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NOTE

Sabotaging Scrutiny: *SFFA's* Racialized Distortion of Suspect Classification

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ABSTRACT

This Note explores how the Supreme Court's opinion in Students for Fair Admissions (SFFA) has changed the functional effect of strict scrutiny in affirmative action challenges and subsequently warped suspect classification under the Fourteenth Amendment. It argues that the Court's strict scrutiny analysis in SFFA, which ignores the dynamic realities of race in America and gives doctrinal credence to meritocracy in higher education, handicaps non-white litigants' access to the Fourteenth Amendment's Equal Protection Clause while widening the availability of the Fourteenth Amendment suspect for white litigants. By parsing whiteness' evolution in race related jurisprudence before and after suspect classification became canonical doctrinally, dissecting the SFFA opinion's approach to narrow tailoring and compelling interests, and presenting the lower courts' utilization of post-SFFA strict scrutiny's edit in employment cases, the Note highlights the court's strategy in reconstructing strict scrutiny and offers the Thirteenth Amendment as a solution to the foreclosure of the Fourteenth Amendment for non-white litigants post-SFFA.

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INTRODUCTION

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (*SFFA*) is infamous for the obvious: ending affirmative action. Yes, its wrapping of the diversity rationale for race-conscious admissions in a bow before discarding of it is monumental in and of itself. But to accomplish this disposal, the opinion took an approach to suspect classification and strict scrutiny that has gone unprobed. In *SFFA*, the Roberts Court took advantage of American jurisprudence's sinuous development of race's legal conceptualization and strict scrutiny's formulaic nature to *distort suspect classification.* Prong by prong, the opinion widened the gap in access to suspect classification for white and non-white people, offering the former group an extended path to "suspicion" and leaving the latter group with a constricted path to "suspicion." In effect, the opinion has manufactured a dual system of classification that blocks non-white people's access to the Fourteenth Amendment's Equal Protection Clause in the affirmative action context. *SFFA*'s barricading of equality by way of diluting suspect classification is the apotheosis of Fourteenth Amendment jurisprudence's increasing insistence on a one-size-fits-all approach in race-related challenges. Truly, it is the Supreme Court's myopic demand for parity that has allowed a "Whites Only" sign to be placed on the door to equal protection. Accordingly, the dismembering of compelling interests and narrow tailoring in *SFFA* are technical fractures that create a need for a new approach to class-based protection outside of the Fourteenth Amendment. This Note will analyze these fractures to reveal the Court's strategy, present suspect classification's bifurcation in practice, and present a solution to *SFFA*'s establishment of a racialized gap in access to the Fourteenth Amendment.

Part I organizes the background of race and suspect classification's legal development generally as well as in the specific context of affirmative action leading up to *SFFA*. This section explains the Court's consistent treatment of whiteness as similar to but still different from all other

races and how that incoherence foreshadows the Court's maltreatment of suspect classification. Part II traces the results of this context in the *SFFA* opinion and explains how, at both the compelling interest and narrow tailoring stages of strict scrutiny, Chief Justice John Roberts's analysis concurrently shrinks and expands suspect classification. In this section, the ramifications of this pulsing are examined in recent lower court decisions acting upon SFFA's newly christened classification dichotomy. Part III presents the Thirteenth Amendment as the soundest solution to the Supreme Court's eviction of non-white people from the Fourteenth Amendment's protections. This section considers the difficulty of including all minorities under the umbrella of the Thirteenth Amendment, as well as how mixed admissions results from recent higher education application cycles demonstrate the practical effect of the new suspicion unleashed by *SFFA*.

I. RACE AS THE CONSTITUTION'S SUSPICIOUS STEP-CHILD

Understanding *SFFA's* demolition of suspect classification requires tracing the evolution of how racial identity came to be suspect in constitutional jurisprudence. Subsequently, this requires an examination of how quickly suspect classification became diluted after jurisprudence made it the threshold to the adjudication of equal protection claims. Beginning with post-Reconstruction jurisprudence and *Plessy v. Ferguson*'s proclamation of "separate but equal" and ending with higher-education affirmative action jurisprudence's treatment of suspect classification from *Regents of the University of California v. Bakke* to *SFFA*, this section details why suspect classification always stood on uncertain footing even before *SFFA*'s sliced its efficacy.

A. Post-Reconstruction Race Jurisprudence

Plessy v. Ferguson, decided in 1896, is a necessary companion to *SFFA*. In *Plessy*, Homer Plessy, a man who was one-eighth Black, sued a railroad for violation of the Fourteenth Amendment's Equal Protection Clause after being arrested pursuant to a Louisiana statute that

allowed for the segregation of train cars under the premise of "separate but equal."[2] In an opinion by Justice Henry Brown, the Supreme Court denied Plessy's claim by saying, despite the Fourteenth Amendment being ratified to "enforce the absolute equality of the two races before the law," it was not "intended to abolish distinctions based upon color."[3] Parsing Plessy's claim, the Court notably addressed whiteness as a type of property, writing, "the reputation of belonging to the dominant race, in this instance the white race, is property in the same sense that a right of action or of inheritance is property."[4] This concession is significant (despite *Plessy* being overturned by *Brown v. Board of Education*) because it indicates that even with the Reconstruction Amendments preventing race from being siloed to property disputes, whiteness was still considered as distinct from race's function as a category. The Court's opinion makes it clear that there is no property right, reputational or otherwise, for non-white people, despite there being one for white people.[5] Necessarily, Justice Brown's assertions here indicate that whiteness in the post-Reconstruction era was more than a racial label while to be Black *could be nothing but* a racial label. This distinction is particularly peculiar when juxtaposed with Justice Harlan's famous dissenting opinion in *Plessy,* which is considered the genesis of colorblind constitutionalism.[6] Harlan's edict that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law," has been cited for decades as dispositive of the

[2] Plessy v. Ferguson, 163 U.S. 537, 542 (1896).

[3] *Id*. at 544.

[4] *Id*. at 549 and *See* Cheryl I. Harris, *Whiteness As Property,* 106 HARV. L. REV. 1707 (June 1993) (explaining that in American law whiteness evolved into a form of protected property and that this evolution creates distortions in affirmative action doctrine due to jurists' failure to recognize whiteness' position as property instead of identity).

[5] "If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so-called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man." *Supra* note 2.

[6] *See* Frederic Rodgers, *Our Constitution Is Color Blind: Justice John Marshall Harlan and the Plessy v. Ferguson Dissent*, 43 JUDGES J. 15 (Spring 2004), CASS R. SUNSTEIN, *The Invention of Colorblindness,* In THE SUPREME COURT REVIEW, 67-83 (2024).

purpose of the Fourteenth Amendment's Equal Protection clause.[7] But Harlan does not explain what qualifies all citizens for equality before the law and does not delve into what makes race a sensitive consideration other than the fact that it is race. Still, however, these words have become imperative to sustaining the concept of suspect classification despite providing no elaboration upon what the "suspicions" in question are.[8] This hollow proclamation in the dissent and the certainty of whiteness' inherent difference in the majority indicate that at the time, the Supreme Court remained incapable of articulating why or whether race required special protections and that the idea of a "suspect" classification was still yet too precise.

Footnote four of *United States v. Carolene Products Company* provides the first inching toward suspect classification in the post-Reconstruction era. While the core of *Carolene Products* centered around Congress' ability to regulate interstate commerce, footnote four suggested that judicial review of statutes and policies should be structured differently depending upon the context bringing review of the policy to the Court.[9] With respect to race, footnote four prescribes that "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[10] Ironically, this footnote arrives at a conclusion more akin to Justice Brown's majority in *Plessy* as it establishes that prejudice on the basis of a minority status is a special condition, mirroring Brown's suggestion that whiteness is a distinct condition beyond the formal category of race. Both the footnote and Brown's opinion paint a picture of race automatically including a difference in status

[7] This passage is directly cited by Chief Justice Roberts in *Students for Fair Admissions*. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023) quoting Plessy v. Ferguson, 163 U.S. 537, 559 (Harlan, J., dissenting).

[8] See Lauren Sudeall Lucas, *Functionally Suspect: Reconceptualizing Race as a Suspect Classification*, 20 MICH. J. RACE & L. 255 (Spring 2015).

[9] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

[10] *Id.*

depending upon which race is being spoken of or addressed. And although footnote four also fails to spell out "suspect classification" like Harlan's dissent in *Plessy*, it demonstrates that the Court's understanding of race included dissimilarity between minorities and the unsaid majority.[11] This understanding of dissimilarity based on majority-minority position in *Carolene Products*' footnote goes further toward the idea that in crafting suspect classification, the Court did not originally think race in and of itself was suspect, but instead that race *became* suspicious as it applied to certain groups—particularly the discrete and insular.[12]

Fortunately (or unfortunately), the Court provided clarification on how to approach the constitutionality of racial categorizations six years later in *Korematsu v. United States*. Although upholding the internment of Japanese Americans during World War II as non-violative of the Fourteenth Amendment's Equal Protection clause, the case addressed the nature of racial classifications as fundamentally "suspect." In the majority opinion for the Court, Justice Black wrote, "... all legal restrictions that curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[13] Noticeably, Black's unveiling of racial classifications

[11] *See* JOHN HART ELY, *Policing the Process of Representation*, in DEMOCRACY AND DISTRUST 81, 73-104 (1980).

