAVID S. CECELSKI, ALONG FREEDOM ROAD: HYDE COUNTY, NORTH CAROLINA AND THE FATE OF BLACK SCHOOLS IN THE SOUTH 8 (1994))).

[185] *See* Davison M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade After* Brown, 89 NW. U. L. REV. 92, 98 (1994) ("[T]he concept of 'moderation' in the post-*Brown* South, particularly in North Carolina, was a malleable concept, skillfully used to deflect widespread pupil integration. Resistance to *Brown* was far more spectacular in the defiant southern states such as Virginia and Louisiana, but equally effective in states such as North Carolina that understood the value of tokenism and appeals to moderation.").

[186] *See* Braxton Craven, Jr., *Legal and Moral Aspects of the Lunch Counter Protests*, CHAPEL HILL WKLY., Apr. 28, 1960, at 1B. Even before *Brown*, North Carolina's legislature had opened an all-Black law school for the express purpose of excluding Black students from its flagship schools. Nixon, *supra* note 177, at 1756-57 (citation omitted) ("The unaccredited North Carolina College School of Law was . . . the only institution open to African Americans for enrollment. It was specifically created . . . to avoid integrating Carolina Law, the state's flagship university . . . ."); *see* Joyner, *supra* note 184, at 169.

[187] *See* Douglas, *supra* note 185, at 98 (noting how moderation was "skillfully used to deflect widespread pupil integration").

[188] Title VI of the Civil Rights Act of 1964 prohibits entities receiving federal funding from discriminating based on race. 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[189] *See* Hist. Dep't of N.C. State Univ., *Fluctuating Commitment*, STATE OF HIST., https://soh.omeka.chass.ncsu.edu/exhibits/show/colorline-hew/hewcommitment [https://perma.cc/8LB2-J3QE] (last visited Oct. 25, 2022).

Even if initially effective, UNC's efforts to evade desegregation mandates never escaped public scrutiny. Buoyed by the Civil Rights Movement, local stakeholders and organizations pressed the federal government to enforce antidiscrimination law.[190] In 1969, the Nixon administration ordered North Carolina and nine other states to develop desegregation plans.[191] Rather than comply, UNC joined four states that "ignored the request because they realized that Nixon did not plan to enforce consequences for failing to comply."[192] The following year, Nixon's Department of Health, Education, and Welfare ("HEW")[193] advised UNC that failing to remedy its legacy of de jure segregation violated Title VI.[194] The agency's complaint initiated a decade of negotiation between UNC and the federal government.[195] This stalemate ended in 1979, when the Carter Administration—which revived Executive Branch commitments to civil rights enforcement—announced its intent to terminate roughly $90 million in federal funding to UNC.[196]

The threat was short-lived. In 1981, Ronald Reagan entered the White House and brought with him an education philosophy more sympathetic to desegregation resistance than desegregation itself. That year, UNC and Reagan's Department of Education entered a settlement to govern desegregation across the UNC system.[197] The settlement ended the eleven-year legal dispute.[198] It did not, however, convince local civil rights leaders that North Carolina would desegregate its public universities. The skepticism was warranted. Beyond lacking specific requirements, the agreement was negotiated in secret and

[190] *Id*.

[191] *Id*.

[192] *Id*.

[193] In 1979, HEW was split into the Department of Health and Human Services and the Department of Education. *See United States Department of Health, Education and Welfare Records*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://www.jfklibrary.org/asset-viewer/archives/USDHEW [https://perma.cc/35YD-726P] (last visited Oct. 25, 2022).

[194] *See* David W. Bishop, *The Consent Decree Between the University of North Carolina System and the U.S. Department of Education, 1981-82*, 52 J. NEGRO EDUC. 350, 353 (1983) ("Toward the end of 1969, [the Department of Education's Office of Civil Rights] decided that ten states were operating segregated systems of higher education in violation of Title VI. HEW finally sent letters to those ten states requesting that they devise statewide plans to desegregate and integrate their dual systems of higher education.").

[195] In 1973, UNC submitted a desegregation plan that called for enhanced recruitment, remedial programming, and an antidiscrimination policy, among other provisions. Nixon's Department of HEW rejected the plan for lacking specific admissions goals or plans for execution. *See id*.

[196] *See* Hist. Dep't of N.C. State Univ., *Consent Decree, 1979-1981*, THE STATE OF HIST., https://soh.omeka.chass.ncsu.edu/exhibits/show/colorline-hew/hewconsentdecree [https://perma.cc/3RZJ-FJJM] (last visited Oct. 25, 2022); *see also* Bishop, *supra* note 194, at 353 (noting that North Carolina had $90 million in federal funding on the line).

[197] Bishop, *supra* note 194, at 350.

[198] *Id*.

facilitated by North Carolina Senator Jesse Helms—a stalwart segregationist.[199] David S. Tatel, who led the Office of Civil Rights at HEW during the Carter Administration, offered a candid reaction:

> This is the first really major action the new administration has taken in the civil rights field, and it shows they're not interested in enforcing the civil rights laws that prohibit segregation in education . . . . This settlement doesn't read like a desegregation plan. It reads like a joint U.S.-North Carolina defense of everything the system did.[200]

Elliott C. Lichtman, who prepared multiple NAACP briefs over the preceding decade, offered a similar take. Lichtman termed the agreement "'a triple end run' around federal courts in Washington, civil rights laws and the Constitution."[201]

In sum, for nearly three decades after *Brown v. Board of Education*,[202] North Carolina's white political class defied federal orders to integrate its public university campuses. Federal confrontation ended in 1981, but only through a closed-door negotiation between outspoken segregationists and a sympathetic administration.

A brief review of UNC's racial demographics adds texture to this partial history.[203] Before *Brown*, UNC formally barred Black students from its campuses.[204] In the four years following *Brown*, UNC's undergraduate Black

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[199] *The New York Times* portrayed the consent decree as follows: "But the agreement does not require the state university system, which includes 16 campuses, to dismantle programs at white schools to eliminate duplication of programs, as the Carter Administration had demanded. The agreement was worked out in secret negotiations at the same time the Government was taking the state to court in a suit that could have cost North Carolina $90 million in Federal education aid. . . . Mr. Bell credited Senator Jesse Helms, Republican of North Carolina, with helping to start the negotiations with North Carolina officials. He said Mr. Helms had told them of Mr. Bell's interest and that secret talks were conducted through Douglas Bennett, a Washington lawyer." *Carolina Settles Integration Suit on Universities*, N.Y. TIMES, June 21, 1981, at 22.

[200] Charles R. Babcock, *U.S. Accepted Desegregation Plan Once Rejected for N.C. Colleges*, WASH. POST (July 11, 1981), https://www.washingtonpost.com/archive/politics/1981/07/11/us-accepted-desegregation-plan-once-rejected-for-nc-colleges/3e4c542b-40b8-405f-8cc9-a46952035b0f/.

[201] *See id.* (stating also that NAACP would challenge the consent decree); *see also* Bishop, *supra* note 194, at 359 ("The LDF concluded that the Decree totally lacked 'commitments to meet *specific* requirements of the desegregation "Criteria" . . . .'").

[202] 347 U.S. 483, 495 (1954).

[203] Institutional demographic statistics never tell a complete story. Still, these figures add depth to UNC's legacy of racial exclusion. As a point of reference, North Carolina's population is roughly 22% Black, a baseline that the State has employed to measure racial inclusion within its universities. *See QuickFacts North Carolina*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/NC [https://perma.cc/EV8K-5MAY].

