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ARTICLE

The Magnet School Wars and the Future of Colorblindness

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Abstract. The Supreme Court's recent decision striking down the use of race-based classifications in university admissions reflects its growing commitment to the concept of "colorblindness," which has implications well beyond education. In anticipation, many schools and other actors are already moving toward alternative, facially race-neutral strategies for promoting diversity and reducing racial disparity. But what will happen when those policies too are challenged because they have race-related motives? Will courts soon find all race-conscious policymaking unlawful based on its ends? This is the next stage of the legal battle over colorblindness, and it is already underway.

The first wave of this litigation has centered on selective public magnet schools at the K-12 level. At the time of the Supreme Court's affirmative action decision, four challenges to magnet school admissions policies were already pending in, or had just been decided by, the federal courts of appeals. All of the policies in question are race blind: Applicants' race is not considered in any way. But all were nonetheless challenged under the theory that they were crafted impermissibly with diversity concerns in mind. In one, a district court threw out the policy. These cases are clearly designed to be vehicles for the Supreme Court to extend the colorblindness principle to the ends sought by policymakers, not merely to race-conscious means. Such an extension would completely upend the government's role in addressing racial inequality and throw countless existing policies into question. Other similar challenges will surely soon follow. This Article uses the magnet school litigation as an entry point to examine the future of colorblindness, arguing that precedent and many other considerations counsel against extending the principle beyond racial classifications.

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Introduction

The early 2020s have been a period of anxiety and anticipation for stakeholders on all sides of the national debate about educational diversity. The most prominent development was a long-expected one: the Supreme Court's decision in twin lawsuits brought by Students for Fair Admissions, Inc. (SFFA) against Harvard and the University of North Carolina (UNC), which essentially banned the use of race-based affirmative action in higher education.[1] But even before achieving that long-sought victory, some "colorblindness" advocates had begun laying the groundwork for a much bigger legal transformation. If they succeed, it could reshape not just educational policymaking, but potentially *any* area of governmental—and even private—decisionmaking that encompasses race-related considerations. The new movement's most important developments have arisen in a set of cases challenging admissions policy changes at public magnet schools. This Article uses this ongoing litigation as an entry point to explore the questions likely to embroil courts and policymakers after the fall of affirmative action.

The case that has created the biggest shock waves so far involves the Thomas Jefferson High School for Science and Technology (TJ), a magnet school that regularly tops national rankings. The plaintiff organization, Coalition for TJ, alleged that TJ's admissions policy discriminated against Asian-American applicants. The district court agreed, striking down the policy in February 2022.[2] Although the Fourth Circuit reversed the decision in May 2023,[3] a petition for certiorari was pending as this Article was being prepared for publication,[4] and many observers believe that the Supreme Court might take the case and side with the district court.[5] Even if the Court stays out of the TJ case, though, the case will remain worthy of examination as a canary in the coal mine. The same lawyers have already challenged three other magnet school programs under the same theory, with all three cases pending in federal courts of appeals. And even if none of those cases go to the Supreme Court, some other case presenting the same core issues might soon do so, because similar litigation at the university level is bound to emerge in the wake of *SFFA*. The magnet school cases thus offer a preview of the legal battles soon to come.

1. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) [hereinafter *SFFA*] (deciding SFFA's consolidated lawsuits against Harvard and UNC). Part III below discusses these cases in detail.

2. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809, at *11 (E.D. Va. Feb. 25, 2022). See Part II.A below for detailed discussion and further citations.

3. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 871 (4th Cir. 2023).

4. Petition for Writ of Certiorari, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 23-170 (Aug. 21, 2023), 2023 WL 5486403.

5. *See, e.g.*, Adam Liptak, *Elite High School's Admissions Plan May Face Supreme Court Test*, N.Y. TIMES (May 29, 2023), https://perma.cc/4XAW-NV6P.

The twist in these magnet school cases—which made the district court's decision in *Coalition for TJ*[6] remarkable—is that the challenged policies consist of *completely race-blind admissions*.[7] For example, before admissions reforms were adopted in 2020, TJ's admissions centered on a high-stakes test; under the reforms, the test was dropped and replaced by a policy that emphasizes grades and includes socioeconomic and geographic diversity mechanisms.[8] Race is not considered. But the plaintiff's complaint turns on the fact that the new regime's adoption was partly motivated by concerns about Black and Hispanic students' near exclusion under the old one.[9] This case and the others like it present a crucial question: Does the Constitution permit the pursuit of racial diversity and inclusion through means that do not classify individuals by race, or may race-related concerns *never* be taken into account, even as broad policy goals?

That question looms large over the post-affirmative-action future. Affirmative action has been one of many tools that schools use to promote racial diversity; now that it is unavailable (as it already was in some settings, including K-12 public schools), other tools, like socioeconomic and geographic preferences, will become more important. In addition, concerns about racially disparate impacts often influence schools' choices regarding admissions criteria, especially standardized tests. In recent years, a test-optional movement has taken off at U.S. universities, often expressly on diversity grounds. While this strategy has been debated vigorously, its *legality* has not been widely questioned. But given that this policy change and reasoning mirrors TJ's, that could change scrutiny if the district court's decision portends the federal courts' future direction.

A form of "colorblindness" already characterizes current doctrine—it is the reason courts have long applied strict scrutiny to affirmative action, the same standard that applies to classifications adversely affecting disadvantaged minorities. Although controversial, that symmetry is doctrinally entrenched. But it has an important limit. Existing "colorblindness" doctrine focuses on a particular type of suspect *means*—namely, the use of racial classifications (or, similarly, racial discrimination in individual-level application of laws). The doctrine's animating logic is that racial classifications entail harms—like stereotyping, stigma, and affronts to individual dignity—that potentially apply even if aimed toward a "benign" end like diversity. I call this symmetrical approach to racial classifications "means-colorblindness."

But the position of the *Coalition for TJ* plaintiff and district court goes much further. It demands what I call "ends-colorblindness": the position that,

6. 2022 WL 579809.

7. *See id.* at *2.

8. *Id.* at *1-2.

9. *Id.* at *2, *4.

even absent classifications or individual-level disparate treatment, any race-related objective itself renders a policy suspect and almost certainly invalid—whether that objective is to reduce racial inequality or increase it, to integrate or segregate, to include or exclude. This is novel and dangerous.

If ends-colorblindness became the law of the land, through *Coalition for TJ* or any other case, the implications would extend far beyond educational admissions into countless dimensions of American life. Ultimately, ends-colorblindness entails a radical proposition: that it is unconstitutional for government actors to notice a racial disparity and try to reduce it, even with race-neutral tools. Because many private actors are governed by laws interpreted to mirror constitutional requirements, this principle would reach their actions too. And if it even looks plausible that the courts would go that far, we can expect a deluge of litigation in the lower courts testing the principle's limits. That is because thinking about racial disparity and diversity has been routine in American public and private life—socially and politically encouraged, and sometimes legally required—for decades. Facially neutral actions motivated by racial-equality-related goals are ubiquitous. Here are a few examples:

- Employers and landlords are required by Title VII of the Civil Rights Act and the Fair Housing Act (FHA) to avoid adopting unnecessary policies that, while facially neutral, have racially disparate impacts.[10] This requirement is itself motivated by recognition of racial disparities, and it requires employers and landlords to make race-conscious policy choices.
- The federal environmental permitting process requires disparate impact analyses.[11] The Biden administration, reportedly anticipating legal challenges to expressly race-based analyses, has shifted toward race-neutral criteria but maintains that these criteria will protect racial equity.[12]
- Department of Labor regulations require federal contractors to ensure "equal opportunity" for different racial groups via measures including avoidance of policies with disparate impacts and monitoring of racial representation; the regulations prohibit "quotas" or "preferences."[13]

10. *See* 42 U.S.C. § 2000e-2(k)(1) (codifying Title VII disparate impact liability); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545-46 (2015) (recognizing disparate impact liability under the Fair Housing Act).

11. *See* Exec. Order No. 12898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 note; FED. INTERAGENCY WORKING GRP. ON ENV'T JUST. & NEPA COMM., EPA 300B16001, PROMISING PRACTICES FOR EJ METHODOLOGIES IN NEPA REVIEWS 33 (2016), https://perma.cc/8E9W-92SD.

12. Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won't Mention Race*, N.Y. TIMES (Feb. 15, 2022), https://perma.cc/H73U-HV5Z.

13. *Affirmative Action Frequently Asked Questions*, OFF. OF FED. CONT. COMPLIANCE PROGRAMS, https://perma.cc/9T55-QAK6 (last updated Aug. 30, 2023).

- The No Child Left Behind Act, the signature domestic policy accomplishment of the George W. Bush administration, sought to "clos[e] . . . the achievement gaps between minority and nonminority students."[14] Its substantive requirements demanded uniform standards, with no individual-level racial classifications. But several of its accountability standards are race conscious—for example, states must assess the "achievement of . . . major racial and ethnic groups," and must ensure that minority students do not disproportionately receive less skilled teachers.[15] The Act's successor, the Every Student Succeeds Act of 2015, has similar language on race.[16]
- During the COVID-19 pandemic, officials regularly cited concern for racial disparities in infections, deaths, and vaccinations as motivation for facially neutral policy choices (e.g., vaccine distribution strategies).[17]
- Legislators routinely cite racial disparities when advocating for efforts to help the poor and unemployed, and they sometimes specifically design programs to reduce racial gaps and evaluate them for success in doing so. For example, New York City's Young Men's Initiative encompasses dozens of programs that, while individually race blind, are designed to "address increasing disparities [affecting young] black and Latino men . . . in education, employment, health and justice."[18]
- Although the relevant substantive provisions are race neutral, racial disparities in incarceration and other outcomes are ubiquitous themes of criminal justice reform debates and often feature in legislative findings or executive statements.[19]

This list could go on, and the general practice of talking about race when debating policy has not been highly controversial, even when the policy

14. No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 101, § 1001(3), 115 Stat. 1425, 1440 (2002) (codified as amended at 20 U.S.C. § 6301).

15. *Id.* sec. 101, §§ 1111(b)(2)(C)(v), 1111(b)(8)(C), 115 Stat. at 1446, 1453-54 (codified as amended at 20 U.S.C. § 6311).

16. *See, e.g.*, Every Student Succeeds Act, Pub. L. No. 114-95, sec. 1006, § 1112(b)(2), 129 Stat. 1802, 1854 (2015) (codified as amended at 20 U.S.C. § 6312).

17. *E.g.*, Press Release, Colo. Dep't of Pub. Health & Env't, State Adds New Data Metrics to Vaccine Dashboard (Jan. 22, 2021), https://perma.cc/JWE5-QEDG; Pub. Health: Seattle & King Cnty., King County Unified Regional Strategy: COVID-19 Vaccine Delivery (2021), https://perma.cc/P4HU-HQ48.

18. *About YMI*, N.Y.C. YOUNG MEN'S INITIATIVE, https://perma.cc/S6D9-4BGA (archived Oct. 24, 2023). The "NYC Men Teach" initiative is illustrative: Its mission statement is entirely about bringing men of color into teaching, but it specifies that it does not discriminate based on race or gender. *NYC Men Teach*, N.Y.C. YOUNG MEN'S INITIATIVE, https://perma.cc/X7YP-MCFP (archived Oct. 24, 2023).

19. *E.g.*, Remarks on Criminal Justice Reform Legislation, 2018 DAILY COMP. PRES. DOC. 788 (Nov. 14, 2018), https://perma.cc/44WR-U769; Jennifer Brown & Jesse Paul, *Colorado Governor Signs Sweeping Police Accountability Bill into Law. Here's How It Will Change Law Enforcement.*, COLO. SUN (June 19, 2020, 9:53 AM MDT), https://perma.cc/28D6-RGDT.

specifics *are* controversial.[20] But if ends-colorblindness becomes the law, then any policy put forward in these terms is vulnerable to being struck down, so long as somebody has standing to sue.

These developments are far from inevitable but are more than plausible. Indeed, serious effort is already being put into their realization. We will know by the time this Article is in print, or soon thereafter, whether the Court will grant certiorari in *Coalition for TJ*. But the case already illustrates that there is an appetite among some Justices for the plaintiff's theory. In the spring of 2022, the Fourth Circuit stayed the district court's order pending appeal in a 2-1 opinion.[21] Three Justices dissented from the Supreme Court's refusal to review that stay, even though the legal test for doing so in an emergency posture is extremely demanding.[22] The same Fourth Circuit panel reversed the district court in May 2023 in another divided opinion,[23] which the plaintiff is now asking the Court to review.[24] The case has not gotten much serious scholarly attention yet,[25] but its importance has not escaped the attention of

20. Politicians of both parties routinely argue that their policies will better serve the interests of minority groups. *E.g.*, Julia Manchester, *GOP Stepping Up Appeals to Black Candidates, Voters*, HILL (Mar. 20, 2022, 3:38 PM ET), https://perma.cc/VG5W-CGXM; Alex Gangitano & Hanna Trudo, *Democrats Stress Need to Appeal to Black Voters: 'We Have to Be Very Clear About the Barrier,'* HILL (Aug. 28, 2023, 6:00 AM ET), https://perma.cc/7253-FAQE; *see also* Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After* Inclusive Communities, 101 CORNELL L. REV. 1115, 1156-57 (2016) (noting lack of controversy around goal of reducing racial disparity).

21. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022).

22. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022) (mem.); *see infra* notes 176-80 and accompanying text.

23. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 887-88 (4th Cir. 2023).

24. *See supra* note 4 and accompanying text; *see also* Heather Zwicker, *Battle over TJHSST Admissions Heads to the U.S. Supreme Court*, FAIRFAX CNTY. TIMES (May 26, 2023), https://perma.cc/5MSM-R8HV.

25. Prior to this Article (and its prior working-paper versions), the closest scholarly examination of the case was an article by Janel George. Janel A. George, *The Myth of Merit: The Fight of the Fairfax County School Board and the New Front of Massive Resistance*. 49 FORDHAM URB. L.J. 1091 (2022). George's article overlaps little with this Article but instead provides interesting details on the case's facts and historical context, and critiques model-minority tropes, the "myth of meritocracy," and resistance to racial inclusion. The case is also discussed in Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate over Standardized Entrance Exams*, 73 S.C. L. REV. 759, 779-87 (2022), which focuses on the role of Asian Americans in recent political and legal struggles over educational diversity but does not cover the legal ground explored by this Article. Some recent opinion pieces by law professors in popular media (including my own, which draws on my argument here) have highlighted the case's importance. *See, e.g.*, Sonja B. Starr, Opinion, *The Next Battle Over Colorblindness Has Begun*, N.Y. TIMES (July 10, 2023), https://perma.cc/35VD-BVCJ; Jeannie Suk Gersen, *After Affirmative Action Ends*, NEW YORKER (June 26, 2023), https://perma.cc/2YHX-5NZY

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practitioners in this space; civil rights organizations and other stakeholders have filed a flood of amicus briefs.[26] News stories have begun to proliferate, emphasizing the case's potential as a Supreme Court vehicle.[27] It is easy to see the stakes.

But *Coalition for TJ* is just one potential vehicle for these issues to reach the Supreme Court. Magnet school admissions are often battlegrounds for racial politics, despite generally being race blind. The Pacific Legal Foundation (PLF) alone—which represents the Coalition for TJ—is also litigating at least three similar cases in New York City, Boston, and Montgomery County, Maryland.[28] The challenged policies include geographic and socioeconomic preferences and abandonment of standardized tests. PLF is appealing losses in all three cases as of August 2023. In Montgomery County, PLF won an initial victory at the motion-to-dismiss stage (with legal reasoning similar to *Coalition for TJ*), but subsequent policy changes led to dismissal, which is now being appealed.

And while PLF has focused on high schools, similar university policies are equally vulnerable to challenge, and lawsuits against them will likely proliferate in the years to come as universities shift to race-blind diversity strategies in the wake of *SFFA*. In the past, litigation over university admissions principally focused on affirmative action, with challengers typically presenting other diversity strategies as race-neutral alternatives that render affirmative action unconstitutional under strict scrutiny, which requires ruling out viable alternatives. It is hard to take that position and simultaneously challenge those same strategies. But now that their movement has won that fight at the Supreme Court, for some colorblindness adherents, the goalposts are likely to shift. PLF has already been laying the groundwork with its magnet school cases. Its stated objectives are not limited to education but entail fighting what it calls "all forms of racial discrimination by government, both overt and covert."[29]

(offering a mixed assessment of the Fourth Circuit opinion and emphasizing the importance of the issue); Brian T. Fitzpatrick, Opinion, *Racial Preferences Won't Go Easily*, WALL ST. J. (May 31, 2023, 5:54 PM ET), https://perma.cc/RM3N-8HKR (arguing against the Fourth Circuit's position).

26. *See infra* note 170.

27. *E.g.*, Pema Levy, *Affirmative Action May Be Dead—But the Battle Over Race and Admissions Is Just Getting Started*, MOTHER JONES (Aug. 16, 2023), https://perma.cc/X6AZ-LS6F; Karina Elwood, *Supreme Court Asked to Hear Thomas Jefferson High School Admissions Case*, WASH. POST (Aug. 23, 2023, 6:00 AM EDT), https://perma.cc/EE8V-27QF; Liptak, *supra* note 5.; Stephanie Saul, *High School Did Not Discriminate Against Asian American Students, Court Rules*, N.Y. TIMES (May 23, 2023), https://perma.cc/DTK5-QVZK.

28. See Part II below for citations and detailed discussions.

29. *What We Fight for: Equality and Opportunity*, PAC. LEGAL FOUND., https://perma.cc/XQK6-LXT9 (archived Oct. 24, 2023).

This Article examines the key legal questions on the near horizon and argues against the potential shift to ends-colorblindness. It is crucial that schools considering their post-affirmative-action policies, other decisionmakers, and their lawyers fully understand these issues. I frame my arguments within the current doctrine, including the Supreme Court's decision in the *SFFA* cases. *SFFA* does not endorse ends-colorblindness, but it also does nothing to foreclose a future shift in that direction. Indeed, it contains some language that can be interpreted to invite further litigation over these issues. The current legal world would not be my first choice; I wish the Court had not restricted affirmative action and do not support means-colorblindness generally. But I want to provide a realistic framework for courts and lawyers who must confront the legal landscape as it is. So my aim here is not to critique that landscape but rather to help preserve it against an alarming effort to profoundly transform it in ways far beyond the Court's ruling in *SFFA*.

The distinction between means- and ends-colorblindness is well supported by doctrine, as I explore in Part I of this Article. It is also consistent with the underlying normative reasons many Justices have expressed for deeming affirmative action suspect (such as a concern for stigma and racial polarization). As I also explain in Part I, these concerns are specific to racial classifications and do not apply to the consideration of diversity and equality as policy goals. In affirmative action case law leading up to *SFFA*, courts routinely took for granted the permissibility of race-neutral alternatives and indeed required schools to consider them. In *SFFA*, because the Court declined to treat the universities' diversity-related educational interests as compelling, it did not reach the narrow-tailoring step of strict scrutiny and thus did not discuss race-neutral alternatives in the way that it had in prior cases. Still, as I explain below, nothing in *SFFA* changes existing law regarding the permissibility of those alternatives, nor did the Court suggest that racial diversity was an *unconstitutional* interest to pursue (even if it is not "compelling").

Moreover, two Supreme Court decisions—which are still good law even after *SFFA*—explicitly state that policymakers *may* use facially neutral means to pursue racial-equality-related goals. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy's controlling concurrence endorsed race-neutral strategies for racially integrating public schools.[30] And in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, a case upholding disparate impact liability under the Fair Housing Act, a Court majority embraced Justice Kennedy's *Parents Involved* reasoning and the objective of "foster[ing] diversity and combat[ting] racial isolation with

30. 551 U.S. 701, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

race-neutral tools."[31] These opinions articulate the means-ends distinction clearly. Both are sympathetic to arguments for reducing the role race plays in public life and seek to do so in balanced ways. They represent a serious effort to grapple with the colorblindness movement's arguments *and* with its critics' central objection: that racial disparity fundamentally shapes our society in ways that policymakers cannot be constitutionally required to ignore. The compromise they strike is under attack in the magnet school litigation, but I am hopeful that it can be successfully defended.

There is an extant literature on facially neutral policies that result from race-conscious policymaking.[32] Most of it focuses on disparate impact liability, which raises issues that overlap with those in educational admissions. The literature overwhelmingly concludes that such policies are constitutionally

31. 576 U.S. 519, 545 (2015).

32. *See, e.g.*, Elise C. Boddie, *The Constitutionality of Racially Integrative Purpose*, 38 CARDOZO L. REV. 531 (2016) (arguing that racial integration is an objective permitted by constitutional doctrine); Bagenstos, *supra* note 20 (arguing that *Inclusive Communities* settled the debate about the constitutionality of race-conscious policymaking designed to avoid racially disparate impacts); Kim Forde-Mazrui, *The Canary-Blind Constitution: Must Government Ignore Racial Inequality?*, 79 LAW & CONTEMP. PROBS., no. 3, 2016, at 53 [hereinafter Forde-Mazrui, *Canary-Blind Constitution*] (arguing that it is constitutional, under strict scrutiny, for policymakers to seek to redress racial inequality through race-neutral means); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 655-56 (2015) [hereinafter Siegel, *Roberts Court*] (arguing that facially neutral strategies for achieving benign race-conscious goals are permissible, including disparate impact analysis); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) [hereinafter Siegel, *From Colorblindness*] (arguing that the center of the then-current Court embraced a normative "antibalkanization" principle that supports using race-neutral means to reduce disparities); Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837 (2011) (arguing for the constitutionality of racial integration as a government purpose); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) [hereinafter Primus, *Future of Disparate Impact*] (warning of potential threats to the constitutional permissibility of disparate impact analysis but arguing that doctrine should be read to permit it); Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277 (2009) (arguing that facially neutral school integration efforts should be seen as constitutionally permissible); Andrew M. Carlon, *Racial Adjudication*, 2007 BYU L. REV. 1151, 1155-57 (laying out a syllogism that would apply colorblindness to the purposes of policies, and arguing that doctrine clearly rejects it); R. Richard Banks, Essay, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573 (2003) (arguing that notwithstanding its discomfort with affirmative action, the Court's doctrine recognized crucial distinctions between benign and invidious discrimination); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003) [hereinafter Primus, *Equal Protection*] (flagging coming challenges to disparate impact law but defending its constitutionality); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331 (2000) [hereinafter Forde-Mazrui, *Constitutional Implications*] (arguing for the constitutionality of facially neutral diversity strategies).

unproblematic under then-existing doctrine and that this permissibility is normatively important.[33] Those conclusions are correct, and the existing scholarship is strong. I seek to build on it here, not to reinvent it. The doctrinal bottom line has not changed. The *Coalition for TJ* district court was wrong under existing law, both at the time of its decision and a year and a half later, after *SFFA*. Its decision looks like a bet on where the law is going next—a bet that lower courts should not feel free to make.

But the district court was not necessarily wrong about where the law is going. In this Article, I relay the latest chapters of this evolving story, and I predict and make arguments seeking to shape the next ones. The most recent wave of scholarship on race-conscious policymaking was published around the time of *Inclusive Communities*[34]—which, in Supreme Court time, seems like eons. Just two of the five Justices in the *Inclusive Communities* majority (Justices Sotomayor and Kagan) are still on the Court as of this writing. Three of the dissenters are still there (Justices Roberts, Thomas, and Alito), and of the new Justices, one (Justice Gorsuch) already voted to review the stay in the *Coalition for TJ* interlocutory proceeding.[35] And a majority has now changed the law in the affirmative action cases, in a direction that is likely to encourage the ends-colorblindness movement, even though it did not directly endorse its aims.[36]

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33. For two exceptions, see generally Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53 (arguing that policy changes to avoid racially disparate impacts are unconstitutional); and Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001) (arguing that facially neutral racial diversity initiatives like the Texas Ten Percent Plan should not survive strict scrutiny). Professor Forde-Mazrui also argues that such actions should be subject to, but should overcome, strict scrutiny under current doctrine. *See* Forde-Mazrui, *Canary-Blind Constitution*, *supra* note 32, at 63; Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2360, 2371.

34. *See, e.g.*, Bagenstos, *supra* note 20, at 1117; Siegel, *Roberts Court*, *supra* note 32, at 655 & n.5, 668 n.85. Some recent literature on race-conscious algorithm design picks up these themes but relies on this same set of cases when discussing the constitutional issues. *See* Pauline T. Kim, *Race-Aware Algorithms: Fairness, Nondiscrimination and Affirmative Action*, 110 CALIF. L. REV. 1539, 1569-71 (2022); Jason R. Bent, *Is Algorithmic Affirmative Action Legal?*, 108 GEO. L.J. 803, 847 (2020); Deborah Hellman, *Measuring Algorithmic Fairness*, 106 VA. L. REV. 811, 851 (2020).

35. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022) (mem.).

36. A recent piece by Khiara Bridges assesses the potential threat to disparate impact liability that could follow the striking down of affirmative action. Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 153-67 (2022). Although I agree that this threat is important, my focus and conclusion on that issue differs from hers. Extending the colorblindness principle from means to ends would require a large doctrinal leap, a point Bridges only alludes to in a paragraph, *see id.* at 161-62, seeming to assume the Court will take that leap. This Article focuses in depth on that leap itself, the next wave of litigation pushing for it, and what arguments might persuade courts not to take it.

In addition to updating the literature in response to recent developments, which is the focus of Part I, I hope to make several distinct contributions not found (at least not in depth) in that literature. First, the magnet school wars are, I think, an extremely likely context in which these issues could reach the Supreme Court, and they are already challenging the lower courts. These issues have heated up politically and attracted high-profile legal entities like PLF in the past few years. Even if the Supreme Court stays out of *Coalition for TJ* and its three sister cases, similar challenges elsewhere are likely to arise soon, and these first four cases provide a preview of the arguments likely to arise. They have not been a focus of the prior literature, and they raise some important doctrinal issues left unexamined there—for example, whether and how plaintiffs must prove disparate impact to support a discriminatory purpose claim, particularly when a policy change mitigates an existing racial disparity. It is worth closely examining these cases, and I do so in Part II.

In Part III, I consider the likely status of facially neutral alternatives to affirmative action, and other neutral policies with race-conscious ends, after the fall of affirmative action. I begin by assessing the implications of *SFFA* itself, including what the majority, concurrences, and dissents said (and didn't say) about race-neutral alternatives to affirmative action. Although I conclude that *SFFA* did not change the law with respect to those policies, I explain how it nonetheless will likely trigger a wave of future litigation seeking to do so. I will present arguments for preserving the preexisting lawful status of race-neutral policies with race-conscious ends, arguing that Justice Kennedy's reasoning in *Parents Involved* and *Inclusive Communities* is both correct and entitled to respect under stare decisis. Overturning it would be wildly disruptive to settled expectations and would lead to a flood of litigation in other areas. I discuss possible ways to contain that flood (i.e., to cabin a pro-plaintiff holding in cases like the magnet school litigation). And I consider arguments grounded in the original public meaning of the Fourteenth Amendment, which has not been previously examined by the literature on race-conscious but facially neutral policymaking. That meaning is not well understood, but no evidence seems to affirmatively support ends-colorblindness.

I attended TJ, which was a formative experience for which I remain extremely grateful. I care about the school and have followed its case closely. But it is the broader implications that made this an Article worth writing. Reasonable minds can differ as to the merits of any school's admissions regime; admissions policy debates often include difficult balances among important objectives. But it is quite another matter to *constitutionally* curtail a school system's ability to give *any* weight to racial diversity, even when using race-blind tools. That radical change would threaten routine political practices throughout the country as well as countless laws and policies that have resulted from those practices. It threatens to make government pretend to be

blind to—and give up on trying to address—the deep racial disparities that continue to pervade American life. These issues are already being contested, and that contest will surely escalate. The outcome is unknown, and anyone who cares about racial equality and inclusion should pay attention.

I. The Preexisting Doctrinal Landscape

In this Part, I begin with the doctrine that preceded the *SFFA* cases, which framed the lower-court stages of the magnet school litigation that I explore in Part II. I show that the pre-*SFFA* doctrine generally permits facially neutral policies that result from race-conscious policymaking. In this Part, I will only briefly touch on *SFFA* itself, but in Part III, I will show in detail that *SFFA* did not change the doctrine in any way relevant to this point, although we can expect it to lead to further litigation aiming to do so.

Part I.A starts with a brief clarification of some of the terms I use, to make clear what kinds of policies this Article is and is not about. In Part I.B, I outline the underlying doctrinal logic of arguments in *favor* of the ends-colorblindness position raised by plaintiffs in cases like *Coalition for TJ*. Their argument combines the existing, weaker version of colorblindness that is already part of Supreme Court doctrine with the principle that facially neutral policies can be rendered unconstitutional by an underlying discriminatory purpose. Subparts B.1 and B.2 examine each of these doctrinal threads. In Subpart B.3, I show that these two threads have never been combined to produce the ends-colorblindness principle, and indeed, key precedents reject ends-colorblindness implicitly or explicitly, instead endorsing the use of race-neutral tools to promote racial equality and inclusion.

A. Defining Terms

First, this Article focuses on the constitutional status of policies that are both facially neutral and administered in a race-neutral way. That is, no individual is being treated differently from another due to race. Those applying the policies to individuals (e.g., admissions officers) do not apply racial classifications in doing so, and the policies as written do not direct them to do so. When I refer to "race-neutral," "facially neutral," or "race-blind" policies, or to an absence of racial classifications, this is what I mean.

Second, the policies in question are *products of race-conscious policymaking*—their content is shaped at least in part by a race-related purpose. For example, in a simplified variant of the magnet school cases, suppose a school is choosing between basing admissions exclusively on a standardized test or exclusively on grades. Neither approach would give admissions officers access to racial information about applicants; both are race-blind policies. But if the school takes expected impacts on the class's racial composition into account when

choosing between the two approaches, we can say that the policymaking process was race conscious. Examples of race-conscious policymaking include avoiding the use of criteria (such as some standardized tests) that have racially disparate impacts or pursuing diversity objectives using nonracial but race-correlated criteria, like socioeconomics. Such policies often also have nonracial purposes, but the legal issues explored here arise only in cases where race-related concerns have at least some effect on policy choices. The metaphor of "retail" versus "wholesale" use of race is often used to refer to the distinction between the individual-level use of racial classifications and the presence of broader race-related policy goals. The policies I am concerned with do not use race at the "retail" level to treat individuals differently, but they do use it at the "wholesale" level in the sense that policymakers care about the aggregate racial effects of their policies and might sometimes gather data to measure those aggregate effects.

Third, although I often refer to "race-conscious" or "race-related" ends without specifying each time exactly what that means, I focus on what are often called "benign" ends: They aim to reduce race gaps and/or bring racial groups together, and they do not entail racial animus.[37] These objectives include reduction of disparity, integration, remedying historical discrimination, diversity, and inclusion, for example. These goals are not identical, and I distinguish among them where the differences matter. But they all raise the core question of whether race-related purposes alone trigger strict scrutiny of facially neutral policies. As we will see, the doctrine has treated "benign" and "invidious" racial purposes differently when it comes to facially neutral laws. There are difficult edge cases, but roughly speaking, the benign/invidious distinction has intuitive meaning. One important and perhaps nonobvious point is that the doctrine treats "racial balancing" differently from other efforts to close race gaps—as invidious rather than benign. Where benign "diversity" efforts end and "racial balancing" begins is a key question in the magnet school cases, and I will explore it in detail in Part II, arguing that the policies at issue in these cases fall easily on the benign side of the line.

All of this terminology is drawn from the doctrine and scholarship discussed below, although there are occasional inconsistencies in how they are applied. To this existing glossary I add what, to the best of my knowledge, are new terms: "means-colorblindness" and "ends-colorblindness." As further detailed below, means-colorblindness is what the Supreme Court has already embraced, and ends-colorblindness is what the plaintiffs in the magnet school litigation are pushing for. Under means-colorblindness, racial classifications

37. In practice, both animus and the causal role of race are often factually contested, but the legally interesting question arises when animus is absent and causation is present.

(i.e., retail-level use of race) are generally subject to strict scrutiny, regardless of their purpose. This is a colorblindness triggered by the use of particular policy tools (suspect means). Under ends-colorblindness, a race-related purpose (i.e., wholesale-level use of race) would also trigger strict scrutiny, whether that purpose was benign or invidious and even if the tools used are race blind. All of this will be explored in detail below; my purpose here is merely definitional.