> "The fact that effective majorities can usually be described as clusters of cooperating minorities won't be much help when the cluster in question has sufficient power and perceived community of interest to advantage itself at the expense of a minority (or group of minorities) it is inclined to regard as different, and in such situations the fact that a number of agencies must concur, and others retain the right to squawk, isn't going to help much either."

[12] *See* JOHN HART ELY, *Facilitating the Representation of Minorities*, in DEMOCRACY AND DISTRUST 152-3, 135-80 (1980).

> "Standard renditions of what we think of as the *Carolene Products* approach… do not include this element: 'discrete and insular minorities' are simply entitled to 'heightened judicial solicitude.' Justice Stone's original, however, was richer than this, indicating that *'prejudice against discrete and insular minorities* may be a special condition, which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities….' Now 'prejudice' is a mushword in its own right…".

[13] Korematsu v. United States, 323 U.S. 214, 216 (1944). Justice Black continued, saying, "Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."

does not contain the prerequisites of discretion and insularity outlined in *Carolene Products*' footnote four. His words are a colorblind blanket, honoring Harlan's dissent in *Plessy*. However, given how the Court distinguished whiteness from other racial groups in race-related jurisprudence during the same decade, particularly *in Takao Ozawa v. United States* and *United States v. Bhagat Singh Thind*, the ethos of *Carolene Products* remains a relevant specter over Justice Black's words in *Korematsu*.[14] *Ozawa v. United States* and *United States v. Thind*, respectively decided five and four years before *Korematsu*, implied that whiteness was certainly not seen as "discrete and insular" by the Court. In *Ozawa*, the court held that a Japanese man was not entitled to citizenship because he could not be considered white. Justice Sutherland's opinion in *Ozawa* reveals that the Court relied on the presumption that race is scientific to decide the case. The opinion goes as far as to say that skin color could not be used to determine whiteness, but instead that "the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race."[15] Later in *Thind*, however, the Court used exclusivity and assimilation to deny an Indian man citizenship, saying,

> It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian, and other European parentage quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body

[14] Takao Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923).

[15] Ozawa v. United States, 260 U.S. at 197.

> of our people instinctively recognize it and reject the thought of assimilation.[16]

Taken together, *Ozawa* and *Thind* communicate that the Court readily moved the goalpost for what was required to access whiteness while maintaining the undercurrent that it is predicated on exclusion. So, although both of these cases showcase the development of whiteness in constitutional jurisprudence in the citizenship context, they cannot be removed from tracing the court's development of suspect classification jurisprudence. And if whiteness is based on exclusion, then returning to Justice Black's proposition that racial classifications are suspect for *every* racial group in *Korematsu* reasonably invites pause. Is whiteness exclusive or is it just another racial group? Because if access to other racial groups is not based on this property-like distinction, as first articulated by Justice Brown in *Plessy*, then Justice Black's stamping of racial categorization as "immediately suspect" in *Korematsu* must include recognition of varying levels of suspicion when the categorization occurs. If nothing else, the doctrinal line from *Plessy* to *Korematsu* in the early development of suspect classification demands recognition of the court continuously treating whiteness as oscillating between one foot in the realm of "race" and one foot outside of it. This then sets up suspect classification to be wielded as a one-size-fits-all treatment for racial discrimination despite whiteness and non-whiteness steadily being treated differently as strict scrutiny matured.

It would be reckless to discuss the evolution of race's constitutional suspicion without turning towards *Brown v. Board of Education*. *Brown v. Board*, like Harlan's dissent in *Plessy*, is a talisman in many race discrimination cases.[17] The opinion's insistence that separation amongst

[16] United States v. Thind, 261 U.S. at 215.

[17] *See* Gerardo R. López and Rebecca Burciaga, *The Troublesome Legacy of Brown v. Board of Education,* 50 EDUCATIONAL ADMINISTRATION QUARTERLY 796 (2014); Mark Tushnet and Katya Lezin, *What Really Happened in Brown v. Board of Education,* 91 COLUM. L. REV. 1867 (1991); Donald E. Lively, *The Desegregation Legacy: Uncertain Achievement and Doctrinal Distress*, 47 HOWARD L. J. 679 (Spring 2004).

races in education "generates a feeling of inferiority… that may affect… hearts and minds in a way unlikely to ever be undone" has a history of being used in Fourteenth Amendment challenges to indicate that any modicum of different treatment on the basis of race is a pipeline to internalized subordination.[18] Known for (as well as criticized for) its unanimity and common sense approach to overruling *Plessy*, the opinion's focus on the "intangible" harms of racial segregation implies that at this point in time the Court understood race relations to be a complex aggregation of race's concrete and abstract realities.[19] In underscoring the intangible factors that accompany racial considerations, the Court, again, positions racial distinctions as not merely descriptive but instead largely interactive on a sociocultural level. Citing higher education cases where separation was deemed constitutionally impermissible, the Court wrote that its decision "cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education."[20] Such a dynamic consideration of the impact of segregation, again, reveals that the Court was not entirely ignorant to the fact that Blackness is positioned socially, civically, and politically differently from whiteness.[21] And that the only way to begin to address this difference was by, literally, placing the two ends of America's racial dichotomy in the same rooms. The inferiority concerns buttressing the Court's opinion in *Brown* are not double ended, (meaning they do not acknowledge any effect of segregation on white students), but instead only point to the effects on Black primary school students being denied access to "white" schools. The Court even admits this in saying that their decision is applicable to the plaintiffs "and others similarly situated."[22] Similarly situated

[18] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 494 (1954).
[19] *Id.* at 493.
[20] *Id*. at 492.
[21] Teresa J. Guess, The Social Construction of Whiteness. Racism by Intent, Racism by Consequence, 32 CRITICAL SOC. 649, 650-51 (2006).
[22] *Id*. at 495.

necessitates that there are some who are dissimilarly situated; and in the context of *Brown*, that was undoubtedly white children specifically, but also white people and whiteness generally.

The Supreme Court's creeping articulation of race within the constitutional frame post-Reconstruction is slow with a bit of a staccato. Yet, there is uniformity in the way the opinions parsed above showcase that, to the Court, whiteness, although admittedly a "race," was a race unlike others. In judicially combing through how to conceptualize Blackness outside of slavery, the citizenship rights of Asian ethnicities, and desegregation, the Court never arrived at any conclusions about the entitlements inherent to whiteness. The aforementioned conceptualizations were only arrived at by positioning other races as operating differently than whiteness in legal and constitutional contexts. And does that not provoke the question of whether racial categorization being "immediately suspect" and that suspicion being evenly applied is fallacious in its generosity?[23]

B. Affirmative-Action Jurisprudence and Suspect Classification

By the time the first key affirmative action case, *Regents of the University of California v. Bakke*, presented itself, the Court took on the fallacy of suspect classification being applicable to all races head-on. The Court was unabashed in its declaration that the "rights established by the Fourteenth Amendment are personal rights."[24] In *Bakke*, the University of California argued that the lower courts should not have applied strict scrutiny when reviewing whether their admissions policy was a racial classification because strict scrutiny should be preserved for the "discrete and

[23] *See* Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739 (February 2014). "But the absence of an affirmative explanation of why it is presumptively invidious to discriminate on the basis of race has left a void of reasoning on the issue, inhibiting the Court's ability to evaluate other claims to suspect classification status. In failing to affirmatively articulate, as a matter of principle, why race is suspect, the Court has left the core understanding of suspect classifications under-theorized.".

[24] Regents of the University of California v. Bakke, 438 U.S. 265, 288 (1978) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

insular" minorities distinguished in *Carolene Products*' footnote four.[25] But the Court agreed with Allen Bakke, a white man who had been denied admission to the University of California Davis Medical School twice, that discretion and insularity were not a prerequisite for Fourteenth Amendment protections, writing:

> The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley v. Kraemer, supra* at 334 U. S. 22. *Accord, Missouri ex rel. Gaines v. Canada, supra* at 305 U. S. 351; *McCabe v. Atchison, T. & S.F. R. Co.,* 235 U. S. 151, 235 U. S. 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[26]

The Court did not entirely erase the significance of *Carolene Products*' footnote four, but they cabined its emphasis on minority status to only "be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination."[27] Even admitting that the development of Fourteenth Amendment jurisprudence "arose in response to the continued exclusion of Negroes from the mainstream of American society" by the "'majority' white race," the Court contended that strict scrutiny required

[25] *Id.*
[26] *Id.* at 290.
[27] *Id.* at 291.

uniform application.[28] The Court viewed any deviation from uniformity as amounting to preferential treatment that "may well serve to exacerbate racial and ethnic antagonisms rather than alleviate them."[29] Ultimately, the Court held that the University of California Davis Medical School's admissions policy was unconstitutional and that race could only be used as a "plus" in evaluations of an application and not as a singularly determinative factor.[30] This case then confirmed the interstices of Justice Black's generality in *Korematsu* and that the Court was comfortable with the tautology that suspect classifications are suspect because they are suspect. Despite strict scrutiny being a demanding inquiry that literally requires tailoring—no measurements need be taken for access to its precision. [31]

In *Grutter v. Bollinger*, the second key affirmative action case following *Bakke*, the Court repeats much of its grandstanding from *Bakke* regarding the suspicion of racial classification as uniform across all races, but with a new respect for taking "'relevant differences'" into account.[32] However, the Court's opinion makes it clear that its willingness to digest context could not come before conceding whiteness as a suspect classification, but instead only during the process of

[28] Further, the Court explained that white should not be considered a majority. "As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." *Id*. at 296-7.