[204] *See* Nicholas Graham, *Historic African American Enrollment at UNC*, UNC UNIV. LIBRS. (Apr. 21, 2016), https://blogs.lib.unc.edu/hill/2016/04/21/historic-african-american-

student population never exceeded seven students (or 0.14% percent of the entire undergraduate student population).[205] By 1974, amid federal litigation, undergraduate Black enrollment reached nearly 700 students (surpassing 5% of the student body).[206]

UNC's percentage of Black students peaked in 2011, at 9.2% of the undergraduate campus population.[207] This figure represents a significant increase from thirty-five years prior, when the State settled with Reagan's Department of Education. Still, in a state that is over 20% Black, that peak reflects UNC's inability to rectify a legacy of racial exclusion. In the decade since, UNC's Black student population declined to a low of 7.6% in 2018.[208] In 2014, the year SFFA sued UNC, that number was 7.9%.[209]

The foregoing provides a partial picture of UNC's exclusionary history. Yet it exceeds the picture UNC has presented throughout the litigation. Fortunately, UNC's legacy of exclusion is not wholly absent from the case.[210] Notwithstanding UNC's resistance, student intervenors secured the right to share a more comprehensive account. Through their advocacy, the intervenors reveal how UNC could have marshaled a more capacious remedial defense that ties past to present.[211] This starts with the intervenors' basic framing of the case:

enrollment-at-unc/ [https://perma.cc/QLK2-PAR4] ("African American students joined the undergraduate population in 1955.").

[205] *See id*.

[206] *See id*.

[207] Graham, *supra* note 204.

[208] *Analytic Reports: Student Characteristics*, UNIV. OF N.C. AT CHAPEL HILL OFF. OF INSTITUTIONAL RSCH. & ASSESSMENT, https://oira.unc.edu/reports/ [https://perma.cc/ZQ25-G8T7] (last visited Oct. 25, 2022). To view the relevant student characteristics statistic, navigate to the "Diversity" tab, select "Student Characteristics," choose "2018" from the "Select Calendar Year" dropdown menu, choose "Fall" from the "Select Term Type" dropdown menu, and finally, select "(All)" from the "Select Student Level" dropdown menu.

[209] *Id*. To view the relevant student characteristics statistic, navigate to the "Diversity" tab, select "Student Characteristics," choose "2014" from the "Select Calendar Year" dropdown menu, choose "Fall" from the "Select Term Type" dropdown menu, and finally, select "(All)" from the "Select Student Level" dropdown menu.

[210] UNC's only reference to the Consent Decree is for definitional purposes. *See* Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law at 9, Students for Fair Admissions v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (No. 1:14-cv-00954). UNC does not, for example, explain the conditions that permitted the consent decree's adoption, the decades of desegregation resistance it followed, nor the desegregation resistance it enabled.

[211] *See id*. at 2-3 ("Unrebutted evidence demonstrates that while UNC has made strides in harnessing the benefits of diversity, Black, Latinx, and Native American students continue to experience tokenism, false stereotypes, racial isolation, and overt racial hostility on UNC's campus. These dynamics require UNC's ongoing attention to both numeric representation and contextual factors that shape the campus climate.").

> [A] "race-blind" . . . admissions process would produce a range of harms. Such harms would include: . . . lessening the diversity within each racial group, thereby entrenching racial stereotypes; exacerbating racial isolation among students who are already among the most marginalized on UNC's campus; and undermining their leadership and collective efforts to *counter the lingering effects of racial discrimination on campus*.[212]

To support their argument, the intervenors tie contemporary racial hostility and incidents of anti-Black racism to North Carolina's "sordid history of state sponsored racial discrimination, which includes excluding African-American and other students of color from UNC-Chapel Hill."[213] The intervenors emphasized that even after court-ordered integration, "UNC's leadership turned a blind eye to the discrimination experience by those same students once admitted."[214] The intervenors further relay how UNC's institutional culture continues to stymie the full participation of students of color.[215] This culture is linked to individual acts of bias, the presence of confederate relics, and visits by white nationalists.[216] Against this backdrop, the intervenors contend that "[w]hile UNC publicly rejects its prior legacy of racial discrimination and has made some progress in removing and renaming confederate relics, . . . *UNC's historical context has present-day manifestations that make students of color feel unwelcome on UNC's campus*."[217]

To be clear, there is no reason to believe that this conclusion or the evidence on which it relies could sway a hostile court. Still, this story is significant; without understanding UNC's racial past, it is impossible to understand UNC's racial present. In short, this historical account enables a more honest, comprehensive, and colorconscious story about race's role in UNC's admissions process today. Unlike UNC, the intervenors defend affirmative action as a modest antidote to ongoing racial harms inseparable from an institutional legacy of racial exclusion.

2. During Admissions: Racially Defective Measures of "Merit"

Above, I outlined how an institution's historical legacy of racial exclusion continues to shape the present. Next, I explore how race matters in the present. Specifically, I examine how facially neutral criteria systematically understate the existing academic qualifications of students from negatively stereotyped

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[212] *Id*. at 3 (emphasis added).

[213] *Id*. at 41.

[214] *Id*. at 41-42.

[215] *See id*. at 64 ("UNC's past history does not stand in isolation. The record is abundantly clear that to this day, issues of race, white supremacy, and the historic legacy of slavery and Jim Crow discrimination continue to pervade UNC's campus environment, impacting the University's ability to harness the educational benefits that flow from student body diversity.").

[216] *See id*. at 42-43.

[217] *See id*. at 43-44 (emphasis added).

racial groups. This insight undergirds the claim that affirmative action counters concrete and quantifiable racial advantages that flow to white applicants during the admissions process.

Elsewhere, I have detailed how standard measures of "merit"—e.g., standardized tests, grades, interviews—tend to understate the academic "merit" of students of color.[218] The underlying scholarship underscores a critical observation: a portion of perceived achievement "gaps" is illusory.[219] Instead of capturing actual differences in preparation, ability, or motivation, a substantial portion of "achievement gaps" reflects measurement errors that artificially inflate the relative merit of white students.[220]

This is not a "pipeline" story that attributes the underrepresentation of Black and Latinx students to past discrimination (e.g., racially disparate access to well-resourced K-12 schools).[221] Rather, this is a story about universities privileging

[218] *See* Jonathan Feingold, Note, *Racing Towards Color-Blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSPS. 231, 233 (2011) (examining stereotype threat impact on performance on the Law School Admission Test (and in law school); *see also* Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 312, 324 (2015) (explaining that common measures of intellectual ability underestimate minority students' potential because pervasive negative intellectual stereotypes cause distraction and anxiety that impede academic achievement); Carbado, *supra* note 20, at 1146-47 (citations omitted) ("There is some, albeit imperfect, evidence that implicit biases [and stereotype threat] . . . impact[], to the detriment of students of color, critical admissions criteria and decisions, including: (1) the content of letters of recommendation; (2) assessment of resumes; (3) evaluation of writing samples; (4) student performance on standardized tests; (5) grading; (6) mentoring; and (7) class placement decisions.").

[219] *See* Christine R. Logel, Gregory M. Walton, Steven J. Spencer, Jennifer Peach & Zanna P. Mark, *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCH. 42, 43 (2012); Feingold, *infra* note 232, at 98 ("[A] portion of perceived group-based differences across educational settings is often illusory, a consequence of psychological harms that obscure the actual, but 'latent,' ability of negatively stereotyped students.").

[220] This story of discrimination is narrow. It does not, for example, implicate intersecting structural dynamics (e.g., the relationship between housing segregation and educational resources) and individual behavior (e.g., teacher expectations) that shape a student's educational trajectory before the moment of admissions. *See* Carbado, *supra* note 20, at 1139-43.

[221] More broadly, "pipeline" theories assume that certain groups (e.g., Black students) remain underrepresented in employment or educational domains because they are underqualified relative to groups that are overrepresented (e.g., white students). *See* Kristen Monroe & William Chiu, *Gender Equality in the Academy: The Pipeline Problem*, 43 POL. SCI. & POL. 303, 303 (2010) ("The image of a pipeline is a commonly advanced explanation for persistent discrimination that suggests gender inequality will decline once there are sufficient numbers of qualified women in the hiring pool."). Narratives that attribute racial

fraught measures of "merit" that, in practice, subject students of color to unequal treatment by understating their true academic qualifications.[222] When universities fail to correct for fraught metrics, they confer racial advantages to wealthy white students. Affirmative action, by countering those racial advantages, promotes a more objective, individualized, and race-neutral process.