B. Understanding the Argument for Ends-Colorblindness

A move toward ends-colorblindness would be unprecedented, disruptive, and unjustified, as I show below—but the argument for it is not wholly disconnected from existing doctrine, and it's important to understand its underlying logic. The strongest argument in its favor combines two principles that each concededly play important roles in existing equal protection jurisprudence, although they have not historically been applied in combination. The first, which I label the "purpose principle," is that facially neutral policies may be rendered unconstitutional by an underlying discriminatory purpose. The second is colorblindness: the idea that racial discrimination is equally constitutionally suspect (and triggers strict scrutiny) no matter which racial groups it runs in favor of or against, and no matter whether it tends to alleviate or exacerbate existing racial disparities.

As Part II will detail, plaintiffs in cases like *Coalition for TJ* have relied on both these ideas, suggesting that in combination they lead to a strong conclusion: Facially neutral actions trigger strict scrutiny if they have *any* race-related purpose, even a benign one. After examining each of these principles closely, I will show that this is a flawed syllogism—the two principles have not been and should not be combined in that way.

1. The purpose principle

It is black-letter law that policies need not involve an express racial classification to be unconstitutional racial discrimination. Facially neutral actions trigger strict scrutiny under the Equal Protection Clause if they have a racially disparate impact and that impact is intentional. As the Court explained in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, if "there is a proof that a discriminatory purpose has been a motivating factor in [a challenged] decision, [the] judicial deference [that normally attaches to state action] is no longer justified."[38] In *Hunter v. Underwood*, for example, the Court relied on this doctrine to strike down Alabama's facially neutral felony-disenfranchisement provision based on overwhelming evidence in the

38. 429 U.S. 252, 265-66 (1977).

historical record that its purpose had been "to establish white supremacy."[39] Citing *Arlington Heights*, the Court further held that it didn't matter whether there were also additional, constitutionally permissible motives so long as the racial motive was ultimately dispositive.[40] However, this causal test is demanding; applying it in the gender-discrimination context in *Personnel Administrator of Massachusetts v. Feeney*, the Court clarified that plaintiffs must prove the contested decision was undertaken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[41] That is, true purpose is required, not merely awareness of a disparate impact.

The purpose principle is quite uncontroversial when applied to claims brought by disadvantaged minorities. This is not to say that there are no controversies related to it in that context. For example, many critics argue that a discriminatory purpose should not be *required* to establish an equal protection claim, and many also argue that the governing tests make discriminatory purpose too hard to prove. But to my knowledge, no court or scholar has contended that a purpose of invidious discrimination should generally be *insufficient* to trigger strict scrutiny of a facially neutral policy or practice. In the modern era, racial discrimination is typically no longer written into laws, and equal protection litigation normally turns on allegations of sub rosa discriminatory motives. Modern civil rights litigation thus depends on and takes for granted the purpose principle.

Notably, though, the Supreme Court cases establishing and applying the purpose principle have consistently involved the kind of alleged discriminatory motive usually described as "invidious," which typically means discrimination against disadvantaged racial groups of a sort that exacerbates existing disparities. And this does not seem like mere happenstance; the *Arlington Heights* majority opinion, for example, uses the qualifier "invidious" five times to describe the kind of purpose that triggers strict scrutiny.[42] None of these cases involve facially neutral policies with an underlying purpose of *promoting* racial equality, diversity, or integration. To extend the purpose principle to these "benign" racial purposes requires combining it with a more contested theory: colorblindness.

39. 471 U.S. 222, 229 (1985) (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, at 8 (1940) (statement of John B. Knox)).

40. *Id.* at 231-32.

41. 442 U.S. 256, 279 (1979).

42. 429 U.S. at 265, 266 & n.14, 267, 270.

2. Colorblindness

"Colorblindness" arguments draw rhetorically on Justice Harlan's dissent in *Plessy v. Ferguson*, which stated: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[43] The target of this language was the legal enforcement of white supremacy. The application of this concept to "benign" classifications benefiting people of color is more recent and more controversial. On the Supreme Court, its most vigorous endorsements have been in concurrences and dissents. For example, Justice Scalia, concurring in *City of Richmond v. J.A. Croson Co.*, argued:

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.[44]

The majority of the Court has not generally been as full-throated as Justice Scalia in embracing this principle. Still, in cases involving explicit racial classifications, the Court *has* long adopted a weaker form of colorblindness, sometimes labeled "consistency" or "congruence." Under this principle, all racially disparate treatment of individuals by government, including "benign" examples like affirmative action, are equally subject to strict scrutiny.[45] In Justice Powell's influential *Bakke* opinion, he wrote that 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."[46] This position was endorsed by a Court majority in *Adarand Constructors, Inc. v. Pena*, a government contracting case,[47] and in all of the Court's affirmative action cases (even those upholding affirmative action, such as *Grutter v. Bollinger*, which set the legal standard for two decades until *SFFA*).[48]

In *Adarand*, the Court denied that applying strict scrutiny equally to "benign" and "invidious" classifications would cause it to lump dissimilar policies together; rather, it held that strict scrutiny was necessary for it to *discern* what uses of race were benign.[49] As that framing suggests, strict scrutiny has historically been somewhat easier to *satisfy* in the benign-discrimination cases. That is mainly because educational diversity was, in pre-*SFFA* cases, accepted as a compelling state interest in the higher-education

43. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

44. 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring in the judgment).

45. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995).

46. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978) (plurality opinion).

47. 515 U.S. at 226-27.

48. 539 U.S. 306, 323 (2003).

49. 515 U.S. at 228-29.

context[50]—a fact that illustrated the Court's complicated relationship with colorblindness. Racial diversity is itself a race-conscious objective; it recognizes that the reality of race's role in American life will tend to mean that students from different racial backgrounds bring different experiences and perspectives to the classroom.[51] As I will explore further in Part III, in *SFFA* the Court declined to treat Harvard's and UNC's diversity-related educational interests as compelling, but it did not suggest that there was anything constitutionally problematic about the interests themselves (as opposed to the means used to pursue them).

In any event, even though (at least before *SFFA*) it was not always "fatal in fact" in the affirmative action context,[52] strict scrutiny has always been a demanding standard that has sharply constrained usage of racial classifications. For example, in *Grutter*'s sister case, *Gratz v. Bollinger*, the Court struck down a university policy that gave "*automatic*" weight to race, even while approving a more "individualized" plus-factor role in *Grutter*.[53] In *Parents Involved*, the Court likewise applied strict scrutiny to bar a K-12 school district from explicitly taking race into account when assigning students to schools.[54] In his plurality opinion, Chief Justice Roberts included strong language in favor of colorblindness: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[55] The Court has repeatedly referred to "racial balancing"—that is, efforts to engineer the composition of a school or some other entity to mirror the broader population of the community—as "patently unconstitutional."[56] In Part II, I will closely examine what racial balancing entails, arguing that the label is inapt as applied to the kinds of modest diversity efforts at issue in the magnet school cases.

Note that, so far, all the colorblindness cases discussed here involve express racial classifications—the practice with which the Court has been uniquely uncomfortable. And indeed, the Court's decisions have generally framed the colorblindness rule explicitly in terms of classifications. Take *Grutter*, for example:

50. *See Grutter*, 539 U.S. at 328.

51. *See* Siegel, *From Colorblindness*, *supra* note 32, at 1292 (arguing that "the anticlassification principle cannot explain" why racial diversity is a compelling state interest).

52. *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 237).

53. 539 U.S. 244, 276-77 (2003) (O'Connor, J., concurring).

54. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720, 734-35 (2007).

55. *Id.* at 748 (plurality opinion).

56. *E.g.*, Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 311 (2013) (quoting *Parents Involved*, 551 U.S. at 732).

> We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' . . . ." We apply strict scrutiny to all racial classifications to "'smoke out' illegitimate uses of race by assuring that [the government] is pursuing a goal important enough to warrant use of a highly suspect tool."[57]

This language illustrates what I call "means-colorblindness," which is colorblindness applied when government uses race-conscious *means* to accomplish its ends. Classifications are "a highly suspect tool," the purpose of which cannot be merely assumed to be benign. There is no suggestion, however, that *no* race-related purpose is benign, or that all racial purposes are equally suspect. *Adarand* and *Croson* similarly refer repeatedly to the dangers of racial classifications and to an individual's right to be treated equally without regard to her race.[58] These cases' argument that strict scrutiny is needed to distinguish between benign and invidious discrimination has never been applied in cases without individual-level classification.[59]

Even when limited to classifications, colorblindness is highly controversial.[60] Many scholars have advanced critiques of it, which are often associated with an "antisubordination" view of equal protection, under which an action's constitutionality should be assessed by whether it tends to exacerbate or mitigate existing racial subordination.[61] Antisubordination critiques of colorblindness generally run along the following general lines: U.S. history entails hundreds of years of racial subordination, including slavery, segregation, redlining, and employment discrimination. Enormous racial disparities in wealth, employment, and opportunities remain a reality, and to

57. 539 U.S. at 326 (alteration in original) (citations omitted) (first quoting *Adarand*, 515 U.S. at 227; and then quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

58. *See Adarand*, 515 U.S. 200, 224-29 (citing *Croson*, 488 U.S. at 516-17 (Stevens, J., concurring in part and concurring in the judgment)).

59. *See id.* (citing *Croson*, 488 U.S. at 516-17 (Stevens, J., concurring in part and concurring in the judgment)).

60. For one illustrative collection of academic critiques, see generally SEEING RACE AGAIN: COUNTERING COLORBLINDNESS ACROSS THE DISCIPLINES (Kimberlé Williams Crenshaw, Luke Charles Harris, Daniel Martinez HoSang & George Lipsitz, eds. 2019).

61. *See, e.g.*, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 157-58 (1976) (noting that the Equal Protection Clause prohibits "the state law or practice [that] aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group"); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9 (2003) (describing the antisubordination theory and contrasting it with anticlassification approaches).

require "blindness" to them shackles the government's ability to redress them. Moreover, critics argue, the application of strict scrutiny to "benign" classifications has a weak theoretical basis. Strict scrutiny is meant to constrain classifications that typically serve no legitimate interest and to protect groups that have historically suffered discrimination or lack political power—the "discrete and insular minorities" who most need judicial protection.[62] Uses of race that *help* such groups do not implicate these concerns and should not be treated as presumptively suspect, absent some additional reason for concern such as animus.

Supreme Court dissents have sometimes critiqued colorblindness and embraced antisubordination arguments. For example, in *Adarand*, Justice Stevens argued against a doctrine that assumes "equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."[63] But this view has never commanded a majority of the Court. Means-colorblindness can now fairly be described as black-letter law: All racial classifications in government's treatment of individuals are subject to strict scrutiny. The Court is unlikely to abandon that view anytime soon, and I treat it here as a doctrinal given.

3. Does any doctrine support ends-colorblindness?

So the Supreme Court's purpose-principle cases all concern invidious discrimination, and its colorblindness cases concern classifications. Neither principle taken alone gets us to ends-colorblindness. Still, can these cases' logic, taken together, bar policymakers from considering any race-related ends, even if benign and even if the tools are race neutral?

It is theoretically *possible* to make this leap. If we do so, the logic underlying it may further imply that race-conscious government interests should not themselves be treated as compelling, as doing so would seem circular: How can racial equality or diversity concerns be a compelling interest if race consciousness renders a motivation suspect? This extreme version of colorblindness would thus not only apply strict scrutiny to nearly *all* government efforts to redress racial disparities, exclusion, and the like, but also would likely make that scrutiny close to impossible to overcome.[64]

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

63. *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting); *see also* Siegel, *Roberts Court*, *supra* note 32, at 1303-05 (discussing the *Parents Involved* dissents).

64. I say "close to" because the Court would probably make an exception, even under ends-colorblindness, for tailored remedies for past discrimination by a specific government actor. *See, e.g.*, *Croson*, 488 U.S. at 492-93 (plurality opinion) ("Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.").

But so far, the Supreme Court has not embraced ends-colorblindness. Its case law has consistently implied, and occasionally held, that facially neutral policies that serve race-related purposes like inclusion and integration are *not* subject to strict scrutiny. So a "benign" race-related purpose does not *save* racial classifications from being subjected to strict scrutiny, but neither does it *trigger* strict scrutiny absent retail-level use of race.

This distinction is reflected, with some ambiguity, in the Court's pre-*SFFA* educational affirmative action cases, such as *Grutter* and *Fisher v. University of Texas at Austin* (*Fisher I*). In those cases, the Court held that universities defending affirmative action must demonstrate that they have considered race-neutral strategies to pursue their compelling interest in the educational benefits of racial diversity.[65] Specific race-neutral strategies were praised, not criticized. For example, the University of Texas's (UT) Ten Percent Plan (TPP) offered admission to top graduates of all Texas public high schools; it was adopted expressly for diversity purposes after the Fifth Circuit struck down the university's race-based affirmative action program.[66] The theory was that the TPP would benefit applicants from previously underrepresented public schools in predominantly Black and Hispanic jurisdictions.[67] Later, after *Grutter*, UT began considering race again, but only for students not admitted under the TPP.[68] In *Fisher v. University of Texas at Austin* (*Fisher II*), Abigail Fisher was denied admission not only under this race-conscious scheme, but also under the TPP.[69] But no opinion in *Fisher I* or *II* questioned the TPP's constitutionality. For example, Justice Alito, who dissented in *Fisher II*, emphasized that the TPP "effectively compensated for the loss of affirmative action" and described its success in increasing Black and Hispanic representation, seemingly approvingly.[70] Justice Thomas, concurring in *Fisher I*, described the Black and Hispanic students admitted under the TPP as being "admitted without discrimination."[71]

65. Grutter v. Bollinger, 539 U.S. 306, 339 (2003); *Fisher I*, 570 U.S. 297, 312 (2013).

66. *See* Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2332-33, 2342-43.

67. *See, e.g.*, Eboni S. Nelson, Ronald Pitner & Carla D. Pratt, *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187, 2210-11 (2017) (describing the TPP as "leveraging the neighborhood segregation of Texas cities and the resulting de facto segregation in Texas public schools" to create diversity).

68. *See Fisher I*, 570 U.S. at 305 (describing this chronology); *id.* at 333-34 (Thomas, J., concurring) (explaining that most Black and Hispanic students are admitted to UT without consideration of race, via the TPP).

69. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2207 (2016).

70. *Id.* at 2218 (Alito, J., dissenting) (quoting Joint Appendix at 396a, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 8395796) ("The 2004 entering class thus had a higher percentage of African-Americans, Asian-Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.").

71. *Fisher I*, 570 U.S. at 333 (Thomas, J., concurring).

Prior to *SFFA*, universities throughout the country took the Court's emphasis on race-neutral alternatives seriously, undertaking detailed analyses of race-neutral diversity strategies and sometimes adopting them.[72] It would be a surreal turnaround were the Court to later hold that the very decisionmaking process the Court required for decades renders a resulting race-neutral policy unconstitutional. And the implicit approval in these educational cases echoes what many Justices have said in other contexts. For example, in *Croson*, even while forcefully endorsing a colorblindness principle as to classifications, Justice Scalia wrote that "[a] State can, of course, act 'to undo the effects of past discrimination' in many permissible ways that do not involve classification by race."[73] He gave the example of a small-business preference that would disproportionately benefit minority businesses.[74] In *Adarand*, the Court emphasized that "this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose."[75] This language does not pass judgment one way or another on facially neutral laws, but nonetheless plainly limits what the Court *did* hold to the means-colorblindness principle.[76]

The affirmative action cases do not definitively reject ends-colorblindness, to be sure. In these cases, the constitutionality of facially neutral alternatives is not directly presented to the Court (for example, Abigail Fisher never challenged the TPP), and the Court has not purported to resolve the issue. Moreover, a few opinions *declining* to strike down affirmative action have questioned whether a bright line separates it from facially neutral policies. Most are dissents, but they include Justice Kennedy's opinion for the four-justice majority in *Fisher II*.[77] Rejecting the plaintiff's argument that narrow

72. For example, the University of North Carolina's Admissions Office in 2013, responding to *Fisher I*, convened a Race-Neutral Alternatives Working Committee, which reviewed empirical evidence on race-neutral alternatives adopted by many other universities, as well as projecting the impacts of similar approaches on UNC's racial composition if adopted there. *See* OFF. OF UNDERGRADUATE ADMISSIONS, UNIV. OF N.C. AT CHAPEL HILL, EXPLORING RACE-NEUTRAL ALTERNATIVES IN UNDERGRADUATE ADMISSIONS (2019), https://perma.cc/RBM5-7F84.

73. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment).

74. *Id.*

75. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213 (1995).

76. *Id.*; *see* Banks, *supra* note 32, at 578 n.30 (suggesting that this disclaimer may "signal the Court's unease with the implications of the coupling of the discriminatory purpose standard and the consistency principle"); Bagenstos, *supra* note 20, at 1144 (same).

77. Justice Kagan was recused, and the late Justice Scalia's seat was vacant. *See Fisher II*, 136 S. Ct. 2198, 2204 (2016) (4-3 decision); Adam Liptak, Larry Buchanan & Alicia

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tailoring required UT to expand the TPP, Justice Kennedy wrote that the TPP, "though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. . . . Consequently, petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral."[78]

The *Fisher* litigation thus produces some confusion about the status of race-neutral alternatives. The Court's language concededly calls into question whether such alternatives truly are race neutral if their purpose is racial diversity. But it does so not to impugn the TPP but rather to support upholding affirmative action. It remains the case that no race-neutral alternative has ever been called into constitutional question in any of the Court's affirmative action jurisprudence. The *Grutter* requirement was reiterated in *Fisher II*, suggesting that the majority's comments about the TPP did not unsettle the consensus that there is a meaningful constitutional difference between policies that do not consider race in their treatment of individuals and those that do.[79] And as we'll see in Part III, the *SFFA* majority opinion said next to nothing about race-neutral alternatives, and it did not weigh in one way or another on their permissibility.

In any case, beyond the indirect implications of the affirmative action case law, two key Supreme Court opinions speak directly to the constitutional permissibility of race-conscious policymaking processes. In *Parents Involved*, Justice Kennedy's controlling concurrence explicitly endorsed the constitutionality of policymakers' pursuit of race-conscious objectives through facially neutral means.[80] Justice Kennedy had first joined the majority in striking down a school district's use of race in assigning individual students to schools and in declining to extend *Grutter*'s recognition of racial diversity as a compelling state interest to the K-12 context.[81] Although they did not directly concern selective magnet programs, these holdings are core reasons that (as the cases in Part II will illustrate) selective magnet schools have long stayed away from race-based affirmative action; they have known for over fifteen years that they cannot rely on *Grutter*.

But Justice Kennedy did not join the Chief Justice's entire opinion. Instead, he wrote separately to respond to the possible implication that school assignment policy must be designed without regard to racial integration. This

Parlapiano, *How a Vacancy on the Supreme Court Affected Cases in the 2015-16 Term*, N.Y. TIMES, https://perma.cc/A8ZD-83P2 (updated June 27, 2016).

78. *Id.* at 2213.

79. Nor should these comments be read to overrule sub rosa Justice Kennedy's own more detailed and on-point analyses in *Inclusive Communities* and *Parents Involved*, discussed below; no court has so suggested.

80. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 789 (Kennedy, J., concurring in part and concurring in the judgment).

81. *See id.* at 792-93.

concurrence offers the most detailed analysis of any Supreme Court opinion of the difference between retail-level and wholesale-level uses of race and the problems with total colorblindness:

> The enduring hope is that race should not matter; the reality is that too often it does. . . .
>
> The plurality's postulate that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race" is not sufficient . . . . To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.
>
> The statement by Justice Harlan that "[o]ur Constitution is color-blind" . . . , as an aspiration, . . . must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle. . . .
>
> [S]chool authorities . . . are free to devise *race-conscious measures* to address the problem [of de facto segregation] in a general way. . . .
>
> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. *These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny* . . . . Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers [race-related impacts].[82]

It is worth highlighting Justice Kennedy's conclusion that facially neutral integration strategies should *not be subject to strict scrutiny*, not merely that they would *survive* strict scrutiny. One could imagine the latter argument, given cases like *Grutter* that treated similar policies as more narrowly tailored ways to achieve educational diversity. But if policies are not subject to strict scrutiny in the first place, then policymakers need not tailor them to the diversity objective alone, nor must courts find that they serve compelling interests and use narrowly tailored means. Many critics have argued that even in the education context, the focus on diversity (a product of Justice Powell's concurrence in *Bakke*) is overly narrow, ignoring other important race-related goals, such as remedying historical injustice or developing leaders to serve a

82. *Id.* at 787-89 (first and second alterations in original) (emphasis added) (citations omitted).

variety of communities.[83] Moreover, in addition to the Court's reluctance to apply it to K-12 schools, the educational-diversity interest often has no analogue in other race-conscious policymaking contexts outside education. But Justice Kennedy's *Parents Involved* opinion is not framed in terms of the educational benefits of diversity per se—rather, it emphasizes integration and avoidance of racial isolation. Justice Kennedy also does not suggest that only narrowly tailored approaches are permitted. Indeed, it is not clear how narrow tailoring would distinguish among different race-neutral policies.

Justice Kennedy's opinion is important because his was the controlling view on the fractured Court. He provided the fifth vote to strike down the Seattle school assignment plan—and on clearly narrower grounds than those of the other four justices who voted for the same outcome. That four-justice plurality embraced stronger colorblindness rhetoric, although it did not actually find that school district policies must be entirely race blind.[84] Because Justice Kennedy's is the narrower of the opinions that determined the case's outcome, it is controlling precedent under *Marks v. United States* (1977).[85] The *Marks* rule has sometimes confused lower courts because it is not always obvious what counts as the narrower rationale;[86] here, though, it *is* obvious. Some scholars have argued that *Marks* should be abandoned (such that only reasoning embraced by a majority would create precedent).[87] But *Marks* itself is binding, which means that Justice Kennedy's *Parents Involved* opinion also is. Some lower courts have failed to recognize this, but they are wrong.[88]

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83. *See, e.g.*, Sally Chung, *Affirmative Action: Moving Beyond Diversity*, 39 N.Y.U. REV. L. & SOC. CHANGE 387, 387-89, 396-97, 400, 407 (2015). For another critique of the diversity interest, see Bridges, note 36 above, at 137-38.

84. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720, 748 (2007).

85. 430 U.S. 188, 193 (1977) (finding that the holding of a fragmented Court's decision should be viewed as the position taken by the Justices who concurred in the judgment on the narrowest grounds).

86. *See* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1944-45, 1959-60 (2019).

87. *See id.* at 1966. In *Parents Involved*, the dissents did not comment on what review standard applies to facially neutral policies, so it cannot be said that Justice Kennedy's position held majority support even if one counts dissenting votes. 551 U.S. at 798-803 (Stevens, J., dissenting); *id.* at 803-68 (Breyer, J., dissenting).

88. *See infra* notes 308-09 and accompanying text. One could potentially question whether the above-quoted passage of Justice Kennedy's opinion, specifically, is a holding; it is discussing policies that weren't before the Court. But Justice Kennedy next goes on to say that the school district's failure to pursue these permissible alternatives is why its policy fails strict scrutiny; their permissibility is thus a key part of the reason for his vote. *Parents Involved*, 551 U.S. at 790. ("I join Part III–C of the Court's opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a

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If there was doubt about the precedential value of Kennedy's *Parents Involved* opinion, the question is obviated by the 2015 majority opinion in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[89] *Inclusive Communities* was not an education case; it held that disparate impact lawsuits were cognizable under the Fair Housing Act.[90] In doing so, Justice Kennedy (now writing for the Court) quoted and followed his *Parents Involved* opinion.[91]

Disparate impact liability, in general, has been a key context in which scholars have examined race consciousness in the design of facially neutral policies.[92] Although constitutional equal protection claims require a showing of purposeful discrimination, in some statutory antidiscrimination contexts (in particular, employment and housing), a claim can be grounded in a showing that a challenged practice or criterion disproportionately excluded or harmed members of a particular racial group. For example, employers governed by Title VII of the Civil Rights Act are required to avoid employment criteria that impose a racially disparate impact, unless those criteria are "job related . . . and consistent with business necessity."[93] The idea is to avoid creating gratuitous barriers to inclusion, even if those barriers do not involve racial classifications or intentional discrimination. Disparate impact theory (beyond itself resulting from race-conscious lawmaking) is an important potential application of ends-colorblindness, because these laws effectively *require* those subject to them to be race conscious when determining policies. Employers and landlords are expected to assess the racial impacts of their policies in order to avoid creating unnecessary disparities.

For government employers, this obligation potentially conflicts with their constitutional obligations to avoid racially disparate treatment—or at least, it would, if the ends-colorblindness principle were adopted. And even private employers might face such conflicts because statutory antidiscrimination law arguably imposes two requirements (avoiding disparate treatment and disparate impact) that would then be in tension with each other. The same basic issue may also arise when there is *no* law imposing disparate impact

more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.").

89. 576 U.S. 519, 545 (2015).

90. *Id.*

91. *Id.*

92. *See generally* Bagenstos, *supra* note 20 (discussing the constitutional status of disparate impact law); Siegel, *Roberts Court*, *supra* note 32 (same); Primus, *Future of Disparate Impact*, *supra* note 32 (same).

93. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

liability, but a government decisionmaker chooses to try to avoid a racial impact for policy reasons.

This potential conflict between disparate treatment and disparate impact law had initially been highlighted, six years before *Inclusive Communities*, in *Ricci v. DeStefano*.[94] *Ricci* involved the New Haven Fire Department, which administered a test for promotion to hundreds of firefighters but declined to rely on its results after learning that they overwhelmingly favored white candidates.[95] The Department claimed that it feared a Title VII disparate impact suit if it did rely on the test.[96] In another Justice Kennedy opinion, the Supreme Court held that its decision to abandon the test was purposeful discrimination against white firefighters in violation of Title VII's disparate treatment prong.[97] It reasoned that the promotion test could be readily justified by business necessity, and therefore there was no good reason to fear disparate impact liability. Absent a legitimate disparate impact concern, the fire department engaged in unlawful disparate treatment when it refused to promote a group of firefighters that met the pre-stated criteria because that group had the wrong racial composition.[98]

The Court left open the possibility that the statutory result would be different if the disparate impact liability concern were stronger. But it also raised (and bracketed) another possibility: that the *Constitution* might in such a case bar a decision like the New Haven Fire Department's.[99] The majority did not comment extensively on this, but in his concurrence, Justice Scalia wrote:

> [The] resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection? The question is not an easy one. . . .
>
> Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory. . . .
>
> Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level.[100]

94. 557 U.S. 557, 576 (2009).

95. *Id.* at 566, 573-74.

96. *Id.* at 562-63.

97. *Id.* at 592.

98. *Id.* at 587-88, 592.

99. *Id.* at 584.

100. *Id.* at 594-95 (Scalia, J., concurring).

Justice Scalia floated a possible resolution: Disparate impact liability could be defended as a prophylaxis against intentional discrimination if narrowly tailored. He concluded that while the issue did not require immediate resolution, "the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them."[101] This concurrence, together with the majority leaving the constitutional question open, raised deep concern among many scholars, several of whom published thoughtful responses to Justice Scalia.[102] *Ricci* was understood to leave big questions unanswered, and Justice Scalia's opinion was a warning shot. That these questions were on the table at all was a sign of how far the Court had moved; not long earlier, the hot issue had been whether the Fourteenth Amendment itself *required* disparate impact analysis.[103]

Still, scholars generally agreed that the *Ricci* majority opinion should not itself be read to undermine the continuing validity of disparate impact or of race-conscious policy generally. After all, it was written by Justice Kennedy, whose views in *Parents Involved* just two years earlier were irreconcilable with ends-colorblindness. Instead, many argued, the best reading of *Ricci* was a narrow one focused on its unusual facts—what Richard Primus labeled the "visible-victims reading."[104] The New Haven Fire Department had not *prospectively* changed promotion standards; it had thrown out, because of race, the results of a test that specific, identifiable firefighters had already passed, and disrupted their expectations. Once particular individuals are involved, it is hard to say the Department's decision is "wholesale" anymore. It looks more like a typical retail-level classification, raising Title VII disparate treatment and possibly constitutional concerns that would not have been raised had the Department merely declined to reuse the test in the future.

For those worried about *Ricci*, *Inclusive Communities* brought reassurance.[105] There, the Court not only extended disparate impact liability to another statutory context (even though constitutional avoidance arguments

101. *Id.* at 595-96.

102. *See, e.g.*, Primus, *Future of Disparate Impact*, *supra* note 32, at 1362-74 (proposing readings that would not be fatal to disparate impact law).

103. *See, e.g.*, Siegel, *Roberts Court*, *supra* note 32, at 660-61; Primus, *Equal Protection*, *supra* note 32, at 496. When the Court held that it did not so require, it also stated in dicta that legislatures were free to adopt disparate impact statutes. *See* Washington v. Davis, 426 U.S. 229, 247-48 (1976).

104. *See, e.g.*, Primus, *Future of Disparate Impact*, *supra* note 32, at 1345, 1369-75; *see also* Siegel, *Roberts Court*, *supra* note 32, at 682; Adams, *supra* note 32, at 842; Hellman, *supra* note 34, at 864.

105. For a convincing argument about the implications of *Inclusive Communities*, see generally Bagenstos, note 20 above. For more discussion, see also Kim, note 34 above, at 1569-71.

were raised against this move), but also embraced, and quoted favorably, Justice Kennedy's *Parents Involved* reasoning. It found: "When setting their larger goals, local housing authorities may choose to foster diversity and combat racial isolation with race-neutral tools, and mere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor at the outset."[106] The Court was deeply divided. Justice Alito dissented (joined by Justices Roberts, Scalia, and Thomas), relying on statutory interpretation grounds but citing constitutional avoidance concerns.[107] Justice Thomas went further, characterizing disparate impact liability as a tool of unconstitutional racial balancing.[108]

Still, the majority clearly embraced, within constraints, the permissibility of race-neutral strategies with race-conscious aims. The majority did not expressly address the level of constitutional scrutiny that would apply to such strategies, but it did use language implying that they raise no "difficult constitutional questions," implying that they are not "suspect."[109] Moreover, if what the Court meant was that these race-neutral policies would *survive* strict scrutiny, it would be odd for it not to declare the compelling state interest and specify what race-neutral housing strategies might be narrowly tailored to it. In an important commentary, Samuel Bagenstos persuasively argues that this holding ratified the narrow, fact-driven interpretation of *Ricci* and illustrated the limits of the Court's commitment to colorblindness.[110]

Inclusive Communities has so far been mostly ignored by lower courts in the magnet school cases and by many school-system defendants.[111] This is a significant error. One *could* read the case narrowly, confining it to the FHA context, but that interpretation is unpersuasive. Although it is a statutory interpretation case, the defendants raised (and the dissents relied on) constitutional avoidance arguments. That meant the Court's opinion, by necessity, encompassed extensive discussion about what limits the Constitution did and did not impose on disparate impact liability and judicial remedies in disparate impact cases. The Court's statements about

106. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015).

107. *Id.* at 589-90 (Alito, J., dissenting).

108. *Id.* at 555 (Thomas, J., dissenting).

109. *Id.* at 544-45 (majority opinion) (stating that remedial court orders in disparate impact cases should use "race-neutral means" because using racial classifications instead "might raise more difficult constitutional questions").

110. Bagenstos, *supra* note 20, at 1151; *see also* Kim, *supra* note 34, at 1563, 1569-70 (agreeing with Bagenstos); Siegel, *Roberts Court*, *supra* note 32, at 681-83 (arguing that *Fisher II* pointed to this same interpretation).

111. *See infra* Part II.

constitutionally permissible uses of race were thus not mere dicta; they were essential parts of its reasoning.

Moreover, the Court itself did not suggest that those constitutional principles were limited to the housing context. It cited, in addition to two key passages of *Parents Involved*, the *Croson* plurality's endorsement of "race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races" and the *Ricci* Court's refusal to "question[] an employer's affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions."[112] Its holding turns on a principle that cuts across contexts: Government actors are generally free to undertake race-neutral equal-opportunity efforts and to eliminate practices with disparate impacts. That reading is consistent with many past opinions that implicitly approve such efforts and a complete absence of decisions holding them unconstitutional.