[29] *Id*. at 298.

[30] Interestingly, the Court said that the policy, even if construed to be "benign," included "a measure of inequity in forcing innocent-persons in respondent's position to bear the burden of redressing grievances not of their making." This seems to indicate that, again, the Court was willing to recognize a hierarchy between whiteness and all other racial groups — but was unwilling to incorporate the general truths of that hierarchy as an indication of how the 14th Amendment should function. *Id*.

[31] "Sense can be made of the package only if we recognize that it is a package, and understand the unusual fit and weight requirements not as new demands piled on as a sort of penalty for being suspect, but rather as ways of extending the initial inquiry, of determining whether the initial suspicions aroused by the classification are well founded or rather on fuller exploration can be allayed." ELY *supra* note 11.

[32] Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (citing Adarand Constructors, Inc. v. Peña 515 U. S. 200, 228 (1995)).

applying strict scrutiny's two prongs.[33] The Court does not dive deeply into whether permitting whiteness access to suspect classification was a necessity because *Bakke* completed that legwork. Surprisingly, though, the Court provided a lifeline to the majority-minority-shaped elephant in the room by holding racial classifications permissible in admissions for the "benefits that flow from a diverse student body."[34] To achieve diversity in the student body, the Court granted the University of Michigan Law School the opportunity to create a "critical mass" of minority students. [35] Again, just as the conceptualization of whiteness as property is inconsistent with suspect classification being intrinsically universal, so is the preservation of diversity and the creation of a "critical mass" in *Grutter*. If all racial classifications are the same, and so much so that the application of constitutional protections for race ought to be standardized, then why has the Court consistently recognized that whiteness is not the same as any other race? The functionality of suspect classification does not match its outputs—especially in the affirmative action context. Per *Grutter*, suspect classification could be described as insisting on offering one size of a jacket to an auditorium full of people but only considering differences in measurements after being able to see that some jackets are too tight while others are too loose. One-size-*must*-fit-all is closer to the truth of strict scrutiny in practice.

[33] "We apply strict scrutiny to all racial classifications to "smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Id*. at 326 (citing Richmond v. J. A. Croson Co., 488 U. S. 469, 493 (1989)).

[34] *Id*. at 343.

[35] *Id*. at 333. The definition of "critical mass" has been repeatedly parsed in legal scholarship for its vagueness. *See* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97 (October 2007); Jessica Rose Kalbfeld, *Critical Mass for Affirmative Action: Dispersing the Critical Cloud*, 53 LAW & SOC'Y REV. 1266 (December 2019); In *SFFA*, Chief Justice Roberts highlighted that UNC and Harvard both admitted they did not understand the terms meaning. "But neither Harvard nor UNC claims to be using the critical mass concept—indeed, the universities admit they do not even know what it means. See 1 App. in No. 21–707, at 402 ("[N]o one has directed anybody to achieve a critical mass, and I'm not even sure we would know what it is." (testimony of UNC administrator)); 3 App. in No. 20–1199, at 1137–1138 (similar testimony from Harvard administrator)." Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181, 229 (2023).

The ill-fitting nature of suspect classification has been largely pored over in and outside of the affirmative action context. Much of this analysis is centered on whether it's logical for the Court to readily change how strict scrutiny is applied depending on the context of the constitutional claim. Perhaps the most obvious example is the difference between strict scrutiny's application in the redistricting context as opposed to the affirmative action context.[36] In the remedial and diversity affirmative action context, "any use of race… triggers an enhanced form of scrutiny," whereas in the redistricting context, "only the predominant use of race in redistricting triggers an enhanced form of scrutiny."[37] This difference in application indicates that the meaning of race's "suspicion" shapeshifts in the Court's analysis intentionally, which has broader implications for the test's outcomes. Professors Evan Gerstmann and Christopher Shortell explain how suspicion's mutating ability can change a plaintiff's burden based on the type of racial classification challenged, writing:

> For racial redistricting, the Court focuses on the burden on whites as a whole, and looks for evidence of group harm. For remedial affirmative action, the Court focuses on the burden of the individual plaintiffs. For whites who see themselves as marginalized by other whites as a result of such factors as a lack of seniority or membership in a minority religion, this is a major difference.[38]

Additionally, suspect classification's ambiguity is further illuminated by how few groups are included in the category. That barrier has also created difficulty for the expansion of quasi-suspect classifications.[39] Most notably, LGBT+ individuals and the mentally disabled are not among the suspect or quasi-suspect despite sexuality and disability largely having legal and social

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[36] Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 24 (Fall 2010).

[37] *Id*. at 25.

[38] *Supra* note 31.

[39] *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (Fall 2011). (highlighting that the Court's emphasis on symmetry requires that they "consider not the particular discriminated classes but rather a group's general classification" which promotes inconsistency in the vindication of equal protection.)

histories similar to the category deemed "race."[40] And in the face of strict scrutiny's consistent inconsistency, Professor Maxwell L. Stearns has argued that the Court has exercised a deep commitment to avoiding dimensionality, which in turn has "created anomalies associated with affirmative action, same-sex marriage, and gender-based classifications… ."[41]

Considering these criticisms of suspect classification in conjunction with the Court's lethargic and hypocritical conceptualization of race underscores that strict scrutiny has always been amorphous and ripe for mutilation. Recognizing the dissonance of strict scrutiny being one-size-fits-all despite the hierarchical nature of race in the sociopolitical order is critical in order to understand how Chief Justice Roberts's opinion in SFFA removes non-white people from suspect classification while reinforcing whiteness' access to race's suspicion.

II. COMPELLINGLY TAILORED TO FIT SOME BUT NOT ALL

A. SFFA's Revision of Strict Scrutiny's Prongs

To understand *SFFA*'s distortion of race's suspicion, it is useful to approach strict scrutiny and suspect classification as having the relationship of a threshold and a filter. As a threshold, suspect classification provides access to the demanding inquiry of strict scrutiny, which then filters out classifications using two prongs. These prongs, (1) whether the classification is justified via a compelling interest and (2) whether the classification is narrowly tailored to achieve that compelling interest, are used to determine the necessity of race's invocation as part of a policy,

[40] *See generally* Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733 (2015) (arguing that LGBT+ individuals should have access to heightened scrutiny in Equal Protection challenges because being a sexual minority can be easily paralleled to racial minority status and that heterosexuals have access to heightened scrutiny that LGBT+ individuals do not) and City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985)
(holding that mental retardation does not constitute a quasi-suspect classification despite it being an immutable characteristic because it would invite the aging, disabled, mentally ill, and the infirm to also seek heightened protections under the Fourteenth Amendment's Equal Protection Clause.)

[41] Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043,1048 (June 2017).

procedure, or guideline.[42] Together, they operate to further the proposition that if an interest "could be fulfilled without use of a racial preference, then no racial preference would be allowed" or if only "mild racial preferences" were needed to achieve the interests, "then nothing more than mild preferences" can be "constitutionally countenanced."[43] Both components of strict scrutiny have their origins in First Amendment jurisprudence. The demand for a compelling interest specifically comes from the case of *Sweezy v. New Hampshire*, where in a concurring opinion Justice Felix Frankfurter remarked that "[f]or a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be *compelling."*[44] And the first use of narrow tailoring is understood to come from the case of *Police Dept. of City of Chicago v. Moseley*, where Justice Thurgood Marshall asserted that "[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."[45] In *Bakke*, the Court's first affirmative action case, both prongs of the test appear, although "precisely tailored" stands in for "narrowly tailored."[46]

Similar to the inconsistency in the Court's identification of suspect classifications, the straightforwardness of the phrases "compelling interest" and "narrowly tailored" is not replicated in the Court's heightened scrutiny jurisprudence. Although the two prongs cannot be separated from one another, the Court is considered to have repeatedly prioritized compelling interests over

[42] Students for Fair Admissions, 600 U.S. at 207.

[43] Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring after Grutter and Gratz*, 85 TEX. L. REV. 517,519 (February 2007).

[44] Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 265, 77 S. Ct. 1203, 1219, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring).; *see also* Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 364 (2006) (spotlighting Frankfurter's concurrence in Sweezy as the basis of "compelling interest" logic in heightened scrutiny cases).

[45] Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 101 (1972).