Notably, this counterpreference framing enjoys a doctrinal hook. In *Bakke*, Justice Powell made the following observation:

> Racial classifications in admissions conceivably could serve a fifth purpose . . . : *fair appraisal of each individual's academic promise* in the light of some *cultural bias in grading or testing procedures*. To the extent that race and ethnic background were *considered only to the extent of curing established inaccuracies* in predicting academic performance, it might be argued that there is *no "preference" at all*.[223]

In the decades since *Bakke*, social scientists from a range of disciplines have confirmed Justice Powell's insight.[224] Yet with minor exception, affirmative action advocates have not harnessed this counterpreference framing—even

disparities in admissions to racialized resource gaps are not, in whole, wrong. But they tend to (1) reproduce the pernicious presumption that Black students are less capable and talented than their white counterparts and (2) conflate racial (dis)advantage with class (dis)advantage. *See* Jonathan P. Feingold, *Deficit Frame Dangers*, 37 GA. ST. U. L. REV. 1235, 1249-50, 1258-60 (2021). Among other consequences, "pipeline" stories can reinforce the unfounded claim that middle-class status inoculates students of color from racial disadvantage. *See generally* Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMPLE L. REV. 513, 530, 537 (2019) (exploring the intersection of class and race in university admissions and arguing that class-based admissions serve neither poor white people nor people of color).

[222] Standard measures of merit are most likely to understate the existing talent of students from "the academic vanguard of their group"—that is, students who are race disadvantaged but class privileged. Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613, 617 (1997); *see also* Camille Lamar Campbell, *Getting at the Root Instead of the Branch: Extinguishing the Stereotype of Black Intellectual Inferiority in American Education, A Long-Ignored Transitional Justice Project*, 38 LAW & INEQ. 1, 54 (2020) ("Paradoxically, highly-motivated students who are most invested in academics and whose academic engagement should enhance their performance are most vulnerable to stereotype threat.").

[223] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978) (emphasis added).

[224] Justice Powell relegated this insight to a single footnote, in part, because U.C. Davis did not invoke the counterpreference argument—an omission that tracked U.C. Davis's ambivalence toward its own policy. *See* DREYFUSS & LAWRENCE, *supra* note 87, at 32. Available evidence supporting a counterpreference frame included many of U.C. Davis's own students, who achieved great academic success at U.C. Davis but would not have been admitted based on standard admissions considerations. *See id.* at 46, 74-75. Moreover, U.C. Davis never disclosed that the Medical School Dean employed a discretionary list—a practice through which the Dean approved the admission of roughly five (out of 100) wealthy and well-connected students per admissions cycle who would not have been admitted otherwise. *See id.* at 24, 47.

though it reinforces the constitutional and moral case for affirmative action and dovetails with the Colorconscious Story.

To see how a university might mobilize this counterpreference framing, I now turn to Harvard.[225] To begin, we might ask whether Harvard considers criteria likely to compromise a "fair appraisal" of an applicant's "academic promise." At least three stand out: (1) standardized test scores;[226] (2) teacher and counselor recommendations; and (3) alumni interviews.[227]

We can start with standardized tests.[228] Decades of research confirm that racial performance gaps cannot be fully explained by differences in preparation, motivation, or resources.[229] A significant portion results from environmental forces such as *stereotype threat*, a psychological phenomenon that depresses the performance of high-achieving individuals in domains where their group faces a negative stereotype.[230]

Stereotype threat's impact is concrete and quantifiable. According to two meta-analyses, stereotype threat may account for roughly one-fifth of a standard

[225] Albeit underdeveloped, the student intervenors mobilized counterpreference frames in the Harvard and UNC litigation. *See* Defendant-Intervenors' Proposed Findings of Fact and Conclusions of Law at 17, Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (No. 1:14-cv-00954) ("Race-[c]onscious [a]dmissions [a]llows UNC to [a]ccount for [i]nequalities and [b]etter [a]ssess a [s]tudent's [p]otential."); Harvard Intervenors Posttrial Brief, *supra* note 48, at 10 ("Traditional admissions criteria systematically undervalue the potential contributions of racial minorities . . . . The ability to consider race allows admissions officers to counterbalance the racial skew in admissions criteria and academic opportunities.").

[226] In December 2021, Harvard announced that standardized test scores would be an optional component of an applicant's application through 2026. *See* Nick Anderson, *Harvard Won't Require SAT or ACT Through 2026 as Test-Optional Push Grows*, WASH. POST (Dec. 16, 2021, 7:00 PM), https://www.washingtonpost.com/education/2021/12/16/harvard-test-optional-college-admissions/. This places Harvard alongside a growing number of universities that have reduced or eliminated reliance on standardized test scores. *See id*.

[227] Race arguably influences every criterion upon which Harvard relies. *See* Carbado, *supra* note 20, at 1145 ("Negative action can manifest itself not only in 'hard' evaluative measures, such as standardized test scores and grades, but also in 'soft' evaluative measures, such as leadership experience, awards, extracurricular opportunities, internships, and letters of recommendation."). I have limited the Article's focus to the three identified criteria to manage scope.

[228] Grades are susceptible to similar race-based measurement errors. *See* Brief for Legal Scholars Defending Race-Conscious Admissions as Amici Curiae Supporting Respondents at 27, *SFFA v. Harvard III*, 142 S. Ct. 895 (2022) (No. 20-01199).

[229] *See* Steele, *supra* note 222, at 622 ("[S]tereotype threat may be a possible source of bias in standardized tests, a bias that arises not from item content but from group differences in the threat that societal stereotypes attach to test performance."); *see also* Erman & Walton, *supra* note 218, at 313.

[230] *See generally* Kim Shayo Buchanan & Phillip Atiba Goff, *Racist Stereotype Threat in Civil Rights Law*, 67 UCLA L. REV. 316 (2020).

deviation in test performance.[231] Translated to the SAT, this equates to roughly sixty-three points on a 2,400-point test.[232] Sixty-three points might appear trivial, but it explains substantial portions of observed performance gaps.[233]

This literature betrays the common notion that standardized tests—whatever their faults—provide an objective measure of student ability.[234] Blind reliance on these tests, in turn, deprives Black and Latinx students of a fair appraisal of their true academic talent and potential. These tests confer a corresponding racial advantage upon white applicants unencumbered by negative societal stereotypes. Accordingly, if universities consider standardized test scores without accounting for stereotype threat, that consideration functions as a racial preference for white students. Race-conscious admissions offer a direct, if imprecise, mechanism to counter that preference and realize a more meritocratic selection process.

Beyond standardized tests, criteria that rely on subjective judgment present similar fair measure concerns. This includes letters of recommendation and alumni interviews—both of which can grant evaluators substantial discretion. As a result, such criteria are vulnerable to implicit biases and racially disparate treatment.[235]

Notably, implicit bias was identified as a potential source of disparate treatment at Harvard. But concerns about implicit bias did not come from Harvard—e.g., as a racial (dis)advantage that warrants a countermeasure like affirmative action. Rather, SFFA cited implicit bias research to buttress its

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[231] *See* Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCH. SCI. 1132, 1134-37 (2009).

[232] *See* Jonathan P. Feingold, *Hidden in Plain Sight: A More Compelling Case for Diversity*, 2019 UTAH L. REV. 59, 98 (2019).