A final strand of doctrine that ends-colorblindness advocates could potentially look to for support is the Supreme Court's racial gerrymandering case law, although, in my view, it is sui generis and readily distinguished from cases involving other forms of race-conscious policymaking. In a line of cases beginning with *Shaw v. Reno*, the Court has struck down electoral district lines drawn in a contorted manner to encompass minority voters, with an evident and/or conceded purpose of creating majority-minority districts while carving those voters out of other districts.[113] Gerrymandered district maps are in one sense "facially neutral"; what is assigned to a particular district is land, not people, and once the lines are created, people vote according to where they live. And in *Shaw*, the Court did invoke the colorblindness principle, noting that racial gerrymandering is unconstitutional even if designed to increase minority representation in the legislature rather than to reduce it. Still, for several reasons, this line of cases does not imply a broader embrace of ends-colorblindness.

First, in the seminal cases on racial gerrymandering, the Court consistently characterized the state's racial purpose as *segregative*, "an effort to separate voters into different districts on the basis of race,"[114] which the Court has expressly compared to Jim Crow practices it had previously struck down.[115] Because segregation is the epitome of an invidious purpose, it makes

112. *Inclusive Communities*, 576 U.S. at 544-45 (first quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989); and then quoting Ricci v. DeStefano, 557 U.S. 557, 585 (2009)).

113. Shaw v. Reno, 509 U.S. 630, 657-58 (1993). For applications of this rule, see *Miller v. Johnson*, 515 U.S. 900, 905 (1995); *Bush v. Vera*, 517 U.S. 952, 957-59 (1996); and *Cooper v. Harris*, 137 S. Ct. 1455, 1463-65 (2017).

114. *Shaw*, 509 U.S. at 649.

115. *Miller*, 515 U.S. at 911 ("Just as the State may not, absent extraordinary justification, segregate citizens on the basis of race in its public parks, buses, golf courses, beaches, and schools, so did we recognize in *Shaw* that it may not separate its citizens into

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sense that once an electoral policy is characterized as having this purpose, it would trigger strict scrutiny—but that logic does not apply, for example, to facially neutral school diversity initiatives, which are integrative. Of course, some (including dissenting Justices) have pushed back on this characterization of the policy purposes at issue in the gerrymandering cases—one could see the objective as integrating the *legislature*, for example, instead of focusing as the majority does on the *electorate*.[116] But the dissents did not carry the day (and if they had, strict scrutiny wouldn't have been applied). The majority, plainly, does not view racial gerrymandering as benign.

Second, the Court also emphasized several normative concerns about the impact of "carving electorates into racial blocs" that do not carry over readily to race-neutral affirmative action alternatives, nor to benign race-conscious policymaking more broadly.[117] These include promoting racial balkanization and racial bloc voting,[118] promoting racial stereotypes by assuming that members of a racial group share views and interests,[119] encouraging electoral officials to consider themselves accountable only to one racial group,[120] and, in sum, impeding the country's "progress as a multi-racial democracy."[121] Although concerns about the democratic process are specific to the electoral context, the broader concerns about stereotyping and balkanization overlap with the harms the Court has attributed to racial classifications in its affirmative action cases, examined in Part III.[122] These concerns, however, are not triggered by the sorts of race-neutral policies that are the focus of this Article.[123]

Third, the Court repeatedly refers to racial gerrymandering *as a racial classification*—a characterization that makes the application of strict scrutiny follow naturally and provides another possible basis for distinguishing these

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different voting districts on the basis of race." (citations omitted)); *see also Shaw*, 509 U.S. at 647 (citing a "resemblance to political apartheid").

116. *See Shaw*, 509 U.S. at 679 (Stevens, J., dissenting) (arguing that what should matter is whether the policy tends to subordinate an already underrepresented group); *Miller*, 515 U.S. at 932 (Stevens, J., dissenting) (arguing that gerrymandering to create majority-minority districts "serves the interest in diversity and tolerance by increasing the likelihood that a meaningful number of black representatives will add their voices to legislative debates").

117. *Miller*, 515 U.S. at 927.

118. *Shaw*, 509 U.S. at 648, 657.

119. *Id.* at 647-648; *Miller*, 515 U.S. at 911-12, 914.

120. *Shaw*, 509 U.S. at 648.

121. *Miller*, 515 U.S. at 927 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630-31 (1991)); *see also Shaw*, 509 U.S. at 648, 650 (racial gerrymandering is "antithetical to" and "threatens to undermine our system of representative democracy").

122. *See infra* Part III.C.3.

123. *Id.*

cases.[124] The cases are admittedly somewhat confusing on this point, because they also refer to gerrymandering as a facially neutral policy with discriminatory purposes.[125] And it is plausible to see gerrymanders as functioning in both ways. From the perspective of a voter on Election Day, the policy is facially neutral: One votes based on where one lives, and no racial classification appears on the face of the district map. Yet the policy itself arguably entails "retail-level" use of race at the moment that the lines are drawn, not just the "wholesale" type of usage associated with other race-neutral policies. In the Court's characterization of racial gerrymandering, race shapes not just the broad goals of a districting policy but rather the assignment of particular homes (or at least, particular blocks) to particular districts, based on detailed information on the race of the specific people who live there, using contorted lines unexplainable by "anything other than an effort to classify and separate voters by race."[126] This is not quite the same as telling individual voters where to vote based on their individual race. But it is noticeably different from merely seeking to minimize racially disparate impacts or promote racial integration via policies that rely on existing district lines originally drawn for nonracial purposes, for instance, like the Texas Ten Percent Plan does, or on broad correlations between race and some other factor, like socioeconomic status. Moreover, the Court has made clear that even drawing of new district lines with the open objective of creating a majority-minority district will not trigger strict scrutiny unless this objective "predominate[s]" over other traditional objectives like compactness.[127]

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124. *See, e.g.*, *Shaw*, 509 U.S. at 653 (noting that "the Equal Protection Clause demands strict scrutiny of all racial classifications" and that thus, strict scrutiny applies to racial gerrymanders); *id.* at 657 (discussing "[r]acial classifications with respect to voting," including gerrymandering); *Miller*, 515 U.S. at 910-11 (1995) (referring to the gerrymander as "a legislature's deliberate classification of voters on the basis of race" and as "assign[ing] voters on the basis of race").

125. *E.g.*, *Miller*, 515 U.S. at 913.

126. *Shaw*, 509 U.S. at 650. The Census data on which redistricting efforts ultimately rely include information on the race of individual household members; the versions states use for redistricting are typically aggregated slightly, but not much (e.g., to the city-block level). *See* Bush v. Vera, 517 U.S. 952, 961-62 (1996) (describing use of detailed block-by-block Census data on race to draw lines that weave around particular blocks, creating a "correlation between race and district boundaries [that] is nearly perfect" in many instances (quoting Vera v. Richards, 861 F. Supp. 1304, 1336 (S.D. Tex. 1994))).

127. *E.g.*, Cooper v. Harris, 581 U.S. 285, 292 (2017). Election jurisprudence also provides some affirmative support for the permissibility of race-conscious policy (at least regarding elections). In *Allen v. Milligan*, for instance, the Court recently reaffirmed the longstanding principles of Section 2 of the Voting Rights Act (which are highly race conscious, barring practices that "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters") and rejected a constitutional challenge to it. 143 S. Ct. 1487, 1503, 1516-17 (2023) (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)). However, courts have long found the Act

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In short, the best reading of the law as of this writing is that the purpose principle and the means-colorblindness principle *do not* combine to imply ends-colorblindness. This is perhaps dissatisfying to those for whom that combination seems compelled by logic.[128] To be sure, it is not just ends-colorblindness advocates who have fallen prey to this syllogism. Critics of means-colorblindness also have sometimes invoked it while criticizing the Court's demands for race-neutral alternatives to affirmative action, which, they argue, are pointless given that these alternatives are also race-conscious.[129]

But the syllogism is not necessary as a matter of logic, and it would be foolish to insist on it at the expense of the indefensible outcome of constitutionally barring policymakers from having any tools to address racial disparity. It is perfectly logical to say that because of the particular dangers of individual racial classifications, they always get strict scrutiny, whereas policies that do *not* engage in such classifications only get strict scrutiny if they have *invidious* racial purposes. And that is just what the doctrine does.

This reading complicates the frequent characterization of the Court as wholly rejecting antisubordination theory. It has not done so. The Court's doctrine is *certainly* anticlassification, but where classifications are not involved, and the only thing that is race-conscious is the policy's purposes, antisubordination-type reasoning creeps in.[130] As Richard Banks wrote nearly twenty years ago:

> Contrary to the pronouncements of the Court, characterization of a policy as benign or invidious often influences the level of scrutiny. . . .
>
> The persistence of the benign-invidious asymmetry suggests that the moral intuitions it embodies are more widely shared than commonly supposed. Even seemingly stalwart defenders of a symmetrical nondiscrimination mandate may, in practice, support the very sort of asymmetry they purport to oppose. Such deeply ingrained endorsement of the asymmetry suggests both that it would be exceedingly difficult to eliminate and, more importantly, that we should not strive to do so.[131]

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to be Fifteenth Amendment enforcement legislation, *see id.* at 1516-17, which is a basis for its permissibility that does not apply to other sorts of race-conscious policymaking.

128. *See* Carlon, *supra* note 32, at 1155 (critiquing this syllogism).

129. In addition to the majority's comments in *Fisher II* discussed above, this includes, for example, Justices Sotomayor and Kagan, *see infra* Part III.C.1, and Justice Ginsburg, who wrote in her *Fisher I* dissent that "only an ostrich could regard the supposedly neutral alternatives as race unconscious." 570 U.S. 297, 335 (2013) (Ginsburg, J., dissenting). But this is a straw man; nobody thinks the Ten Percent Plan is "race unconscious" at the policymaking level. It is race neutral when differentiating among individuals, a distinction *with* a difference.

130. Robinson, *supra* note 32, at 358-59; *see also* Carlon, *supra* note 32, at 1184-85.

131. Banks, *supra* note 32, at 574-75; *see id.* at 579-80 (gathering 1990s lower-court cases declining to apply strict scrutiny to facially neutral policies).

Elise Boddie expressed a similar view after *Fisher II*:

> [There] appears to be an emerging consensus on the Roberts Court, forged most explicitly by Justice Kennedy, that the state will largely be held harmless for policies that promote racial inclusion if they do not use race-specific means.
>
> The Court has yet to decide a case on this question, but this apparent consensus . . . undermines the conventional wisdom that the Court is unable, or unwilling, to distinguish between benign and invidious racial purpose.[132]

Reva Siegel has argued that the anticlassification/antisubordination divide does not fully capture the Justices' positions. In 2011, she described an "antibalkanization" approach (exemplified by Justice Kennedy), focused on avoiding racial divisiveness and minimizing the salience of race.[133] From that perspective, she argued, classifications are particularly divisive (as are decisions harming identifiable victims, as in *Ricci*), but race-neutral means of pursuing benign race-conscious goals are not.[134] As this analysis suggests, certain normative objections that animate the Court's jurisprudence on racial classifications—worries about stigma, stereotyping, and polarization—do not similarly indict the policy-level use of race. I will elaborate further on these normative differences in Part III, arguing that they provide a meaningful basis moving forward for maintaining the means/ends distinction.

As these examples suggest, I am hardly alone in my reading of the existing law, nor in my normative analysis. Numerous prominent scholars have (in the immediate wake of *Inclusive Communities*, and well before it) made forceful arguments consistent with mine,[135] and the few exceptions are unconvincing.[136]

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132. Boddie, *supra* note 32, at 532.

133. Siegel, *From Colorblindness*, *supra* note 32, at 1281-82 (observing that this theme is especially explicit in election-law cases).

134. *Id.* at 1305-08, 1332-37 (discussing *Parents Involved* and *Ricci*); *see also* Siegel, *Roberts Court*, *supra* note 32, at 668-78 (discussing *Fisher II*); Primus, *Future of Disparate Impact*, *supra* note 32, at 1347 ("Whether Title VII's disparate impact provisions or any other piece of law is consistent with equal protection depends in part, and perhaps deeply, on whether it is understood to reinforce society's historical problems of racial division."); Hellman, *supra* note 34, at 864 ("[W]e can safely conclude that we should not read *Ricci* to suggest that an awareness of the racial impact of actions by itself would give rise to strict scrutiny.").

135. See notes 32 and 34 for a collection of citations of such scholarship.

136. Fitzpatrick's 2001 argument against the TPP relies implicitly on the syllogism critiqued here, *see* Fitzpatrick, *supra* note 33; he invokes the *Arlington Heights* purpose principle, *id.* at 311, and seems to take ends-colorblindness for granted, treating benign and invidious racial purposes as interchangeable without discussion. Marcus's argument for sharp limits on disparate impact liability similarly does not really consider the possibility that colorblindness might not extend to ends, *see* Marcus, *supra* note 33, at 72; he argues, for example, that post-*Ricci*, even Justice Kennedy's *Parents Involved* opinion must be read as requiring strict scrutiny for actions with a "predominant" racial motive, a reading flatly inconsistent with its language.

How long that existing law will last remains in question, however. In 2016, Bagenstos wrote that the *Inclusive Communities* distinction between policies that do and do not classify by race was, while an essential limitation on the Court's colorblindness jurisprudence, also "unstable," both because it hangs a great deal on what counts as a "classification" and because the consensus behind it was not strong enough to survive a shift in the Court's composition.[137] As Part II explains, some lower courts (including the district court in *Coalition for TJ*) already fail to understand the distinction, falling back on the above-described syllogism despite its apparent rejection by the Supreme Court.

Nonetheless, this limit on the colorblindness principle is the best reading of the current law. Even though the Court has regularly applied strict scrutiny in a "colorblind" way to the application of racial classifications, it has declined to apply it to race-neutral policies motivated by benign race-related objectives. To change that status quo, ends-colorblindness advocates need at least one more vote.

II. The Magnet School Admissions Cases

The legal backdrop laid out in Part I seems discouraging for challengers of race-neutral admissions policies—and yet their efforts have recently picked up steam. Their cases have not been combined with challenges to affirmative action, nor led by the same organizations, even though many universities employ both affirmative action and race-neutral diversity tools. Combining these lines of argument would have complicated the affirmative action challenges, which usually present the existence of race-neutral alternatives as a reason to reject racial classifications.[138] Instead, the primary organization leading the separate charge against what it calls "covert" racial discrimination is the Pacific Legal Foundation, a prominent impact-litigation organization with a long record of success at the Supreme Court.[139] PLF is litigating *Coalition for TJ* and three other high-profile magnet school cases.[140]

137. Bagenstos, *supra* note 20, at 1166-68.

138. *See infra* note 329 and accompanying text (citing SFFA's arguments).

139. *See About Pacific Legal Foundation: Fight Back and Win*, PAC. LEGAL FOUND., https://perma.cc/G9NN-LJFY (archived Oct. 24, 2023) (claiming seventeen victories out of nineteen cases heard by the Supreme Court); *What We Fight for: Equality and Opportunity*, *supra* note 29.

140. *See Fighting Race-Based Discrimination at Nation's Top-Ranked High School*, PAC. LEGAL FOUND., https://perma.cc/5EJT-VDMX (archived Oct. 24, 2023); *Parents Fight Discrimination-by-Proxy at Boston's Elite Public Schools*, PAC. LEGAL FOUND., https://perma.cc/WHH6-SDRL (archived Nov. 13, 2023); *Stopping New York's Attempt to Discriminate Against Asian-American Students*, PAC. LEGAL FOUND., https://perma.cc/YR6H-5TGA (archived Nov. 13, 2023); *Parents Fight Racial Balancing Efforts that Deny*

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Outside of PLF's work, federal courts have recently heard at least two similar recent challenges to magnet school admissions; one of these, in Philadelphia, is being litigated by America First Legal (a new organization founded by Stephen Miller) together with the high-profile litigator Jonathan Mitchell. As of this writing, the case remains on the district court docket but appears to have been in the process of reaching a possible settlement for several months.[141] Another case, *Boyapati v. Loudoun County School Board*, was dismissed in 2021 on fact-specific grounds and has not been appealed.[142] I do not focus on either case here, but both indicate the proliferation of similar legal challenges.

In this Part, I examine the potential of PLF's four pending cases and future similar challenges to change the law, and I assess the merits of the various arguments therein. In Subpart A, I focus in detail on *Coalition for TJ*, probably the likeliest of these to reach the Supreme Court. Subparts B, C, and D offer overviews of PLF's cases against New York City, Boston, and Montgomery County, Maryland, respectively. Each of these cases raises issues likely to arise in future similar cases, including those at the university level.

A. *Coalition for TJ v. Fairfax County School Board*

1. Facts

The Thomas Jefferson High School for Science and Technology (TJ) is an elite magnet school in Fairfax County, Virginia.[143] It frequently tops national rankings, and competition for slots is fierce: "[P]arents have been known to move from other cities, even countries, to ensure their children's eligibility[] . . . [and children] attend afterschool academies to prepare for the admission test—some starting as early as third grade."[144] Public debate about TJ's underrepresentation of Black and Hispanic students, relative to the school-

Educational Opportunities, PAC. LEGAL FOUND., https://perma.cc/N4PM-HG77 (archived Nov. 13, 2023).

141. *See* Docket, Sargent v. Sch. Dist. of Phil., No. 22-cv-1509 (E.D. Pa. filed Apr. 19, 2022) (listing several orders related to settlement conferences beginning in May 2023, including one scheduled for October 2023, and listing voluntary dismissal of a plaintiff's interlocutory appeal on May 12, 2023, pursuant to Fed. R. App. P. 42(b)).

142. Boyapati v. Loudoun Cnty. Sch. Bd., No. 20-cv-01075, 2021 WL 943112, at *11 (E.D. Va. Feb. 19, 2021). In *Boyapati*, while the plaintiffs alleged racial motives underlying a facially race-neutral policy change, the district court found that those motives essentially didn't exist; the role of race in the policy process was apparently minimal, which simplified the issues. *Id.* at *8-9.

143. *Thomas Jefferson High School for Science and Technology*, U.S. NEWS & WORLD REP., https://perma.cc/7X9X-G4EZ (archived Oct. 24, 2023).

144. Lisa Rab, *Does the No. 1 High School in America Practice Discrimination?*, WASHINGTONIAN (Apr. 26, 2017), https://perma.cc/2SHK-SUWR.

system population, has simmered for decades.[145] The debate sharpened in June 2020, when, in the thick of that year's Black Lives Matter protests, Principal Ann Bonitatibus emailed the student body and their parents. The email highlighted various race-related issues, including the following:

> [O]ur school is a rich tapestry of heritages; however, we do not reflect the racial composition in FCPS [Fairfax County Public Schools]. Our 32 black students and 47 Hispanic students fill three classrooms. If our demographics actually represented FCPS, we would enroll 180 black and 460 Hispanic students, filling nearly 22 classrooms. . . . Do the TJ admissions outcomes affirm that we believe TJ is accessible to all talented STEM-focused students regardless of race or personal circumstance?[146]

This message kicked off heated discussion.[147] As Bonitatibus had suggested, the underrepresentation concern was severe. As of 2019, the county student population was about 10% Black and 27% Hispanic, but Black and Hispanic students received about 1% and 3% of TJ's admissions offers, respectively.[148] Admissions numbers for 2020 circulated early that summer and raised particular alarm; the number of Black admitted students was labeled "too small for reporting."[149]

Similar criticisms had been raised for years, including an unsuccessful civil rights complaint filed with the federal Department of Education in 2012.[150] Throughout, TJ's policies had not changed much—but 2020 was different.[151] The

145. *See id.*; James Finley, *The Legal Battle over the Nation's Top High School Reveals a Lot About NoVA's Education Chaos*, N. VA. MAG. (Nov. 11, 2021), https://perma.cc/6HSD-L87P.

146. Ann N. Bonitatibus, *Message from the Principal*, FAIRFAX CNTY. PUB. SCHS. (June 7, 2020, 8:44 PM EDT), https://perma.cc/5HZJ-CTJW.

147. Stephanie Saul, *Conservatives Open New Front in Elite School Admission Wars*, N.Y. TIMES (updated Oct. 31, 2022), https://perma.cc/ABG6-LELN.

148. Opening Brief of Appellant at 7-8, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. 2023) (No. 22-1280) (citing record).

149. Finley, *supra* note 145; Hannah Natanson, *What Could Glenn Youngkin as Governor Actually Do to Alter Admissions at TJ?*, WASH. POST (Nov. 29, 2021, 6:49 PM EST), https://perma.cc/3W5A-NP42 (describing how the "too small for reporting" statistics triggered "parent outrage" that influenced the 2020 reform efforts).

150. Press Release, Coal. of the Silence & Fairfax Cnty. NAACP, Coalition of the Silence and NAACP Fairfax County Branch Applaud US Department of Education's Office of Civil Rights' Decision to Investigate Alleged Discrimination Against African American and Hispanic Students by the Fairfax County Public School System but Regrets that Students with Disabilities Claims Were Left Out (Sept. 26, 2012), https://perma.cc/7G5P-45N4 (describing the complaint); Letter of Findings from Off. of C.R., U.S. Dep't of Educ., to Jack Dale, Superintendent, Fairfax Cnty. Pub. Schs. (May 25, 2012), https://perma.cc/MY4E-248N (reporting closure of case with no finding of discrimination).

151. Matthew Barakat, *Elite Public Schools in Virginia, Elsewhere Seek Diversity*, SEATTLE TIMES (updated Aug. 12, 2020, 5:01 AM), https://perma.cc/G3HL-GFBC; Saul, *supra* note 147.

admissions debate was intertwined with other racial-justice issues embroiling local and state politics. Virginia is the former heart of the Confederacy and a former Jim Crow state; the names of Confederate generals still dotted Northern Virginia's street maps (and its schools).[152] Against this background and at that moment of historical reckoning, the near-exclusion of Black students from the crown jewel of Virginia's schools was particularly untenable.

The Fairfax County School Board, which must vote on changes to the admissions policy, convened a series of virtual meetings focused substantially on race issues at TJ.[153] At these meetings, there was a strong sense that something had to be done.[154] But what? Race-based affirmative action was not seriously considered; the county had long understood it to be too legally vulnerable.[155] The Superintendent proposed an admissions lottery among those meeting comparatively relaxed qualifications, and the county's Chief Operating Officer supported this proposal with slides showing a substantial projected impact on racial demographics.[156] However, the lottery idea encountered sharp opposition from colorblindness advocates and from some diversity supporters who still wanted competitive admissions.[157] The Superintendent ultimately abandoned it, and worked with the school board and other stakeholders to develop a new plan, which the board accepted later that year.[158]

152. Nick Iannelli, *Fairfax Residents Get Emotional at Debate on Renaming Confederate-Linked Streets*, WTOP NEWS (June 15, 2022, 6:17 AM), https://perma.cc/J9SW-7EFJ; Tamara Derenak Kaufax & Nardos King, *Letter on Decision to Name High School After Civil Rights Leader John R. Lewis*, FAIRFAX CNTY. PUB. SCHS., https://perma.cc/U2PT-XJ9S (archived Oct. 24, 2023) (announcing the immediate renaming of Robert E. Lee High School as the John R. Lewis High School).

153. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809, at *2-4 (E.D. Va. Feb. 25, 2022) (describing chronology of meetings and votes).

154. Indeed, even the Coalition for TJ had proposed a geographic-diversity approach that would have helped "disproportionately more Black and Hispanic students," the type of reasoning it now challenges. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 874 n.3 (4th Cir. 2023) (quoting record).

155. TJ briefly had an affirmative-action-like policy in the 1990s but abandoned it due to fear of litigation. Rab, *supra* note 144.

156. Joint Appendix at JA0308-10, *Coal. for TJ*, 68 F.4th 864 (4th Cir. 2023) (No. 22-1280); *see* Fairfax Cnty. Pub. Schs., *FCPS School Board Work Session—09-15-2020—TJ Admissions Review*, YOUTUBE, at 14:50 (Sept. 15, 2020), https://perma.cc/9D7P-6PUN (to locate, select "View the live page").

157. Joint Appendix, *supra* note 156, at JA0618-19, JA0886; Finley, *supra* note 145 (discussing the lottery controversy).

158. Opening Brief of Appellant, *supra* note 148, at 9-12 (citing record).

The key elements of that new plan are familiar in the educational landscape.[159] The standardized test was abandoned, and the other prongs were variants on common race-neutral alternatives to affirmative action, including reservation of slots for students coming from each middle school (1.5% of each school's class), poverty-based plus factors, and an English Language Learner bonus.[160] Finally, the increase in class size reduced the extent to which any group would lose representation from the policy.[161] Academic standards remained extremely high: In 2021, the GPA of admitted students averaged 3.95.[162]

2. Procedural history

The Coalition for TJ—self-described as a grassroots parents organization and represented by PLF—filed suit in March 2021, seeking to enjoin the new plan.[163] The Coalition, which also has engaged in vigorous political activism, purports to represent Asian-American students' interests, although its position is controversial in the majority-Asian TJ community.[164] Its case was assigned to Judge Claude Hilton, a Reagan appointee. Both parties ultimately filed motions for summary judgment, and in February 2022, Judge Hilton granted summary judgment for the Coalition.[165]

The district court's decision characterized the TJ admissions reform as a policy that, while facially neutral, disparately impacted Asian-American students—and did so intentionally. Specifically, the court described the reforms as an effort to bring "racial balance" to the school's population (i.e., to "have TJ reflect the demographics of the surrounding area") by "decreas[ing] enrollment of the only racial group 'overrepresented' at TJ—Asian Americans."[166] The court acknowledged that there was no claim of anti-Asian animus but held that element was unnecessary to make out a discriminatory-purpose claim: "[T]he

159. *See School Board Chooses Holistic Review as New Admissions Policy for TJHSST*, FAIRFAX CNTY. PUB. SCHS. (Dec. 18, 2020), https://perma.cc/B8SG-2EE6 (archived Nov. 23, 2022).

160. *Id.*

161. *See, e.g.*, Diane Dresdner & Sharon Wunder, Opinion, *Thomas Jefferson High School's New Admissions Policy Is the Right Course*, WASH. POST (July 23, 2021, 11:30 AM EDT), https://perma.cc/E6ME-B2VU (noting that the reduced Asian-American percentage of the class was offset by the fact that it was "a smaller share of a larger pie").

162. Joint Appendix, *supra* note 156, at JA0626, JA1143.

163. Complaint and Demand for Jury Trial at 1-2, 24, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296 (E.D. Va. Mar. 10, 2021), 2021 WL 918497.

164. *See* Finley, *supra* note 145; Asra Q. Nomani, *How "Mama Bears" Won a Court Victory—and Helped Elect a Governor—in Virginia*, EDUC. NEXT, Fall 2022, https://perma.cc/YX53-SCXT.

165. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809, at *11 (E.D. Va. Feb. 25, 2022).

166. *Id.* at *5, *10.

Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at TJ."[167] Implicitly, then, the court relied on the same syllogism critiqued in Part I, applying the purpose principle with no differentiation between the "benign" intent to help Black and Hispanic students gain representation and an invidious effort to harm Asian Americans.[168] Finally, the district court simply ignored the most relevant Supreme Court precedents approving the use of race-neutral tools to achieve similar benign purposes: *Inclusive Communities* and the key parts of Justice Kennedy's *Parents Involved* opinion.[169]

Because it was unprecedented for a race-neutral admissions policy to be struck down on grounds of a race-conscious design process, this decision drew considerable attention in the civil rights legal community. Former U.S. Solicitor General Don Verrilli took the appeal pro bono for the county, which had amicus support from the United States, fifteen states, Washington, D.C., and many civil rights organizations.[170] Plaintiff's amici included another sixteen states, most notably Virginia itself, now led by a governor whom the Coalition for TJ's leaders claim credit for helping to elect.[171] The county

167. *Id.* at *10.

168. *See id.* at *5-6, *10 (citing discriminatory-purpose cases and colorblindness cases).

169. The district court cited another part of Justice Kennedy's opinion for the proposition that race-conscious policy must be a "last resort." *Id.* at *11 (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 790 (2007) (Kennedy, J., concurring in part and concurring in the judgment)). But Justice Kennedy did not apply this standard to facially neutral policies, which he stated were not subject to strict scrutiny. *Parents Involved*, 551 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment).

170. Corrected Brief of Amici Curiae National Coalition on School Diversity et al. in Support of Defendant-Appellant, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864 (4th Cir. May 20, 2022) (No. 22-1280), 2022 WL 1732553; Brief for the United States as Amicus Curiae Supporting Defendant-Appellant, *Coal. for TJ*, 68 F.4th 864 (4th Cir. May 13, 2022) (No. 22-1280), 2022 WL 1568334; Brief of Amici Curiae TJ Alumni for Racial Justice et al. in Support of Defendant-Appellant and Reversal, *Coal. for TJ*, 68 F.4th 864 (4th Cir. May 13, 2022) (No. 22-1280), 2022 WL 1568315; Brief of Amici Curiae Massachusetts et al. in Support of Defendant-Appellant, *Coal. for TJ*, 68 F.4th 864 (4th Cir. May 13, 2022) (No. 22-1280), 2022 WL 1568322; Brief for Amici Curiae Professors of Social Science and Education Policy in Support of Defendant-Appellant Fairfax County School Board Seeking Reversal, *Coal. for TJ*, 68 F.4th 864 (4th Cir. May 13, 2022) (No. 22-1280), 2022 WL 1568329; Brief of Amici Curiae TJ Alumni for Racial Justice et al. in Support of Defendant-Appellant's Motion for Stay Pending Appeal, *Coal. for TJ*, 68 F.4th 864 (4th Cir. Mar. 24, 2022) (No. 22-1280), 2022 WL 911557; *see* Levy, *supra* note 27 (describing Verrilli's pro bono representation).

171. Brief of Amici Curiae Commonwealth of Virginia and 15 Other States in Support of Appellee, *Coal. for TJ*, 68 F.4th 864 (4th Cir. June 21, 2022) (No. 22-1280), 2022 WL 2302656; *see* Nomani, *supra* note 164, at 25.

appealed both the grant of summary judgment for the plaintiff and the denial of the county's cross-motion for summary judgment.[172]

Judge Hilton's decision took effect immediately, and TJ's admissions process was many months along, with 2,500 applicants expecting decisions in April.[173] It was impossible to restore TJ's test-based process for that cycle; the test was normally administered in December, and the usual contractor had not yet created a test.[174] The county requested a stay pending appeal, hoping to spare that year's cycle; the district court refused, but the Fourth Circuit granted the stay in a 2-1 decision.[175] The equities favored a stay, but the stay standard also required that the county would likely prevail on the merits.

In April 2022, the Coalition petitioned the Supreme Court to use its emergency powers to vacate the Fourth Circuit's stay.[176] This would have meant deciding the case quickly, without full briefing or oral argument, via the "orders list" (or "shadow docket").[177] The test for the Supreme Court to exercise those powers (unlike the test for the Fourth Circuit to issue the stay) heavily disfavored the Coalition. As the county argued, quoting Court precedents:

> "[T]his power should be exercised with the greatest of caution and should be reserved for exceptional circumstances." . . . An applicant seeking vacatur bears the burden of establishing that (1) the case "very likely would be reviewed [in the Supreme Court] upon final disposition in the court of appeals"; (2) the applicant "may be seriously and irreparably injured by the stay"; and (3) the issuance of the stay was "demonstrably wrong" under "accepted standards." . . . [T]he Court owes "great deference" to the court of appeals' conclusion that a stay should issue.[178]

172. Opening Brief of Appellant, *supra* note 148, at 57.

173. Brief in Support of Defendant's Motion for Stay Pending Appeal at 1, *Coal. for TJ*, No. 21-cv-00296 (E.D. Va. Mar. 4, 2022), ECF No. 146.

174. *Id.* at 2, 9-11.

175. *Coal. for TJ*, No. 22-1280, 2022 WL 986994 (4th Cir. Mar. 31, 2022).

176. Emergency Application to Vacate the Stay Pending Appeal Issued by the United States Court of Appeals for the Fourth Circuit, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (Apr. 8, 2022) (No. 21A590), https://perma.cc/3RD2-UMH9.