[46] Bakke, 438 U.S. at 299.

narrow tailoring in race-related cases.[47] Most explanations for the Court's focus on compelling interests conclude that it is the portion of the strict scrutiny test that is most directly relevant to the outcome of a case. If there is no compelling interest in the first place, whether or not a racial classification is narrowly tailored is irrelevant. But if there is an identifiable compelling interest, whether the Court conceptualizes it as "very narrow and particularized, or a broadly conceived and necessarily collective, interest" changes how much they can push the stringency of narrow tailoring, with the former conceptualization offering elasticity and the latter being restrictive.[48] Of course, prior to *SFFA*, diversity was the only recognized (and remaining) compelling interest for race-conscious admissions.[49] But post-*Bakke*, the cases *Grutter* and *Gratz v. Bollinger*[50] became understood to mean that when diversity was recognized as a compelling interest, the narrow tailoring of a race-conscious admissions policy required an "individualization inquiry." This inquiry required "assessing all of the qualities that an individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education" in addition to their race.[51] This is significant because in nonracial contexts, while the Court is similarly heavy-handed with compelling interest analysis, it has not predicated its recognition of a particular compelling interest on being narrowly drawn as it has in the affirmative action context. Not simultaneously balancing these two prongs in non-racial cases calls into question the utility of inspecting compelling interests as the "Court is rarely explicit about the justification for its approval [of the

[47] David Crump, *The Narrow Tailoring Issue in the Affirmative Action Cases: Reconsidering the Supreme Court's Approval in Gratz and Grutter of Race-Based Decision-Making by Individualized Discretion*, 56 FLA. L. REV. 483, 485 (July 2004).

[48] R. George Wright, *The Scope of Compelling Government Interests*, 98 NOTRE DAME L. REV.146,155 (2023).

[49] *See* Daniel Kees, *Defanging Diversity: SFFA v. Harvard and Its Implications For the Diversity Rationale in Higher Education Admissions*, 14 COLUM. J. RACE & L. 1023 (2024) (examining the Court's ending of the diversity rationale as a compelling interest for race-conscious admissions policies and how the end of the rationale is likely to affect America and higher education's understanding of race as identity).

[50] 539 U.S. 244 (2003).

[51] Gratz v. Bollinger, 539 U.S. 244, 271, (2003).

state's interest], typically treating the state interest's weight as purely axiomatic."[52] Regardless, this probing is indicative of the threshold and filter relationship of classifications and strict scrutiny in affirmative action cases functioning in a very particular manner prior to *SFFA*. And it is this particularity combined with Chief Justice Roberts's articulations that allowed for *SFFA* to provide whiteness an increase in suspicion, prong by prong of strict scrutiny.

1. Prong One - Compelling Interests

To begin, Chief Justice Roberts centered his approach to compelling interests in *SFFA* by labeling the benefits of race-conscious admissions posited by Harvard and UNC as "standardless."[53] Specifically, the opinion says that "preparing engaged and productive citizens and leaders" and "preparing graduates to 'adapt to an increasingly pluralistic society'" are commendable goals, yet not "sufficiently coherent for purposes of strict scrutiny."[54] What is especially warping about the hand waving here is that it does not consider the consequences of Harvard and UNC not being able to achieve these goals even if they are lofty. Instead, he insists that it is less hypothetical and more tangible for the judiciary to "discern whether a prisoner will be injured" or "whether an employee should receive back pay" than whether diversity will increase the quality of a university's student body.[55]

This jolts suspect classification via strict scrutiny's first prong because Roberts unevenly slants judicial manageability as a condition of compelling interests specifically in racial contexts.[56] Taken literally, Roberts's poking of UNC and Harvard's compelling interests signals

[52] *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling and Important Interest Inquiries*, 129 HARV. L. REV. 1406 (March 2016). *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 923 (1988) (citing *Carolene Products* as the origin of heightened scrutiny).

[53] Students for Fair Admissions, 600 U.S. at 215.

[54] *Id*. at 214.

[55] *Id*. at 215.

[56] This is precisely the characterization this portion of the opinion has taken. *See* Fellowship of Christian Athletes v. D.C., No. 24-CV-1332 (DLF), 2024 WL 3400104, at *8 (D.D.C. July 11, 2024) (holding that the District

that a lack of diversity, and the preservation of whiteness through the homogeneity accompanying that lack, does not raise the same judicial manageability alarm. Thus, when a non-white applicant makes a claim that they've been denied admission under the Fourteenth Amendment—they won't have the access to the immediate "coherence" that whiteness as a compelling interest does.[57] Because the Court has decided it is impracticable to measure the benefits brought by diversity, it is better to maintain the assumed lack of informed leaders, unproductive citizens, and disengaged students because the status quo does not require the judiciary to engage in any quantification. However, when a white applicant makes a claim that they have been denied admission because of an institution's commitment to diversity, there is immediately more elasticity to the compelling interests portion of their fight against an alleged classification. With such a stark disparity of access to compelling interests, then, the opinion insulates whiteness's recognition as suspect via strict scrutiny's first prong and insists that any interest that dilutes whiteness is unpersuasive.

Compelling interests are supposed to help the Court determine whether use of a racial classification is necessary for a satisfactory outcome. Consider *Korematsu*, often cited by the Court to explain its invocation of strict scrutiny (including in *SFFA*), where the Court held that the internment of Japanese Americans was necessary to satisfy the compelling interest of national security.[58] Though the opinion is perennially jarring, *Korematsu*'s second paragraph is seminal for absorbing the fickleness of compelling interests in *SFFA*:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most

of Columbia's interest in "maintaining an 'equitable environment free of discrimination'" was as standardless as Harvard and UNC's goals in *SFFA*).

[57] Chief Justice Roberts wrote that Harvard and UNC's goals were "commendable" yet not "sufficiently coherent for purposes of strict scrutiny."

[58] "There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified." Korematsu, 323 U.S. 214, 224 (1944).

> rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[59]

Objectively, the pressing public necessity protected by Exclusion Orders No. 34 and 9066 had a racially antagonistic effect.[60] But in framing pressing public necessity and racial antagonism as mutually exclusive, the Court did not engage with the fact that public necessity was only effectively compelling in *Korematsu* because it was done at the expense of non-white people. Of course, it must be conceded that *Korematsu* was overruled by *Trump v. Hawaii* (which Roberts addresses in a footnote to further his argument in *SFFA*). But that makes the visibility of its throughline in *SFFA*'s compelling interest analysis even worse. The case ought to be out of sight and out of mind. As the *Korematsu* Court could not admit that it was deprioritizing the physical well-being of Japanese Americans because of the "military urgency of the situation," in *SFFA* Roberts does not admit that he is prioritizing racial homogeneity in higher education because the fruits of diversity are allegedly unquantifiable. Because this materially invalidates higher-education diversity at the compelling interest stage, it leaves non-white applicants with no access to their race within the first prong while overly accommodating white applicants within the same prong. It is the silence of the *SFFA* opinion on how diversity could be made quantifiable in order to be compelling that cauterizes this imbalance. Roberts details everything that diversity cannot be, but never what it could be.

2. Prong Two - Narrow Tailoring

The *SFFA* opinion attacks the tailoring of Harvard and UNC's admission policies from the limitations introduced in *Grutter*: (1) that race can never be a negative in admissions, (2) race can

[59] *Id*. at 216.

[60] Donna K. Ngata, Jacqueline H.J. Kim, Kaidi Wu, *The Japanese American Wartime Incarceration: Examining the Scope of Racial Trauma,* 74 AMERICAN PSYCHOLOGIST, 36 (2019) (analyzing how the internment of Japanese Americans has had a racially traumatizing effect on Japanese Americans across generations and social contexts).

never have a stereotyping effect in admissions, and (3) the use of race in admissions policies must come to an end.[61] This analysis is in part IV, sections A-C of the opinion. Collectively, these portions of the opinion promote a supersized suspicion for whiteness by assuming that meritocracy is race-neutral and that racial imbalance in higher education is unalarming because it is natural. Because these fallacies reserve just a sliver of prong two, they require non-white applicants to seek tailoring arguments that are only effective for groups that can pick and choose when their race is significant.

a. The Opinion's Critique of The Racial Groups Used in the Programs

To Roberts, the racial categories in Harvard and UNC's plans were too "plainly overbroad" and "underinclusive" to effectively tackle underrepresentation in admissions.[62] In substantiating this point, Roberts says that the racial categories cannot be adequately disaggregated: "...respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter." However, nowhere in this section does Roberts address whether whiteness can or needs to be disaggregated into sub-categories such as ethnicity or geographical origin. The opinion's lack of examples of racial categories that are not opaque is, of course, connected to its exaltation of the colorblind constitutionalism thesis.[63] But that is not fair or workable at the narrow tailoring stage for all racial groups. It ignores the reality that certain types of admissions considerations, although facially race-neutral, rely upon the same sort of aggregate and unparticularized racial categorization. For example, consider legacy admissions

[61] Students for Fair Admissions, 600 U.S. 181, 212 (2023).
[62] *Id.*
[63] *Id*. at 217.

policies and athletic-based admissions.[64] If a non-white student brought a challenge to legacy admissions or athletic-based admissions, this portion of the *SFFA* opinion would hamper their ability to argue that the racial statistics of the policies indicate they are not narrowly tailored.

