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RESPONSE

Alternative Action After *SFFA*

Kim Forde-Mazrui*

Introduction

In *The Magnet School Wars and the Future of Colorblindness*,[1] Professor Sonja Starr assesses the constitutional implications of school-admissions policies that use race-neutral means to achieve race-related ends, such as advancing racial equality or creating racially diverse student bodies. Starr focusses on the high-stakes setting of elite public magnet schools, which has generated litigation over such admissions policies, a trend likely to increase in the wake of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).[2]

Starr uses the term "*ends-colorblindness*" to describe an approach by which the Court would treat race-neutral laws or policies with *benign* racial ends, such as benefitting historically disadvantaged racial minorities to advance equality, with the same strict scrutiny as policies with *invidious* racial ends, such as harming such minorities to perpetuate white supremacy.[3] Under ends-colorblindness, all race-related ends would render a policy presumptively unconstitutional even if the policy relied exclusively on race-neutral means. Thus, if a magnet school had a policy that used race-neutral criteria, such as economic disadvantage, to *increase* the admission of minority applicants, the policy would be subject to the same strict scrutiny that the Court would apply

* Professor of Law and Mortimer M. Caplin Professor of Law, University of Virginia.

1. 76 STAN. L. REV. 161 (2024).
2. 143 S. Ct. 2141 (2023). Starr primarily focuses on the Fourth Circuit case, *Coalition for TJ v. Fairfax County School Board*, which at the time of *Magnet School Wars*'s publication was being reviewed by the Supreme Court for *certiorari*. 68 F.4th 864 (4th Cir. 2023); Starr, *supra* note 1, at 195-213. In February, 2024, the Court rejected the *certiorari* petition in *TJ*, leaving standing the decision of the Fourth Circuit Court of Appeals that the school district's facially neutral admissions policy did not violate equal protection. *Coal. for TJ*, 68 F.4th 864, *cert. denied*, 2024 WL 674659 (U.S. Feb. 20, 2024) (No. 23-170). But, as Starr explains, litigation bringing similar claims at either the K-12 or university level will remain common until the Supreme Court clarifies the scope of its ruling in *SFFA*. *See* Starr, *supra* note 1, at 163 ("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.").
3. *See* Starr, *supra* note 1, at 164-65, 174-75 (Introduction and Part I.A defining terms).

to a race-neutral policy, such as raising test-score admission minimums, to *decrease* the admission of minority applicants. Ends-colorblindness, Starr claims, could invalidate virtually all facially race-neutral policies that pursue benign race-related ends, not only in education but also in a broad range of other contexts, such as employment, housing, environmental policy, health care, and criminal justice.[4]

Starr argues that the Court should not adopt ends-colorblindness and that existing caselaw,[5] originalist approaches to constitutional interpretation,[6] and normative considerations[7] counsel in favor of upholding race-neutral policies with benign race-related ends. Her analysis is careful, fair, and copiously documented. She demonstrates deep knowledge of equal-protection doctrine and scholarship on race-related admissions and other policies. Her breakdown of the affirmative-action precedents and the various recent lawsuits against magnet schools is sophisticated, nuanced, and lucidly written. I wholeheartedly recommend *Magnet School Wars*.

Given my general agreement with Starr's claims and analyses, my response is more constructive engagement than criticism. For succinctness, I use the term "*alternative action*"[8] to refer to policies that use race-neutral means to achieve the types of racial ends traditionally pursued through race-based affirmative action, such as remedying racial discrimination and creating diverse student bodies. Although alternative-action policies could pursue these goals by *intending* to benefit racial minorities, they need not intend to benefit any racial group. As Part I explains, seeking to remedy racial discrimination and to create a student body with diverse perspectives, experiences, cultures, and ethnicities, does not necessarily involve an intention to benefit or harm any racial group. Race-based affirmative action often pursued these ends through race-based means. If such purposes were pursued through race-neutral means without intending to benefit a racial group in the process, alternative action should not be subject to strict scrutiny even in an ends-colorblindness world. Moreover, although alternative action designed to remedy discrimination or promote diversity might often benefit Black, Latino, and

4. *See id.* at 165-66.
5. *See id.* at 180-95 (Part I.B.3 discussing pre-existing caselaw), 246-47 (Part III.C.2 discussing stare decisis after *SFFA*).
6. *See id.* at 258-65 (Part III.C.5 discussing originalism).
7. *See id.* at 247-52 (Part III.C.3 making normative arguments).
8. I first borrowed the term "alternative action" in Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332 (2000) (quoting Michele Norris & Peter Jennings, *Colleges Seek Alternative to Affirmative Action Keeping Minority Enrollment Numbers Up*, ABC NEWS: WORLD NEWS TONIGHT (ABC television broadcast May 20, 1998) (describing turn by university administrators to "alternative action" to boost minority enrollment)).

Native people, it could also benefit Asians and whites in contexts in which those groups may have been discriminated against or where their perspectives or experiences are systematically underrepresented.