177. *See* William Baude, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5, 11 (2015) (coining the term "shadow docket" and examining the docket's increasing use). *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (exploring the increasing use of the shadow docket).

178. Response in Opposition to Applicant's Emergency Application to Vacate the Stay Pending Appeal at 13-14, *Coal. for TJ*, 142 S. Ct 2672 (Apr. 13, 2022) (No. 21A590) (first alteration in original) (citations omitted) (first quoting Holtzman v. Schlesinger, 414 U.S. 1304, 1308 (1973) (Marshall, J., in chambers); then quoting Coleman v. Paccar, Inc., 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers); and then quoting Garcia-Mir v. Smith, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers)), https://perma.cc/Y72X-N32H.

These were large hurdles, and indeed, the Court denied the request.[179] But three Justices (Thomas, Alito, and Gorsuch) voted to vacate, a strong sign that they sympathized with the Coalition on the merits.[180] The decision by the other six Justices to deny the request, on the other hand, was not a strong sign of anything in particular. That denial could have been based on any number of rationales: that the Coalition was wrong on the merits, that any of the prongs in the test above were not met, that a legal change that big should not be made on the shadow docket, that the then-pending *SFFA* cases should be decided first, or that the issues should be left to percolate in the lower courts.

As expected based on its stay decision, in May 2023, the Fourth Circuit decided in favor of the county and indeed granted it summary judgment, in addition to reversing the district court's grant of summary judgment for the plaintiff.[181] This was a 2-1 decision, with Judge Rushing dissenting.[182]

The majority opinion by Judge King offered two main reasons for reversal (each vigorously contested by Judge Rushing). First, the court held that TJ's admissions policy had no racially disparate impact on Asian Americans, who remained the group with by far the highest admissions rates to TJ, even after the policy change.[183] The court characterized absence of disparate impact as an independently fatal flaw in the plaintiff's claim, regardless of discriminatory purpose—that is, it read *Arlington Heights* to require *both* that a facially neutral policy have an actual disparate impact on a particular racial group *and* that the impact be intended.[184]

Second, the court also held that discriminatory purpose was lacking, rejecting the characterization of the county policy as "racial balancing."[185] The court observed (citing *Inclusive Communities*) that the Supreme Court has generally permitted pursuit of racial inclusion through race-neutral means.[186] And it held that any negative impact on Asian enrollment was not the policy's purpose but merely a byproduct of this benign objective—thus failing to satisfy the *Feeney* but-for causation test.[187]

179. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022) (mem.).

180. *See id.*

181. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 871 (4th Cir. 2023).

182. *Id.*

183. *Id.* at 879.

184. *Id.*

185. *Id.* at 883-84.

186. *Id.* at 885-86.

187. *Id.* at 879, 886; *see* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

In August 2023, the Coalition again filed a petition for certiorari—this time in an ordinary, nonemergency posture.[188] Although *SFFA* had been decided in the interim, the Coalition's arguments were not premised on any purported change in the law; rather, on the merits, the petition reiterates the arguments made below.[189] The Coalition did emphasize the post-*SFFA* context when arguing that the case was important enough that the Court should take it:

> The longer this question is not resolved, the more incentive school districts (and now, universities) will have to develop workarounds that enable them to racially discriminate without using racial classifications. . . . [T]he guarantees of *SFFA* might mean little if schools could accomplish the same discriminatory result through race-neutral proxies. . . .
>
> [T]here is an urgency to address these issues now, rather than later. . . .
>
> Some universities are already strategizing how to get around this Court's ruling in *SFFA*, and they are looking to the panel decision below as the roadmap to do so. Only a decision from this Court can resolve this question and ultimately stop this troubling trend.[190]

The Coalition also argued that the case presented an opportunity for the Court to resolve a circuit split as to the nature of the disparate impact requirement.[191] The Coalition pointed to precedents in two other circuits in which courts found disparate impact when a group was adversely affected relative to a prior baseline, even though this effect was not large enough to render that group underrepresented relative to their population share.[192]

My view is that the Court should *not* review *Coalition for TJ*, despite the importance of the issue and for reasons beyond my position that the Fourth Circuit's decision is correct. The purported "circuit split" does not really exist;[193] as the rest of this Part details, the three circuit courts that have directly

188. Petition for Writ of Certiorari, Coal. for TJ v. Fairfax Cty. Sch. Bd., No. 23-170 (Aug. 21, 2023), 2023 WL 5486403.

189. The petition does contain numerous citations to *SFFA*, but for propositions—such as the unconstitutionality of racial balancing—the petitioners cite arguments advanced below. *See id.* 4-5. This is unsurprising, given that—as I argue in the next Part—*SFFA* did not change the law insofar as it applies to cases like *Coalition for TJ*.

190. *Id.* at 17, 27-28.

191. *Id.* at 6 (citing Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548 (3d Cir. 2002); Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142 (9th Cir. 2013)).

192. *Id.*

193. In the two contrary cases cited by the plaintiff, the courts were not presented with the disparate impact questions addressed by the Fourth Circuit in *Coalition for TJ* and thus did not reject the approach the Fourth Circuit later took. In *Pryor*, the Third Circuit held that Black student-athlete plaintiffs stated a Title VI claim when they asserted that the NCAA adopted new academic standards with the express purpose of excluding Black athletes. 288 F.3d at 565-66. The opinion does not discuss how disparate impact is to be evaluated in the context of a purposeful discrimination case and never mentions any argument that Black athletes remained well-represented even after the new

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confronted the key issues in this case have agreed. The plaintiff's arguments turn heavily on a dubious characterization of the facts, discussed below. The post-*SFFA* admissions landscape at the college level is just in its earliest days; it makes sense for the Court to see how things play out on the ground and in subsequent lower court litigation. I acknowledge that the plaintiff is surely right that universities are trying to plan for maintaining diversity after *SFFA* and are paying attention to this case—but that does not mean that the Court should deprive them of the chance to do so or the lower courts a chance to assess whatever the new status quo turns out to be. After all, what the plaintiff calls "workarounds" are, in fact, strategies that comply with *SFFA* and don't classify by race. In any event, deciding this issue now—if in the plaintiff's favor—will hardly avoid a morass of litigation; rather, as I will argue in Part III, it would invite a bigger one, reaching areas well beyond education. There will be plenty of opportunities to decide these issues in the future, if the Court decides it needs to; it need not jump at the first one.

The remainder of this Subpart focuses on two of the key points of contention in *Coalition for TJ*: whether Fairfax County's efforts to promote Black and Hispanic representation constituted "racial balancing," and whether they amount to anti-Asian discrimination. Both questions intersect with, but go beyond, the doctrinal questions already considered in Part I. Moreover, both involve themes that are common in magnet school litigation, as the next three Subparts examining PLF's other cases show, and are also likely to emerge in litigation at the university level, so they will be relevant even if the Court denies certiorari in *Coalition for TJ*.

I do not focus in this Subpart on the issues raised in the appeal surrounding the disparate impact requirement, even though these are fascinating as well as potentially dispositive and will have to be resolved by the Supreme Court if it agrees to review the case or a similar one. That is because the disparate impact issues have been even more central to, and more comprehensively litigated in, the New York City litigation described in the next Subpart. I will discuss them there, referring back to points made in the *Coalition for TJ* opinions as relevant.

3. Racial balancing

The district court opinion, Judge Rushing's dissent, and the plaintiff's briefing all characterized the TJ admissions reform as "racial balancing"—that is, as an effort to bring TJ's demographics in line with those of the county. This characterization made obvious strategic sense for the plaintiff because the Supreme Court has repeatedly rejected "racial balancing" efforts in precedents

standards were adopted. *Pacific Shores*, meanwhile, is a statutory disability discrimination case that seems even less relevant; nothing in it even touches on the questions central to *Coalition for TJ*. *See* 730 F.3d 1142.

dating back to *Bakke*.[194] Quoting Justice Powell's opinion in that case, in *Grutter*, the Court held that if Michigan Law School's affirmative action policy had been designed "'to assure within its student body some specified percentage of a particular group,' . . . [t]hat would amount to outright racial balancing, which is patently unconstitutional."[195] The Court also criticized "outright racial balancing" in *Croson*, in which it rejected a quota for city contractors.[196] And the Court has also been clear that what matters is "substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[197] This holding was emphasized by Judge Rushing's dissent and by the district court's opinion, both of which characterized the school board's "diversity" efforts as doing exactly that.[198]

But while these Supreme Court cases certainly reject "racial balancing," that simply raises the question of what racial balancing is—and the cases do *not* suggest that it encompasses what Fairfax County did. First, all of the Court's cases rejecting racial balancing have involved challenges to the "retail" use of racial classifications—which, as we have seen in Part I, makes a big difference to how the Court treats underlying race-related purposes. To be sure, a future Court could easily extend the anti-racial-balancing principle to "wholesale" use of race. Though it has not done so yet, its opinions do treat racial balancing as noxious, and one could imagine a position that treated this objective as an invidious purpose triggering strict scrutiny (even absent classifications) even when other goals related to mitigating racial disparities are treated as benign. Even under this view, though, another limit implied by the Court's jurisprudence would remain important. In every case, when the Court has condemned racial balancing, the challenged actions involved *actual attempts to achieve balance* with underlying demographic benchmarks. They were much more ambitious interventions than Fairfax County's.

The TJ admissions policy does not use individual race, *and* it does not come remotely close to achieving demographic balance with the county. The class admitted in 2021—the first year under the new regime—was 54% Asian, 22%

194. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

195. Grutter v. Bollinger, 539 U.S. 306, 329-30 (2003) (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.)).

196. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); *id.* at 509-11 (plurality opinion).

197. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 732 (2007) (plurality opinion); *Fisher I*, 570 U.S. 297, 311 (2013).

198. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 892-94 (4th Cir. 2023) (Rushing, J., dissenting); Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809, at *10 (E.D. Va. Feb. 25, 2022).

white, 11% Hispanic, and 7% Black.[199] These numbers were shaped that year in part by a spike in applications that was larger among non-Asian groups—that is, the change was likely not entirely driven by the admissions policy changes themselves, but also by a shift in the applicant pool.[200] In 2022, the second year, the newly admitted class was 60% Asian, 21% white, 8% Hispanic, and 6% Black.[201] In any case, either set of numbers is a long way from the school system's demographics (20% Asian, 37% white, 27% Hispanic, 10% Black).[202] Even in the 2021 admitted class, for example, the numbers above imply that Asian students were represented at TJ at nearly seven times the rate of Hispanic students relative to their share of the school system (and in 2022, they were represented at over ten times the rate of Hispanic students).

If the objective of the school board's reforms *had* been "racial balancing," then, they certainly had a very poorly conceived plan for achieving it! What the reforms *did* do was more modest: They created a far more significant population of Black and Hispanic students—albeit still a quite small one in both absolute terms and relative to county demographics. Even if true racial balancing cannot be salvaged by relabeling it a "diversity" effort, neither should efforts that are substantively best described as "diversity" be relabeled "racial balancing" and thereby be condemned. The line between these two categories is not a bright one, and there may be hard cases. But TJ's reforms are very comfortably on the "diversity" side of the line.

In an effort to establish a racial-balancing motive, the Coalition relied on various comments from stakeholders, such as the principal's email, the Chief Operating Officer's (COO) slideshow, and the superintendent's comments on demographics.[203] But these arguments run into a basic factual problem. Most of these comments the Coalition cites related to the initial lottery proposal from the Superintendent, which was rejected, not the reforms ultimately adopted by the board; moreover, most of the comments were not from board members, but from other stakeholders (the principal, COO, and superintendent) with no ultimate vote.[204] The Superintendent's lottery proposal could much more

199. Hannah Natanson, *Fairfax Releases Demographic Data on Thomas Jefferson Class of 2026*, WASH. POST (May 25, 2022, 5:39 PM EDT), https://perma.cc/A96K-MHYK.

200. *See* Brief in Support of Defendant's Motion for Summary Judgment at 14-15, *Coal. for TJ* (E.D. Va. Dec. 3, 2021) (No. 21-cv-296), ECF No. 111 (describing this spike and stating that the Asian share of the applicant pool dropped from 56.1% to 48.6%).

201. *See* Natanson, *supra* note 199.

202. *Coal. for TJ*, 2022 WL 579809, at *1.

203. *See* Complaint, *supra* note 163, at 16-18.

204. As the county pointed out, the one comment by an actual school board member that seemed to support racial balancing came from a member who voted *against* the admission reform. Brief in Support of Defendant's Motion for Summary Judgment, *supra* note 200, at 34.

plausibly have been characterized as racial balancing; as discussed above, the Superintendent's and COO's arguments focused on aligning TJ's demographics with those of the county, and a lottery would presumably have come much closer to doing so. But those arguments, and the proposal, did not carry the day. And there were no similar demographic projections offered for the much more modest policy the board actually adopted.[205]

The Coalition suggests that because all of these stakeholders were concerned about TJ's demographics—and were well aware that they did not track those of the county—*all* of their subsequent efforts to address that concern necessarily constitute "racial balancing." But this stretches the term beyond recognition. Again, if what matters is substance and not semantics, then we should examine what the school board actually did, not whether some statements by some individuals during the long reform process suggested a desire to go further.

The Coalition's interpretation of "racial balancing" implies that when government actors make any comparison to demographic baselines during a policy debate, that argument is per se illegitimate and renders any resulting policy unconstitutional. This is not a reasonable interpretation of current doctrine. As discussed in Part I, the Supreme Court has repeatedly said that policymakers may use race-blind tools to reduce disparities and promote integration. But race-conscious policymaking of this sort *always* entails *some* variety of comparison to demographic baselines, without which it would be hard to even identify disparities. Disparate impact analysis, for example, requires benchmarks of some sort in order to determine whether a criterion *disproportionately* excludes a particular racial group.

If courts *did* completely bar demographic comparisons, the implications would be profound. Beyond formal disparate impact analysis, it is quotidian for policymakers to cite a desire for institutions (from schools to legislatures themselves) to "look like America," or like their jurisdiction, and to express dismay when they do not.[206] It is equally routine to express concern about demographic disparities in some negative outcome (e.g., "*X*% of those incarcerated are Black").[207] Such statements are explicitly or implicitly

205. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 899 (4th Cir. 2023) (Rushing, J., dissenting) (conceding this point but maintaining that the "absence of yet another racial model does not sanitize the record").

206. *See, e.g.*, Maya Parthasarathy, *Will the Biden Administration Really Look Like America?*, POLITICO (Dec. 4, 2020, 12:30 PM EST), https://perma.cc/MEE7-T62Q (citing promises made by then-President-elect Biden); Sophia Cai, *GOP at Odds While Courting Black Voters*, AXIOS (Feb. 3, 2022), https://perma.cc/333N-D5PT ("Put me in the camp of making sure the court and other institutions look like America." (quoting Senator Lindsey Graham)).

207. *See, e.g.*, Sabrina Siddiqui, *'An Injustice System': Obama's Prison Tour Latest in Late-Term Reform Agenda*, GUARDIAN (July 16, 2015, 6:43 PM EDT), https://perma.cc/RV98-86R6
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comparative with a jurisdiction's demographics. The expression of such concerns has never invalidated race-neutral policy. It would be especially radical to rely on those statements to invalidate policy that (like the TJ reforms) is *not* tailored to actually achieve racial balancing, or even to come close, but merely cuts in the direction of somewhat mitigating large disparities.

4. Anti-Asian discrimination

Were TJ's admissions reforms "anti-Asian"? Although the question is fact specific, it is likely to recur in some form in other cases. As the *SFFA* cases and the other cases discussed in this Part also illustrate, Asian-American admission rates to competitive schools often decline when policies are adopted that promote representation of underrepresented groups. A key question moving forward will be how willing courts are to infer, in those circumstances, an intent to harm Asian Americans, even when no invidious motive is evident from the record. TJ's case provides an illustrative example.

To assess the question, it is important to emphasize what has and has not been alleged, much less proven, in court. The Coalition for TJ and their allies have been outspoken in political debates, op-eds, and other nonlegal settings about ascribing anti-Asian racism to county decisionmakers.[208] When the board met after the district court's decision to figure out next steps, they had to disband the meeting because they were drowned out by protesters shouting "racist!"[209] The comments of the Coalition and its allies insinuate that the policy changes sought to claw back from Asian students more space for white students, whose share of TJ's class had shrunk over time.[210]

I want to make clear that if that *were* what TJ's policy changes were about, I would join the Coalition in condemning that motive. Seeking to shield white people from a minority group's rising success is crucially different from seeking to expand representation for historically disadvantaged groups. The

(noting President Barack Obama "citing statistics showing that 60% of the nation's inmates are black and Hispanic even though both demographics combined make up just 30% of the population").

208. For a description from one of the Coalition's cofounders, see Nomani, note 164 above. *See also* Hans A. von Spakovsky & Sarah Parshall Perry, *A Racist Virginia School Board and Principal Get Called Out*, HERITAGE FOUND. (Mar. 3, 2022), https://perma.cc/YGW4-Q7DT; Peter Van Buren, *TJ High School's Race Problem*, AM. CONSERVATIVE (Feb. 21, 2022, 12:01 AM), https://perma.cc/C7LU-GT9C.

209. Nomani, *supra* note 164, at 20-21, 26.

210. *See, e.g.*, William McGurn, Opinion, *An Ugly Game of Race Preferences*, WALL ST. J. (Jan. 10, 2022, 6:07 PM ET), https://perma.cc/VG4J-35PV (quoting Coalition for TJ co-founder Harry Jackson: "Admission changes to TJ were driven by jealously infused xenophobia and racism against the Asian community . . . . Most of the internal deliberations focused on a tailored solution to get just enough black and Hispanic kids in to open the floodgates for rich white affluent families, the primary beneficiaries.").

former has no grounding in any legitimate race-related objective, and it should properly be understood as invidious. White people have been—and continue to be—collectively advantaged throughout Virginia's (and America's) history.[211] And white students still comprise a substantial share of TJ's population; the educational benefits of diversity would not be served by increasing their numbers at the expense of reducing a diverse Asian student population.[212] From an antisubordination perspective on constitutional law, and also from an "antibalkanization" approach, it is appropriate to differentiate between efforts to open opportunities for disadvantaged racial groups and policies that protect white advantage; the former is benign and the latter invidious. PLF's legal strategy in this case and others blurs that distinction, characterizing any policy that has the effect of reducing Asian representation as equally anti-Asian.

To be sure, no outside observer can rule out the possibility that anti-Asian bias *did* affect the TJ policy process, much less that some individual participants in that process harbored such sentiments. Proving that race influences decisions (even when it does) is notoriously difficult, anti-Asian bias is real and important, and 2020 was a bad year for it.[213] There is evidence that, in some educational contexts, Asian-American applicants do face discrimination—of the classic sort favoring white students—and those who favor educational diversity should unhesitatingly acknowledge and condemn it.[214]

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211. For example, Fairfax County's schools were segregated until the late 1960s. *Fairfax's Long Road to Integration*, CONNECTION NEWSPAPERS (Mar. 3, 2004), https://perma.cc/2CRC-5MR2; *see also infra* note 226 (citing much lower poverty rates today for white Fairfax County residents than for any other racial group).

212. TJ's Asian population includes children of Northern Virginia's many large Asian communities, of many ethnicities, some immigrants or first-generation, some multigenerational Americans, a diversity that the Coalition is right to emphasize. *E.g.*, Complaint, *supra* note 163, at 9; *see also* Kyaw Khine, *Diversity Among Asians in Virginia*, STATCHAT (Jan. 11, 2019), https://perma.cc/D56H-ZMX9 (discussing different dimensions of diversity within the state's Asian population). But that does not obviate the reasons to pursue other dimensions of diversity as well (and in particular to worry about Black and Hispanic exclusion), or equality considerations beyond diversity. Also, the admissions changes likely increased diversity within TJ's Asian population by increasing representation of poor students and English-language learners. *See* Brief in Support of Defendant's Motion for Summary Judgment, *supra* note 200, at 4, 14-15.

213. *See, e.g.*, Kimmy Yam, *Anti-Asian Hate Crimes Increased by Nearly 150% in 2020, Mostly in N.Y. and L.A., New Report Says*, NBC NEWS (Mar. 9, 2021, 12:37 PM PST), https://perma.cc/RC7H-3KWU; *see infra* text accompanying note 277 (discussing anti-Asian racism from a Boston politician).

214. For example, SFFA provided fairly substantial evidence of Harvard discriminating against Asian applicants relative to white applicants, via practices that were separable from the affirmative action program; in my view, Harvard should not have defended these practices. SFFA argued that a personality-assessment score was administered with bias against Asian applicants. Complaint at 4, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176). Although the district court found no evidence the assessment was discriminatory,
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Still, while it is impossible to be certain, the record in *Coalition for TJ* simply does not establish that kind of discrimination. In a legal proceeding about purposeful discrimination against a specific group, it matters that no such evidence was introduced. Indeed, in the actual legal proceedings, the plaintiff (and the district court) appeared to concede that it had introduced no evidence of anti-Asian animus.[215] Nor were there any allegations of implicit anti-Asian bias in the admissions process, which is not only race blind, but also formula-driven; there are no "personality scores" or other subjective criteria to apply in biased ways.[216] Moreover, although the initially proposed lottery would have nontrivially increased the white-student share,[217] the policy changes that were actually adopted did *not* have that effect. By the second year after adoption, the white-student share was 21%, about what it had been for years.[218] Meanwhile, in that second year, Asian students represented 60% of the

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Harvard didn't deny that Asian students scored substantially lower on several personality metrics, which counsel struggled to explain except by blaming differences in teacher recommendations. Transcript of Oral Argument at 54-56, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707). This defense suggests at best that Harvard's system gave force to other people's underlying biases, which may not make out a Title VI claim, but should be embarrassing to Harvard. Harvard also used test-score cutoffs for recruiting efforts that expressly favored white students over Asian students in rural areas. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 154 (D. Mass. 2019). Its admissions director, also embarrassingly, defended this by suggesting that white students could be assumed to have lived in the rural areas "their entire lives" while Asian students had lived there just "a year or two," which the plaintiff correctly called a "stereotype." Petition for Writ of Certiorari at 9, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199), 2021 WL 797848.

215. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809, at *10 (E.D. Va. Feb. 25, 2022) ("This does not mean 'that any member of the [Board] harbored racial hatred or animosity toward [Asian Americans].' Discriminatory intent does not require racial animus." (alterations in original) (citation omitted) (quoting N.C. State Conf. of NAACP v. McCory, 831 F.3d 204, 233 (4th Cir. 2016))); *see also* Plaintiff's Memorandum in Support of Motion for Summary Judgment at 32, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809 (E.D. Va. Dec. 3, 2021), ECF No. 98.

216. I do not mean to imply that "racism" conceptually requires animus or implicit bias, but clearly the plaintiffs, adamant colorblindness advocates, do not mean to invoke a systemic notion of racism either.

217. This expectation was clear from the demographic projections shared by county officials, discussed above. I do not think increasing white representation was those officials' *purpose*, but there's an obvious potential political advantage to policies that (while framed in racial-equity terms) on balance help white people, the county's largest and most powerful racial group. *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that civil rights advances benefiting Black people are more likely when they also benefit white interests). On the other hand, the lottery policy did get blocked, so this advantage wasn't ultimately politically dispositive.

218. *See* Natanson, *supra* note 199.

class, triple their share of the county school population.[219] This was down from 73%, but because the class size had been enlarged, the total number and rates of Asian students admitted were well within the range of the recent years before the policy changes.[220] As with the alleged racial balancing objective, if this was an anti-Asian policy, it was a remarkably ineffective one.

Instead, the record supports the story I have told: The policy changes sought to address TJ's near-total exclusion of Black and Hispanic students, which, at a time of public ferment about anti-Black racism, was particularly mortifying to the county.[221] This motive was no secret; board members and other stakeholders like the Superintendent hardly showed themselves to be litigation-savvy. These leaders also cited other goals (e.g., redressing the abysmal socioeconomic-diversity numbers), but when it came to race, they put their cards on the table.[222] And indeed, the district court's opinion also tells this story, emphasizing the effect of the Black Lives Matter protests.[223] In its telling, the story appears designed to be damning, which it would only be under a worldview in which *any* race-related motive is equally problematic.

In order to translate this story into one of anti-Asian discrimination, the plaintiff relies on a logic more indirect than an animus claim. The plaintiff observes that in a "zero-sum" admissions world, slots gained by one group have to come at the expense of another. So, in TJ's case, efforts to help minimally represented racial groups achieve even modest inclusion necessarily harmed the group that constituted the majority of TJ's admits: Asian Americans. If the policy succeeded in increasing Black and Hispanic representation, it all but inevitably would reduce Asian representation.[224]

But this zero-sum logic provides thin support for a claim of purposeful discrimination *against* Asians, as opposed to a purpose of *helping* Black and Hispanic applicants. Recall the Supreme Court's causal test for discriminatory purpose: To establish anti-Asian discrimination, plaintiff must show the board

219. *Id.*

220. Total offers to Asian-American students for 2022 were between 327 and 332, which is higher than the number in 2018, for example. Appellee's Response Brief at 22, *Coal. for TJ*, 68 F.4th 864 (4th Cir. 2022) (No. 22-1280), 2022 WL 2197387 (citing the figure for the class of 2022 admitted in 2018). The range for the 2022 admitted class is calculated by multiplying the reported Asian share of 60% (rounded) times the number of admitted students (550). *See id.* at 9 n.2 (noting figure of 550 admitted students); Natanson, *supra* note 199.

221. *See* Joint Appendix, *supra* note 156, at JA0073-74 (citing exhibits from the record).

222. *See, e.g.*, *id.* at JA0074 (citing the principal's email to the community as well as various comments of Board members regarding the "unacceptable" underrepresentation of Black and Hispanic students).

223. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 21-cv-00296, 2022 WL 579809, at *2, *5-6 (E.D. Va. Feb. 25, 2022).

224. Appellee's Response Brief, *supra* note 220, at 56-58.

acted "'because of,' not merely 'in spite of,' its adverse effects" on Asians.[225] If board members had sought to ensure that Asian applicants specifically—and not white applicants—bore the brunt of their efforts to help underrepresented minorities, that would be a stronger argument for the plaintiff. But there is no evidence that they sought to do so; indeed, if they had, it would be hard to explain their adoption of preferences for poor and English Language Learner students, each of which cut in the opposite direction.[226] Ultimately, the "zero-sum" argument implies that *all* efforts to help underrepresented groups achieve inclusion constitute purposeful discrimination against whatever group loses seats.[227] But this effectively collapses into the "racial balancing" argument and runs into the same doctrinal problem: Existing precedents clearly say that it *is* permissible for policymakers to pursue inclusion and integration using race-neutral tools.[228]

All in all (and even setting aside for now the disparate impact issue), the Coalition has a weak case under existing precedent. Its strategy is perhaps best understood as a bet on *future* law—that is, on what the Supreme Court might do next. This is an understandable approach for the plaintiff, litigating at a time of anticipated legal change and correctly viewing its own case as a plausible vehicle for pushing colorblindness further. Lower courts are, however, supposed to follow the law as it stands at the time, and I think there is little doubt that the *Coalition for TJ* district court was wrong under that law.

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225. *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

226. White families in Fairfax County are only half as likely as Asian families to be poor (and far less likely than other groups), and less likely to be recent immigrants. LEAH HENDEY & LILY POSEY, URB. INST., RACIAL INEQUITIES IN FAIRFAX COUNTY 2011-15, at 9, 12-13 (2017), https://perma.cc/Y5DS-6U5F.

227. In his concurring opinion, Judge Heytens asserts that the plaintiff "waived" any claim that "the challenged policy is unconstitutional because the Board hoped it would increase the number of Black and Hispanic students at TJ." *Coal. for TJ*, 68 F.4th at 891 (Heytens, J., concurring). This, I am afraid, understates the radical nature of the plaintiff's position. It may not have used that exact language (and one of its deposition witnesses made a comment that seems inconsistent with that view, *see id.* at 891 n.5, which is not the same as a "waiver"), but the plaintiff's arguments about the zero-sum tradeoff and about racial balancing do in fact both boil down to exactly this claim. Moreover, as discussed here, Judge Rushing's dissent and the district court opinion both characterize the board's efforts to help improve Black and Hispanic representation as impermissible racial motives. For example, the district court described the board's allegedly discriminatory motive as such: "[T]he Board's policy was designed to increase Black and Hispanic enrollment, which would, by necessity, decrease the representation of Asian-Americans at TJ." *Coal. for TJ*, 2022 WL 579809, at *10.

228. In addition, the class-size increase offset the zero-sum tradeoff, such that Asian admissions were impacted fairly minimally. *See supra* note 220 and accompanying text. The Coalition focuses on harm to Asians' *share* of the class, not their admission *rates*. That emphasis is strategic, but it implies something unattractive: that the objection is not really that Asian kids are being stopped from attending TJ, but rather that Black and Hispanic kids are joining them there.

In any event, the fact that the plaintiff found a district judge (and one appellate judge, and—so far—three Supreme Court Justices) willing to rule in their favor notwithstanding that doctrine says something about the potential inclinations of the current federal judiciary. Moreover, any signs that the judiciary may be willing to embrace ends-colorblindness can only encourage the proliferation of similar litigation in the future.

B. *Christa McAuliffe Intermediate School PTO, Inc. v. DeBlasio*

Among the magnet school admissions controversies, the most high-profile concerns the nation's largest school system: that of New York City. The City has eight magnet high schools that share a Specialized High School Admissions Test (SHSAT), each basing admissions on different cutoffs.[229] But there is another route to admission, the Discovery program: Disadvantaged rising ninth graders who barely missed a school's test cutoff may be admitted after successfully completing a summer training course.[230]

Twenty percent of slots are set aside for Discovery students.[231] To qualify, students must score near the cutoff of the SHSAT; be low-income, in temporary housing, and/or an English Language Learner who moved to New York City within the last four years; and attend a middle school at which 60% of students meet certain poverty-related criteria.[232] The policy is race blind, but its adoption responded to longstanding concerns about Black and Hispanic underrepresentation.[233] When it substantially expanded the program, Mayor Bill de Blasio's administration projected that the changes would nearly double the combined Black and Hispanic share at the eight schools, from 9% to 16%.[234] More ambitiously, de Blasio also sought to eliminate the SHSAT and move to a different admissions process (something like TJ's), but doing so would have required state legislative support that he did not obtain,[235] and his successor Eric Adams does not support such a policy.[236]

229. *See Specialized High School Admissions Test*, N.Y.C. PUB. SCHS., https://perma.cc/QC9F-QANS (archived Oct. 24, 2023) (to locate select "How are the results used?").

230. Winnie Hu, *Elite New York High Schools to Offer 1 in 5 Slots to Those Below Cutoff*, N.Y. TIMES (Aug. 13, 2018), https://perma.cc/6QYA-7B88.

231. *Id.*

232. Tai Abrams, *What is the SHSAT Discovery Program?*, ADMISSIONSQUAD (Oct. 11, 2021), https://perma.cc/2AKL-RSNY.

233. *See Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools*, CITY OF N.Y. (June 3, 2018), https://perma.cc/2TXP-QCLB.

234. Hu, *supra* note 230.

235. *Id.*; Eliza Shapiro, *This Year, Only 10 Black Students Got into N.Y.C.'s Top High School*, N.Y. TIMES (updated Dec. 18, 2020), https://perma.cc/6EFZ-ZWBV.

236. Eric Adams, *BP Eric Adams States His SHSAT Position*, N.Y. AMSTERDAM NEWS (July 2, 2018), https://perma.cc/K2MC-R9RL.

The concerns about Black and Hispanic underrepresentation were significant. In April 2019, for example, Stuyvesant offered admissions to 895 students; 7 of those were Black, 33 were Hispanic, 587 were Asian, and 194 were white, with the remaining 74 in an "other" category.[237] Overall, at the eight SHSAT schools, just 3.6% of admits were Black and 5.4% Hispanic.[238] New York City's public high school population as of 2019 was 26% Black, 40% Hispanic, 16% Asian American, and 15% white.[239]

The expanded Discovery program somewhat boosted Black and Hispanic representation, but it is even further from "racial balancing" than TJ's changes. Only 20% of slots at the SHSAT schools are allocated to Discovery students, and so far only about 35% of the Discovery slots have gone to Black and Hispanic students, and half to Asian students.[240] The program has successfully increased representation of impoverished middle schools; in 2020, Discovery offers were made to children from 112 middle schools whose student bodies had received zero offers through the regular SHSAT process.[241] As this illustrates, socioeconomic and geographic-diversity interventions have far more dramatic effects on socioeconomic and geographic diversity than they do on racial diversity (a point I return to below).