b. Race as a Negative

In *Grutter*, the Court never actually said that race could not be used as a negative despite Roberts's words in *SFFA*.[65] Instead, the opinion reads: "Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group."[66] While Roberts's supplanting "unduly harm" with the proposition that "race may never be used as a 'negative'" provokes a semantic inquiry, what is the most damaging about it is its misunderstanding of how benefits and disadvantages work in a racial context. Again, following the opinion's logic requires disregarding the inverse of Roberts's words and taking no issue with the opinion's inability to acknowledge that whiteness is "a benefit provided to some applicants but not to others" that "necessarily advantages" a specific group of applicants.[67] Here, Roberts creates a gridlock under prong two because he is tying a lack of tailoring to the overt racialization of non-whiteness and tying an assumed lack of racialization to whiteness. Per the opinion, any key differences between a white applicant and a non-white applicant cannot be traced back to race on the white applicant's part—only on the non-white applicant's part. Accepting this logic, if a Black applicant argued they were not admitted as the result of an admissions policy preferencing white

[64] Kees, *supra* note 44, at 1030. *See also* T. Liam Murphy, *Scrutinizing Legacy Admissions: Applying Tiers of Scrutiny to Legacy Preference Policies in University Admissions*, 22 U. PA. J. CONST. L. 315 (November 2019) (arguing that the preference given to legacy applicants has such a disproportionate effect that courts should apply one of the three standards of heightened scrutiny to legacy-based admissions policies).

[65] The second risk is that race would be used not as a plus, but as a negative—to discriminate *against* those racial groups that were not the beneficiaries of the race-based preference. A university's use of race, accordingly, could not occur in a manner that "unduly harm[ed] nonminority applicants." Students for Fair Admissions, 600 U.S. 181, 212 (2023) quoting Grutter 539 U.S. 306, 341 (2003).

[66] Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

[67] Students for Fair Admissions, 600 U.S. at 219.

applicants, they would be required to trace the "plus" someone white received to race in their narrow tailoring analysis. But Roberts forecloses that avenue because he disconnects whiteness from racialization and buttresses the point with a meritocracy argument. Therefore, it would be incredibly difficult for a Black applicant to trace white admittees' "pluses" back to race. This in turn disintegrates non-white people's access to an effective prong two argument.

Roberts's trumpeting that "College admissions are zero-sum" is the launchpad for *SFFA*'s shadowy incorporation of meritocracy in part IV of the opinion. Something earned *being taken away* by race-conscious affirmative action is the core of Roberts's analysis. He says that without non-whiteness being given a "plus," "members of some racial groups would be admitted in greater numbers" than if race was dismissed from admissions criteria.[68] This promotes the protection of whiteness as a suspicious category while demoting non-whiteness because it puts forth the logic that the achievement and credentials required for admission to higher education have absolutely no connection to one's race and the idea that considering said credentials in a race-cognizant manner is incoherent or, at minimum, undesirable.[69] Meritocracy's hall of mirrors being a restriction on affirmative action is not a new argument, but *SFFA* wields its sword in a manner that makes it non-negotiable. Race is a negative, per the opinion, because meritocracy is the zone that college admissions live in. Meritocracy is not an abstraction or an option; it is the way. Just slight further probing reveals that meritocracy is a theory reliant upon whiteness not being an identity

[68] *Id*.

[69] Roberts boils down this very complicated matrix to the idea that any invocation of race is automatically determinative in admissions:

> "Respondents also suggest that race is not a negative factor because it does not impact many admissions decisions. See *id.*, at 49; Brief for University Respondents in No. 21–707, at 2. Yet, at the same time, respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned. And they acknowledge that race is determinative for at least some—if not many—of the students they admit. See, *e.g.*, Tr. of Oral Arg. in No. 20–1199, at 67; 567 F.Supp.3d at 633." *Id*.

and having no bearing upon social, economic, and political outcomes.[70] So, in making narrow tailoring incompatible with the fixed advantages of race for some groups and not others, *SFFA* asks non-white applicants to make a merit-based argument that is dead before arrival; while inviting white applicants to waive an indestructible merit flag.

c. Race as a Stereotype

Remarkably, Roberts includes the following in his discussion of race as a stereotype:

> The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.[71]

Statistically, there is a continued racial divide within suburbs (and more minorities living in cities than suburbs).[72] Additionally, there are disparities in the number of minority students that have access to music programs at all levels of pre-college education.[73] Of course, this does not mean that every minority applicant is from a metropolitan area or that there are no non-white children excelling in primary education music programs, but instead that Roberts's conception of

[70] *See* Ronald L. Jackson, The Violence of White Entitlement and the Hypocrisy of Earned Merit, 8 DEPARTURES IN CRITICAL QUALITATIVE RESEARCH, 64-68 (2019); Diana Moreira, Santiago Pérez, *Who Benefits from Meritocracy*, (Nat'l. Bureau of Econ. Rsch., Working Paper No. 30113, 2022); *See also* Gregory M. Walton, Steven J. Spencer, Sam Erman, *Affirmative Meritocracy,* 7 SOCIAL ISSUES AND POLICY REVIEW, 1-35 (2013) (explaining that *if* meritocracy does exist it can only be achieved through racial diversity and not via an assumption that academic performance and workplace performance as a precursor to achievement are not informed by external factors as well as stereotypes).; Carlos E. Santos, Erin B. Godfrey, Esther Burson, *For Better or Worse? System-Justifying Beliefs in Sixth-Grade Predict Trajectories of Self-Esteem and Behavior Across Early Adolescence,* 90 CHILD DEVELOPMENT, 180-95 (2019) (finding that the myth of meritocracy and bootstrapping in America negatively effects minority children at an early age, potentially widening achievement gaps between said children and white children).

[71] Students for Fair Admissions, Inc. 600 U.S. 181, 220 (2023).

[72] *See* Ann Owens & Peter Rich, *Little Boxes All the Same? Racial-Ethnic Segregation and Educational Inequality Across the Urban-Suburban Divide*, 9 THE RUSSEL SAGE FOUNDATION JOURNAL OF THE SOCIAL SCIENCES, 26 (February 2023); *see also* Tracy Hadden Loh, Christopher Coes, & Becca Buthe, *Separate and Unequal: Persistent Residential Segregation is Sustaining Racial and Economic Injustice in the U.S.*, THE BROOKINGS INSTITUTION (Dec. 16, 2020) https://www.brookings.edu/articles/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/.

[73] B.R. Morrison, P. McCormick, L.J. Sheperd, & P. Cirillo, *National Arts Education Status Report 2019,* (last visited Jan. 7, 2024), https://artseddata.org/national_report_2019/. Black children have a 6.9% rate of no access to music education, and Hispanic children have a 4.3% of no access to music education compared to white children who have a 3.1% no access rate to music education.

stereotypes does not bother with probability or concurring variables. The opinion's recoiling at the idea that there is "an inherent benefit in race qua race" rests upon the idea that the differences between minorities and non-minorities are *inherently antagonistic*.[74] Injecting this narrative into the narrow tailoring prong widens suspicion for white applicants because it brings in the fragility of assumption as a reason to turn race into a "don't ask, don't tell."

The opinion does not hide its hand here because Roberts writes that "when a university admits a student 'on the basis of race'" it does so based on the belief that minorities "are at the very least alike in the sense of being different from nonminority students."[75] This analysis is actually not that different from the opinion's approach to race as a negative, as both rely on believing that any active acknowledgment of non-whiteness is an immediate demerit for white applicants. However, the opinion's usage of the anti-stereotyping theory does not create the same traceability issue for non-white applicants that the opinion's swatting of race as a plus does. Instead, the opinion's anti-stereotyping preempts arguments for consideration of race by suggesting that race in and of itself is a stereotype. To prevent stereotyping, the opinion suggests that an act of stereotyping must be presumed in admissions considerations when race rears its head. The effect of this tautology on suspect classification is that it allows for the positive stereotypes of whiteness to maintain their beneficial effect, while the genuinely negative, positive, and in-between assumptions connected to non-whiteness are thrown out with the bathwater to avoid contamination. So, that it is a "pernicious stereotype that a 'Black student can usually bring something that a white person cannot offer'" cannot be readily and equally inverted. Again, this returns to the idea that whiteness is only *adjacent* to other racial/ethnic identities (as evidenced by the Fourteenth Amendment's legal history) and the opinion's underlying assumption that

[74] Students for Fair Admissions, 600 U.S. at 220.
[75] *Id*. at 221.

whiteness is not as identifying as, say, Blackness. Therefore, in order to provide equal access to the Fourteenth Amendment, the opinion damns race's ability to communicate any habits, qualities, or perspectives about someone that is non-white because whiteness, per the opinion, does not have those same communicative abilities. To protect those who "cannot" communicate via race, the opinion insists that those whose race is involuntarily communicative must find a way to silence their identities.

d. Defining an "End"

Justice Sandra Day O'Connor's arbitrary 25-year limit on the diversity rationale in *Grutter* was destined to be used as a vehicle for eroding affirmative action.[76] But in addition to being diversity's death knell, the temporal element being articulated as a narrow tailoring consideration provides an "unreasonableness" argument that puts another feather in whiteness's suspect classification. *SFFA* clings quite tightly to the singular sentence in *Grutter* that includes the 25-year limit, saying it "made clear that race-based admissions programs had to end—despite whatever periodic review universities conducted."[77] In turn this creates a rigid temporal element that is rigid qua rigidity—not because it is actually useful in excavating any unconstitutionality created by diversity. For white applicants, this allows them to simply point to duration as an affront to their access to Equal Protection. Whereas for non-white applicants, it requires justifying continued remedial action alongside the opinion's belief in deus ex machina racial reconciliation. The latter is more or less impossible, whereas the former is easily identifiable and arguable. This is not the first time the Roberts Court has engaged in this duration-based avoidance of race-related

[76] "Constitutional principles typically do not expire with time; their shelf life is timeless." Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins,* in EDUCATION LAW STORIES 102, 83-110 (Michael A. Olivas, Ronna Greff Schneider ed., 2008).