[233] *Id.*; *see also* Walton & Spencer, *supra* note 231, at 1137 ("The observed effect sizes suggest that the SAT Math test underestimates the math ability of women like those in the present sample by 19 to 21 points, and that the SAT Math and SAT Reading tests underestimate the intellectual ability of African and Hispanic Americans like those in the present sample by a total of 39 to 41 points for each group. Insofar as the overall gender gap on the SAT Math test is 34 points and as the overall Black-White and Hispanic-White gaps on the SAT (combining math and reading) are 199 and 148 points, respectively, these differences are substantial." (citation omitted)).

[234] Feingold, *supra* note 111, at 530 (arguing that stereotype threat renders standardized tests "susceptible to 'uneven conditions'" because the tests "subject certain performers, because of their race, to materially different conditions during performance (but fail to account for this difference)").

[235] The district court noted that "teacher and guidance counselor recommendations seemingly presented Asian Americans as having less favorable personal characteristics than similarly situated non-Asian American applicants." *SFFA v. Harvard I*, 397 F. Supp. 3d 126, 170 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022).

narrative of anti-Asian discrimination.[236] According to SFFA, Harvard's "personal rating"—which incorporates teacher and guidance counselor recommendations—invites racial stereotyping and has been the "downfall" of many Asian American applicants.[237]

Harvard rejected SFFA's allegations on factual and legal grounds. First, Harvard denied that implicit biases infiltrate its process or otherwise subject Asian American applicants to disparate treatment. Second, Harvard argued that disparate treatment traceable to implicit biases or external sources (e.g., high school guidance counselor letters) was not legally cognizable.[238]

At face value, the parties' respective positions make sense. SFFA, the plaintiff, alleges disparate treatment; Harvard, the defendant, objects. But if SFFA wants to delegitimize affirmative action (its apparent goal), and Harvard wants to fortify race-conscious admissions (its apparent goal), the preceding arguments appear more awkward.[239] By invoking implicit biases, SFFA is articulating a structuralist story that locates racial bias within facially neutral considerations. Put differently, when Harvard relies on the "personal rating" without correcting a predictable measurement error that disadvantages Asian Americans relative to white applicants, those white applicants receive an unearned racial boost. Absent intervention—such as affirmative action—"white students and [Asian American] students are not competing on even ground."[240]

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[236] Plaintiff's Proposed Findings of Fact and Conclusions of Law at 25-26, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 807 F.3d 472 (1st Cir. 2015) (No. 14-14176) ("The United States has a long and tragic history of racial discrimination against Asian Americans. Today, Asian Americans continue to face explicit and implicit racial bias . . . . Admissions systems that rely on subjective criteria are susceptible to abuse, including racial stereotyping and other forms of racial discrimination. Harvard's personal rating is especially susceptible to abuse because of its general subjectivity and because of Harvard's failure to take steps to guard against racial stereotyping."). SFFA critiques Harvard for failing to provide implicit bias training—which SFFA suggests is necessary because implicit biases can manifest as "prejudices of which [admissions officers] are unaware" that may "nonetheless play a large role in their evaluations of people and their work." *Id.* at 28.

[237] *SFFA v. Harvard I*, 397 F. Supp. 3d at 170 ("Because teacher and guidance counselor recommendation letters are among the most significant inputs for the personal rating, the apparent race-related or race-correlated difference in the strength of guidance counselor and teacher recommendations is significant.").

[238] Plaintiff's Proposed Findings, *supra* note 236, at 52.

[239] Notably, the district court recognized multiple ways in which race infects the admissions process (to the benefit of white applicants), yet never identified affirmaitve action as a tool to counter that white racial advantage. *SFFA v. Harvard I*, 397 F. Supp. 3d at 202 n.62 ("Further, the Court feels confident stating that the statistical disparities in personal ratings and admissions probabilities that have been identified are the result of some external race-correlated factors and perhaps some slight implicit biases among some admissions officers that, while regrettable, cannot be completely eliminated in a process that must rely on judgments about individuals.").

[240] Carbado, *supra* note 19, at 1159 (describing inequities in admissions processes that do not account for racial bias).

SFFA's implicit bias allegations opened the door for Harvard to defend affirmative action as a countermeasure. Absent intervention, implicit biases benefit students from societally favored groups (here, white students) and disadvantage students from societally disfavored groups (here, Asian American students). Race-conscious admissions could mitigate the unearned racial advantage white students otherwise enjoy. Or, in Justice Powell's words, evidence of anti-Asian bias calls for a targeted, race-conscious countermeasure to "cur[e] established inaccuracies in predicting academic performance" of Asian American applicants.[241] That race-conscious intervention, which mitigates the bias laden within existing metrics, would constitute "no 'preference' at all."[242]

Harvard could have embraced SFFA's implicit bias story. Doing so would have helped to exculpate affirmative action as the source of anti-Asian bias, even if it implicated Harvard.[243] Harvard did not take that approach, and instead rejected claims of implicit bias. Perhaps strategic on the surface, this decision compromises the case for Harvard's own race-conscious admissions policy. By discounting the presence and potential impact of implicit biases, Harvard reinforced the view that facial neutrality equals racial neutrality. This claim naturalizes the "preference framing" that already pervades public perceptions of affirmative action. Moreover, Harvard enabled SFFA's core narrative that affirmative action is the source of anti-Asian bias.[244]

Before proceeding, it is worth uplifting how the counterpreference framing defuses the oft-cited concern that affirmative action stigmatizes its

[241] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978).

[242] *Id*. The district court comes closest to making this point. *SFFA v. Harvard II*, 980 F.3d 157, 202 (1st Cir. 2020) ("[T]o the extent that the disparities are the result of race, they are unintentional and would not be cured by a judicial dictate that Harvard abandon considerations of race in its admission process."), *cert. granted*, 142 S. Ct. 895 (2022).

[243] Throughout this litigation, SFFA has argued that anti-Asian bias benefits white (and often wealthy) students, not other students of color. *See id*. SFFA also cites facially neutral components of Harvard's admissions process as the source of anti-Asian bias. *See id*. The lower courts identified multiple ways that race could have disadvantaged Asian Americans vis-à-vis similarly situated white students. Letters of recommendation were part of the explanation. *SFFA v. Harvard I*, 397 F. Supp. 3d at 170 ("[R]ace-correlated variation in teacher and guidance counselor recommendations is likely a cause of at least part of the disparity in the personal ratings."). The courts posited multiple factors, from implicit biases to the disproportionate concentration of Asian applicants in "public high schools where overloaded teachers and guidance counselors may provide more perfunctory recommendations." *SFFA v. Harvard II*, 980 F.3d at 201; *see also SFFA v. Harvard I*, 397 F. Supp. 3d at 202 ("[Lower scores] might be the result of qualitative factors that are harder to quantify, such as teacher and guidance counselor recommendations, or they may reflect some implicit biases.").

[244] *See* Feingold, *supra* note 153, at 719-28 (arguing that bias against Asian applicants is a product of preferences for white students rather than for other students of color).

beneficiaries.[245] On the merits, this claim enjoys limited empirical support.[246] For present purposes, I am most interested in how stigma concerns interact with competing theories of race and racism.

Stigma arguments follow a basic logical progression: if an entity admits underqualified members of a specific group, all group members are stigmatized as intellectually inferior regardless of their individual qualifications.[247] Even if one accepts this premise, additional presumptions are required before one can conclude that affirmative action produces stigma. Specifically, affirmative action should produce stigma only if it contravenes an otherwise race-neutral, objective, and meritocratic process. But if Harvard considers race to counter racial (dis)advantages that otherwise lead to the admission of underqualified white applicants, there would be no stigma concern. If anything, affirmative action should be necessary to avoid the stigma that white students would otherwise confront on Harvard's campus.

We can concretize the above by returning to SFFA's implicit bias concerns. If Harvard knows that its personal rating (because of implicit biases) tends to understate the existing merit of Asian American applicants relative to white applicants, a policy that corrects that measurement error would not be a racial preference for Asian American applicants. To the contrary, it would reduce a racial preference for white applicants. If left unaddressed, that white racial advantage would lead Harvard to admit less qualified white applicants over more deserving Asian Americans.