Compared to the proposal to eliminate the SHSAT, the Discovery program has been much less controversial. It has, nonetheless, become the target of colorblindness advocates. In 2018, not long after the program expansion was announced, PLF filed suit in the Southern District of New York on behalf of a middle school parents' association: *Christa McAuliffe Intermediate School PTO, Inc. v. De Blasio*.[242] One can see why Christa McAuliffe's parents were unhappy:

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237. Eliza Shapiro, *Only 7 Black Students Got into Stuyvesant, N.Y.'s Most Selective High School, out of 895 Spots*, N.Y. TIMES (Mar. 18, 2019), https://perma.cc/357D-X4FG. Note that these figures do not include those admitted later in the summer through the Discovery program. *Id.*

238. Sophia Chang & Jessica Gould, *Number of Black and Latino Students Admitted to NYC Specialized High Schools Falls to Lowest Level in 3 Years*, GOTHAMIST (Apr. 29, 2021), https://perma.cc/53KV-KBLY.

239. *See* Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 627 F. Supp. 3d 253, 256 (S.D.N.Y. 2022).

240. Christina Veiga, *Program Aiming to Integrate NYC's Specialized High Schools Continues to Enroll Few Black and Hispanic Students*, CHALKBEAT N.Y. (May 1, 2020, 1:33 PM PDT), https://perma.cc/64VR-GYGQ. These figures are for 2020. The most recent figures, from 2023, show that 60% of Discovery students are Asian—a figure that actually exceeded the Asian share of those admitted under the SHSAT that year. Amy Zimmer, *Black and Latino Enrollment in NYC Specialized High School Integration Program Still Lags*, CHALKBEAT N.Y. (June 13, 2023, 11:30 A.M. PDT), https://perma.cc/RD3C-ZW2N.

241. Veiga, *supra* note 240.

242. Christa McAuliffe Intermediate School PTO, Inc. v. De Blasio, 364 F. Supp. 3d 253, 270 (S.D.N.Y. 2019). It was still so styled in 2022, although de Blasio was out of office by that point. *Christa McAuliffe*, 627 F. Supp. 3d at 256.

Fifty-six percent of the school's population is impoverished per Discovery's criteria, just below the 60% cutoff.[243] As a result, its students had less chance of getting into the specialized schools than they did before the Discovery expansion, because they are ineligible for Discovery and, meanwhile, 20% fewer seats are now being awarded via the SHSAT alone.[244] The *Christa McAuliffe* plaintiff organization alleges that this cutoff was racially motivated, because poor Black and Hispanic kids are more likely than poor Asian kids to live in neighborhoods above the 60% threshold.[245] Christa McAuliffe's population is majority Asian.[246] As in *Coalition for TJ*, the plaintiff characterizes the policy as anti-Asian, based on a zero-sum argument, and as unconstitutional racial balancing.[247] The city does not contest that representation of Black and Hispanic students was a consideration, but denies that the design was anti-Asian.[248] Here, the plaintiff's claim of anti-Asian purpose is even more dubious than in the TJ case, because (as the above-cited numbers imply) there are three times as many Asian students as white students admitted via Discovery.[249] The program benefits poorer neighborhoods and individuals, and Asian New Yorkers are more likely than the citywide average to be living in poverty.[250]

In September 2022, district court Judge Edgardo Ramos, an Obama appointee, granted summary judgment for the city—which the plaintiff has since appealed.[251] The court decided the case on grounds entirely related to the absence of disparate impact, so this case places the issues related to the disparate impact requirement front and center.

Specifically, the court's reasoning proceeded in three key steps. First, the court held that to succeed in an equal protection challenge against a race-neutral

243. *2021-22 School Performance Dashboard: The Christa McAuliffe School*, N.Y.C. DEP'T OF EDUC., https://perma.cc/9552-XY89 (archived Oct. 24, 2023).

244. *See* Hu, *supra* note 230.

245. Complaint at 12-14, *Christa McAuliffe*, 627 F. Supp. 3d 253 (S.D.N.Y. 2022) (No. 18-cv-11657), ECF No. 1.

246. *Id.* at 3. Christa McAuliffe is "one of the city's top-rated middle schools," sending "many" students to the specialized high schools. *See The Christa McAuliffe School I.S. 187*, INSIDESCHOOLS, https://perma.cc/G6P3-2ZZN (archived Oct. 24, 2023).

247. *Id.* at 15.

248. *See* Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment at 26, *Christa McAuliffe*, 627 F. Supp. 3d 253 (S.D.N.Y. 2022) (No. 18-cv-11657), ECF No. 149.

249. *See supra* notes 239-40 and accompanying text.

250. Chau Lam, *Nearly One in Four Asian Adults in NYC Lived in Poverty in 2020: Report*, GOTHAMIST (May 3, 2022), https://perma.cc/99FN-WHAU.

251. *Christa McAuliffe*, 627 F. Supp. 3d at 269; Notice of Appeal, *Christa McAuliffe*, 627 F. Supp. 3d 253 (S.D.N.Y. 2022) (No. 18-cv-11657), ECF No. 171.

policy, plaintiffs must show *both* an actual disparate impact *and* that the impact was purposeful.[252] Second, the court held that there was no disparate impact because Asian students had by far the highest admission rates both under Discovery and overall; the court rejected the plaintiff's argument that disparate impact should be assessed in terms of *changes* in groups' admission rates before and after the policy change.[253] Third, the court held that even if the before-and-after comparison *were* the right test, there still would be no disparate impact, because the Asian share of admits actually *grew* under Discovery.[254]

Thus, the district court did not reach the question of whether benign race-conscious goals constitute a discriminatory purpose triggering strict scrutiny. A higher court could still use this case to reach that question, though, and the legal issues surrounding the role of disparate impact in discriminatory-purpose claims are themselves important and have arisen in other magnet school cases, including *Coalition for TJ*, as noted above. These questions have not been addressed by the prior literature on the pursuit of race-conscious objectives through facially neutral tools. That is a significant omission, because the disparate impact requirement could potentially produce a powerful and widely applicable defense against challenges to such efforts, such that strict scrutiny could never apply when a policy merely mitigates an existing disparity. So how should these questions be decided?

First, is disparate impact required at all to prevail on a discriminatory-purpose claim? The plaintiff in *Christa McAuliffe* contends that it is not. They argue that if a policy was designed to create a disparate impact, it should not matter whether it actually did, because all individuals are entitled to be considered under a process untainted by an unconstitutional purpose.[255]

This position is not frivolous; no Supreme Court case squarely rejects it. The district court cited both *Washington v. Davis* and *Arlington Heights*, both of which contain language which could be taken to suggest that both disparate impact and discriminatory purpose are required.[256] But while these cases make

252. *Christa McAuliffe*, 627 F. Supp. 3d at 264-65.

253. *Id.* at 267.

254. *Id.*

255. *Id.* at 263-64. This is an argument that apparently was not made in *Coalition for TJ*; none of the Fourth Circuit opinions discuss it, focusing instead on the dispute over *how* disparate impact is to be proven.

256. Washington v. Davis, 426 U.S. 229, 239 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). The court also cited a more on-point Second Circuit precedent: *Hayden v. County of Nassau. Christa McAuliffe*, 627 F. Supp. 3d at 262 (citing Hayden v. County of Nassau, 180 F.3d 42, 50-52 (2d Cir. 1999) (holding that the intent to mitigate a disparate impact against one group does not count as purposeful discrimination against another group and that the plaintiff group had not established disparate impact because they were still favored overall)).

clear that disparate impact alone is not enough, the issue of whether discriminatory purpose alone would suffice was not presented in either; both involved claims that failed for lack of discriminatory purpose.[257] The district court followed the language of binding precedents, which is appropriate, but it is possible that the Supreme Court could eventually clarify the test to indicate that while evidence of disparate impact may be relevant to assessing the evidence of discriminatory purpose, ultimately, purpose is what matters.

If that position were adopted, it might help some traditional civil rights plaintiffs alleging a purpose of harming disadvantaged racial groups, especially in cases where it is hard to gather evidence of disparate impact. Indeed, it is even possible that adopting a more plaintiff-friendly view on disparate impact would help other civil rights plaintiffs *without* helping those—like the Christa McAuliffe PTO—whose case also depends on the characterization of diversity objectives as a discriminatory purpose.

Still, the district court's answer is probably the best one. Remember, first, that we are focused only on cases with no individual-level use of race. The *only* alleged racial purpose in *Christa McAuliffe* is an aggregate one—to shift the schools' overall racial composition. But if the policy does not actually have an aggregate-level disparate impact, it is hard to conceptualize the constitutional wrong: Is it that policymakers had the wrong thoughts? This is analogous to an individual case in which an admissions officer scored a candidate lower for race-related reasons, but the candidate ended up being above the admissions cutoff anyway. Normally, it takes an adverse action with a discriminatory effect to give rise to a claim. An intent to discriminate is not enough if never effectuated.

To be sure, in that analogy there were *no* consequences for any candidate, and the admitted candidate would presumably lack standing to sue. In contrast, the Discovery program was adopted, and students at Christa McAuliffe were excluded from it. But is this exclusion meaningfully cognizable as racial discrimination if it neither reflects an aggregate pattern of disparate impact nor unequal treatment of any individual based on race? Christa McAuliffe is majority Asian, but its non-Asian students were just as excluded from Discovery as its Asian students were. So were all of the students at all of the other schools below the 60% poverty cutoff, regardless of their race or their schools' racial composition. All suffered the same injury-in-fact, and in the aggregate, Asians were no more likely to suffer that injury. It would be strange to treat an unrealized intent to cause an aggregate disparate impact as different from an unrealized intent to discriminate against an individual.

Courts might have reason to treat differently cases in which a policy has a discriminatory purpose, but its disparate effects are unknown—either because it is too early (in cases seeking to enjoin a new policy) or because data are

257. *Davis*, 426 U.S. at 246; *Arlington Heights*, 429 U.S. at 270-71.

unavailable. These are, I think, the best cases for a "purpose only" test; it would be odd to require a deliberately discriminatory policy to succeed in accomplishing its discriminatory purpose before action could be taken to stop it. That concern could perhaps best be addressed by shifting the burden to the government to establish the policy's lack of an actual or expected disparate impact, once purpose is established. In *Christa McAuliffe*, the district court's factual conclusions imply the government could meet that burden.[258]

Second, assuming disparate impact is required, how should it be assessed when a *change* in policy is challenged? Is it the effect of the *policy change* (relative to a prior baseline), or that of the new *policy* itself (considered in isolation)? This question is of particular importance for the legal struggles over colorblindness because in cases where a policy change seeks to mitigate an existing disparity, the two measures are likely to point in different directions. In the admissions context, such cases often depend on characterizing a racial group as a victim of "disparate impact" even though it still has higher admissions rates than any other group—a characterization that makes no sense if the policy is considered in isolation. The plaintiffs' argument instead turns on change relative to a prior baseline—the fact that they used to have an even larger advantage before a policy change took effect.

In *Christa McAuliffe*, for example, the preexisting admissions policy of the specialized high schools had a racially disparate impact, adversely affecting Black and Latino students and favoring white and Asian students. This is also true of the new admissions policy, and of Discovery itself. The *Christa McAuliffe* plaintiff does not contest this, but they do claim that absent the Discovery program, Asian representation would be higher because the main SHSAT process produces even higher numbers of Asian students than does the Discovery program.[259] If this claim were true, would it establish a disparate impact disfavoring Asian Americans?

If it did, then the disparate impact requirement would not do much work in cases like *Christa McAuliffe* and the other magnet school cases. After all, whenever there are zero-sum tradeoffs, any successful effort to increase representation of an underrepresented group must necessarily adversely impact *some* other group relative to its prior baseline. Whatever group loses seats in any admissions reform could always claim a disparate impact, even if—as with Asian Americans here—that group is still doing much better than all the others. The ironic result would be that whenever policymakers try to *reduce* an existing disparate impact that an underlying policy has on one group,

258. *See supra* notes 253-54 and accompanying text.

259. This appears to have been true in 2020, the year that the plaintiff's claim focuses on, but no longer true in 2023. *See* Zimmer, *supra* note 240.

their *change* in policy would always be seen as generating a disparate impact against a different group.

Whether this is the right rule is difficult to disentangle from the question of whether seeking to mitigate an existing racially disparate impact amounts to a discriminatory purpose in the first place. If you think it does, then you probably also think that successfully doing so *should* be understood to have a disparate impact running in the opposite direction of the existing one. That is, you would favor focusing the impact analysis on the *change*, not on the *end state*. On the other hand, if you think (as I do) that government actors should be generally free to try to mitigate racial disparity and exclusion with race-neutral tools, then the fact that an ends-focused disparate impact requirement will help to insulate those efforts from constitutional challenge may strike you as a feature, not a bug. It gives defendants the option to invoke either of two arguments in order to protect such efforts: (1) a goal of mitigating an existing disparity is not a racially discriminatory purpose; or (2) a required showing of disparate impact is not satisfied in a case where a policy change reduces an existing disparity. The existence of these two paths to the same result may be useful if the Supreme Court or the courts of appeals ultimately foreclose one or the other.

It is worth considering, however, Judge Rushing's counterargument in dissent in *Coalition for TJ*, in which she argued for a focus on the effects of the change relative to the prior baseline.[260] She reasoned that a focus on the final policy in isolation would effectively allow government actors free rein to seek to curtail the success of especially successful racial groups (here, Asian Americans), so long as they do not go so far as to render them worse off than any other groups.[261] Or, put another way, government actors would have unlimited use of facially neutral tools to pursue racial balancing, right up until that balance is achieved.

This point has some force. There is a genuine dilemma here; neither approach seems perfect. The disparate impact requirement should not, I think, be interpreted in a way that effectively finds a new disparate impact anytime the government tries to reduce an existing one. And yet, it also should not be interpreted in a way that insulates genuinely nefarious government conduct from constitutional challenge. Suppose, for example, that a school affirmatively sought to curtail its growing Asian-American presence for malign reasons (i.e., standard-issue racism), rather than doing so as a byproduct of an attempt to improve the representation of other long-excluded minority

260. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 904-05 (4th Cir. 2023) (Rushing, J., dissenting).

261. *Id.*

groups.[262] I think this hypothetical should give rise to a claim even if, notwithstanding the policy, Asian Americans remained represented well above their population share. But the difference between this hypothetical and the actual *Christa McAuliffe* case ultimately turns on the nature of the government's purpose, not on the policy's demographic consequences. The impact and purpose questions are, indeed, hard to disentangle.

One could imagine solutions: For example, perhaps an exception to the disparate impact requirement could be carved out for true animus cases. But the dilemma could be avoided entirely if courts take the first of the two paths described above and hold that a purpose of reducing an existing disparity or promoting diversity is not an invidious one triggering strict scrutiny.

Ultimately, although the issues surrounding New York's specialized high schools are similar to those in *Coalition for TJ, Christa McAuliffe* may be easier for courts to resolve on fact-specific grounds. This may make it a less attractive vehicle for Supreme Court review. That is for a simple reason: The Discovery program barely changed the selective high schools' racial composition. Indeed, per the district court, it did not harm Asian enrollment at all, even relative to its prior baseline. If a future mayoral administration were to enact more substantial changes (as DeBlasio sought), this could potentially change, and further litigation would be likely, forcing courts to more squarely confront these difficult legal questions.

C. *Boston Parent Coalition for Academic Excellence Corp. v. City of Boston*

Boston, like New York City, has a predominantly Black and Hispanic public school population and a set of highly regarded public "exam schools" at which those groups are substantially underrepresented.[263] The three exam schools (covering grades 7-12) have traditionally admitted students based largely on a standardized test administered to sixth graders.[264] The schools' admissions policies have been revised twice in recent years. In 2020, the city's school committee temporarily suspended its test, basing admissions on GPA; a longer-term plan adopted in 2021 phased the test back in (while still considering

262. This hypothetical is easily imaginable, and it would be analogous to twentieth-century Jewish quotas, under which universities likewise held back the success of a minority group that was perceived as being overrepresented. *See* MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970, at 14-25 (Transaction Pubs. 2010) (1979) (describing emergence of these quotas at elite colleges).

263. Melissa Bailey, *A Golden Ticket: Efforts to Diversify Boston's Elite High Schools Spur Hope and Outrage*, NBC NEWS (Mar. 17, 2021, 2:00 AM PDT), https://perma.cc/5V6C-N55Z.

264. *See id.*

GPA).[265] Both plans also have geographic criteria.[266] Boston Parent Coalition (BPC), an organization represented by PLF, filed suit, challenging only the first, one-year-only policy; they seek delayed admission for then-sixth-graders who missed that year's cut.[267] They do not challenge the test's suspension (which was COVID-driven) but instead contend that the geographic criteria are impermissibly racially motivated.[268] BPC includes white and Asian parents and does not claim unique harm to Asian students; as detailed below, the reduction in white students' class share was substantially larger.

Under the challenged plan, applicants with the highest GPAs from each ZIP code were admitted, with a slight priority for poorer ZIP codes.[269] The parties agree that the policy had race-conscious aims; the school committee was legally required to complete an Equity Impact Statement and produced simulations of expected effects on racial composition.[270] The plaintiff argues that this policy change had a "racial balancing" purpose and a racially disparate impact.[271] Once again, though, the changes came far short of actual "racial balance." The committee anticipated (and events approximately bore out) modest shifts in the admitted-students pool's racial composition: from 39% to 31% white; from 21% to 18% Asian; from 14% to 23% Black; from 21% to 23% Hispanic; and from 5% to 6% multiracial/"other."[272] Boston's school-age population is 16% white, 7% Asian, 35% Black, 36% Hispanic, and 5% multiracial/"other."[273]

In its initial April 2021 decision, Judge William Young, a Reagan appointee, decided the case for the city based on a stipulated record.[274] The court held that race-related ends alone do not trigger strict scrutiny.[275] It also held that the above-described declines in white and Asian representation did

265. Ainslie Cromar, *It's Official: No Admissions Test at Boston Exam Schools for Incoming Fall Class*, BOSTON.COM (Oct. 22, 2020), https://perma.cc/E2NP-8MQK; Ellen Barry, *Boston Overhauls Admissions to Exclusive Exam Schools*, N.Y. TIMES (updated Oct. 9, 2021), https://perma.cc/NT8B-H8NB.

266. Cromar, *supra* note 265; Barry, *supra* note 265.

267. First Amended Verified Complaint at 12, 23, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos., 2021 WL 1422827 (D. Mass. Apr. 15, 2021) (No. 21-cv-10330), 2021 WL 5103261.

268. *Id.* at 12-13, 14 n.5.

269. *Bos. Parent Coal.*, 2021 WL 1422827, at *6, *13.

270. *Id.* at *4, *7.

271. First Amended Verified Complaint, *supra* note 267, at 20, 22.

272. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos., No. 21-cv-10330, 2021 WL 4489840, at *7 (D. Mass. Oct. 1, 2021).

273. *Id.*

274. *Bos. Parent Coal.*, 2021 WL 1422827, at *2.

275. *Id.* at *10.

not establish a disparate impact, absent statistical analysis showing that this was more than just a fluctuation.[276] The court cited evidence of "racist . . . animus" on the part of the former school committee chair, who was caught on a hot mic at a hearing mocking the names of Asian-American community members and resigned the next day.[277] But the court found this non-dispositive absent either evidence of animus on the part of the other six committee members or evidence that animus causally influenced the process.[278]

BPC appealed and sought an immediate injunction; the First Circuit denied the request, finding BPC unlikely to prevail on the merits.[279] Like the district court, the court of appeals followed the Justice Kennedy opinion in *Parents Involved* and embraced its distinction between retail-level classifications and policy-level consideration of diversity concerns.[280] It also cited a 2004 First Circuit case declining to extend strict scrutiny to facially neutral school-assignment policies.[281] The court also cited several post-*Parents Involved* decisions from other circuits that upheld facially race-neutral educational policies—all of which involved more traditional civil rights claims, specifically challenges by Black plaintiffs to policies with segregative effects.[282] Although

276. *Id.* at *15.

277. *Id.* at *16.

278. *Id.*

279. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos., 996 F.3d 37, 50-51 (1st Cir. 2021).

280. *Id.* at 46-50.

281. *Id.* In 2004, Boston had recently ended its longtime court-ordered desegregation plan, but the plaintiffs complained that its new race-neutral school-assignment plan still had an underlying racial purpose. The First Circuit held, "[no Supreme Court case] has subjected a governmental program to strict scrutiny simply because the state mentioned diversity as a goal. . . . The Supreme Court has explained that the *motive* of increasing minority participation and access is not suspect." Anderson *ex rel.* Dowd v. City of Boston., 375 F.3d 71, 87 (1st Cir. 2004) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)).

282. *See* Doe *ex rel.* Doe v. Lower Merion Sch. Dist., 665 F.3d 524, 548 (3d Cir. 2011) ("Designing a policy 'with racial factors in mind' does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion." (quoting Hayden v. Cnty. of Nassau, 180 F.3d 42, 48 (2d Cir. 1999))); Spurlock v. Fox, 716 F.3d 383, 394-95, 399 (6th Cir. 2013) ("[T]he requirement that legislative classifications be color-blind does not demand demographic ignorance during the policymaking process."); Lewis v. Ascension Par. Sch. Bd., 806 F.3d 344, 357-58 (5th Cir. 2015) ("[A]wareness of racial demographics . . . has no bearing on the *facial* neutrality of the Board's action—at least absent evidence that the geographic boundaries are explicable *only* as the product of intentional segregation."). These cases' relevance should not be overstated; all the courts ultimately found a lack of evidence that a racial purpose played a causal role in motivating the policy, and thus their reasoning does not necessarily tell us what these courts would have done if there were a dispositive racial consideration, but a benign one.

these decisions do not really speak to the core issues surrounding pro-diversity policies, they nevertheless contain useful language defending school districts' use of demographic data as routine and constitutionally unproblematic.

The *Boston Parent Coalition* appeals court's brief discussion of disparate impact also favors the city:

> [A]s compared to a random distribution of invitations, the Plan has no adverse disparate impact on White and Asian students. Rather, plaintiff is able to generate a supposed adverse impact principally by comparing the projected admissions under the Plan to prior admissions under the predecessor plan . . . [or] to projections of admissions based only on GPA. . . . But plaintiff offers no analysis or argument for why these particular comparators, rather than a plan based on random selection, are apt for purposes of determining adverse disparate impact.[283]

In other words, the court appears unconvinced that the policy *change* should be the focus, much less some hypothetical alternative change. Rather, the court focuses on whether the new policy disproportionately excludes white and Asian students (that is what a comparison to random selection would entail). It does not.

After this decision in April 2021, the merits appeal was delayed by unexpected developments. In June 2021, the *Boston Globe* published text messages exchanged between two committee members during the meeting at which the policy was adopted.[284] The two members anticipated "white racists . . . yelling [a]t us," and agreed that they were "[s]ick of westie whites," a reference to West Roxbury, where many of BPC's members reside.[285] The day after the meeting, the *Globe* had filed a public records request for relevant committee communications, and the city's lawyers did not fully comply, instead turning over an edited transcript omitting these comments.[286] After the *Globe* finally obtained and released the full text exchange, BPC moved for relief from judgment under Federal Rule of Civil Procedure 60(b).[287]

In October 2021, the district court issued a new opinion finding again for the city, largely reiterating its prior legal analysis.[288] The new opinion added some discussion of the disparate impact question that did not appear to embrace the court of appeals' suggestion that random selection was the appropriate

283. *Bos. Parent Coal.*, 996 F.3d at 46.

284. Marcela García, *Boston School Committee Member Resigns over Texts*, BOS. GLOBE (June 7, 2021, 9:41 PM), https://perma.cc/56NU-MBPP.

285. Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos., No. 21-cv-10330, 2021 WL 4489840, at *8 (D. Mass. Oct. 1, 2021) (first alteration in original).

286. *Id.*

287. *Id.* at *10, *12 (allowing courts broad discretion to provide relief from final judgments, orders, and proceedings).

288. *Id.* at *15, *17.

comparator.[289] It focused on the policy change, but found that even so, there was no statistically significant adverse impact.[290] Regarding the text-message imbroglio, the court's tone evinced frustration and anger. It characterized the texts as evidence of anti-white animus, and excoriated the city for concealing them.[291] But the court said that there was still no disparate impact and that the plaintiff's strategic choices (not seeking discovery and insisting that it did not need to prove animus) were largely to blame for the texts never having been revealed, barring Rule 60(b) relief.[292] It concluded the opinion with a long and extraordinary footnote directly addressing Boston schoolchildren, recognizing the failures of the committee members, their lawyers, and the judge himself.[293] The appeal was argued in December 2022, and the panel seemed to maintain its prior skepticism of the plaintiff's position.[294]

Like the other cases considered here, *Boston Parent Coalition* presents a potential Supreme Court vehicle, but the fact-specific animus arguments, related procedural questions, and lack of disparate impact evidence make it an imperfect one. Ends-colorblindness advocates might want a case in which the school system comes across badly. But fact-specific decisions are easier to cabin—a worry that may underlie PLF's earlier refusal to center animus arguments or seek related discovery. As in New York, whatever happens with this litigation, future challenges to Boston's exam-school admissions are likely. This particular case only involves the temporary pandemic policy, but the permanent one is similarly vulnerable.

D. *Association for Educational Fairness v. Montgomery County Board of Education*

Another case litigated by PLF, challenging the assignment policy for four magnet middle schools in Montgomery County, Maryland, was dismissed in

289. *Id.* at *15 ("[T]his Court does not suggest that remaining overrepresented alone precludes a disparate impact. It simply notes that when a group is as overrepresented as White and Asian students at the Exam Schools, nearly any changes to the admissions process will likely result in some reduction, if only from the law of averages. Absent any additional statistical analysis, such a reduction is not . . . a disparate impact.").

290. *Id.*

291. *Id.* ("This Plan is not the celebrated result of transcending racial classifications that this Court once found it to be.").

292. *Id.*

293. *Id.* at *17 n.23.

294. Oral Argument at 05:10-06:28, 08:00-08:42, 11:55-12:50, 14:40-15:15, 18:00-18:35, Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of the City of Bos., No. 21-1303 (1st Cir. Dec. 07, 2022), https://perma.cc/8FYX-2UBE (to locate, select "View the live page").

July 2022, and is now on appeal.[295] But the case started out differently, with an initial victory that represented PLF's first success in persuading a federal district judge—in this case, Judge Paula Xinis, an Obama appointee—of its colorblindness theory.[296] The case has been lower profile than those involving renowned high schools, but the county defended it vigorously with top-tier representation—former acting Solicitor General Neal Katyal. The victory must have been very encouraging for PLF and its allies. How did they achieve it?

Let's start with the facts. The schools in question began with demographics not unlike those in the other cases, but the county's policy response had some different features and effects. The magnet schools had, similar to many "gifted and talented" programs, long based admission largely on cognitive tests administered on parental request.[297] In the years before this policy was changed, Black and Hispanic students constituted about 47% of the county's student population but only about 14% of students at magnet middle schools; for Asian-American students, these figures were approximately flipped, 15% and 46% respectively.[298] White students were represented at approximately their population share.[299]

In 2016, the board voted on a new admissions model. First, parental initiation was scrapped; every fifth-grader was considered, and about half (based on grades and other test scores) were invited to take the cognitive test.[300] Second, the county modified its policy of admitting all the highest test performers; the county had "unfettered discretion" to refuse admission to such students if they had a "peer group" of at least twenty high-performing children at their home middle schools.[301] Third, after evaluating the demographic data from the first two years of this reform, the county took the further step of "locally norm[ing]" its test results, assigning percentiles within bands defined by elementary schools' poverty rates.[302] The plaintiff organization, a parents' group called Association for Educational Fairness (AFEF), argued that these changes aimed to reduce the

295. Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ. (*AFEF II*), 617 F. Supp. 3d 358, 360 (D. Md. 2022); Notice of Appeal, *AFEF II*, 617 F. Supp. 3d 358 (D. Md. 2022) (No. 20-cv-02540), ECF No. 115.

296. *See* Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ. (*AFEF I*), 560 F. Supp. 3d 929, 956 (D. Md. 2021) (denying defendant's motions to dismiss).

297. *Id.* at 939.

298. *Id.* at 936.

299. *Id.*

300. *Id.* at 939.

301. *Id.* at 939, 946. This rule is a considerable departure from traditional "meritocratic" admissions. The defense for it is that it is not obvious that middle-school assignment should be "meritocratic," rather than designed to target scarce county resources toward otherwise unmet educational needs.

302. *Id.* at 940-41.

number of Asian students, who had been much more likely to take the test and were clustered in wealthier elementary schools that were more likely to be excluded by the "peer group" rule.[303] For example, in the 2018-2019 school year, twelve Asian students from a single elementary school had scored in the 99th percentile but were excluded by the peer-group rule.[304]

Together, these changes led to a sharp drop in Asian admission rates.[305] The reported data on Black and Hispanic representation was incomplete and hard to assess without discovery, but it *was* reported that white representation had increased notably at three schools, nearly doubling at one.[306] In this sense, the case is less like a typical "colorblindness" challenge to a diversity policy and more like a traditional civil rights case, in which non-white plaintiffs allege intentional discrimination benefiting white people.

Still, the discriminatory-purpose analysis does directly focus on diversity objectives. The plaintiff does not claim anti-Asian animus, nor does it allege a motivation to help white students. Instead, its allegations of discriminatory purpose turned on statements (from the superintendent, board members, and a consultancy's report) about improving Black and Hispanic representation.[307] Thus, the plaintiff's case ultimately depended, as in PLF's other cases, on characterizing this objective as a discriminatory purpose.

The last few pages of the first *Association for Education Fairness v. Montgomery County Board of Education* (*AFEF I*) opinion embraced that characterization, effectively following PLF's now-familiar script. The court invoked the *Arlington Heights* purpose principle, and combined it with colorblindness holdings from cases involving retail-level classifications (the *Parents Involved* plurality, *Croson*, and Fourth Circuit cases) to conclude that "[e]ven 'benign remedial aims' remain 'inherently suspect.'"[308] It rejected the application of *Marks* to confer precedential status on Justice Kennedy's *Parents Involved* opinion, never mentioning the majority's endorsement of that opinion in *Inclusive Communities* (which the county had not cited).[309] The court held

303. Complaint and Demand for Jury Trial at 2, 19, 24, *AFEF I*, 560 F. Supp. 3d 929 (D. Md. 2021) (No. 20-cv-02540), ECF No. 1.

304. *Id.* at 23.

305. *Id.* at 30-31.

306. *See id.* at 29.

307. *Id.* at 14-16.

308. *AFEF I*, 560 F. Supp. 3d 929, 952 (D. Md. 2021) (quoting Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993)).

309. *Id.* at 955. The court reasoned that Justice Kennedy's *entire* opinion was not binding under *Marks*; rather, only what it shared with the plurality was, namely, the conclusion that the district's policy was not narrowly tailored. But as discussed above in note 82, the premise that race-neutral alternatives were constitutionally permissible

footnote continued on next page

that diversity efforts are unconstitutional if they entail "racial balancing" in disguise.[310] It also claimed that (even if it *were* controlling precedent) Justice Kennedy's opinion supports applying strict scrutiny to any policy focused substantially on race rather than on a broadly defined diversity in which race is only "one modest factor"—an untenable reading of that opinion.[311]

Finally, the court did acknowledge circuit-level precedents like *Spurlock* and *Doe*, which the *Boston Parent Coalition* court relied on for the proposition that merely designing a race-neutral policy with demographic effects in mind is not a discriminatory purpose.[312] But it concluded that permissible "race-consciousness" means only *being aware* of racial effects; once policymaking is *influenced* by those anticipated effects, then strict scrutiny applies.[313] Although this is a plausible way to distinguish those circuit cases, it is again inconsistent with Justice Kennedy's *Parents Involved* opinion and with *Inclusive Communities*, which make clear that policymakers are not limited to simply "awareness" of demographics; they may try, on purpose and candidly, to rectify race gaps using race-neutral means without triggering strict scrutiny.[314]

The *AFEF I* opinion has not been vacated, so these holdings remain citable in other cases. However, due to changes in circumstances, the district court granted a subsequent motion to dismiss in July 2022.[315] The first reason was fact specific: The county had abandoned the challenged admissions plan.[316] Its new plan, in contrast, awarded slots by lottery among students who scored above the 85th percentile on state standardized tests (which were locally normed) and received A grades in certain classes.[317] There was no peer-group rule.[318] When the new plan was adopted, most of the board had turned over,

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was part of Justice Kennedy's reason for that conclusion. It was not shared with the plurality, but under *Marks*, precedent can be created without five votes.