[77] Students for Fair Admissions, 600 U.S. 181 at 225.

remedial action, as the majority opinion in *Shelby County v. Holder* illustrates.[78] In *Shelby*, the Court said an incredibly colored history of racist voter discrimination was not enough to justify renewing the Voting Rights Act of 1965's clearance formula.[79] But there the Court explicitly relied on the distinction between "past" and "current" anti-discrimination needs to dismiss continued race-related remedial action. In *SFFA*, there is no clarifying distinction, only a demand that universities commit to ending the consideration of race in admissions practices. Therefore, even if racial discrimination reaches or surpasses its robustness from "nearly 50 years ago," the barriers to higher education caused by that discrimination are a non-starter for non-white people looking to vindicate their 14th Amendment protections.[80] This provides the final instance of the opinion's bloating of strict scrutiny with a sterilized presumption that there are not historical and contemporary differences in the material realities between white and non-white people. And it is this bloating that furnishes whiteness's suspect classification with more teeth in the affirmative action context than for any other racial or ethnic group.

B. Scrutiny and Classification in Lower Court Cases and Admissions Results Post-SFFA

Turning to the lower courts showcases *SFFA*'s bifurcation of suspect classification in action and how district courts have already taken advantage of the Supreme Court's gnarling of strict scrutiny. The most recent and relevant case law is not precisely situated within the affirmative

[78] "The Government has a fallback argument—because the formula was relevant in 1965, its continued use is permissible so long as any discrimination remains in the States identified in 1965. But this does not look to "current political conditions," *Northwest Austin, supra,* at 203, 129 S.Ct. 2504, instead relying on a comparison between the States in 1965. But history did not end in 1965. In assessing the "current need" for a preclearance system treating States differently from one another today, history since 1965 cannot be ignored." Shelby Cnty., Ala. v. Holder, 570 U.S. 529, 532 (2013).

[79] "But a more fundamental problem remains: Congress did not use that record to fashion a coverage formula grounded in current conditions. It instead re-enacted a formula based on 40–year–old facts having no logical relation to the present day." *Id*.

[80] *Supra* note 72.

action/higher education context. However, this only indicates that the opinion's misunderstanding of suspect classification is bound to have far-reaching effects, such as in the sphere of employment.

Ultima Servs. Corp. v. U.S. Dep't of Agric., decided just one month after *SFFA*, involved Fifth Amendment and 1981 claims brought by a white woman against the Small Business Administration (SBA) and United States Department of Agriculture (USDA) for their use of a rebuttable presumption of social and economic disadvantage in awarding federal service contracts.[81] In applying strict scrutiny, the Eastern District of Tennessee readily adapted the Court's logic in *SFFA*. Regarding whether the SBA and USDA provided compelling interests for the rebuttable presumption, the opinion denied remedying past racial discrimination compelling status, saying that goal was not judicially manageable.[82] However, the defendants in *Ultima Servs*. provided expert evidence that there were disparities in the awarding of federal contracts.

> Defendants produced reports from Mr. Daniel Chow, a senior economist at the United States Department of Commerce, and Dr. Jon Wainwright, a consulting economist [*Id.*, pgs. 4-9]. Mr. Chow found that "woman-owned, minority-owned, and other veteran-owned firms have lower odds than other firms to win a contract, all else being equal." [*Id.*, pg. 6]. His study showed that participation in the 8(a) program coincided with a higher likelihood of winning a federal contract and produced a higher odds ratio for successfully winning a government contract [*Id.*, pgs. 6-7]. According to Mr. Chow, the odds of winning contracts for minority owned businesses not participating in the 8(a) program were 37% lower compared to the odds of winning contracts by firms that were not identified as minority owned [*Id.*, pg. 6]. Mr. Chow's report further stated that minority owned businesses' odds of winning contracts across 90% of industries examined were lower than other non-minority owned firms. [83]

[81] Ultima Servs. Corp. v. U.S. Dep't of Agric., 683 F. Supp. 3d 745 (E.D. Tenn. 2023).

[82] "Without stated goals for the 8(a) program or an understanding of whether certain minorities are underrepresented in a particular industry, Defendants cannot measure the utility of the rebuttable presumption in remedying the effects of past racial discrimination. In such circumstances, Defendants use of the rebuttable presumption 'cannot be subjected to meaningful judicial review.'" *Id*. at 765 (quoting Students for Fair Admissions, 600 U.S. at 214).

[83] *Id*. at 754.

The statistical credibility of this evidence in the face of the court saying remedying past discrimination in consulting contracts is standardless is uncomfortable. Of course, the Supreme Court brushed off similar evidence in *City of Richmond v. J.A. Croson* when it struck down a similar rebuttable presumption.[84] But in *Croson*, the judicial manageability critique was missing. *Ultima* denotes that the layering of *Croson*'s specificity requirement with *SFFA*'s judicial manageability requirement means that only a sliver-sized narrative of discrimination can overcome the compelling interest hurdle in a post-*SFFA* anti-classification challenge to affirmative action brought by a white plaintiff.

On September 23, 2024, three months after the Court handed down *SFFA*, the Eastern District of Kentucky preliminarily enjoined the Department of Transportation's Disadvantaged Business Enterprise Program (DBE) in *Mid-American Milling Co., LLC v. United States Dept' of Transportation*.[85] *Mid-American Milling* provides proof of concept for *SFFA*'s narrow tailoring analysis's negative effect on suspect classification for non-white people. Similar to *Ultima*, *Mid-Am Milling* involved a challenge to a rebuttable presumption as a qualification for the DBE. The opinion decided that the DBE's presumption was not tailored enough because it carved out "preferences for only some minority groups" despite assessing "past discrimination against minority-owned businesses broadly."[86] The opinion relies on an example similar to Justice Roberts's example of an admitted class with a higher percentage of Mexican students than students from Latin American countries, saying that because a Pakistani business owner would receive the DBE's rebuttable presumption, but an Afghani owner would not—there is no connection between

[84] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[85] Mid-Am. Milling Co., LLC v. United States Dep't of Transportation, No. 3:23-CV-00072-GFVT, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024), opinion clarified, No. 3:23-CV-00072-GFVT, 2024 WL 4635430 (E.D. Ky. Oct. 31, 2024).

[86] Mid-Am. Milling Co., 2024 WL 4267183, at *9 (E.D. Ky. Sept. 23, 2024).

the plan's goals and its methods.[87] As in *SFFA*, this example and the ethnicities singled out for the purposes of the point, do not mirror the identities of the plaintiffs who brought the cases. This waving of a non-white flag distracts from the opinion's further protection of whiteness' legal suspicion while resting said protection on a manufactured concern of under-inclusivity. This solidifies that *SFFA*'s circularity of using an under-inclusivity argument to defeat the defendant's attempts to get around claims of over-broadness is being used in pursuit of dampening narrow tailoring avenues that would benefit non-white people. However, it is the opinion's homing in on *SFFA*'s use of *Grutter*'s temporal element that is the loudest extension of *SFFA*'s demolition of narrow tailoring. *Mid-Am Millin*g provides no more analysis than "enough is enough" to explain that the DBE's lack of an endpoint disqualifies its tailoring.[88] Because the DBE has existed since "Kenny Rogers's and Dolly Parton's 'Islands in the Stream' topped the country music charts for two straight weeks," the program has no "foreseeable conclusion."[89] This underscores that *SFFA*'s obsession with *Grutter*'s end-point greenlights separating context from time in favor of time alone. So, effective challenges to racial-remedial actions are made using an "enough is enough" argument. Of course, this logic is not readily available to all racial and ethnic groups and is inherently disparate in and of itself. On the one hand, the vague expectation of a remedial program having an "end" is enough to sustain a Fourteenth Amendment challenge. But on the other hand, a mountain of past racial discrimination is not enough to justify a remedial program unless it is specific, yet flexible, and sealed with an expiration date.

[87] *Id*.
[88] *Id*. at *1.
[89] *Id*. at *10.