If one endorses the stigma logic, the above scenario does not depict a system free from stigma. Rather, it suggests that standard stigma arguments identify the wrong victim and culprit. Because affirmative action often produces a more meritocratic playing field, race-conscious policies reduce stigma, not produce stigma. If anything, affirmative action would appear necessary to buffer white students from the stigma that comes from an admissions program saturated with white racial advantages.

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[245] *See* Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (outlining concern that affirmative action stigmatizes Black students); Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1301-02 (2008) ("Proponents of this view identified both internal stigma—doubt of one's own qualifications—and external stigma—the burden of the doubts of others in one's qualifications—as reasons for dismantling affirmative action programs.").

[246] The weight of evidence identifies racial stereotypes, not affirmative action, as the source of stigma. *See* Onwuachi-Willig et al., *supra* note 245, at 1344 ("[W]ith respect to the seven law schools we surveyed, it was not affirmative action that resulted in internal and/or external stigma, but rather racial stereotypes that have attached historically to different groups, regardless of affirmative action's existence.").

[247] *See* john a. powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 792 (2009) ("There is an assumption that racially targeted programs create white resentment because there is a sense that whites who are playing by the rules are having things taken from them and given to undeserving non-whites who do not play by the same rules.").

Harvard, for example, could have preemptively defused stigma arguments by foregrounding the myriad race- and class-based (dis)advantages that benefit wealthy white applicants. Doing so would help anchor the argument that affirmative action yields a more individualized and meritocratic process. But Harvard did the opposite. Rather than surface how race shapes its admissions process, Harvard denied, discounted, and obscured race's enduring relevance. As a result, Harvard reproduced the very presumptions that legitimize and rationalize enduring racial disparities on its own campus. And Harvard enabled the colorblind logic that regressive forces have long weaponized to malign antiracism itself.

3. After Admissions: Racial Headwinds in the Classroom

Above, I outlined how universities could surface racial (dis)advantages that arise before and during the admissions process. Here, I shift the frame forward and outline how affirmative action promotes racial neutrality after admissions.

Harvard and UNC identify student body diversity as the interest their race-conscious practices serve. This makes sense. In 2016, the Supreme Court reaffirmed that the Fourteenth Amendment permits universities to employ narrowly tailored race-conscious policies designed to ensure a diversity student body.[248] Even so, the diversity rationale remains far from secure—particularly given a new rightwing majority open to revisiting and overturning existing precedent.[249] For this reason alone, it is worrisome that Harvard and UNC have marshaled a shallow theory of diversity susceptible to predictable but avoidable critique.[250] Specifically, the university defendants understate why racial diversity matters on campus. As a result, Harvard and UNC reinforce a formalist vision of race and racism that understates racial diversity's value in higher education and beyond.

To see what a more robust diversity story might entail, we can start by reviewing standard diversity critiques from the Right and Left. On the Right, a common claim is that racial diversity's educational benefits—to the extent they exist—are limited to subjects that directly implicate race. Racial diversity might matter in an ethnic studies class or Asian American history class, but not in a

[248] *See* Fisher v. Univ. of Tex., 579 U.S. 365, 367 (2016)*; see also* Feingold, *supra* note 232, at 60.

[249] Even if the diversity rationale survives in form, the Supreme Court could render it unavailable in practice. Justice Samuel Alito's *Fisher* dissent offers a model for how this might occur. *See id.* at 2227 ("Neither [University of Texas ("UT")] nor the majority has demonstrated that any of these four [diversity-related] goals provides a sufficient basis for satisfying strict scrutiny. And UT's arguments to the contrary depend on a series of invidious assumptions.").

[250] Moreover, elite universities have resources to support existing arguments by funding research that examines and identifies the benefits of student body diversity. *See, e.g.*, Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 331 (2022).

physics or math class.[251] On the Left, a resonant concern is that diversity—as a concept and practice—decouples race from racism in ways that privilege the interests, comfort, and learning of institutional insiders (who often are white, male, and cisgendered).[252] The concern is that diversity commitments reinforce the status quo by obscuring how race shapes institutional environments and experiences therein.

On the surface, these critiques share little in common. They cohere, however, in two respects. First, a common conception of diversity infuses both. Advocates herald diversity for multiple reasons.[253] But the dominant vision of diversity remains a "marketplace of ideas" story that views diversity as a tool to promote discourse in the classroom.[254] One can think of this as the First Amendment case for diversity: student body diversity yields more perspectives, which facilitates more learning for all.

Albeit dominant, this First Amendment diversity story invites predictable critique—including the foregoing concerns from the Right and the Left.[255] To meet these concerns, it behooves advocates to offer a multifaceted diversity story. This can occur by linking diversity's discourse benefits to diversity's equality function.[256] As I and others have detailed, racial diversity is essential because it buffers students of color against a host of environmental headwinds that can compromise their right to "equal university membership."[257]

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[251] *See* Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. DISCOURSE 40, 62-63 (2016).

[252] *See* Jonathan P. Feingold, *Diversity Drift*, 9 WAKE FOREST L. REV. ONLINE 14 (2019).

[253] *Compare* Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301, 2305 (2004) ("What I have called 'discourse' benefits are the core 'educational benefits' of student body diversity, and they are, unsurprisingly, grounded in 'the expansive freedoms of speech and thought associated with the university environment.'"), *with* Charles R. Lawrence, III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 765 (1997) ("But I believe that this distinction is misconceived. The diversity rationale is inseparable from the purpose of remedying our society's racism.").

[254] *See* Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 71 n.26 (2016) ("[T]he diversity rationale in higher education admissions . . . is rooted in First Amendment freedoms."*);* Feingold, *supra* note 232, at 115 ("To attain a robust marketplace of ideas, a university must admit individuals with different experiences and viewpoints.").

[255] Moreover, this dominant framing tends to value difference for difference's sake, a position that can blur any meaningful distinction "between those who would #TakeAKnee to honor Black lives and those who travel the college circuit to mock, demean, and insult." Feingold, *supra* note 252, at 14.

[256] *See* Feingold, *supra* note 232, at 66.

[257] For a comprehensive overview of this argument, see Feingold, *supra* note 232, at 75 (reviewing social identity threat and stereotype threat literature); Erman & Walton, *supra* note 218 (describing role of stereotype threat in antidiscrimination law); Anastasia M. Boles, *Valuing the "Race Card": Teaching Employment Discrimination Using Culturally Proficient Instruction*, 44 T. MARSHALL L. REV. 25, 26 n.5 (2019).

Identifying racial diversity as a predicate to racial equality serves two purposes. First, it leverages existing doctrine (that is, the diversity rationale) to illuminate often unseen manifestations of racial (dis)advantage ubiquitous across university settings. Second, it fortifies the case for diversity by mooring an existing rationale to a more compelling legal, empirical, and normative anchor.[258]

Diversity's equality function is not absent from doctrine. The related concept of critical mass entered the Supreme Court's lexicon in *Grutter*.[259] Invoking testimony from university administrators, Justice Sandra Day O'Connor embraced the notion that racial representation (or "critical mass") reduces racial isolation, tokenism, and the negative effects that flow therefrom.[260] In *Fisher v. University of Texas*,[261] Justice Anthony Kennedy cited similar reasoning to support the University of Texas's ("UT") race-conscious admissions program.[262]

Harvard and UNC recognize that racial representation shapes students' experiences. But consistent with their broader defenses, the universities hardly highlight the relationship between racial diversity and racial equality on campus. As one example, the defendants fail to emphasize the following dynamic: (1) "colorblind" admissions policies advantage applicants with the most race- and class-based privilege (i.e., wealthy white students); (2) this predictably yields a student body where wealthy white students are overrepresented;[263] and (3) the ensuing lack of racial diversity contributes to an institutional setting where students of color are more likely to experience racial stigma and hostility.