310. *AFEF I*, 560 F. Supp. 3d at 954.

311. *Id.* at 955 (quoting Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting)). This characterization is accurate as to Justice Kennedy's affirmative action opinions (such as his *Grutter* dissent); the requirement that race play a modest role arose from the narrow-tailoring component of strict scrutiny. But it is not accurate as to his discussion of race-neutral policies in *Parents Involved*, which made clear his view that such policies would not be subject to strict scrutiny at all. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

312. *AFEF I*, 560 F. Supp. 3d at 951; *see supra* note 282 and accompanying text.

313. *AFEF I*, 560 F. Supp. 3d at 954-56.

314. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545 (2015).

315. *AFEF II*, 617 F. Supp. 3d 358, 373 (D. Md. 2022).

316. *Id.* at 360, 364.

317. *Id.* at 364.

318. *Id.*

and there was a new superintendent.[319] These decisionmakers' stated reasons for the new plan did not reference race.[320] The plaintiff sought to characterize the new policy as a thinly veiled extension of the prior policy process, but the district court in *Ass'n for Education Fairness v. Montgomery County Board of Education* (*AFEF II*) found no evidence for that extrapolation, observing that the Supreme Court has refused to treat new policies as presumptively tainted by prior policies' impermissible purposes.[321]

This turn in the case is ironic because, at two of the schools, the new lottery plan shifted demographics more dramatically than the previous reform did.[322] If the result survives, there is a potential lesson for policymakers: You can adopt race-neutral policies with substantial racial effects, so long as you don't talk about race. In the Conclusion, I explore the downsides of this potential turn against candor.

The second reason for the dismissal turned on the disparate impact theory, which had in the interim been raised by Judge Heytens in his stay-stage concurrence in *Coalition for TJ*.[323] In *AFEF I*, disparate impact was uncontested; the court and parties seemingly assumed the inquiry should focus on the policy change.[324] But in *AFEF II*, the district court followed Judge Heytens's lead and held that the disparate impact inquiry should just compare different racial groups' admission rates under the final policy, which were highest for Asian students.[325]

The case is not over, however. After the district court rejected a Rule 60(b) motion for reconsideration, AFEF filed a notice of appeal in January 2023.[326] The county's policy changes potentially complicate it, but the case remains available as a potential vehicle for the embrace of ends-colorblindness.

III. After Affirmative Action

Because the law has favored the school systems, it is no surprise that they have mostly been winning these cases. Plaintiffs advocating ends-colorblindness will need a change in direction emanating from the Supreme

319. *Id.* at 364-65.

320. *Id.* at 369-73.

321. *Id.* at 369-70.

322. *Id.* at 368.

323. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 22-1280, 2022 WL 986994, at *3 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring).

324. *AFEF I*, 560 F. Supp. 3d 929, 952 (D. Md. 2021).

325. 617 F. Supp. 3d at 367.

326. Notice of Appeal, *supra* note 295; Ass'n for Educ. Fairness v. Montgomery Cnty. Bd. of Educ., No. 20-cv-02540, 2022 WL 1774042 (D. Md. Dec. 16, 2022).

Court. Is that change here, or coming soon? Here, I consider the new landscape likely to emerge in the wake of *SFFA*. In Subpart A, I describe the *SFFA* decision and explain why it does not directly change the status of race-neutral alternatives but potentially sets the stage for that issue to come back to the Court. In Subpart B, I consider how schools will likely respond to *SFFA* and why a surge in litigation can be expected on the same issues at stake in the magnet school cases. In Subpart C, I consider arguments that might sway key votes when the issue does come back, including stare decisis, normative distinctions between race-conscious means and ends, impacts on areas of law outside education, and original-meaning arguments.

A. The *SFFA* Decision

On October 31, 2022, the Supreme Court heard oral arguments in two cases brought by Students for Fair Admissions against Harvard University and the University of North Carolina.[327] Both universities used race as a plus factor in a holistic process much like the one approved in *Grutter*, and in both suits, SFFA asked the Court to overrule that case.[328] Alternatively, SFFA argued that both universities' policies failed the *Grutter* test because they did not use available race-neutral alternatives.[329] The case against Harvard, a private university that receives federal funds, relied on Title VI of the Civil Rights Act.[330] The Supreme Court has held that Title VI's restrictions on race discrimination parallel those of the Equal Protection Clause,[331] so the restrictions on affirmative action in *SFFA* apply to both public and private universities.

The Court issued its decision in the consolidated cases on June 29, 2023, deciding against the universities.[332] Although the Court did not squarely overrule *Grutter*, its approach was a major departure from it and seemingly leaves little room, if any, for other educational institutions to pursue affirmative action in the future.[333] *Grutter* and other cases had, as discussed in

327. Transcript of Oral Argument, Students for Fair Admissions, Inc. v. Univ. of N.C., 143 S. Ct. 2141 (2023) (No. 21-707), 2022 WL 18033754 [hereinafter *UNC* Transcript]; Transcript of Oral Argument, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199), 2022 WL 18033693 [hereinafter *Harvard* Transcript].

328. Brief for Petitioner at 2, 14, 37, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 2918946.

329. *Id.* at 2-3.

330. *Id.* at 1.

331. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

332. *SFFA*, 143 S. Ct. at 2175.

333. *Id.* at 2207 (Thomas, J., concurring) (describing *Grutter* as "for all intents and purposes, overruled"); *id.* at 2239 (Sotomayor, J., dissenting) (agreeing with Justice Thomas's

footnote continued on next page

Part I, already applied strict scrutiny to race-based affirmative action programs (consistent with the means-colorblindness principle) but had left room for those programs to *survive* strict scrutiny if narrowly tailored to diversity-related educational interests. In *SFFA*, the central difference from *Grutter* was that the Court refused to recognize the universities' diversity objectives as compelling; it also held that the affirmative action program had no "meaningful connection" to those interests.[334] Either of those reasons was enough for affirmative action programs to fail the strict-scrutiny test, and the Court never proceeded to the narrow-tailoring analysis under which race-neutral alternatives would have been considered.[335]

The *SFFA* opinions are cumulatively hundreds of pages long, and they contain countless passages that future litigants may well parse for various purposes. In this Subpart, I focus on several aspects of the Court's opinion—as well as concurrences and dissents—that are at least potentially relevant to future challenges to the constitutionality of facially neutral policies with race-conscious objectives. These include (1) the change in the Court's treatment of diversity interests; (2) its comments on the colorblindness principle; and (3) its limited, but potentially important, comments on race-neutral alternatives to affirmative action.

1. The constitutional status of universities' interests in diversity

In *SFFA*, the Court departed from its prior affirmative action jurisprudence in declining to recognize the universities' diversity-related educational interests as compelling. It proceeded systematically through a list of specific educational interests that the defendants had invoked, and dismissed each of them, concluding that they were insufficiently "coherent" to enable courts to apply the strict-scrutiny analysis meaningfully.[336] This dismissal was outcome-determinative (even absent the Court's further holding that the universities' affirmative action programs did not meaningfully advance those interests) because the Court had already long rejected other plausible race-

characterization and critiquing the majority for effectively overruling the case without saying so and thus failing to apply stare decisis analysis). The Court left room for a possible exception for service academies based on their "distinct interests." *Id.* at 2166 n.4 (majority opinion).

334. *Id.* at 2166-67 (majority opinion).

335. The Court also held that the universities' policies violated two additional restrictions that it drew from its reading of prior case law: Affirmative action programs "may never use race as a stereotype or negative, and—at some point—they must end." *Id.* at 2166-69. I return to these points in Subpart C below.

336. *Id.* at 2166-67.

related justifications that universities might have invoked for the retail-level use of race (e.g., remedying societal discrimination).[337]

But despite their effect on affirmative action, the Court's holdings regarding diversity interests do not have immediate implications for challenges to race-neutral policies. Notably, in the K-12 setting, the Court in *Parents Involved* had already declined to recognize educational diversity interests as compelling, cabining *Grutter*'s reasoning to the higher education context. Nonetheless, as argued in Part II, the law favors school systems' use of race-neutral means to promote diversity interests, because strict scrutiny does not apply to those efforts in the first place, so no compelling state interest is required to justify them. In *Parents Involved*, Justice Kennedy joined the majority in refusing to extend *Grutter* to K-12 schools, yet, in his concurrence, also made clear that school systems could nonetheless pursue diversity and integration using facially neutral means without triggering strict scrutiny.[338] After *SFFA*, this same logic should apply to universities that shift to race-neutral tools for promoting diversity.

And indeed, nowhere in the *SFFA* majority's lengthy discussion is there any suggestion that the diversity-related educational interests were *unconstitutional*, as opposed to merely not compelling. To the contrary, the Court stated: "Although these are *commendable* goals, they are not sufficiently coherent for purposes of strict scrutiny."[339] The middle ground between compelling state interests and unconstitutional objectives is an enormous one, encompassing most of what government does—"commendable" and otherwise.

It is worth noting that UNC and Harvard, consistent with the Court's holdings in earlier affirmative action cases, articulated their interests not in terms of racial representation as an objective in its own right, and not in terms of racial equity, but in terms of educational aims for all students to which race and other dimensions of diversity are relevant. These include, for example, "preparing graduates to 'adapt to an increasingly pluralistic society,'" or "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."[340] Although these objectives were not sufficient in the Court's view to justify the use of racial classifications, universities that invoke similar objectives to justify race-neutral policies will be on much

337. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274-75 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497-98 (1989) (plurality opinion); *id.* at 498-99 (majority opinion).

338. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 782, 788-89 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

339. *SFFA*, 143 S. Ct. at 2166 (emphasis added).

340. *Id.* (first quoting Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 900 F.3d 157, 173 (1st Cir. 2020); and then quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021)).

stronger ground defending them. Moreover, even though *Grutter* was confined to higher education, there is no reason to believe that interests deemed "commendable" for universities to pursue would somehow be impermissible for K-12 schools.

Still, while it has little direct impact on the current legal landscape, the Court's refusal to characterize universities' diversity interests as compelling *could* be disastrous for their pursuit of race-neutral alternatives if it were combined in the future with a holding (in, for example, a case like *Coalition for TJ*) that policies with race-related ends *are* subject to strict scrutiny even if they don't classify by race. This would make it much more difficult for such policies to *survive* strict scrutiny.[341] It is the outcome the ends-colorblindness movement wants and will fight for moving forward.

Finally, although promotion of racial diversity remains a permissible government interest after *SFFA*, the Court did reiterate its longstanding position that it cannot be used as a justification for "racial balancing," which remains "patently unconstitutional."[342] This language is likely to be invoked by challengers in the magnet school cases and similar litigation, but it is nothing new and does not alter the conclusion laid out in Part II that the more modest diversity efforts at issue in those cases do not amount to racial balancing.

The Court *did* characterize what Harvard and UNC were doing as, in practice, racial balancing—but not simply because they were trying to increase the presence of racial minorities on campus. In Harvard's case, the Court

341. Could such policies survive strict scrutiny if their defenders rely on a *non-race-related* compelling state interest—for example, socioeconomic diversity? Perhaps, but it is hard to envision the scenario where this defense would both be needed *and* succeed. Many policies that are widely considered alternatives to race-based affirmative action have nonracial justifications, and if those justifications are the reasons they were adopted, they wouldn't be subject to strict scrutiny in the first place. To support the finding of discriminatory purpose necessary to trigger strict scrutiny, a court would first have to find that the policy was *not* passed for those other reasons, but rather "at least in part 'because of,' not merely 'in spite of'" its disparate racial impact. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (establishing this causation requirement in a sex-discrimination case). This would imply that the nonracial reason did *not* drive the policy outcome—that it was either a pretext or, at least, non-dispositive; although the language "at least in part" is ambiguous, the Court later adopted a burden-shifting framework in which, once a racial purpose is established, defendants may defeat an equal protection claim showing that the purpose was not a but-for cause of the policy's adoption. Hunter v. Underwood, 471 U.S. 222, 228, 232 (1985); *see* Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L. J. 1106, 1144-50 (2018). But if the government *cannot* meet this test (i.e.it cannot show it would have adopted the policy based on nonracial considerations) it is hard to see how a court could deem those same considerations a compelling state interest to which the policy was narrowly tailored. A court might think the policy *could* have been justified that way, but strict scrutiny focuses on the actual reasons things happened, not on post hoc rationalizations.

342. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. at 2172 (quoting *Fisher I*, 570 U.S. 297, 311 (2013)).

observed that for decades, the college's Black class share had remained roughly constant at 10% to 12%, which the Court seemed to view as evidence that an implicit quota was in place.[343] In UNC's case, the Court pointed to the university's objective of achieving "proportional" representation for each racial group, and the stated objective of its affirmative action program to help groups that were "underrepresented" in the sense that their "percentage enrollment within the undergraduate student body is lower than their percentage within the general population in North Carolina."[344]

To be sure, the Court's characterization of these policies as racial balancing could potentially be helpful to future litigants challenging race-neutral policies that have objectives that are truly similar to Harvard's and UNC's. One example would be if in the TJ case, the Superintendent had succeeded in using demographic projections to persuade the school board to adopt an admissions lottery rather than having that proposal voted down. Even in the counterfactual, it's not *obvious* what the result would be: *SFFA* itself, of course, concerned the use of *racial classifications* to achieve racial balance, and it is not at all clear that the Court's objections would hold were classifications not used. In any case, though, race-neutral policies with more modest and less quantified diversity aims (like the TJ admissions reforms that were actually adopted) are sharply dissimilar from what the Court criticized in *SFFA*.

2. Colorblindness

SFFA obviously reflects a victory for the colorblindness movement, which has long sought the abolition of affirmative action. But does its actual discussion of the colorblindness principle provide fodder for those seeking to extend it further, to the objectives of facially neutral policies? This can be concisely answered: The colorblindness rhetoric in *SFFA* does not seem to change the existing doctrine with respect to that question.

In *SFFA*, the Court followed the established central requirement of means-colorblindness: All racial classifications must satisfy strict scrutiny, regardless of what race they benefit or whether their motives are benign.[345] Because *SFFA* made it harder for racial classifications to pass that test, it effectively imposed a stricter requirement of colorblindness on government actors (and Title VI-governed actors) themselves. That is, as in prior cases, the Court in *SFFA* used colorblindness rhetoric simultaneously to refer to the requirement of symmetrical standards of constitutional review (the idea that "the Constitution

343. *Id.* at 2171-72.

344. *Id.* (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 591 n.7 (M.D.N.C. 2021)).

345. *See id.* at 2161-62.

is color blind"[346]) and to the idea that government actors should not, in general, take race into account (the idea that the Constitution *requires* colorblindness, with narrow exceptions that *SFFA* made narrower still).[347] But as with prior cases, in both of these senses, the Court's colorblindness rhetoric in *SFFA* centers on racial classifications.[348] Nothing in it suggests that government policymakers cannot think about racial equality or diversity when they craft race-neutral policies, nor that the courts should apply the same constitutional standards to benign and invidious race-related motives for such policies.

3. Alternatives to affirmative action

As discussed in Part I, past affirmative action cases appeared to approve race-neutral tools for promoting racial diversity by requiring their consideration as part of strict scrutiny's narrow-tailoring analysis. In *SFFA*, the Court *could* have ruled against UNC and Harvard while sending a similar positive signal about race-neutral alternatives if its reasoning had relied on the universities' failure to adequately consider or pursue those alternatives. That is

346. *Id.* at 2160 (emphasis added) (quoting Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument at 65, Brown v. Board of Ed., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10), 1953 WL 48699); *see id.* at 2175 ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); *see also, e.g.*, *id.* at 2161-62 (stating that the Court has held that "the Equal Protection Clause . . . applies 'without regard to any differences of race' . . . [f]or '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color'" (fourth alteration in the original) (first quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); and then quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289-90 (1978))).

347. *See, e.g.*, *id.* at 2160 ("[N]o state has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities . . . ." (quoting Transcript of Oral Argument at 7, Brown v. Board of Ed., 347 U.S. 483 (1954) (Nos. 1, 2, 4, 10))); *id.* at 2161 ("[T]he Constitution . . . forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race." (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (second and third alterations in original)); *see also id.* at 2159-63 (intertwining two types of colorblindness arguments in a review of the history of equal protection law). Note that the ends-colorblindness movement has a similar duality: It seeks to get courts to apply strict scrutiny to the race-conscious objectives of policy, and it seeks to thereby force government actors to be colorblind in their objectives.

348. *See, e.g.*, *id.* at 2166 (stating that strict scrutiny applies to race-based admissions and that "'[c]lassifying and assigning' students based on their race 'requires more than . . . an amorphous end to justify it.'" (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 735 (2007) (second alteration in original))); *id.* at 2168 ("Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (alteration in original))).

not the route the Court took. Because it never got to the narrow-tailoring step of strict scrutiny, the opinion does not say very much about race-neutral alternatives to affirmative action—and as a result, provides little indication as to the majority's view of their constitutional permissibility.

Although this near absence is understandable in the context of the opinion's reasoning, it is nonetheless striking. In addition to the central role the race-neutral-alternatives question has played in past affirmative action cases, at oral argument in *SFFA*, many questions focused on these alternatives—and some revealed the Justices' acute awareness that the issue of their constitutionality is coming down the pike. The Justices dove into the question almost immediately, with several of them (Chief Justice Roberts, Justice Kagan, and Justice Kavanaugh) interrogating SFFA's counsel as to whether UNC could permissibly take race into account in choosing among new race-blind admissions policies.[349] Additional questions focused on why the schools had not pursued particular alternatives, including eliminating legacy and athletic preferences and class-based or geographic affirmative action.[350] As Justice Kavanaugh put it to SFFA's counsel, striking down affirmative action "will put a lot of pressure . . . on what qualifies as race-neutral."[351] Several Justices explored that definitional issue—for example, whether a preference could be given for descendants of enslaved people, which SFFA's counsel contended would be merely a race proxy.[352]

Almost none of these questions are aired in the majority opinion—which could perhaps itself be a sign that the Justices in the majority were not uniform in their views on them and chose to avoid them. But the majority did speak to one affirmative action alternative:

> [N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But, despite the dissent's assertion to the contrary, universities may not simply establish through application essays or other means the regime we hold unlawful today. (A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.) "[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the

349. *See UNC* Transcript, *supra* note 327, at 12-16. Counsel equivocated. *Id.*

350. *Id.* at 103-07; *Harvard* Transcript, *supra* note 327, at 45-46.

351. *UNC* Transcript, *supra* note 327, at 43-44.

352. *Id.* at 44-45, 64-65.

> university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.[353]

This passage merits scrutiny for two reasons: the essay carveout itself and its hints concerning the Justices' thinking regarding the alternatives issue more broadly. Let us consider each in turn.

Experiential essays like those envisioned by the Court are not quite as "race neutral" as the policies this Article has focused on because they are explicitly intertwined with race, making admissions officers aware of an applicant's race. But by drawing a distinction between individual experience and race *qua* race, the Court is effectively treating these essay requirements as distinct from racial classifications, and more similar to genuinely race-blind admissions policies. The Court's carveout acknowledges some ways in which race might be *relevant* to an individual's qualifications, albeit not *itself* a qualification. It seems quite likely to prove important to the post-*SFFA* practices of universities, many of which have reportedly already started tailoring their essay requirements in response.[354] SFFA's counsel conceded the permissibility of such statements at oral argument.[355] Like the race-neutral alternatives I have focused on, they could potentially help colleges to maintain racial diversity after *SFFA* (a possibility that, interestingly, the Chief Justice raised with seeming approval at oral argument).[356]

But experiential essays are unlikely to escape controversy or legal challenges. The Court's warnings in the passage above against circumvention of its opinion seem designed to invite such challenges—although the passage provides little guidance as to how lower courts are meant to determine when such circumvention is happening.[357] And some colorblindness advocates are already warning about the possibility of litigation over this issue. John Yoo, who is on the board of the Pacific Legal Foundation, suggested that he would view the essays as more legally problematic the more effective they are in preserving diversity:

> Suppose Harvard asked these questions and, magically, the racial composition of the freshman class is within three to four points of what it was before these essay

353. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. at 2176 (alteration in original) (citations omitted) (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866)).

354. Anemona Hartocollis & Colbi Edmonds, *Colleges Want to Know More About You and Your 'Identity,'* N.Y. TIMES (updated Aug. 18, 2023), https://perma.cc/S6XG-ANAQ.

355. *UNC* Transcript, *supra* note 327, at 23-24.

356. *Id.* at 42-43.

357. In dissent, Justice Sotomayor describes the essay carveout as "lipstick on a pig"—a gesture meant to "appear attuned to reality" but not meant to provide a serious pathway for universities to advance their diversity interests. *SFFA*, 143 S. Ct. at 2251 (Sotomayor, J., dissenting).

> questions. . . . I don't think the courts are going to be fooled by innocuous-seeming essay questions which are used as a pretext by the colleges.[358]

As a predictive matter, Yoo could be right that the numbers are what will drive courts' interpretation of colleges' use of essay requirements (and perhaps other race-neutral alternatives too). Normatively, though, this possibility is troubling. It suggests that only a large drop in the class shares of underrepresented minorities will suffice as proof of compliance with *SFFA*—a sort of mirror image of the quantitative, quota-like reasoning that colorblindness advocates usually disclaim.

In any case, if litigation challenges to essay requirements do arise, many of the issues already examined by this Article may be relevant. Yoo's comments, for example, imply that a "too diverse" class would suggest intent to shape the racial composition of the class—raising the question whether, in fact, that constitutes an impermissible intention. That said, challenges to colleges' use of essays may also raise the issue whether a college's policy in practice *is* a racial classification, which truly race-neutral alternatives do not raise.

The passage from *SFFA* above does allude to those other alternatives too, however. The parenthetical warning about taking legal advice from a dissenting opinion includes no citation, but it appears to refer to this paragraph from Justice Sotomayor:

> To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not, and cannot, touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first-generation college applicants or who speak multiple languages, for example. Those factors are not "interchangeable" with race. . . . At SFFA's own urging, those efforts remain constitutionally permissible[,] . . . such as those that focus on socioeconomic and geographic diversity, percentage plans, plans that increase community college transfers, and plans that develop partnerships with disadvantaged high schools . . . .[359]

As Justice Sotomayor also points out, separate opinions from Justices Thomas, Kavanaugh, and Gorsuch all contain language that might be read to suggest the permissibility of race-neutral alternatives.[360] Of these, Justice Kavanaugh's endorsement of those alternatives is the most explicit, and reminiscent of Justice Kennedy's opinions in *Parents Involved* and *Inclusive Communities*. He writes:

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358. Hartocollis & Edmonds, *supra* note 354.

359. *SFFA*, 143 S. Ct. at 2252-53 (Sotomayor, J., dissenting) (citations omitted).

360. *See id.* at 2253.

> To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. . . . [G]overnments and universities still "can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."[361]

Justice Thomas's concurrence, meanwhile, does not explicitly speak to the "permissibility" of race-neutral diversity strategies, but (as in *Fisher I*, as discussed in Part II) he *does* describe them approvingly. Indeed, he describes them as consistent with a "colorblindness" rule and states that race-neutral alternatives do not raise the normative concerns associated with affirmative action:

> Universities' recent experiences confirm the efficacy of a colorblind rule. To start, universities prohibited from engaging in racial discrimination by state law continue to enroll racially diverse classes by race-neutral means. For example, the University of California purportedly recently admitted its "most diverse undergraduate class ever," despite California's ban on racial preferences. Similarly, the University of Michigan's 2021 incoming class was "among the university's most racially and ethnically diverse classes[.]" . . . Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies.[362]

The Universities of California and Michigan submitted amicus briefs in *SFFA* detailing how they achieved this racial diversity (which, the Universities observe, was less than they would have liked). They achieved it *by trying for it*—as Michigan put it, by "persistent, vigorous, and varied efforts to increase student-body racial and ethnic diversity by race-neutral means," including preferences for poor applicants and first-generation college students, recruiting efforts targeting Detroit and other areas with substantial minority populations, and various programs seeking to improve disadvantaged K-12 schools in order to generate a stronger pipeline of qualified minority applicants.[363] The University of California system, meanwhile, has (among other explicitly race-conscious strategies) adopted a geographic policy similar to the Texas Ten Percent Plan, reduced and then eliminated its reliance on standardized tests, and

361. *Id.* at 2225 (Kavanaugh, J., concurring) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment)); *see also Croson*, 488 U.S. at 509 (plurality opinion) ("[T]he city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.").

362. *Id.* at 2206 (Thomas, J., concurring) (citation omitted) (first quoting Teresa Watanabe, *UC Admits Largest, Most Diverse Class Ever, but It Was Harder to Get Accepted*, L.A. TIMES (July 19, 2021, 9:23 AM PT), https://perma.cc/TH7Z-K9PN; and then quoting Samuel Dodge, *Largest Ever Student Body at University of Michigan This Fall, Officials Say*, MLIVE (Oct. 22, 2021, 8:10 AM), https://perma.cc/26QT-PWDZ).

363. Brief for the University of Michigan as Amicus Curiae in Support of Respondents at 11-14, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3130736.

created extensive outreach programs targeting disadvantaged students and those from underrepresented areas.[364] Justice Thomas's *SFFA* comments suggest approval of all this openly race-conscious policymaking, much of which is similar to the steps at issue in the magnet school cases. That position is hard to reconcile with an ends-colorblindness view.

Finally, Justice Gorsuch, writing separately to advance an additional theory for affirmative action's unlawfulness under Title VI, described SFFA's arguments about how Harvard "could nearly replicate the current racial composition of its student body" using race-neutral alternatives such as preferences for poor applicants and elimination of legacy preferences.[365] I read this commentary as noncommittal, and I think it would be a stretch to infer from it the proposition that it would be *lawful* for Harvard to pursue that replication objective—but, at least, Justice Gorsuch nowhere suggests that it would not be.

Notwithstanding these encouraging passages from their concurrences, it bears emphasis that Justices Kavanaugh, Thomas, and Gorsuch all joined the majority opinion. That opinion seems to warn universities against following Justice Sotomayor's advice about the permissibility of race-neutral alternatives, and in general against seeking to recreate affirmative action through "indirect" means—language that the Coalition for TJ petitioners has already seized on. What are we to make of that warning?

As a predictive matter, it is hard to say. The majority may not be in agreement about race-neutral alternatives, and some Justices may be open to different views about them—or open to them only within limits, which none of the *SFFA* opinions define. That said, there is one thing we can say clearly: Whatever might happen in the future, *SFFA* itself did not change the law as to the permissibility of race-neutral alternatives and race-conscious policymaking. Whatever the majority's comments on alternatives might mean, they cannot be read to overrule the Court's specific holding in *Inclusive Communities*, for example. The question was not presented to the Court, and the Court's cryptic dicta can best be understood to leave it for another day—and indeed, perhaps to invite litigation over it. Meanwhile, lower courts must follow the existing law, which favors the general permissibility of benign race-conscious policymaking.

364. Brief for the President and Chancellors of the University of California as Amici Curiae Supporting Respondents at 4, 9-25, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3108901.

365. *SFFA*, 143 S. Ct. at 2215 (Gorsuch, J., concurring).

B. Education After Affirmative Action and the Coming Litigation Wave

Now that affirmative action is off the table, what will universities do? Even before *SFFA* was decided, educational institutions nationwide were reportedly already working on backup diversity plans.[366] This is unsurprising; we have seen similar developments play out when affirmative action was banned in more limited settings, such as when the University of Texas adopted the Ten Percent Plan in response to a Fifth Circuit decision.[367] As discussed above, the Universities of California and Michigan adopted race-neutral strategies in response to state constitutional bans on public-sector affirmative action.[368] At the K-12 level, most school districts do not employ racial classifications in student assignment or magnet school admissions, which were effectively prohibited in *Parents Involved*. But, as the cases discussed in Part II illustrate, race-related concerns still influence policy. Indeed, even schools that have affirmative action do not rely on it exclusively; they have always used a broader diversity toolkit.

Still, many higher-education institutions will likely soon take steps they have not taken before.[369] Many of the available race-neutral tools "are essentially the same as those challenged" in the magnet school cases. Such tools include geographic diversity plans (including plus factors and percent plans);[370] socioeconomic preferences;[371] financial aid expansion;[372] and elimination of athletic and legacy preferences, which often favor white students.[373] Lotteries are not serious options for competitive colleges, but they

366. Bianca Quilantan, *Colleges Brace Themselves for SCOTUS Loss on Race-Conscious Admissions*, POLITICO (updated Oct. 28, 2022, 10:36 AM EDT), https://perma.cc/C84Q-M4SW; Stephanie Saul, *If Affirmative Action Ends, College Admissions May Be Changed Forever*, N.Y. TIMES (updated Jan. 26, 2023), https://perma.cc/E2TP-PVPV.

367. *See supra* note 66 and accompanying text.

368. Stephanie Saul, *Affirmative Action Was Banned at Two Top Universities. They Say They Need It.*, N.Y. TIMES (updated Oct. 31, 2022), https://perma.cc/FBZ9-9MS7.

369. Anemona Hartocollis, *How Will College Admissions Change if Affirmative Action Is Eliminated?*, N.Y. TIMES (Oct. 31, 2022), https://perma.cc/Y7TH-QH8X; Saul, *supra* note 366; *see also* Lauren S. Foley, *The Supreme Court May End College Affirmative Action. Then What?*, WASH. POST (Oct. 27, 2022, 2:12 PM EDT), https://perma.cc/W2GC-MX4F (highlighting three universities that implemented innovative solutions to increase racial diversity).

370. Hartocollis, *supra* note 369.

371. *Id.*

372. *E.g.*, Peter Reuell, *Leveling the Playing Field*, HARV. GAZETTE (June 12, 2018), https://perma.cc/N6FD-WLT6.

373. Scott Jaschik, *Will Affirmative Action Debate Kill Legacy Admissions?*, INSIDE HIGHER ED (Nov. 6, 2022), https://perma.cc/HJF4-3R84; Stephanie Saul, *Fencing Can Be Six-Figure Expensive, but It Wins in College Admissions*, N.Y. TIMES (updated Oct. 31, 2022), https://perma.cc/59JW-4DX8.

are on the table for K-12 schools, where competitive programs are often controversial.[374] Perhaps the single most sweeping shift already underway is the elimination of standardized testing requirements; COVID-19 catalyzed this trend, but most schools are now making the change permanent. In fall 2022, only 4% of colleges that use the Common Application required the SAT or ACT, and fewer than half of early applicants submitted those scores; the corresponding numbers in 2019 were 55% and 78%.[375] This shift has been partly motivated by racial diversity concerns, including anticipation of the Court's affirmative action decisions.[376]

It is hard to predict the effect of these changes on admissions outcomes. So far, for instance, the evidence that test-optional policies increase Black and Hispanic representation is mixed.[377] Likewise, consider the policy changes at issue in the magnet school cases. Some of the admissions-process changes were very substantial (TJ's and Montgomery County's), others relatively modest (New York City's), but none came close to the purported "racial balancing" objective that their opponents ascribe to them. This does not mean that race-neutral alternatives are pointless from a racial diversity perspective; it does matter that schools retain these options. All the magnet schools increased Black and Hispanic representation substantially—often by multiples—albeit starting from a low baseline.[378] But race-neutral affirmative action alternatives are blunt instruments for achieving racial diversity.

Moreover, race-neutral tools often have other big effects. Some involve sweeping changes that affect the way *all* applicants are considered (e.g., eliminating tests), rather than simply adding a plus factor to some applicants. Similarly, consider socioeconomic affirmative action. To use it to increase racial diversity even modestly usually requires a strong thumb on the scale for poor kids because socioeconomics and race are very imperfectly correlated. But putting that thumb on the scale will directly and powerfully increase

374. *See supra* Part II.D (discussing Montgomery County); Ida Mojadad, *Selective Admissions Are Back at Lowell High After a Split Vote Reinstates the Controversial Policy*, S.F. STANDARD (June 22, 2022, 8:02 PM), https://perma.cc/89S5-THS5.