III. USING OLD TRICKS ON AN OLD DOG – THE THIRTEENTH AMENDMENT AS A SOLUTION

Post-*SFFA*, challenges to racial classifications and racial-remedial policies from non-white people require staring down a precedent-sized wall. Whether that wall can be successfully mounted has been up for debate in the year following the decision, with many arguing that affirmative action is sealed in its tomb.[90] Available enrollment data from selective higher education institutions reveal that *SFFA* has had a mixed effect on Black and Hispanic enrollment so far at the undergraduate level.[91] Notably, Harvard saw a 4% decrease in its enrollment of Black students, while UNC saw a 2.7% drop in Black enrollment and a 0.7% enrollment decrease in Latin students. Asian American enrollment at Harvard remained at 37%, while it rose 1% at UNC. Results are similarly mixed at the graduate level, specifically for law schools where Black enrollment has increased overall by 3% according to the American Bar Association, despite the JD programs at Harvard and UNC suffering relatively steep declines for Black and Hispanic admission.[92] Asian American enrollment falling at selective universities such as Yale, Princeton, and Duke prompted Edward Blum, President of Students for Fair Admissions, to announce that the organization may sue

[90] *See* Jelani Cobb, *The End of Affirmative Action,* The New Yorker (June 29, 2023). https://www.newyorker.com/magazine/2023/07/10/the-end-of-affirmative-action; Uma Mayzck Jayakumar & Ibram X. Kendi, *'Race Neutral' is the New 'Separate But* Equal', THE ATLANTIC, (June 29, 2023) https://www.theatlantic.com/ideas/archive/2023/06/supreme-court-affirmative-action-race-neutral-admissions/674565/; Zak-Cheney Rice, *Affirmative Action Never Had a Chance*, NEW YORK MAGAZINE (June 12, 2023) https://nymag.com/intelligencer/2023/06/affirmative-action-never-had-a-chance.html.

[91] Nicole Narea, *The Impact of the Supreme Court's Reversal of Affirmative Action, Explained in One Chart*, VOX, (Sep. 12, 2024) https://www.vox.com/policy/370854/affirmative-action-black-enrollment-universities-diversity-supreme-court; Anemona Hartocollis & Stephanie Saul, *Affirmative Action was Banned. What Happened Next Was Confusing.*,THE NEW YORK TIMES (Sep. 13, 2024). https://www.nytimes.com/2024/09/13/us/affirmative-action-ban-campus-diversity.html and James Murphy, *Tracking the Impact of the SFFA Decision on College Admissions*, EDUCATION REFORM NOW (Sep. 9 2024) https://edreformnow.org/2024/09/09/tracking-the-impact-of-the-sffa-decision-on-college-admissions/.

[92] In 2024, only 3.4% of Harvard Law's incoming class was Black—the lowest that number has been since the 1960s. At U.N.C. Law, Black enrollment dropped from 13 to 9 students and Hispanic enrollment dropped from 21 to 13 between 2023 and 2024. *See* Anemona Hartocollis & Stephanie Saul, *Black Student Enrollment at Harvard Law Drops by More Than Half*, THE NEW YORK TIMES (Dec. 13, 2024). https://www.nytimes.com/2024/12/16/us/harvard-law-black-students-enrollment-decline.html.

additional schools to ensure compliance with the parameters outlined in *SFFA*.[93] Regardless, the "too soon to call" nature of this data has all minority groups waiting with bated breath to draw conclusions about the case's impact. This anxiety, coupled with the Department of Education's current probing of Harvard's legacy admissions policy, is a brewing storm for litigation that will invoke *SFFA*'s distortion of suspect classification.[94] [95]

While there are no precise answers or strategies widely presented for this potential litigation, the Thirteenth Amendment's prohibition against "all badges and incidents of slavery" presents a potential barricade.[96] And even though the Thirteenth Amendment has been historically underutilized in jurisprudence, the unprecedented nature of *SFFA* warrants genuine consideration of the Amendment's redistributive and remedial properties.[97] The potential power of the Thirteenth Amendment in race-related cases due to the ambiguity of Section 1 of the Amendment is, of course, not a new suggestion or theory.[98] Further, neither the Supreme Court nor the lower courts have ever seriously entertained consideration of the amendment's Congressional enforcement power in Section 2 or provided a definitive answer on what is and is not a "badge" or "incident" entitled to coverage by Section 1. But the uncertainty of *SFFA*'s impact on admissions results coupled with

[93] Anemona Hartocollis, *Yale, Princeton, and Duke Are Questioned Over Decline in Asian Students*, THE NEW YORK TIMES (Sep. 17, 2024) https://www.nytimes.com/2024/09/17/us/yale-princeton-duke-asian-students-affirmative-action.html and Edward Blum, Letter to Vice President and General Counsel of Duke University, Students for Fair Admissions (Sep. 17, 2024). https://studentsforfairadmissions.org/wp-content/uploads/2024/09/SFFA-Letters-to-Princeton-Duke-and-Yale.pdf.

[94] Hartocollis and Saul, *supra* note 84, "The results have confused experts and admissions officials. They have also raised questions about admissions practices and who will get access to the nation's most elite campuses in the future."

[95] Anemona Hartocollis & Michael D. Shear, *Education Dept. Opens Civil Rights Inquiry Into Harvard's Legacy Admissions*, THE NEW YORK TIMES, (July 15, 2023) https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html and Stephanie Saul, *Harvard's Admissions is Challenged for Favoring Children of Alumni*, THE NEW YORK TIMES (July 3, 2023) https://www.nytimes.com/2023/07/03/us/harvard-alumni-children-affirmative-action.html.

[96] Civil Rights Cases, 109 U.S. 3, 21 (1883).

[97] "With a few exceptions, such as early twentieth-century cases invalidating state laws establishing peonage, there is still very little Thirteenth Amendment jurisprudence." ERIC FONER, *Epilogue*, in A SECOND FOUNDING, 169, 169-76 (2020).

[98] James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426 (March 2018).

its disproportionate inflation of Equal Protection for white people, creates a moment particularly suited for investing in the Thirteenth Amendment. Honoring that the Fourteenth Amendment was created under the guise of enhancing the Thirteenth Amendment's protections for newly freed slaves but ultimately narrowed them is pivotal to accessing this argument.[99] *SFFA* is a crescendo of the Fourteenth Amendment's recession in the affirmative action context, as its pushing of the Amendment's boundaries makes overinclusion regressive. Thus, the Thirteenth Amendment now offers a more genuine fulfillment of the Fourteenth Amendment's promises for Black people (and potentially other minorities), as it specifically refers to the institution of slavery, and is therefore the best attempt for litigators to confront SFFA's deterioration of strict scrutiny. Accordingly, Black and non-white litigants should argue that the Thirteenth Amendment's prohibition against the badges and incidents of slavery constitutionally protects race-conscious admissions policies.[100]

In so stridently avoiding an "indiscriminate imposition of inequalities," the Roberts Court has created a discriminant imposition of equality.[101] Because *SFFA* plugs the legal history of whiteness being separate yet concurrently the same as other races into the equal protection clause, Black people and minorities have been shuttled away from suspect classification into a suspended state of, at most, quasi-protection/suspicion. The Thirteenth Amendment offers an escape route and prevents dilution and artificial overinclusion because it, on its own, constitutes the same protective/class-based insulation the Fourteenth Amendment previously supported. Section 1 of

[99] Mark A. Graber, *Subtraction by Addition: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1506,1501-50 (November 2012).

[100] Although beyond the direct scope of this paper, this argument could also be used to call into question race-neutral admissions policies that have a disparate and/or discriminatory impact.

[101] "The contrary position-that the Constitution insulates unintentional discrimination against race-conscious remedies-confers upon whites a constitutional right to enjoy the benefits of racial discrimination that is not probably intentional. Although individual white job applicants might be entirely innocent of race discrimination themselves, it is difficult to see why that innocence should endow them with a constitutional right to profit from invidious racial discrimination directed against equally innocent black applicants." Shelley v. Kraemer, 334 U.S. 1, 22. *See also supra* note 90, at 476.

the Thirteenth Amendment is the most relevant for the purposes of this argument because it provides the basis of the "badges and incidents" doctrine:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.[102]

Jones v. Alfred H. Mayer Co., decided in 1968, is the singular case providing the backbone of badges and incidents doctrine.[103] In *Jones*, the Court decided that discrimination in the sale of homes ran afoul of the purpose and intention behind the Thirteenth Amendment's ratification. Writing for a 7-2 majority, Justice Potter Stewart asserted that the freedom protected by the Thirteenth Amendment necessarily entails one-to-one parity between white and Black people.[104] Legalizing any less, Stewart wrote, meant that "the Thirteenth Amendment made a promise the Nation cannot keep."[105] Although *Jones*' conclusion rests upon Congress' ability to enforce the Thirteenth Amendment via Section 2, the case does not erase the Thirteenth Amendment's self-executing power, and no successive case law has either.[106] Therefore, *Jones* provides an open door for exploration of the Thirteenth Amendment as a self-executing path to group-based protection and affirmative remedies for Black people.[107]

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[102] U.S. CONST. amend XIII, § 1.

[103] Since Jones, "the Court has never gone on to define more broadly the badges and incidents of slavery." FONER, *supra* note 88, at 170.

[104] "Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live." Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968).