This is the backdrop against which affirmative action intervenes. By mitigating severe racial disparities, race-conscious admissions promote learning environments where all students, regardless of race, can enjoy the full benefits of university membership.[264] Put differently, affirmative action promotes equality during admissions (by countering white racial advantage) and after admissions (by fostering more equitable educational environments).

To better appreciate how university defendants have failed to surface these dynamics, consider an exchange between Chief Justice John Roberts and UT's

[258] *See* Feingold, *supra* note 232.

[259] 539 U.S. 306, 316 (2003) (discussing goal of reaching critical mass to reach diversity objectives); Feingold, *supra* note 232, at 70 (describing *Grutter's* invocation of critical mass).

[260] Grutter v. Bollinger, 539 U.S. at 308 (arguing that function of critical mass was to ensure that benefits of diversity were fully realized); Feingold, *supra* note 232.

[261] 579 U.S. 365 (2016).

[262] 579 U.S. 365, 384 (2016) (citing evidence that "minority students admitted under [race-neutral admissions] regime experienced feelings of loneliness and isolation").

[263] In recent years, extreme examples have garnered national attention. *See* Drake Pooley, Opinion, *Why Has Black Enrollment Fallen at an Elite Southern University*, N.Y. TIMES (Sept. 17, 2021), https://www.nytimes.com/2021/09/17/opinion/auburn-university-black-students.html (describing instances of racial prejudice).

[264] Universities could, for example, link diversity's equality function to Title VI obligations to prevent a racially hostile learning environment.

attorney in *Fisher v. University of Texas*.[265] During oral argument, the Chief Justice posed the following question: "What unique perspective does a minority student bring to a physics class?"[266] UT's counsel dodged the question.[267] This nonresponse did not prove fatal—at least not for UT.[268] Still, UT missed an opportunity to fortify the case for diversity and affirmative action more broadly.

If Harvard and UNC receive a similar question, they should do better. They might start by invoking Rachel Godsil, who argued that UT should have highlighted diversity's equality function.[269] Specifically, Godsil urged advocates to defend racial diversity as necessary, even in physics, to "create an environment in which all students can perform to their capacity through the reduction of stereotypes, racial anxiety, and racial isolation."[270] In fact, racial diversity may matter most in classes like physics—that is, "disciplines and domains in which negative stereotypes hold a stronger historical significance and contemporary salience."[271]

Now before the Supreme Court, Harvard and UNC can draw on decades of scholarship that demonstrate the positive correlation between racial diversity and racial equality.[272] But they need not be limited to this body of research. Universities enjoy access to a unique and local "data set" that can buttress the empirical scholarship: their own students. Unfortunately, university defendants tend to overlook—if not minimize and marginalize—the experiences of students on their campus. This dynamic has unfolded in both cases.[273] Rather than center the voices and experiences of their students, Harvard and UNC have fought to exclude that testimony and perspective from the litigation.[274] Fortunately, courts in both cases permitted student intervenors to thicken the factual record with their personal accounts of campus life. Those stories are critical. Beyond strengthening the case for affirmative action, the testimony illuminates an unassailable yet contested reality: race continues to matter on university campuses, and affirmative action offers one tool to make that less so.

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[265] 579 U.S. 365. *Fisher v. University of Texas* is the most recent race-conscious admissions challenge to reach the Supreme Court.

[266] Transcript of Oral Argument at 55, Fisher v. Univ. of Tex., 579 U.S. 365 (2016) (No. 14-00981).

[267] *Id.* at 55-56.

[268] *See* Fisher v. Univ. of Tex., 579 U.S. 365, 376 (2016) (upholding constitutionality of UT's race-conscious admissions policy).

[269] Godsil, *supra* note 251, at 62-63 (2016).

[270] *Id.*

[271] *Id.*

[272] *See* Feingold, *supra* note 226, at 106.

[273] *See* Cheryl I. Harris, *What the Supreme Court Did Not Hear in* Grutter *and* Gratz, 51 DRAKE L. REV. 697, 697 (2003).

[274] *See* Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490, 493 (M.D.N.C. 2017) ("SFFA and UNC oppose intervention and argue that Proposed Intervenors should be allowed to participate as amicus curiae.").

B. *The Rebrand: Affirmative Action as Affirmative Obligation*

Above, I explored how race matters before, during, and after admissions. The goal was to (1) add depth and texture to the structuralist insight that facial neutrality does not ensure racial neutrality, (2) reveal how affirmative action advocates often defend their own policies in colorblind terms, (3) offer a roadmap for advocates to champion affirmative action as essential antidiscrimination—a countermeasure that mitigates an array of racial (dis)advantages embedded in standard admissions processes.

Next, I take the argument one step further. If affirmative action comprises essential antidiscrimination, it suggests that universities do not just enjoy a *right* to consider applicant race. They might, in fact, possess an *obligation* to do so. To unpack this reframe, I turn to two final points of analysis: Title VI's disparate impact regulations and the tiers of scrutiny that govern equal protection challenges.

1. Title VI Disparate Impact Regulations

Universities rarely argue that affirmative action is required. Yet, the UNC student-intervenors made this argument to justify their involvement in the litigation. Specifically, the intervenors argued that UNC was unlikely to develop evidence or otherwise argue "that the current admissions process is *necessary* to comply with minority students' rights under the Constitution and Title VI."[275]

The proposition that a university could have an obligation to employ race-conscious admissions relies upon multiple sources of law.[276] One source is Title VI of the Civil Rights Act of 1964, which prohibits covered entities from discriminating against students on the basis of race.[277] Consistent with its broader equality-based jurisprudence, the Supreme Court has read a discriminatory "intent" requirement into Title VI. This judicial narrowing of Title VI's antidiscrimination provision constrains the statute's remedial efficacy. It does not, however, displace the disparate impact provision in Title VI's implementing regulations.[278] From the perspective of affirmative action advocates, the Title VI regulations can serve two related purposes. First, the

[275] Memorandum of Law in Support of Proposed Defendant-Intervenors' Motion to Intervene at 14, Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (No. 1:14-cv-00954).

[276] *See, e.g.*, Luke Charles Harris, *Reimagining* Regents v. Bakke, in CRITICAL RACE JUDGMENTS 246 (2022) (arguing that university's overreliance on "untrustworthy" measures of academic potential without countermeasure (e.g., affirmative action) discriminates—in practice if not law—against Black students).

[277] *See, e.g.*, 42 U.S.C. § 2000d.

[278] *See* 34 C.F.R. § 100.3(b)(2) (prohibiting covered entities from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race"); *see also* William C. Kidder & Jay Rosner, *How the SAT Creates Built-in-Headwinds: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 175 (2002).

regulations offer a mechanism to surface racial (dis)advantage within facially neutral processes.[279] Second, the regulations offer a legal hook to defend race-conscious admissions as mandatory antidiscrimination.[280]

To establish a prima facie case under Title VI's implementing regulations, a plaintiff must show (1) that a covered entity "admitted members of [a] racial group at a rate that is lower than the admission rate of the racial group admitted at the highest rate," and (2) that "the disparity between the difference in rates meets the judicially determined threshold that triggers the legal requirement that the university prove the admissions criteria causing the racial disparity in rates is an 'educational necessity.'"[281]

Multiple methods exist for establishing a "judicially determined threshold,"[282] one of which is the "four-fifths rule."[283] Kimberly West-Faulcon outlines how this rule would apply to anti-Asian bias claims:

> Applying the four-fifths rule involves determining whether the ratio of the selection rate for the racial group alleging disparate impact—the group with the lower selection rate—is less than 80 percent of the selection rate for the racial group selected at the highest rate. If the ratio of the selection rate of Asian Americans compared to the rate of selecting whites is less than 80 percent, a rejected Asian American student would potentially have evidence of legally cognizable racial adverse impact, also called racially disparate impact, under established Title VI disparate impact law.[284]

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[279] Michael G. Perez, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467, 467 (2004) ("Enforcing a prohibition on disparate impact in higher education admissions would force schools to discard or reform admissions criteria that have an *unfair* and *unnecessary* discriminatory effect on minority applicants.").