375. Daniel de Visé, *In College Admissions, 'Test-Optional' Is the New Normal*, HILL: CHANGING AM. (Dec. 2, 2022), https://perma.cc/FZY9-KQ98.

376. *Id.*; Shaun Harper, *Eliminating Standardized Tests to Achieve Racial Equity in Post-Affirmative Action College Admissions*, FORBES (July 9, 2023, 2:48 PM EDT), https://perma.cc/5LDY-HYL4.

377. Alina Tugend, *Advocates Hope Higher Ed Shift from Standardized Tests Will Aid Diversity, but It's No Cure-All*, PBS (Jan. 27, 2021, 12:33 PM EDT), https://perma.cc/VWH2-5J4J; Kathy Wren, *Q&A: Stuart Schmill on MIT's Decision to Reinstate the SAT/ACT Requirement*, MIT NEWS OFF. (Mar. 28, 2022), https://perma.cc/6TZA-A62V.

378. Natanson, *supra* note 199; *AFEF I*, 560 F. Supp. 3d 929, 941-42 (D. Md. 2021); Christa McAuliffe Intermediate Sch. PTO, Inc. v. De Blasio, 364 F. Supp. 3d 253, 268 (S.D.N.Y. 2019).

socioeconomic diversity—itself an important goal, especially for institutions that have little of it.[379] TJ's reforms, for instance, produced modest improvements for Black and Hispanic kids but *amazing* results for poor kids; students qualifying for reduced-priced lunch, who got a plus factor, went from under 2% to 25% of the class.[380]

That effect is worth celebrating. But even changes that seem plainly positive to policymakers (or law professors) will not be good for everyone. For example, another way to describe the effect above is that nonpoor kids lost twenty-three percentage points from their class share. In general, many of these new changes will be relatively dramatic compared to a modest program of race-based affirmative action—so there will be *more* people whose ox is being newly gored. And when changes threaten to make schools less elite, they often upset even people who *are* admitted, as well as alumni.[381]

Opponents of affirmative action have often invoked race-neutral tools as preferable alternatives.[382] But some of those opponents might not like those tools much in practice, as the magnet school controversies indicate. In particular, Asian-American applicants—whose interests have been publicly centered by the anti-affirmative-action movement—may often be rendered worse off collectively by the blunter instrument of race-neutral tools than by more targeted affirmative action. That is because affirmative action can be targeted specifically to help underrepresented minorities without aiding white students relative to Asians, as some other reforms have done in practice.[383]

For these reasons, affirmative action's demise will likely lead to a new wave of litigation from applicants disadvantaged by the next reforms. In addition, advocates' goalposts are now free to shift. Strategically, before *SFFA* it did not made sense for the organizations and lawyers challenging affirmative action to attack race-neutral alternatives because those alternatives' availability helped them argue that affirmative action is not narrowly tailored. With that concern mooted, some advocates will likely broaden their objectives to include ends-colorblindness. Of course, many people who hold anti-affirmative-action views

379. Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, *Income Segregation and Intergenerational Mobility Across Colleges in the United States*, 135 Q.J. ECON. 1567, 1630 (2020).

380. Brief in Support of Defendant's Motion for Summary Judgment, *supra* note 200, at 4, 8-9, 14.

381. *E.g.*, Alvin Chang, *The Fraught Racial Politics of Entrance Exams for Elite High Schools*, VOX (June 14, 2018, 9:10 AM EDT), https://perma.cc/N8XY-BT4Z (noting that then-Mayor de Blasio's plan to eliminate the SHSAT elicited "hand-wringing from graduates of these schools, who believe the move will lower the quality of the education at these institutions").

382. *See supra* notes 66-74 and accompanying text.

383. *See supra* notes 305-06 and accompanying text (discussing the Montgomery County Case).

do not support that goal and *do* sincerely support race-neutral alternatives. But an aggrieved subset could still drive a lot of litigation.

And that litigation is sure to lead to at least some admissions policies being struck down. PLF has obtained initial district court decisions siding with them on key legal issues in two of their four pending cases (*Coalition for TJ* and *AFEF I*), despite seemingly hostile doctrine. When we see cases filed all over the country, with a variety of judges with different views, this mixed pattern will probably continue. Even if results mostly favor schools, circuit splits are likely.

The Supreme Court could well decide to let these issues percolate in the lower courts for a while. Its certiorari practice generally favors allowing lower courts the first crack at key issues, involving itself once circuit splits are well-developed.[384] The Court may also want to see how things evolve on the ground as universities adapt to the loss of affirmative action. The Court has been patient in the past; it allowed educational affirmative action to persist in some form for a half-century, despite decades of decisions expressing discomfort with it. On the other hand, the current Court has often been described as eager to move quickly on a range of issues.[385] And most strikingly, three Justices *already* voted to review *Coalition for TJ* in an emergency posture with a demanding legal standard and with the affirmative action cases still pending.[386] Nothing is certain, but even assuming it does not get involved in the currently pending magnet school cases, I would not bet on the Court staying out of this fray indefinitely.

C. The Next Stage of Supreme Court Litigation

When the Court does take up the issue, can race-neutral policies with racial-equality-related ends be effectively defended and distinguished from affirmative action? The best arguments favor that outcome, though there is certainly room for the Supreme Court to pursue the ends-colorblindness path. I have already laid out the key precedents, argued that the current magnet school challenges should fail under those precedents, and explained why *SFFA* does not unsettle them. If those cases or similar ones come to the Supreme Court, defendants should of course lead with those precedents and their convincing arguments. In this Subpart, I examine some additional issues that will be important: stare decisis analysis, normative distinctions between means- and ends-colorblindness, the potential impact of an ends-

384. Tom S. Clark & Jonathan P. Kastellec, *The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model*, 75 J. POL. 150, 152 (2013).

385. *E.g.*, Jamelle Bouie, Opinion, *The Supreme Court Is Turning into a Court of First Resort*, N.Y. TIMES (Dec. 7, 2022), https://perma.cc/XQ2M-R2E5.

386. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022) (mem.).

colorblindness theory in education on law in other areas, and original-meaning arguments. I will assume here that the issue will arise in the educational context first, whether in one of the currently pending magnet school cases (most likely *Coalition for TJ*) or another future case, perhaps involving university admissions. That is likely, but many of the same arguments will apply if the Supreme Court addresses some other ends-colorblindness argument first (for example, reconsidering disparate impact litigation).

1. Tea leaves

When crafting arguments designed to persuade a majority, it helps to have a (cautious) idea of the Justices' present concerns and inclinations. The Court has never directly weighed in on the permissibility of race-neutral alternatives, but past statements and votes give us some sense. First, Justices Sotomayor, Kagan, and Jackson, the dissenters in the affirmative action cases, are unlikely to want to go further down the colorblindness path. Justices Sotomayor and Kagan both asked questions at the affirmative action oral arguments suggesting that in their view, affirmative action was hard to distinguish logically from race-neutral alternatives, which Justice Sotomayor suggested were "subterfuges."[387] However, this questioning was seemingly meant as a warning against the consequences of striking down affirmative action, and it seems unlikely that either Justice will feel compelled to strike down race-neutral alternatives later.[388]

The three Justices who appear *most* likely to strike down those alternatives are Justices Thomas, Alito, and Gorsuch; Justices Thomas and Alito in particular have long judicial records opposing race consciousness.[389] But there is some room for doubt, especially as it relates to Justice Thomas and conceivably Justice Gorsuch, give the above-discussed passages on alternatives in their *SFFA* concurrences.[390] Justice Thomas's opinion in *Fisher I* and Justice Alito's opinion in *Fisher II* also seem favorable to the Ten Percent Plan, which Thomas deemed

387. *Harvard* Transcript, *supra* note 327, at 8-11, 37.

388. *See id.*; *UNC* Transcript, *supra* note 327, at 13-15. Justice Kagan stated, for example, that she "welcome[d]" SFFA's position that the Texas TPP was constitutional. *UNC* Transcript, *supra* note 327, at 14-15.

389. For example, both joined the *Parents Involved* majority, dissented in *Fisher II*, and joined opinions questioning disparate impact's constitutionality in *Ricci* and *Inclusive Communities*. *See supra* Part I.

390. *See supra* notes 362, 365 and accompanying text. During the *SFFA* arguments, Justice Gorsuch also asked questions about alternatives, such as eliminating preferences for certain sports. *UNC* Transcript, *supra* note 326, at 103-06; *Harvard* Transcript, *supra* note 327, at 45-46. If a university actually stopped recruiting for teams like squash and crew based on their racial composition, it would obviously be race conscious, inconsistent with the ends-colorblindness view.

nondiscriminatory.[391] All three of these Justices might be open to original-meaning arguments, which I discuss below. Defenders of race-neutral alternatives should not assume that they cannot persuade any of these Justices. But there is one strong indicator that this may be an uphill battle: their votes at the stay stage in *Coalition for TJ*, which imply their position on the merits.

That leaves the Chief Justice, Justice Kavanaugh, and Justice Barrett. None voted to review the *Coalition for TJ* stay, leaving their hands untipped. Of these three, Justice Kavanaugh seems most likely to join the liberals on this issue or at least to take some middle position. His *SFFA* concurrence made that clear,[392] and that position is also consistent with both his past statements affirming the permissibility of race-neutral diversity efforts[393] and his outspoken advocacy of hiring diverse law clerks, which is backed up by his hiring record.[394] The Chief Justice's voting record on these issues mostly coincides with those of Justices Thomas and Alito—and indeed, unlike Justice Thomas, he has no history of concurrences favorably mentioning race-neutral alternatives. He drafted the *SFFA* majority opinion, with all of its mixed signals and its seeming invitation to future litigation over perceived circumvention of the ruling. He wrote the *Parents Involved* plurality opinion, which did not squarely *reject* Justice Kennedy's position on race-neutral alternatives, but it did include enough colorblindness rhetoric to make Justice Kennedy consider it necessary to write separately. But the Chief Justice is known as cautious and institutionalist, and he might be reluctant to move too fast or to trigger a flood of litigation challenging other race-conscious policies.[395] Finally, Justice Barrett has not revealed much, at the affirmative action arguments or elsewhere, as to her view of race-neutral

391. *See supra* Part I.B.2.

392. *See supra* note 361 and accompanying text.

393. Li Zhou, *Kavanaugh Bragged About His Clerks' Diversity. His Legal Record Is Another Story.*, VOX (Sept. 8, 2018, 8:00 AM EDT), https://perma.cc/KM7W-VP9H ("Diversity is a permissible goal, but a state must use race-neutral criteria when available." (quoting Justice Kavanaugh)).

394. *See id.*; *Confirmation Hearing on the Nomination of the Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 526-27 (2018) (statement of Luke McCloud, former law clerk to then-Judge Kavanaugh), https://perma.cc/R24C-CUNH (providing a former clerk's testimony regarding Justice Kavanaugh's commitment to clerk diversity).

395. *See, e.g.*, Stuart Gerson, *Understanding John Roberts: A Conservative Institutionalist Concerned with Durability of the Law and Respect for the Court*, JURIST (July 31, 2020, 2:17:13 PM), https://perma.cc/S7HS-Y2CR.

alternatives or disparate impact analysis.[396] She may be amenable to originalist arguments, which I will turn to below.[397]

Ultimately, there is neither clear evidence of a majority that is broadly deferential to race-neutral alternatives, nor of one that is hostile to *all* race-conscious policymaking. Some compromise position is a plausible outcome. For example, the Court might find a way to uphold some products of race-conscious policymaking despite subjecting them to strict scrutiny, or it could differentiate among arguably "benign" race-conscious objectives, treating those that come too close to "racial balancing" as suspect.[398]

2. Stare decisis

Of course, the Justices will not be deciding on a blank slate, and the same precedents that should bind the lower courts will give rise to a stare decisis argument. Having already laid out the substance of those precedents (in particular, Justice Kennedy's *Parents Involved* concurrence and his *Inclusive Communities* majority opinion), I next consider whether stare decisis can be overcome. I focus on the five factors the Court discussed in *Dobbs v. Jackson Women's Health Organization*, which were drawn from prior case law: "the nature of [the decisions'] error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."[399]

None of these factors favor overruling the key precedents on race-neutral but race-conscious policy. In *Dobbs*, the Court's analysis of each of the first two factors boiled down to an argument that *Roe v. Wade* was egregiously wrong in its conclusion and reasoning.[400] Whatever one thinks about that argument, it would be hard to make a similar one about the permissibility of race-neutral strategies that advance race-conscious aims. At least in the educational-diversity context, such strategies have generally not had any direct critics on

396. Justice Barrett asked whether essay-writing on experiences of discrimination would be permitted, *UNC* Transcript, *supra* note 327, at 23-24, but later observed that the distinction between race and experiences with race was "slicing the salami pretty finely," *Harvard* Transcript, *supra* note 327, at 9-10.

397. *See UNC* Transcript, *supra* note 327, at 172-73 (containing questions from Justice Barrett about originalist evidence as it bears on affirmative action).

398. Another possible middle position could interpret the strict-scrutiny standard, such that "the extent to which an interest is 'compelling' depends on the nature of the means used to advance it." Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2352. So, for example, remedying societal discrimination might not be a sufficiently compelling interest to justify racial classifications but *could* justify race-neutral alternatives. *Id.* at 2353.

399. 142 S. Ct. 2228, 2265 (2022).

400. *Id.* at 2265-66.

the Supreme Court, and many of the means-colorblindness advocates litigating affirmative action cases have embraced them implicitly or explicitly. Nor has the position laid out by Justice Kennedy in *Parents Involved* and *Inclusive Communities* proven unworkable. In fact, an approach that more readily applies strict scrutiny to facially neutral policies would make many cases far more complicated to assess, raising a host of secondary issues (e.g., about identifying causation in mixed-motive cases and about disparate impact). Finally, taking the last two factors together, embracing ends-colorblindness would be hugely disruptive to law in other areas, largely because policymakers have relied for decades on the idea that they are free to candidly discuss racial inequities, and so countless existing policies would be vulnerable to challenge. I return to this point in the next Subpart.

Indeed, I think the stare decisis analysis will be clear enough that a *Dobbs*-like opinion would be hard even for the Justices most inclined toward ends-colorblindness to write. I suspect that the easier path toward ends-colorblindness would be to reject the necessity of stare decisis analysis at all, arguing the doctrine is not so clear as to require any overruling (or, perhaps, simply declining to be explicit about its departure from precedent, as in the *SFFA* Court's treatment of *Grutter*). Cases like *Fisher I* and *Fisher II* may *imply* approval of race-neutral alternatives, but they do not *directly* approve them and would not have to be overruled. The key passages from the Justice Kennedy opinion in *Parents Involved* are clear and on point, and they would have to be overruled if deemed holdings of the Court. But it would be possible to reject that precedential status, as some courts have (although I think they are wrong).[401] Meanwhile, *Inclusive Communities* could be interpreted narrowly, limiting its impact to the interpretation of the FHA. Again, this is not the right reading, but it is possible; as noted above, the case's implications for educational diversity cases have been overlooked in many of the magnet school cases.

In short, even though the best reading of precedent strongly supports the permissibility of race-neutral diversity efforts, defenders of those efforts probably cannot safely plan to rely on stare decisis alone to persuade Justices otherwise inclined against their position. Rather, they will likely have to convince a majority that the status quo doctrine is *correct*, and/or that changing it will bring unacceptable consequences. The remainder of this Part turns to those tasks.

3. Distinguishing normative objections to affirmative action

The distinction between means- and ends-colorblindness is not just doctrinally well grounded; it is substantively meaningful. Those defending that

401. *See supra* note 309 and accompanying text.

distinction need to take seriously and distinguish the normative objections to racial classifications that underlie means-colorblindness, rather than merely critiquing or dismissing those premises. Several such objections animate the Supreme Court's affirmative action jurisprudence—and focus on harms unique to individual-level racially disparate treatment. These objections, while interrelated, can be loosely grouped into categories.

A first set of concerns involves fairness to, and respect for the dignity of, the individuals potentially excluded from opportunities as a byproduct of affirmative action. The Supreme Court's equal protection jurisprudence is fundamentally individualistic; it emphasizes the rights of individuals to be treated as such, not lumped in with others according to suspect classifications. From this perspective, relying on race when assessing individuals (even for benign purposes) effectively treats them as group representatives and undermines their individual dignity. This is spelled out in *Croson*, for example:

> The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." As this Court has noted in the past, 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." . . . To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.[402]

A related concern is stereotyping—specifically, the idea that using racial classifications to promote diversity implies that a person's racial identity tells us something important about their perspective. In *Metro Broadcasting, Inc. v. FCC*, for example, a swiftly overruled decision upholding a racial preference in broadcasting licensing, Justice O'Connor's dissent rejected as stereotype-driven the notion that racially diverse licensees would produce more substantively diverse programming.[403] Concern about stereotyping pervades the *SFFA* decision—indeed, the Court included this concern as an independent reason for rejecting the Harvard and UNC affirmative action programs, beyond its failure of strict scrutiny. As the *SFFA* Court read its past precedent, affirmative action programs must not only satisfy strict scrutiny but must also "never use race as a stereotype or negative."[404] The reasons that Harvard's and UNC's programs failed this test center on the nature of using an individual's race as a classification:

402. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (first and second alterations in original) (citations omitted) (first quoting U.S. CONST. amend. XIV, § 1; and then quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)); *accord* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

403. 497 U.S. 547, 603-04, 626 (1990) (O'Connor, J., dissenting).

404. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023).

> Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. . . .
>
> We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.[405]

In contrast, as Elise Boddie has observed, race-neutral alternatives do not "promote racial stereotypes or entail any of the 'expressive harms' that the Court has cited" in its affirmative action cases.[406] They do not make treatment of individuals turn on race whatsoever, much less as the "sole criterion."[407] They do not treat race as a proxy for merit. A geographic criterion, for example, does treat people differently based on whether they are from a city or a suburb, not based on race; even if that criterion is *correlated* with race, it is *not* race, and individuals are not lumped with people of their own race with whom they share little else in common, but rather with individuals of all races with whom they share similar geographic origins. When schools choose those race-blind criteria in a way that is attentive to disparate impact concerns, that does not compromise any individual's dignity or entitlement to a fair assessment. Indeed, disparate impact analysis is often said to *preserve* meritocratic processes that are fair to applicants of all races by ensuring that whatever barriers policies pose to racial inclusion are ones with important purposes, not arbitrary hurdles that exclude for no good reason.[408]

A second set of concerns involves negative effects on individuals in the groups that affirmative action is meant to benefit. Many critics, including Justice Thomas, have argued that affirmative action stigmatizes every member of those groups on a university campus by encouraging others to wonder whether they would have gotten there in its absence.[409] Similarly, Justice

405. *Id.* at 2169-70 (citations omitted) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)).

406. Boddie, *supra* note 32, at 535-36; *see also* Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2370-73 ("A comparison of race-neutral and race-operative classifications reveals that race-neutral affirmative action is substantially less likely to reflect stereotypical, illegitimate motivations, or to have harmful effects."); Adams, *supra* note 32, at 854-55 (reading Justice Kennedy's opinions as motivated by the concern that retail-level use of race "tends to essentialize and therefore debase the individual," while race-conscious policymaking does not).

407. *Croson*, 488 U.S. at 493.

408. *See, e.g.*, Siegel, *From Colorblindness*, *supra* note 32, at 1319, 1347-48.

409. *Fisher I*, 570 U.S. 297, 333 (2013) (Thomas, J., concurring).

O'Connor stated in *Croson*: "Classifications based on race carry a danger of stigmatic harm," namely, they may "promote notions of racial inferiority and lead to a politics of racial hostility."[410] Another concern is "mismatch," the idea that affirmative action beneficiaries tend to underperform in school, hampering their later careers, because they are less qualified than their peers.[411]

These concerns (especially the much-contested mismatch hypothesis) rest on controversial empirical premises,[412] but we need not resolve those controversies to see that neither pertains to race-neutral policies applying identical standards to all applicants. Justice Thomas recognized as much in *Fisher I*, arguing that although the minority students admitted under the TPP got to UT "without discrimination," their reputations were tarnished by nobody knowing whether they were admitted under the other, race-conscious path.[413] The clear implication is that their reputations would *not* have been tarnished by the TPP alone, despite its racial diversity motive. It is possible to imagine stigma or mismatch concerns being linked to race-neutral alternatives; for example, socioeconomic affirmative action could raise the concern that poor students could be stigmatized or struggle in school. But for non-suspect classifications, such concerns clearly do not implicate the Constitution; they are policy challenges for school administrators to weigh and seek to solve, such as by providing resources for struggling students.

A final set of concerns focuses on society at large: the potential polarizing or balkanizing effect of racial classifications and the resulting long-run desire to reduce the role of race in society.[414] In her *Metro Broadcasting* dissent, Justice O'Connor warned that individual racial classifications "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[415] In *Grutter*,

410. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection . . . .").

411. *See Fisher I*, 570 U.S. at 331-32 (Thomas, J., concurring); *SFFA*, 143 S. Ct. 2141, 2197-98 (2023) (Thomas, J., concurring).

412. *See generally* Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q.J. ECON. 115 (2022) (presenting empirical evidence undermining the mismatch hypothesis); Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education*, 36 SOC. SCI. RSCH. 531 (2007) (same).

413. 570 U.S. at 333.

414. *See* Primus, *Future of Disparate Impact*, *supra* note 32, at 1347 ("Symbolism and social meaning have always shaped the law of equal protection, and necessarily so. . . . Whether . . . [any] law is consistent with equal protection depends in part, and perhaps deeply, on whether it is understood to reinforce society's historical problems of racial division.").

415. Metro Broad., Inc. v. FCC, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

Justice O'Connor famously expressed the hope that affirmative action would be a temporary measure, no longer necessary in twenty-five years.[416] Concerns like these help explain why the doctrine favors making government's use of race less salient, favoring "plus factors" and "holistic review" over quotas, for example—and similarly favors race-neutral alternatives over race-based affirmative action. By focusing on other metrics (like class) that cut across racial lines, these approaches are not only less divisive but affirmatively emphasize cross-racial commonalities.[417]

To be sure, one cannot say that race-neutral diversity plans are *never* polarizing. I called this Article "The Magnet School Wars" for a reason. Educational policy debates are often not for the faint of heart, especially at the K-12 level, where they are infused with the fervor of parents who feel their children's interests are threatened. That is often true even when race has nothing to do with it, but race-related arguments sometimes add a special combustibility. And as discussed above, affirmative action alternatives often entail substantial policy changes, heightening possible opposition. On the other hand, *refusal* to address racial disparity can also be inflammatory. The TJ story illustrates both of these dynamics: The school board faced vehement resistance from the Coalition for TJ, but it also was responding to heartfelt and outspoken demands that the county finally address a racial exclusion problem that had been tolerated for too long.

Race-related policy considerations may thus be salient and controversial when policy changes are first adopted. But for race-neutral policies, there is good reason to expect this effect to be transient because it stems from the politics of the adoption process, not from anything intrinsic to the policy. In the long run, for example, it seems unlikely that TJ's applicants and community members will interpret the school's grades-based admissions policy, which is substantively unremarkable, in racially charged terms. As Kim Forde-Mazrui has argued, if racial disparities in society decline over time, the identifiable racially disparate impact of race-neutral policies will diminish.[418] Such policies do not need a "sunset provision," like the *Grutter* Court suggested for affirmative action, to decenter race's role over time. This point, too, distinguishes the normative concern underlying another problem the *SFFA*

416. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

417. Robinson, *supra* note 32, at 348-49 ("Furthermore, focusing on a concern shared by individuals of all races, such as poverty, encourages recognition of commonalities and common interests across racial lines and conveys the suggestion that race is irrelevant."); Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2372 ("To the extent that race-neutral classifications have a *racial* message, it is that blacks and whites who suffer from similar disadvantages share a common condition . . . .").

418. Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2374.

majority found with UNC's and Harvard's affirmative action policies: their failure to have an "end point" in sight.[419]

Meanwhile, policies that promote racial inclusion and integration can substantively help to facilitate that decline in racial disparity, to reduce stereotyping by ensuring that students' impressions of other racial groups are not based on just a few isolated representatives, and to promote intergroup contact, which tends to reduce biases.[420] As Reva Siegel argues, race-neutral strategies for achieving aims like diversity help to balance two competing concerns: first, that racial classifications are polarizing, and second, that society is already polarized by the ways that our history has shaped it, riven by stratification, de facto segregation, and racial tension.[421] Race-conscious deployment of race-neutral tools can help to redress the second problem without triggering the first. In short, even if one accepts the premise that race-conscious *means* tend to be balkanizing, the *goals* of racial diversity and inclusion are not; they are the opposite. If the long-term goal is a less racially divided society where race-conscious policymaking becomes unnecessary, then policies that tend to close racial gaps and promote integration should advance progress toward that end.

4. Effects outside school admissions

Assuming a case on race-neutral educational diversity initiatives arises first, what would striking down those initiatives mean for other race-neutral policies that result from race-conscious policymaking? As the examples in the Introduction illustrate, such policymaking is ubiquitous throughout government, not to mention among private actors governed by Title VI (including, for example, nearly every healthcare facility). Stark racial disparities pervade American life, and politicians and other decisionmakers have long taken for granted that the law allows them to take these disparities into account. Policymakers are routinely open about this. The debate about TJ illustrates this, but it is just one of innumerable debates about redressing racial disparity that were happening throughout the country in the summer of 2020 alone (not to mention before and since).[422]

419. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2173 (2023).

420. *E.g.*, *Grutter*, 539 U.S. at 320, 330; *see* Siegel, *From Colorblindness*, *supra* note 32, at 1283 (observing that "race-conscious, facially neutral interventions may promote social cohesion").

421. Siegel, *From Colorblindness*, *supra* note 32, at 1308.

422. *See, e.g.*, JULIANA HOROWITZ, KIM PARKER, ANNA BROWN & KIANA COX, PEW RSCH. CTR., AMID NATIONAL RECKONING, AMERICANS DIVIDED ON WHETHER INCREASED FOCUS ON RACE WILL LEAD TO MAJOR POLICY CHANGE 4 (2020), https://perma.cc/69BH-UJ8V
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In addition, there is an increasingly wide-ranging debate about how seemingly race-neutral algorithms in many fields (e.g., health care, criminal justice, and lending) disparately impact different racial groups and/or generate predictions that are less accurate for some racial groups. The solution often proposed involves making the algorithmic design process (but not the algorithm itself) race-conscious—assessing disparities during design and tweaking the algorithm to reduce them.[423] Many of these solutions are already being implemented. For example, in 2019, the New York City Criminal Justice Agency implemented a new pretrial risk tool to guide bail decisions, and the tool was designed to avoid the problem of "miscalibration [of risk] by race" that plagued earlier instruments.[424] The University of Chicago health system, after discovering that one of its newly developed algorithms would, if implemented, divert care away from Black patients, moved to incorporate equity considerations in algorithm development routinely.[425] This kind of approach is increasingly common in many areas, and—unlike the use of race *within* algorithms, affirmative action style—it has not typically been considered very controversial or legally vulnerable.

All of these policy efforts to promote racial equality are potentially threatened by the colorblindness movement, specifically by PLF-style educational litigation. To be sure, it is *possible* that successful litigation against race-neutral affirmative action alternatives could be cabined to the educational context. But this is unlikely. Even if courts are ultimately able to draw distinctions, a flood of litigation testing that ability seems likely.[426]

(discussing 2020's so-called "moment of racial reckoning" and divided public opinion on a number of related policy questions).

423. *See, e.g.*, Sonja Starr, *Statistical Discrimination*, 58 HARV. C.R.-C.L. L. REV. 579, 658-69 (2023); Jens Ludwig & Sendhil Mullainathan, *Fragile Algorithms and Fallible Decision-Makers: Lessons from the Justice System*, J. ECON. PERSPS., Fall 2021, at 71, 89-91 (describing "equity knobs" and racial "calibration tests" in algorithm design); Sahil Verma & Julia Rubin, *Fairness Definitions Explained*, 2018 FAIRWARE '18: PROC. INT'L WORKSHOP ON SOFTWARE FAIRNESS, https://perma.cc/K5Q4-UFY8 (illustrating approaches to algorithmic fairness using a gender example); Hellman, *supra* note 34, at 823; Jon Kleinberg, Jens Ludwig, Sendhil Mullainathan & Cass R. Sunstein, *Discrimination in the Age of Algorithms* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25548, 2019), https://perma.cc/59NX-FR7G; Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1076-82 (2019); Nicol Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, BROOKINGS (May 22, 2019), https://perma.cc/RB92-6JF3; Kim, *supra* note 34, at 1549-50; Linda Nordling, *Mind the Gap*, 573 NATURE OUTLOOK S103, S105 (2019), https://perma.cc/9FNQ-PPSJ.

424. *See* Ludwig & Mullainathan, *supra* note 423, at 90-92 (citing other examples from predictive policing, hiring, lending, housing, and health).

425. Nordling, *supra* note 423, at S103, S105.

426. *See* Forde-Mazrui, *Constitutional Implications*, *supra* note 32, at 2348 (citing a range of race-conscious government policies); Banks, *supra* note 32, at 580-81 (same).

For committed advocates of ends-colorblindness, *all* race-conscious policymaking is a target. PLF, for example, targets public employment and public contracting along with public education, seeking to end "all forms of racial discrimination by government, both overt and covert."[427] The "covert" part appears currently to be being litigated through its magnet school cases so far—maybe a strategic choice of vehicle. But their stated goals provide no reason to believe they intend to stop there—and indeed, PLF *did* advance similar arguments in amicus briefs in a variety of other cases years ago.[428] There is also nothing about the educational context that makes it uniquely hard to justify race-conscious policy doctrinally. Indeed, doing so has for decades been somewhat easier, given that the educational value of racial diversity has been recognized as a compelling interest for universities. Affirmative action case law in education has been somewhat sui generis because it has focused so heavily on whether policies are narrowly tailored to that interest. But the key move that ends-colorblindness advocates are pushing for—combining the means-colorblindness principle with the purpose principle—is not similarly education-specific. If that principle is accepted in any context, it will be hard to confine.

Some race-conscious policymaking might be insulated by standing doctrine or by difficulties proving causation. For example, suppose legislators cited racial disparities when advocating for a new social service, income support, or educational program. Even if courts would consider this motivation suspect, there might often not be a specific individual with standing to challenge it, and even when there is, it may be hard to prove race-related concerns played a causal role. Many such policies have numerous purposes, and without evidence of causation, the fact that some legislators mentioned racial disparities would not doom legislation even under a total-colorblindness view.

But these limitations will not always apply. Many government policies and decisions have discrete losers as well as winners. And the causal role of race-related concerns is often obvious—especially when decisionmakers are legally required to engage in disparate impact analysis or voluntarily (but openly) do so and alter their choices accordingly. Regarding race-conscious algorithm design, a near-term deterrent to lawsuits may be that algorithms are poorly understood by most lawyers and the public. But efforts to make

427. *What We Fight for*, *supra* note 29.

428. *See* Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 600 n.292 (2014) (collecting seven such amicus briefs from PLF between 2009 and 2013). Of course, as the review of doctrine in Part I makes clear, these amicus briefs were not successful in persuading the Court to adopt an ends-colorblindness principle; today, with a different Court and cases PLF has developed itself as vehicles, PLF might be more successful.

algorithms more racially equitable are often transparent even if the actual content of the algorithm is not; developers tend to be outspoken about these efforts' importance.[429] Eventually, some such effort will likely provide an irresistible target for ends-colorblindness litigation.

For courts, the risk of opening the door to litigation over countless policies and practices in other areas should loom large as they consider early ends-colorblindness cases like *Coalition for TJ*. This is a practical concern that could prove persuasive to several Justices, particularly because legal disruption is a factor in stare decisis analysis, along with the upending of settled expectations. Public and private decisionmakers have for decades felt free to design race-neutral policies and practices with concerns for racial equity in mind; they are sometimes legally required to do so. To change that understanding now would not only require a sharp shift in practices moving forward, but it would also immediately call into question innumerable already-adopted laws, policies, and practices. It would be an earthquake, and litigants should make sure courts understand this.