[105] *Id.*

[106] "Neither in Jones nor in subsequent cases, however, has the Court defined the Amendment's self-executing scope. The Jones Court specifically reserved the question of whether the Amendment, in the absence of implementing legislation, reaches the badges and incidents of slavery." William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1314 (April 2007).

[107] The Court's opinion in *Palmer v. Thompson* invites pause, as there it was said that adapting Jones' discussion of the badges and incidents of slavery to provide the Court with the power to declare pool segregation laws violative of the Thirteenth Amendment "would severely stretch its short simple words and do violence to its history." However, these words in Palmer ought to be construed as limited to the Court's concern that allowing the Thirteenth

The knee-jerk response to this argument is that, in constitutional jurisprudence, amendments cannot eclipse one another, which is particularly true of the Thirteenth and Fourteenth Amendment due to their connected origins. This has been precisely addressed in the affirmative action context by legal scholar James Gray Pope.[108] However, Pope's caution, which rested on the Court's faithful adherence to strict scrutiny, arrived before *SFFA* evicted Black people from comprehensive suspect classification. With *SFFA*'s corrosion of suspect classification, the Thirteenth and Fourteenth Amendments no longer have to worry about accommodating the same guests for affirmative action challenges. If litigators and judges cling to the textual clarity of the Thirteenth Amendment and the underdevelopment of its badges and incidents doctrine, it will not be in a bid to compete with the Equal Protection Clause. Instead, utilizing the Thirteenth Amendment will provide access to classification protections that cannot be as easily invaded as the Fourteenth Amendment and its jurisprudence. The temporal potency of *SFFA* should be considered an indication that Fourteenth Amendment jurisprudence will not unwind itself from its tapered position under the current Court. Additionally, *SFFA* signals that the Equal Protection Clause's applicability to groups that are not discrete and insular could become so proficiently load-bearing that it will be repeatedly cinched to the point of no return. The Thirteenth Amendment's

Amendment to be self-executing in municipal matters such as pool closings, is unduly capacious, not that the Thirteenth Amendment being self-executing at all is unattainable. Palmer v. Thompson, 403 U.S. 217, 226 (1971).

[108] "Even if the Thirteenth Amendment could support affirmative action on behalf of African Americans, however, there remains the problem of accommodation with Fourteenth Amendment jurisprudence, which currently requires strict scrutiny of all race-conscious affirmative action. "Neither Amendment 'trumps' the other," observes Akhil Amar; "rather they must be synthesized into a coherent doctrinal whole." If courts were to restore the Republican understanding that Section 1 of the Thirteenth Amendment itself bans more than the core incidents of slavery, then that synthesis would proceed from a starting point very different from that of the Fourteenth Amendment affirmative action cases. It is hard to imagine, for example, that a Court imbued with that understanding would arrive at a synthesized principle entitling members of a dominant race, endowed with the historic badge of mastery whiteness-to block government action designed to eliminate the continuing significance of blackness as a badge of subordination and exclusion." James Gray Pope, *supra* note 90, at 477 quoting Akhil Reed Amar, *Case of the Missing Amendments: R.A.V. v. City of St. Paul,* 106 HARV. L. REV. 124, 157 n.180 (November 1992).

explicit emphasis on protecting against slavery insulates Black people from the gratuitous approach to suspect classification embraced by existing Fourteenth Amendment jurisprudence.

Three additional considerations lie in how to incorporate non-Black minorities into the Thirteenth Amendment's embrace for the purposes of affirmative action. First, no precedent categorically denies non-Black people access to the Thirteenth Amendment as a way to bring an implied right of action case. Instead, courts have often upheld claims for non-Black people dependent upon the Thirteenth Amendment as a mechanism of enforcement for legislation.[109] Second, America's particular relationship with race, and how much of it is predicated on a dichotomy of whiteness versus Blackness due to slavery, has long placed non-Black minorities' access to rights and citizenship in the shadow of slavery.[110] Together, these details show that non-Black people could adequately make a case that they are entitled to access the Thirteenth Amendment/badges and incidents doctrine. However, there is the counterpoint that Blackness's historical inelasticity does not provide it the same proximity to whiteness that other racial groups have. And that inelasticity, coupled with the purpose of the 39th Congress in ratifying the Thirteenth Amendment to destroy *Black* enslavement, means that if the amendment is taken seriously as a new vehicle for class protection, it is only genuinely within reach for Black

[109] "The Supreme Court has held that a variety of civil rights statutes passed pursuant to the Thirteenth Amendment do apply to persons who are not African American. See, e.g., Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (holding that 42 U.S.C. § 1982 applies to discrimination against Jewish persons); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (noting that 42 U.S.C. § 1981 applies to discrimination in making or enforcement of contracts without regard to victim's race)." William M. Carter Jr, *supra* note 97, at n. 6.

[110] Karla McKanders, *Politics of Belonging: Anti-Black Racism, Xenophobia, and Disinformation,* HARVARD LAW REVIEW, (Nov. 18, 2024) https://harvardlawreview.org/blog/2024/11/politics-of-belonging-anti-black-racism-xenophobia-and-disinformation/; Immigration and Citizenship: Interview with Letti Volpp, Race: The Power of an Illusion, (last visited Jan. 7, 2024) https://www.racepowerofanillusion.org/videos/immigration-citizenship-interview-leti-volpp; Kenneth L. Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 50 (November 1977); Devon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633, 633 (June 2009); Natasha Howard, Black in the Non-Black Imagination: How Anti-Black Ideology Shapes Non-Black Racial Discourse (2011) (Ph. D. dissertation, The University of Mexico; Jonathan W. Warren, and France Winddance Twine, *White Americans, the New Minority?: Non-blacks and the Ever-Expanding Boundaries of Whiteness*, 28 *Journal of Black Studies*, 200-18, (1997).

Americans.[111] Additionally, America's failure to provide reparations to Black Americans for slavery could be presented as an indication that the Thirteenth Amendment will remain an unfulfilled promise.[112] There is certainly credence owed to the idea that if the Thirteenth Amendment has not fully protected the very group it was tailored for, litigants may have a hard time extending its objectives to non-Black people. Third, it is worth considering (1) whether the Court would genuinely engage with a Thirteenth Amendment-based argument, and (2) whether it is worth testing the resilience of the Thirteenth Amendment in front of the Court. Although the Court has not contemporarily entertained the Thirteenth Amendment seriously that does not mean the exercise of understanding it as a solution to the Fourteenth Amendment's foreclosure is futile. Further, no case begins with the Supreme Court. So even if the Thirteenth Amendment's value as the Fourteenth's surrogate could lend itself to unfavorable results, the pathway of that potential will have to make its way from the lower courts first. Additionally, the Court does not seem to be slowing its inversion of protections, as it seems ready to rule in favor of a straight woman bringing forth sexual orientation discrimination claims in *Ames v. Ohio Department of Youth Services*.[113] But, regardless, the precision and depth of suspect classification's coring in *SFFA* has unfortunately primed the Thirteenth Amendment for vindication.

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[111] This was precisely the position taken in the *Slaughterhouse Cases*: "Such power is not forbidden by the thirteenth article of amendment and by the first section of the fourteenth article. An examination of the history of the causes which led to the adoption of those amendments and of the amendments themselves, demonstrates that the main purpose of all the three last amendments was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery." Slaughterhouse Cases 83 U.S. 36, 37 (1872).

[112] Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, (June 15, 2024) https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/; Edieth Y. Wu, *Reparations to African-Americans: The Only Remedy for the U.S. Government's Failure to Enforce the 13th, 14th, and 15th Amendments*, 3 CONN. PUB. INT. L.J. 403 (Spring 2004); *Ta-Nehisi Coates Revisits The Case for Reparations*, THE NEW YORKER, (June 10, 2019) https://www.newyorker.com/news/the-new-yorker-interview/ta-nehisi-coates-revisits-the-case-for-reparations.

[113] Adam Liptak, *Supreme Court Poised to Rule for Straight Woman in Discrimination Case*, THE NEW YORK TIMES, (Feb. 26, 2025) https://www.nytimes.com/2025/02/26/us/politics/supreme-court-reverse-discrimination.html.

CONCLUSION

Perhaps Justice Roberts's declaration that "college admissions are zero-sum" is best read as the Court communicating that race relations in the United States are zero-sum. The opinion's dilution of suspect classification has doctrinally placed whiteness in a league of its own. Now, *complete* access to the Equal Protection Clause requires a pin that only some are given at birth: whiteness. The concentric imbalances assembled in *SFFA* are so striking in effect that it is as if the Court is encouraging judges and litigants alike to consider the Fourteenth Amendment a fledgling. Luckily, it is easier to redirect an old dog with old tricks than new tricks, and fortunately the Thirteenth Amendment is no stranger to America and its highest court (even if it is treated as such). And while pressing for what is owed in an era of encroaching entitlement can seem futile, the truth is that nothing beats a failure but a try. In theory, then, invoking the Thirteenth Amendment could serve as the antidote for *SFFA*'s shriveling of the Fourteenth Amendment and give the Court a chance to recognize its failure(s) and give sincere equality a try.