[280] The Supreme Court has barred private parties from enforcing Title VI's implementing regulations. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602."). Private parties may still file administrative complaints with the Department of Education, which is empowered to bring such claims. *See* Kidder & Rosner, *supra* note 278, at 177.

[281] West-Faulcon, *supra* note 150, at 625 n.143. West-Faulcon has offered the most comprehensive analysis of how a university defendant could operationalize Title VI's disparate impact regulations to make an affirmative case for race-conscious admissions and defuse standard lines of attack. *See id*.

[282] *See id*. at 616 n.105, 143 and accompanying text; *see also* Jenkins, *supra* note 163, at 309-10 (describing similar framework in constitutional context).

[283] 29 C.F.R. § 1607.4(D) (2016) ("A selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a rate greater than four-fifths will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").

[284] West-Faulcon, *supra* note 154, at 615 (citing 29 C.F.R. § 1607.4(D)).

University defendants rarely mobilize Title VI's disparate impact provisions to defend race-conscious admissions.[285] Albeit underutilized, Title VI's implementing regulations offer an affirmative action defense. Under certain facts, a university could establish that race-conscious admissions are necessary to avoid an unjustifiable disparate impact from unreliable admissions criteria.[286] The argument makes multiple interventions. First, it disrupts the presumption that standard academic indicators are unassailable and race-neutral measures of "merit."[287] Put differently, the implementing regulations provide an analytical framework to highlight how ostensibly colorblind assessments (e.g., grades or standardized tests) artificially inflate the relative qualifications of white applicants.[288]

The implementing regulations also offer a path to counter the narrative that affirmative action harms Asian Americans. West-Faulcon has detailed how UT could have mobilized such an argument to defuse this narrative in *Fisher*.[289] A short review is helpful because similar narratives feature in the Harvard litigation.

UT admitted most of its students through a facially neutral Ten Percent Plan.[290] The remainder of admits ("non-Top Ten") were admitted through a process that permitted admissions officers to consider a range of factors.[291] One factor was an applicant's race—a consideration that was available to any

[285] *See* Kidder & Rosner, *supra* note 278, at 184-85 ("There is a paucity of Title VI standardized testing cases challenging college and university admission practices. This may be a reflection of the availability of affirmative action as a counterbalance to disparate impact, and it may also reflect a recognition on the part of plaintiffs' attorneys that Title VI disparate impact cases are difficult to win and may have even less viability in the future." (footnotes omitted)).

[286] *See id*.

[287] *See* Kidder & Rosner, *supra* note 278, at 193 (explaining why overreliance on standardized tests would not constitute educational necessity).

[288] For deeper critiques of merit, see generally Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1 (1994); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449 (1997).

[289] *Fisher* featured a white plaintiff. Still, conservative Justices couched their affirmative action skepticism in a narrative of Asian victimhood. *See id*. at 2227 n.4 (Alito, J., dissenting) ("The majority's assertion that UT's race-based policy does not discriminate against Asian-American students . . . defies the laws of mathematics.").

[290] Pursuant to the Ten Percent Plan, all Texas students who graduate in the top 10% of their high school automatically receive admission to UT. *See id*. at 2207.

[291] *See id*.

student.[292] Even within this subset of students, UT admitted Black and Latinx students at rates far lower than white and Asian American applicants.[293]

As West-Faulcon explains, UT could have marshaled this data to defend affirmative action on two fronts. First, UT could have argued that the rate disparities for non-Top Ten applicants exposed the University to liability under Title VI's disparate impact provisions.[294] The operative question, in turn, should have been whether UT sufficiently mitigated its overreliance on criteria that produced an unjustifiable disparate impact—not whether the law permitted UT to consider race at all.

Separately, UT could have employed the data to counter the narrative that affirmative action harmed Asian American applicants. UT admitted Asian American and white non-Top Ten applicants at similar rates—evidence that undercuts the claims of negative action against Asian Americans.[295] More importantly, white applicants applied in larger numbers and enjoyed higher admission rates than Black and Latinx applicants. Accordingly, as West-Faulcon explains, rejected Asian American applicants "were far more likely to have been displaced by a white applicant than an African American or Latinx applicant."[296] Accordingly, if UT rejected "deserving" Asian American applicants, the beneficiaries were likely white, not other students of color.

Similar arguments could translate to the Harvard and UNC lawsuits.[297] SFFA has deployed a narrative of Asian victimhood to scapegoat and stigmatize affirmative action—even as its own expert identifies white students as the primary beneficiaries of the alleged anti-Asian bias.[298] Harvard could invoke Title VI's implementing regulations to highlight this dynamic, which calls for more (racially targeted) affirmative action, not less.

Harvard has failed to do so, even as SFFA identifies evidence of white racial advantage:

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[292] *See id*. ("[T]here is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus.").

[293] *See* West-Faulcon, *supra* note 154, at 615 ("Both the white and Asian American admission rates were more than double the rates for Latino and African American students, statistically favoring white and Asian American applicants over African Americans and Latinos, not vice versa.").

[294] *See id*.

[295] Statistics that aggregate the experiences of all Asian American students are likely to obscure meaningful differences across different Asian ethnic groups. *See generally* Vinay Harpalani, *Asian Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 101 (2022). Accordingly, average "Asian" performance masks (1) the group-based disadvantage that certain communities continue to face and (2) why affirmative action benefits certain Asian American students. *See* West-Faulcon, *supra* note 154, at 613.

[296] West-Faulcon, *supra* note 154, at 613.

[297] *See id*. at 625 (explaining that Title VI analysis could dispel narrative of "African Americans and Latinos . . . not whites, as the students who are edging out Asian Americans").

[298] *Id*. at 613.

> [Harvard's Office of Institutional Research] found that Asian-American admit rates were lower than white admit rates every year over a ten-year period even though . . . white applicants materially outperformed Asian-American applicants only in the personal rating. Indeed, [the Office of Institutional Research] found that the white applicants were admitted at a higher rate than their Asian-American counterparts at every level of academic-index level.[299]

Harvard could have cited this report to buttress the broader claim that even under the university's current affirmative action policy, white students enjoy racial advantages. Instead, Harvard discounted the report's factual and legal relevance.[300] One might justify Harvard's rebuttal as a rational response to potential evidence of discrimination. That explanation, however, misconstrues the report's relevance vis-à-vis affirmative action. Even if provisional, the report suggests that white applicants enjoy unmerited racial advantages in admissions relative to Asian Americans. It also exculpates affirmative action as the source of any anti-Asian bias.

Similar reasoning extends to UNC's admissions regime. SFFA's complaint contains a table of admissions rates for Black, white, and Asian American students.[301] The table divides students into nine "academic index ranges."[302] In seven of the nine ranges, white applicants enjoy a higher admission rate than Asian Americans—most of which surpass the four-fifths threshold.[303] In its posttrial brief, SFFA highlighted an academic decile where "[t]he white admit rate is 2.9 percent. The Asian American admit rate is 1.4 percent; and then you

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[299] Plaintiff's Memorandum of Reasons in Support of Its Motion for Summary Judgment at 13, *SFFA v. Harvard I*, 397 F. Supp. 3d 126 (D. Mass 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022) (No. 1:14-cv-14176) (citations omitted). This statement tracks additional allegations from SFFA that Harvard prefers white applicants to Asian applicants with similar academic credentials. *See, e.g.*, *id.* at 10 (noting that individual Asian American male applicant with 25% chance of admission would have 31.7% chance of admission if he were white and that, on average, approximately 44% more Asian American applicants would be admitted each year if they were white).