Of course, if courts *do* open that door, those defending race-neutral policies in other contexts will be forced to try to close it as best as possible. Whether they can distinguish those policies from previously invalidated ones will depend on many situationally specific factors. But let's consider one illustrative scenario, which shares much in common with many others: How will other areas of law be affected if the Supreme Court takes the *Coalition for TJ* case and adopts reasoning much like the district court's?

First, questions would immediately surround the status of disparate impact analysis, whether carried out voluntarily or as required by antidiscrimination law, and potentially including the use of race in calibrating algorithms. Fairfax County's most important change to TJ's admissions was eliminating its standardized test. The demographic comparisons and reasoning it relied on were similar to those often used in disparate impact litigation. To be sure, they were not *exactly* the same, and the district court characterized them as evidence of "racial balancing," not as disparate impact analysis—a possible basis for distinction. But substantively, the argument was that underrepresented minorities did not have the same chance at success under the test-based system, which benefited students with the resources for intensive test preparation.[430]

429. A Google or Google Scholar search for "algorithmic fairness" brings up countless articles, guidances, conferences, and the like, highlighting more equitable strategies in algorithm design. *See, e.g.*, Starr, *supra* note 422, at 584 n.10 (collecting scholarship on algorithmic fairness).

430. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 897 (4th Cir. 2023) (Rushing, J., dissenting) (observing that board members reviewed data on the demographic effects of the TJ admissions test and concluded that the test was "a barrier for historically underrepresented students"); Rab, *supra* note 144 (describing the effects of the "test-prep industry" on Black and Hispanic representation at TJ).

The county did not, however, undertake its policy reforms under a serious threat of litigation over the old policy; school admissions are generally not covered by antidiscrimination statutes that confer a private right to sue for disparate impact. It is possible that, where such a statute does apply—in particular, Title VII or the FHA—a defendant might justify a policy change based on litigation fears, at least if those fears are grounded in a "strong basis in evidence."[431] But this runs into a counterargument: How can a statute insulate otherwise unconstitutional conduct from being struck down, and indeed, require that conduct? One plausible answer is that both Title VII and the FHA (at least as applied to government actors) are Fourteenth Amendment enforcement legislation, and Congress's enforcement authority includes the ability to strike a balance when the equality interests it protects come into conflict with one another. Courts have deemed disparate impact liability a "congruent and proportional" enforcement mechanism against unconstitutional disparate treatment, in part because of its prophylactic value vis-à-vis hard-to-detect purposeful discrimination.[432] Congress might reasonably decide that prophylactic purpose is so important as to justify race-conscious decisionmaking that might otherwise be forbidden. This line of reasoning is similar to a passage in *Croson* in which the Court explained that Congress's Section 5 power allows it to authorize race-conscious remedies for unconstitutional conduct (even racial classifications) in situations where states could not do so.[433]

Could a similar argument potentially insulate disparate impact analysis from the implications of an ends-colorblindness rule adopted in a case like *Coalition for TJ*? If so, would such a distinction hold even when there is no risk of private litigation, either because nobody is threatening any or because no law authorizes suits? This would be hardest when the defendant has undertaken disparate impact analysis purely for policy reasons, with no legal compulsion.[434] But the argument still seems plausible where a law (especially a federal statute based on Section 5 authority) creates a duty to avoid unnecessary disparate impacts. This is the case for Title VI of the Civil Rights Act, which governs school systems,

431. Ricci v. DeStefano, 557 U.S. 557, 563 (2009).

432. *E.g.*, Okruhlik v. Univ. of Ark. *ex rel.* May, 255 F.3d 615, 626-27 (8th Cir. 2001); *see also Ricci*, 557 U.S. at 595 (Scalia, J., concurring) (noting that it "might be possible to defend" Title VII disparate impact as a means of "smok[ing] out" intentional discrimination); Primus, *Future of Disparate Impact*, *supra* note 32, at 1376-77 ("Title VII's disparate impact doctrine can be understood either as intended to redress self-perpetuating racial hierarchies inherited from the past or as an evidentiary dragnet intended to identify hidden intentional discrimination in the present.").

433. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (plurality opinion).

434. Of course, it is my view that disparate impact analysis is unproblematic in such cases too; but we are assuming now that courts have already rejected that view.

health facilities, and many other entities.[435] Fairfax County has not made this argument in *Coalition for TJ*, which may be a mistake. The Department of Justice's regulations enforcing Title VI *do* prohibit disparate impact discrimination—they just don't create a private right of action for it.[436] It would be odd to allow defendants to justify policy changes based on a fear of private litigation but *not* based on a fear of federal enforcement, or for that matter, based directly on their legal duty to obey federal law, enforced or not.

On the other hand, maybe the Section 5 argument outlined above is not as strong when the balance of competing interests is struck by an agency, not Congress acting directly. Similar issues arise with disparate impact analyses required by federal environmental law, which are most directly based on a 1994 executive order and various agency guidances and indirectly based on the National Environmental Policy Act and Title VI.[437]

Beyond disparate impact, a decision striking down TJ's admissions policies would also implicate the affirmative use of facially neutral tools (in TJ's case, geographic and socioeconomic preferences) to serve race-conscious ends. For example, consider the use of geographic criteria for government programs, often done with racial-disparity concerns in mind. For example, New York City's Young Men's Initiative, which seeks expressly to address the needs of young men of color, uses residence in New York City Housing Authority buildings (which is highly race correlated) to qualify people for some employment and mentoring programs.[438] Community development programs have sometimes been explicitly race conscious in designating distressed neighborhoods for tax or other advantages.[439] And environmental justice analysis is shifting toward assessment of race-correlated predictors of risk from environmental exposures, rather than race itself.[440]

Would all these policies stand and fall with race-neutral affirmative action alternatives, provided the causation and standing hurdles are overcome? It is difficult to come up with a principled distinction; the total colorblindness envisioned by the *Coalition for TJ* district court is probably not compatible with

435. 42 U.S.C. § 2000(d).

436. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

437. *See Environmental Justice and National Environmental Policy Act*, U.S. EPA, https://perma.cc/4W56-UGRN (last updated Mar. 27, 2023); Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279-80 (Feb. 11, 1994), https://perma.cc/WHJ5-VC47.

438. *See Programs*, N.Y.C. YOUNG MEN'S INITIATIVE, https://perma.cc/A3XZ-XXR2 (archived Oct. 24, 2023) (to locate, select "Cornerstone Mentoring" and "Jobs-Plus" tabs).

439. *See, e.g.*, Meg Walker, *How a Diverse Coalition in Portland, Ore. Is Centering Racial Equity in a Large-Scale Development Project*, BROOKINGS (July 12, 2021), https://perma.cc/6EB9-9X5R (describing a Portland program).

440. *See supra* note 12 and accompanying text.

this kind of policymaking. That said, if the underlying holding in the magnet schools litigation focused on the impermissibility of "racial balancing" as an objective, that might provide a basis for distinguishing some of these policies. Many policies that serve race-conscious ends do not really seek to "balance" participation in any particular opportunity, but rather to target interventions that quite modestly improve the circumstances of particular communities suffering significant socioeconomic distress.

I hope that a majority of Justices—including some who support means-colorblindness—can be convinced not to lead the federal courts headlong into this morass. The easiest way to avoid it is to maintain the current practice of declining to subject race-neutral policies with racial-equality-related goals to strict scrutiny. The consequences of shifting away from that practice will be difficult to cabin to any one context.

5. Originalism

Originalist arguments have been absent from ends-colorblindness litigation so far, and moreover have played surprisingly little role in means-colorblindness cases. In *SFFA*, just a handful of amicus briefs centered originalist arguments, only one of which argued that the Fourteenth Amendment barred affirmative action—a position that Justice Thomas's *SFFA* concurrence ultimately endorsed and Justice Sotomayor's dissent rejected.[441] Some originalist scholarship tentatively supports that argument (and a larger body of scholarship argues against it), but none to my knowledge has contended that the Fourteenth Amendment was originally understood to bar government from seeking to redress racial inequality through race-neutral means.[442] This may be because the argument cannot be plausibly made, but I

441. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2177-88 (2023) (Thomas, J., concurring) (advancing originalist evidence for a prohibition on racial classifications); *id.* at 2226-30 (Sotomayor, J., dissenting) (citing historical evidence that the framers of the Fourteenth Amendment embraced race consciousness and sought specifically to redress the situation of Black citizens); Brief of Amicus Curiae Former Attorney General Edwin Meese III in Support of Petitioner at 2-4, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2021 WL 1255548; Brief of Professors of History and Law as Amici Curiae in Support of Respondents at 2-4, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3137692; Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents at 2-4, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3108865; *see also* Brief of America First Legal as Amicus Curiae in Support of Neither Party at 2, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 2919653 (arguing that Title VI bars affirmative action and that the Court should avoid the constitutional question).

442. In a few sentences of his paper adducing originalist evidence against affirmative action, Michael Rappaport says (speculatively) that the "freedmen" classification might have been understood by the Reconstruction Congress as constitutionally prohibited if it were a subterfuge masking an illicit racial purpose but not if it served a "genuine public

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will try to identify evidence for it, as well as against it.[443] I take no position on theoretical debates about originalist methods, presenting evidence the weight of which might depend on how those debates are resolved.[444] I also do not introduce new historical materials; I rely on evidence familiar to debates about affirmative action or other related questions, assessing whether and how it informs the ends-colorblindness question.

A threshold question is whether racial discrimination in education (or other contexts where ends-colorblindness issues arise) is covered by the Fourteenth Amendment. This is a high-stakes question. A "no" answer would have radical implications, including that *Brown v. Board of Education*[445] was wrongly decided—and consistency with *Brown* is often seen as a litmus test for constitutional theories.[446] Yet getting to "yes" is not straightforward. Many originalists agree that the original public meaning of "equal protection of the laws" did *not* encompass a general antidiscrimination mandate. Rather, it referred to the legal system's administration, as well as a state duty to provide law enforcement protection from private violence.[447] Some who embrace that interpretation argue that there *is* a broader-reaching antidiscrimination mandate under the Privileges or Immunities Clause.[448] Under this view, Fourteenth Amendment doctrine began to go awry when the Supreme Court sharply limited the Privileges or Immunities Clause in the *Slaughter-House Cases*;[449] had it not, it could have relied in *Brown* and other important cases on that Clause rather than on equal protection, with a firmer original-meaning

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purpose." Michael B. Rappaport, *Originalism and the Colorblind Constitution*, 89 NOTRE DAME L. REV. 71, 101 (2013). It is not clear on which side of this line Rappaport would think contemporary affirmative action alternatives fall. Justice Thomas's concurrence does not say anything suggesting that the Fourteenth Amendment's original meaning supports ends-colorblindness; it does not address the issue at all. *SFFA*, 143 S. Ct. at 2177-88 (Thomas, J. concurring).

443. This is a tentative, brief analysis; a fuller one would require its own article.

444. *See* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 718 (2011) (observing that "originalism" refers to a "remarkably diverse array of interpretive theories that in fact share surprisingly little in common").

445. Brown v. Bd. of Educ. of Topeka, 348 U.S. 886 (1954).

446. *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 479 (1998); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995).

447. *E.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 320-21 (2021); Brief of America First Legal as Amicus Curiae in Support of Neither Party, *supra* note 441, at 19-20.

448. McConnell, *supra* note 446, at 953-54; John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1456 & n.274 (1992) (arguing that government benefits paid for via taxation, including public schooling, are encompassed by "privileges or immunities").

449. *Slaughter-House Cases*, 83 U.S. 36 (1872).

foundation.[450] Others argue that the Privileges or Immunities Clause extends only to a narrow range of civil rights that does not include education and thus provides no useful support for *Brown*.[451] Many have likewise argued that the application of equal protection principles to the federal government, as in *Bolling v. Sharpe*, is unsupported by the Fifth Amendment's original meaning.[452]

But even though a finding that the Fourteenth Amendment does not bar racial discrimination in education would defeat most ends-colorblindness challenges, defendants will not argue for it, and if they did, courts would likely reject it. The consequence of gutting equal protection law broadly is too serious, and it is inconsistent with the equality objectives that those defending benign race-conscious policymaking support.[453] Originalists who do not want to say that *Brown* was wrong can cite respectable historical evidence for other positions, and many originalists have considerable respect for precedent and do not want to utterly upend it.[454] I will proceed here on the assumption that the only originalist arguments with which the courts will seriously engage are those consistent with *Brown* and with a general antidiscrimination mandate (either under equal protection, requiring less change to existing precedent, or Privileges or Immunities).[455]

What does the evidence tell us about whether ends-colorblindness is implied by the original meaning of either clause? Did the "privileges and immunities of citizenship" or the "equal protection of the laws" imply a right not to be governed by policies adopted with a broad goal of racial equality or integration in mind? If so, Originalist scholars have presented no evidence whatsoever that so suggests. Some have suggested that original meaning *might* support a bar on racial classifications (i.e., means-colorblindness).[456] Other originalists, as well

450. *See* McConnell, *supra* note 446, at 1003-04, 1135-36.

451. *See* Jeffrey Rosen, Essay, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1242-46 (1998) (citing historical scholarship).

452. *E.g.*, Siegel, *supra* note 446, at 529-30.

453. *See* Rosen, *supra* note 451, at 1242.

454. *See infra* note 480 and accompanying text.

455. Justice Thomas's *SFFA* concurrence does not specifically discuss this debate, but it does argue that the Fourteenth Amendment contains a general antidiscrimination mandate, which, he suggests, is grounded in the Privileges or Immunities Clause and Equal Protection Clause taken together. *SFFA*, 143 S. Ct. 2141, 2182-84, 2182 n.2 (2023) (Thomas, J., concurring). His argument focuses less on the textual meaning of those clauses and more on a discussion of the framers' overall purpose in passing the Amendment, and on pre- and post-ratification legislation. *Id.* at 2177-88.

456. Former Attorney General Edwin Meese so argues in his amicus brief, but the academic sources on which he relies are more cautious; few scholars argue even that the evidence on balance supports colorblindness, and nobody claims *strong* support. Brief of Amicus Curiae Former Attorney General Edwin Meese III in Support of Petitioner, *supra*

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as critics of originalism, have deemed even these more limited claims historically implausible.[457]

Because there is little direct historical evidence surrounding the clauses' language, originalist writing has focused heavily on inferences from other things the Reconstruction Congress did. This type of reasoning speaks most directly to "framers' intent," while most originalists today emphasize the text's original public meaning.[458] Still, even original-meaning theorists give some evidentiary weight to the framers' actions and views, which speak to what *they* thought their words meant—sometimes the best available evidence of what others might have thought, too.[459] So let's consider whether this legislative activity tells us anything about ends-colorblindness.

Those defending affirmative action have often pointed to legislation that Congress passed shortly before or after the Fourteenth Amendment to ameliorate the situation of Black citizens.[460] Some of this legislation involved express racial classifications, such as an 1866 law creating educational opportunities for Black soldiers[461] and an 1867 welfare statute targeting "colored persons" in Washington, D.C.;[462]

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note 441. Rappaport ultimately deems the evidence he provides inconclusive because we lack a "satisfactory understanding of the original meaning of the Fourteenth Amendment." Rappaport, *supra* note 442, at 72. Melissa Saunders argues that the Amendment's purpose was to bar special legislation disadvantaging a class of people (racial or otherwise), rather than to bar racial classifications that do *not* pose such a disadvantage. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247-48 (1997). This theory might support a bar on affirmative action (although she does not so extend it), but it does not argue against neutral legislation that imposes no class disadvantages. Saunders also argues that a discriminatory-effect requirement is supported by original meaning, *id.* at 248-51, which helps defendants in cases like the magnet school litigation.

457. *E.g.*, CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 133-38 (2005) (critiquing originalist justices for inconsistency regarding affirmative action); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 (1997) (same); Siegel, *supra* note 446, at 590 (reaching similar conclusions about the history from an originalist perspective); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754 (1985) (same).

458. Colby, *supra* note 444, at 720-21.

459. *E.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1147-49 (2003).

460. *E.g.*, Brief of Professors of History and Law as Amici Curiae in Support of Respondents, *supra* note 441, at 8-24.

461. An Act to Increase and Fix the Military Peace Establishment of the United States, ch. 299, § 30, 14 Stat. 332, 337 (1866).

462. A Resolution for the Relief of Freedmen or Destitute Colored People in the District of Columbia, No. 4, 15 Stat. 20 (1867).

others (like the Freedmen's Bureau Acts of 1865[463] and 1866[464]) specifically targeted formerly enslaved people.[465] Some of these predated the Fourteenth Amendment's ratification or even its drafting, but the Amendment's legislative history likewise does not suggest any perceived inconsistency between them. The Amendment and the Freedmen's Bureau Acts were said to share the same purpose: "amelioration of the condition of the freedmen."[466]

Affirmative action critics (including Justice Thomas in his *SFFA* concurrence) often emphasize that bills targeting "freedmen" do not classify by race per se.[467] But this focus on the exact nature of the classification should actually help parties in ends-colorblindness cases who are defending nonracial classifications, like class or school district residence, which are much more weakly connected to race than was freedman status. Two other distinctions may be more helpful to ends-colorblindness advocates. One is that laws aiding freedmen had a strong remedial justification that does not apply in the modern era. The other is that the laws in question are federal, and Congress did not believe itself governed by the Fourteenth Amendment.[468] Congress might have mistrusted and intended to restrict states' use of racial classifications, even while feeling free to use its own.

One can push back: Many of these programs were not limited to freedmen, but were open to all Black people,[469] and the federal/state distinction is unconvincing. It is reasonable to assume that, if the Amendment's framers viewed a law as impairing some citizens' privileges or immunities or as denying equal protection of the laws, they would not have voted for it. And this may be so *even though* the framers believed they were not directly bound by the Amendment, because they *did* believe in its underlying normative principles.[470] Perhaps this assumption could be overcome by concrete evidence that Congress knew it was doing something that the

463. An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865).

464. An Act to Continue in Force and to Amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees," and for Other Purposes, ch. 200, 14 Stat. 173 (1866).

465. *See* Siegel, *supra* note 446, at 558-64; Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1106-07 (1998).

466. Schnapper, *supra* note 457, at 785 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2469 (1866) (statement of Rep. Thaddeus Stevens)).

467. *SFFA*, 143 S. Ct. 2141, 2185 (2023) (Thomas, J., concurring); Rappaport, *supra* note 442, at 96-100.

468. Rappaport, *supra* note 442, at 86.

469. Brief of Professors of History and Law as Amici Curiae in Support of Respondents, *supra* note 441, at 10; Schnapper, *supra* note 457, at 754, 792.

470. *See* Schnapper, *supra* note 457, at 787-88 ("But there is substantial evidence that the framers of the fourteenth amendment also believed that Congress was, and indeed always had been, bound by the principles that the amendment extended to the states.").

Amendment would bar the states from doing, but no such evidence exists. Floor-debate records do show that some legislators opposed some of these policies as "class legislation" that provided special privileges to Black citizens.[471] But this opposition was unsuccessful. More importantly for our purposes, the controversy did not include Congress's objective of ameliorating Black citizens' situation per se; rather, what was controversial was limiting relief only to them (i.e., retail-level discrimination).[472]

There is another class of legislation that potentially informs the Fourteenth Amendment's meaning: legislation meant to redress discriminatory conduct by the states. This includes the Civil Rights Act of 1866, to which the Amendment is historically tied; the Act was seen as resting on unsound constitutional ground, and the Amendment shored up its protections by (roughly) constitutionalizing them.[473] The Act's language indicates that white and non-white citizens should stand on equal footing with respect to certain civil rights, which some have read to imply colorblindness. But this is not an obvious reading—as others have pointed out, at least one provision in the Act itself is not colorblind, criminalizing one type of racial discrimination only when its victims are non-white.[474] In addition, after the Amendment passed, Congress passed subsequent legislation grounded in its Section 5 enforcement authority, which implies a view of the unconstitutionality of the state conduct that the legislation targeted.[475]

In the text and legislative history of both waves of civil rights legislation, and that of the Amendment itself, I cannot find (and scholars have not cited) any evidence whatsoever of concern on the part of Congress that the states might be overly attentive to the rights of racial minorities—much less that they might have racial-equality concerns in mind when they adopt race-neutral laws.[476] It is hard to prove a negative; there is no specific evidence in

471. *Id.* at 755-63 (reviewing the legislative history).

472. *Id.* at 756-58, 763-65.

473. *E.g.*, McConnell, *supra* note 446, at 957-58, 961.

474. Brief of Professors of History and Law as Amici Curiae in Support of Respondents, *supra* note 441, at 12-13. This provision was a reason for President Johnson's veto, which was overridden. *Id.* at 13.

475. *See* McConnell, *supra* note 446, at 953, 984-86 (arguing that the debates over the Civil Rights Act of 1875 indicate that the Fourteenth Amendment was understood to bar school segregation).

476. As defenders of affirmative action have pointed out, the drafters rejected several proposed wordings of the Fourteenth Amendment that would have barred racial distinctions categorically. *See, e.g.*, Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents, *supra* note 441, at 7-8. In fairness, it is not obvious whether these were rejected because they would have forbidden *benign* race-conscious laws or because they would have gone further in forbidding *invidious* racial distinctions than Congress believed desirable or politically possible.

the record that Congress *approved* such efforts either. But there remains no evidence in *favor* of the ends-colorblindness view.

What if we look past Congress's intent and instead focus directly on the text? Neither scholars nor litigants have marshaled any other evidence that the privileges or immunities of citizenship were considered by anyone to include the right to a government that ignores racial inequality. Nor have they cited evidence that taking reduction of inequality into account when crafting laws or policies would have been understood to "abridge" a privilege or immunity or deny the "equal protection" of that law.

But perhaps one could simply conclude that the evidence tells us nothing. Even as to means-colorblindness, that could be the right conclusion. Critics of affirmative action have mostly been on the defensive as to originalist arguments (which probably explains their near-absence from litigation); they offer plausible reasons to distinguish their opponents' examples of race-conscious legislation from the Reconstruction Congress, but they do not offer credible evidence positively supporting colorblindness. The brief of former Attorney General Edwin Meese in *SFFA* attempts to do so, but every piece of evidence he cites to show that the framers of the Fourteenth Amendment opposed racial classifications comes from statements focused on then-pervasive *invidious* racial classifications, such as segregation.[477] To conclude that this rhetoric implies opposition to benign classifications assumes the colorblindness premise that Meese is trying to prove. In any event, every piece of evidence he cites also concerns racial classifications—retail-level discrimination. Indeed, Meese's argument is that "the [f]ramers understood the Amendment to require race neutrality."[478] He does not argue, and there is no evidence, that they opposed legislation that *was* race neutral but sought to promote racial equality.

Originalists take various approaches to what to do when evidence of the Constitution's meaning is ambiguous. One answer—given by Justice Scalia, among others—is that courts should defer to the political branches, an approach that would lead to rejection of ends-colorblindness challenges to governmental policymaking.[479] Another answer is that, when possible, legal

477. Brief of Amicus Curiae Former Attorney General Edwin Meese III in Support of Petitioner, *supra* note 441, at 7-16 (citing statements from the legislative history of the 1866 Act, the Fourteenth Amendment, and the 1875 Act, as well as state-level debates about segregation).

478. *Id.* at 7.

479. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 832-33 (2008) (Scalia, J., dissenting); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 166-67 (1990); Michael Stokes Paulsen, Commentary, *How to Interpret the Constitution (and How Not to)*, 115 YALE L.J. 2037, 2057 (2006); Lino A. Graglia, Essay, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1043-44 (1992).

questions left open by originalist inquiries should be resolved by precedent; ambiguous evidence of original meaning cannot provide a basis for overcoming stare decisis, since it cannot even establish that the precedent is wrong (and indeed, many originalists argue that following precedent is often permitted even when there *is* strong historical evidence that the precedent was wrong).[480] A third answer is that the fleshing out of ambiguous constitutional text is properly left to a process of "construction" by future generations, shaped by the general principles discernible from the text.[481] This last approach is malleable (some critics argue too much so),[482] so nothing is certain. But the various normative arguments discussed above suggest that ends-colorblindness is *not* a natural extension of the Fourteenth Amendment's general principles of equality, even assuming those principles included means-colorblindness.

All in all, it is hard to see how to get from the text of either the Equal Protection or the Privileges or Immunities Clause to a total prohibition of race-conscious policymaking (even when laws are race neutral). It is harder still to see how an originalist case for ends-colorblindness could be deemed so persuasive as to overcome contrary precedent, the presumption of constitutionality, decades of contrary practice, and strong normative objections to the prohibition.[483]

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480. *See, e.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358-61 (2015). Another way of resolving ambiguities is "liquidation by practice"; James Madison argued that ambiguities can be resolved by consistent, deliberate, considered practice over an extended period that enjoys the general acquiescence of each branch of government and the public. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13-20 (2019). Baude observes that it is not clear how this concept applies to individual rights, *id.* at 50-51, and that seems especially so when those rights are held against *state* governments, since the theory focuses on Congress's role in articulating constitutional meaning. Madison, obviously, was not anticipating the Fourteenth Amendment. Still, if this theory is relevant at all, it argues against ends-colorblindness. The practice of invoking benign race-related objectives has, as discussed above, been ubiquitous and quite uncontroversial for decades at all levels and branches of government; with regard to race-neutral affirmative action alternatives, it is frequently part of a considered effort to comply with constitutional doctrine.

481. *E.g.*, Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 462-63, 466 (2016) (observing that "new originalist" scholars apply this method to elaborate on "thin" original meanings and arguing that it should further be applied when the original meaning is unidentifiable).

482. *E.g.*, Colby, *supra* note 444, at 753-64.

483. A final question is whether, as one originalist amicus brief argued in *SFFA*, Title VI might prohibit what the Constitution does not. Brief of America First Legal as Amicus Curiae in Support of Neither Party, *supra* note 441, at 2; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2208 (2023) (Gorsuch, J., concurring) (arguing the affirmative action violates Title VI, while also joining the majority's equal protection analysis). Embracing this approach would require the Court to reject longstanding doctrine that treats Title VI as coterminous with the Fourteenth Amendment, which the Court most recently applied in *SFFA*, as a

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Conclusion

I am writing at a time of great flux: affirmative action just struck down, major magnet school cases pending, and universities everywhere rethinking core pillars of their admissions approaches. Much remains unknown about how these controversies will play out. But for those who care about preserving the ability to address racial disparities and promote diversity, now is the time to think carefully about the legal developments that could come next. The legal movement toward ends-colorblindness could happen quickly, especially with ambitious litigators already working to bring these issues to the Supreme Court. Those engaged in race-conscious policymaking need to be prepared to insulate themselves from challenges or to defend themselves in court. Current doctrine favors them; future doctrine is less certain.

I will close with some reflections on candor. Litigation may soon be an ever-present threat for race-conscious policymaking, especially if the Court embraces ends-colorblindness in an education case or elsewhere. In that world, if, for example, you are counsel to a school system, housing authority, or environmental agency, you are likely to advise your client: Don't mention race. After all, the race-correlated criteria directly targeted by race-neutral policies generally serve important goals that the Constitution unquestionably permits, like helping poor people. If those goals are what policymakers talk about when

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basis for applying the same strict-scrutiny standard to Harvard's and UNC's policies. *SFFA*, 143 S. Ct. at 2156 n.2; *see also* Brief of Amici Curiae United States Senators and Former Senators Supporting Respondents at 15-25, *SFFA*, 143 S. Ct. 2141 (2023) (Nos. 20-1199 & 21-707), 2022 WL 3130667 (arguing that this doctrine is supported by congressional intent and consistent with a reasonable interpretation of the ambiguous term "discrimination").

Even if some Justices were willing to upend this doctrine, it is not obvious whether the strictly textualist approach to statutory interpretation that this theory's advocates have put forward would support reading Title VI to reach facially neutral policies with diversity motivations. The statute states that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any" federally funded program. 42 U.S.C. § 2000d. Arguably, this language focuses on retail-level discrimination against individuals based on race, although, to be sure, what it means to "discriminate" against a "person" is susceptible to multiple interpretations. If one looks to other evidence of Congress's intent to resolve this ambiguity, it is obvious that while Congress presumably did want to prevent *invidious* racially motivated policies (for example, expressly banning literacy tests that had been used to exclude Black voters, 52 U.S.C. § 10101), it did *not* intend to require ends-colorblindness. For example, both Title VI itself and Title VII of the same statute have long been held to require disparate impact analysis (an interpretation Congress has codified for Title VII). *See supra* note 436 and accompanying text; *supra* notes 432, 436 and accompanying text. The Congress that passed the Civil Rights Act was evidently very comfortable with race-conscious thinking about the consequences of policies, and there is no hint in the legislative record that it intended Title VI to bar such thinking by federally funded entities.

promulgating a race-blind policy—or even what they *predominantly* talk about—it will be hard for challengers to prove a causal role of race. Hiding race-related motives has worked well for decades for those discriminating against disadvantaged minorities; it is notoriously hard to win disparate treatment suits.[484] Why should it not *also* work to insulate surreptitious efforts to reduce racial gaps?

But for those concerned about the impact of a turn to ends-colorblindness, the possible availability of subterfuge as a "solution" is not especially reassuring. It is one thing for equal protection doctrine to prefer, as it does, *means* of addressing racial disparity that tend to make race less salient.[485] But it is a bridge too far to say that racial disparities themselves must be treated as invisible, rather than acknowledged as something that the government should act on. The United States remains riven by sharp racial gaps across a variety of domains. Black Americans have about one-seventh the per capita wealth of white Americans, for example, and are about five times as likely to be incarcerated.[486] The connection of these disparities to the fact that Black Americans have been (as Justice Kagan put it) "kicked in the teeth by our society for centuries" is obvious.[487] Nor are these gaps *only* a legacy of long-past discrimination; randomized experiments consistently document large continued racial discrimination effects in many sectors.[488] It would be a sad state of affairs if policymakers could not acknowledge these race gaps and had to disguise potential responses.

Beyond that, there are pragmatic problems with the lack-of-candor "solution." It would not salvage the countless existing policies passed with racial-equality-related goals in mind. Moving forward, lack of candor might work for some institutions, especially those in the habit of having their

484. *E.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557-61 (2001).

485. *See supra* notes 133-34, 417 and accompanying text. Such preferences have often been critiqued as insufficiently honest. *See, e.g.*, Derek W. Black, Essay, Fisher v. Texas *and the Irrelevance of Function in Race Cases*, 57 HOW. L.J. 477, 480-81 (2014). But scholars have defended them from an antibalkanization perspective. *See* Siegel, *From Colorblindness*, *supra* note 32, at 1302-03; *see also* Primus, *Future of Disparate Impact*, *supra* note 32, at 1371-72 ("Equal protection aims to reduce the public salience of race. . . . Reducing racial divides therefore calls for sensitivity not just to what is done or what is intended but what is publicly understood.").

486. Catarina Saraiva, *The Historical Reasons Behind the U.S. Racial Wealth Gap*, BLOOMBERG (May 24, 2021, 12:01 AM EDT), https://perma.cc/S7YL-EYYB; Mike Wessler, *Updated Charts Provide Insights on Racial Disparities, Correctional Control, Jail Suicides, and More*, PRISON POL'Y INITIATIVE (May 19, 2022), https://perma.cc/L7YP-KLTA.

487. *UNC* Transcript, *supra* note 327, at 52 (Justice Kagan speaking).

488. *E.g.*, Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 197 (2018) (reviewing research).

statements vetted by lawyers. But broadly speaking, it is unrealistic to expect participants in American political discourse to go abruptly silent about racial inequality—the issue that has, more than any other, defined American history. As the magnet school cases illustrate, policymakers routinely talk openly about race for many reasons: because they care about it, because their constituents and stakeholders care and demand accountability, and because there has never been a reason not to. This would be a hard habit to break, and trying to do so would hardly promote racial harmony. It would undoubtedly hurt and anger countless people of color, especially by closing political discourse to concerns they consider vital.

Ultimately, the ends-colorblindness position envisions a political system in which most of the racial disparities that pervade American life cannot be openly recognized or addressed. Such a system is probably not achievable, and if it were, it would be a broken system and widely perceived as such. That path is not foreordained, and it is in no way the logical consequence of even a principled opposition to individual-level racial classifications. Colorblindness in some form will continue to characterize judicial doctrine, but much is at stake in determining its limits.