[300] I am not suggesting that the report proves discrimination, however defined. Rather, I highlight this evidence because Harvard diminished a report that could have bolstered a colorconscious account of race and the case for more affirmative action for Asian applicants.

[301] *See* Complaint at 18, Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (No. 1:14-cv-00954). UNC generated the statistics in 2006. SFFA employs the table to malign affirmative action, not to target the advantage white students enjoy vis-à-vis Asian applicants.

[302] These indices correspond to the students' SAT scores and undergraduate GPA. SFFA divides students in this way to calculate the purported "boost" students receive from affirmative action. But, as others have noted, this method distorts the admissions process—and overstates affirmative action's impact—by treating academic performance as the only admissions criteria. *See* West-Faulcon, *supra* note 154, at 601-05.

[303] *See id.*

see for African Americans, it's 39.6 percent; and for Hispanics, it's almost 16 percent."[304]

SFFA deploys these misleading figures to implicate affirmative action as the source of anti-Asian discrimination in admissions.[305] UNC, however, need not avoid the evidence. To the contrary, it could emphasize that white applicants enjoy higher admissions rates relative to their Asian American counterparts. Doing so disrupts SFFA's causal claim that affirmative action harms Asian Americans and implicates the racial advantages that white students continue to enjoy—even under a race-conscious admissions regime. By reappropriating the data, stakeholders can reclaim affirmative action as modest—if insufficient—antidiscrimination and, ideally, advocate for more refined and targeted race-conscious programs.

2. Contesting Strict Scrutiny

A Colorconscious Story invites a final intervention: challenge the Supreme Court's decision to subject both Jim Crow segregation and affirmative action to strict scrutiny—the most rigorous level of judicial review. On this point, Devon Carbado has offered the following observation:

> A final reason a countermeasure framing of affirmative might be important is that this framing would make the application of strict scrutiny to affirmative action normatively and doctrinally suspect. Which is to say, it is much easier for opponents of affirmative action to argue that the policy triggers strict scrutiny when affirmative action is conceptualized as a preference than it would be if affirmative action were viewed as a countermeasure.[306]

As Carbado notes, judicial skepticism toward race-conscious admissions trades on the presumption that affirmative action confers a "racial preference." That skepticism is misplaced to the extent affirmative action mitigates racial (dis)advantages that benefit white applicants. For affirmative action advocates, evading colorblind capture leads here: an unbashful critique of doctrinal regimes that constitutionalize an equivalence between segregation and desegregation, subordination and remediation, exclusion and inclusion.

This critique of existing doctrine will not sway the current Supreme Court. But that reality renders the critique no less important. Affirmative action

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[304] Plaintiff's Proposed Findings of Fact and Conclusions of Law at 29, Students for Fair Admissions, Inc. v. Univ. of N.C., 319 F.R.D. 490 (M.D.N.C. 2017) (No. 1:14-cv-00954).

[305] Similar tables tend to overstate affirmative action's impact for at least two reasons. First, the tables employ analyses that disregard multiple admissions considerations. Second, when a university employs affirmative action to reduce overreliance on fraught standardized test scores, Black and Latinx students are likely to enjoy higher median rates of admission when controlling for test scores. Separately, the figures reveal what universities already admit: they consider applicant race. *See* Feingold, *supra* note 153, at 724; *see also* West-Faulcon, *supra* note 154, at 627.

[306] Carbado, *supra* note 20, at 1123.

litigation remains a proxy for broader fights over the enduring relevance of race and racism in America, and of what, if anything, remains necessary to repair a legacy of racialized subordination and oppression. Today, these larger battles could not be more acute. Given resurgent attacks targeting antiracism writ large, university defendants bear a heightened responsibility to reclaim their policies' moral and constitutional authority. Part of that work entails targeting the colorblind logic that underwrites existing doctrine and informs regressive projects that cast antiracism as the new racism.

This is a space where the Left could learn from the Right. The current moment of racial retrenchment is facilitated by an ultraconservative Supreme Court majority.[307] But it is also enabled by a decades-long project that has seeded the colorblind conceptions of race and racism that now pervade constitutional discourse and public consciousness.

At least since *Bakke*, university defendants have acquiesced to a doctrinal framework that equates affirmative action with such ignoble policies as de jure segregation and Japanese interment.[308] By failing to contest strict scrutiny's application to remedial race-consciousness, affirmative action advocates have weakened their own case. To appreciate why, imagine if the Supreme Court included five liberal Justices. Harvard and UNC would prevail in the present litigation, but based on a finding that the challenged policies satisfy strict scrutiny. Even in upholding race-conscious admissions, the Court would reify colorblind logics that render affirmative action presumptively suspect and vulnerable to political, moral, and constitutional attacks.[309]

This acquiescence is neither inevitable nor strategic. Consider SFFA, which has deployed a multipronged front that challenges Harvard and UNC's admissions policies under existing law *and* seeks to overturn existing law.[310] Specifically, SFFA asks the Supreme Court to reject the diversity rationale and overturn *Grutter*, which SFFA casts as inconsistent with the spirit and mandate of *Brown v. Board of Education*. Even more radically, SFFA invites the Court to prohibit all race-conscious considerations, regardless of the rationale, and to ban universities from even knowing the race of their applicants.[311]

Even if SFFA does not prevail on every point, it has expanded the possibilities of regressive lawmaking. This contrasts with the university defendants, whose

[307] *See* Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 325 (2020) ("In this way, Chief Justice Roberts's respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not.").

[308] Before *Bakke*, there was no established framework for adjudicating voluntary remedial race-conscious interventions. *See* Carbado, *supra* note 20, at 1123 ("Justice Powell's concurring opinion in *Bakke* was written at a moment in which the race per se model of equal protection had not yet taken hold . . . . [T]here was a very real question about whether courts should subject race conscious governmental decision-making to something like a tiered approach.").

[309] *See* Murray, *supra* note 307, at 325.

[310] *See* Feingold, *supra* note 153, at 728-34.

[311] *See id.*

acquiescence to existing doctrine circumscribes the grounds for even poignant dissents. Moreover, SFFA recognizes that its audience transcends the Supreme Court. SFFA is addressing the public. The narrative SFFA has constructed within the confines of litigation does more than further the organization's legal claims. It also tracks, amplifies, and reinforces an ongoing campaign to sew colorblindness so deeply into our cultural consciousness that we can no longer distinguish racism from antiracism.

CONCLUSION

This Article has located contemporary affirmative action disputes within longstanding efforts to defuse the transformative potential of antiracist reform. In a way, this connection is obvious: race-conscious admissions offer a modest antiracist practice. Accordingly, these policies are a natural target of regressive backlash. But the connection runs deeper. Fights over affirmative action implicate far more than any given practice or set of practices. Affirmative action debates serve as a proxy for larger and more fundamental contestations over what, if anything, America must do to overcome its racial past. These fights, in other words, are where litigants, judges, and the public debate whether a racial status quo—defined by searing inequalities—is constitutionally acceptable and morally just.

We might expect affirmative action litigation to feature competing visions of race and racism in America. And we might expect affirmative action advocates to wield a structuralist story that combats the colorblind logic that animates anti-affirmative action talking points. But this is not what we see. Instead, we encounter an adversarial space in which both sides—Left and Right, advocate and opponent—espouse thin theories of race and racism that, at best, offer lukewarm support for modest race-conscious interventions.

This reality reveals that the Right has never enjoyed a monopoly on colorblindness. For decades, colorblindness—and the conceptual pillars on which it rests—has infused liberal defenses of affirmative action. This trend shows no signs of subsiding. For those determined to withstand multiple coalescing waves of racial retrenchment, this should be cause for concern. But it also reveals an opportunity. Even if race-conscious admissions are lost in the court of law, this is a moment to revive the case for affirmative action in the court of public opinion. The moment calls for nothing less.