I make four claims. First, complicating the meaning of "race-related" ends more than Starr does, I argue that, even under ends-colorblindness, the Court should uphold some alternative-action policies *without* subjecting them to strict scrutiny. Second, the Court could uphold other alternative-action policies that *intend* to benefit racial minorities on the ground that such policies *satisfy* strict scrutiny. Third, I claim that originalism supports the constitutionality of alternative action more than Starr claims. Fourth, I predict an approach that the Court might apply to alternative action, namely, upholding alternative action when the purpose to benefit a racial group does not play a *predominant* or *excessive* role in the policy's design.

I. Alternative Action That Avoids Strict Scrutiny Under Ends-Colorblindness

My first claim is that a shift from means- to ends-colorblindness need not subject alternative action to strict scrutiny to the extent that Starr seems to anticipate. Starr claims that ends-colorblindness would have the Court treat race-neutral policies with benign racial ends with the same strict scrutiny it applies to race-neutral policies with invidious racial ends. It would follow, she argues, that the Court would treat a race-neutral policy with benign racial ends as having a "discriminatory purpose"—adopted "because of" and not "in spite of" its effect on a racial group.[9] Historically, discriminatory policies were designed to benefit whites. Under ends-colorblindness, adopting a policy to benefit disadvantaged racial minorities would likewise be "discriminatory" and subject to strict scrutiny.

I agree with Starr that, under ends-colorblindness, the Court would treat an end to benefit disadvantaged minorities as equally "discriminatory" as an end to harm minorities.[10] I differ from Starr in that I discern that some benign race-related ends or motivations should not be considered "discriminatory" even under ends-colorblindness. Starr seems to expect that ends-colorblindness

9. *See* Starr, *supra* note 1, at 173 (outlining arguments for ends-colorblindness that would render facially neutral policies unconstitutional based on underlying discriminatory purpose); *id.* at 211-12 (recalling that Court's test for discriminatory purpose requires Asian-American plaintiffs to prove that school board acted "because of," not merely "in spite of," adverse effect on Asians) (citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

10. *See* Forde-Mazrui, *supra* note 8, at 2333-34.

would require strict scrutiny of virtually any "race-related concern,"[11] "race-related purpose"[12] or "racial-equality-related goal."[13] Under that theory, virtually any race-neutral policy that was motivated by race would be subject to strict scrutiny. However, a policy that intends to achieve a race-related end but does not intend to benefit or harm a particular racial group or groups should not be subject to strict scrutiny as it would not be adopted "because of" its effect on a racial group.

For example, consider the race-related end of remedying effects of racial discrimination. Remedying racial discrimination, including what the Court calls "societal" discrimination, is not a racially discriminatory purpose, so long as the goal is to redress discrimination against anyone—regardless of the victim's race.[14] If, for example, alternative action benefits low-income people in order to benefit racial minorities on the assumption that minorities have likely suffered from discrimination, then that policy would probably be deemed racially discriminatory under ends-colorblindness because benefiting racial minorities is one of its goals. If, by contrast, alternative action benefits low-income people on the assumption that they are more likely to have suffered from racial discrimination—regardless of the race of the low-income people benefited—then such alternative action should not be discriminatory under ends-colorblindness because benefiting a particular racial group would not be one of its goals. That disadvantaged racial minorities might

11. *See* Starr, *supra* note 1, at 174 (explaining that "the legal issues explored here arise only in cases where race-related concerns have at least some effect on policy choices"). As Starr's language indicates, she recognizes that race has to affect a decision to be suspect. Correctly, Starr does not claim that any decision made with awareness of a race-related concern would be problematic under ends-colorblindness. That said, I believe some race-related motivations that affect policy choices still would not be subject to strict scrutiny under ends-colorblindness. *See infra* text accompanying notes 14-17. And, for other causal racial purposes, these policies should satisfy strict scrutiny under ends-colorblindness more than Starr expects. *See infra* Part II. Of course, Starr may be right about the Court's approach if it were to adopt ends-colorblindness. I may be naïve to expect the Court to be consistent with prior doctrinal conceptions of "discriminatory purpose" and "compelling interest."

12. *See* Starr, *supra* note 1, at 173 (explaining that "the policies in question are *products of race-conscious policymaking*—their content is shaped at least in part by a race-related purpose"). Starr acknowledges that terms like "race-related" and "race-conscious" are imprecise and broad. *See id.* at 174. Starr clarifies that she is referring to circumstances in which race affects a policy choice and in which race is used for "benign" as opposed to "invidious" purposes. *See id.* However, I believe that Starr fails to recognize the kinds of racial motivations that do not necessarily constitute discriminatory purposes under ends-colorblindness, or that could be sufficiently compelling to withstand strict scrutiny.

13. *See id.* at 165 (referring to the ubiquity of "[f]acially neutral actions motivated by racial-equality-related goals" that would be vulnerable under ends-colorblindness).

14. *See* Forde-Mazrui, *supra* note 8, at 2382-87 (explaining why remedying societal racial discrimination is not a discriminatory purpose).

disproportionately benefit from policies aimed at low-income people, as a proxy for victims of racial discrimination, would not subject such policies to strict scrutiny. Racially disparate impact, including awareness thereof, does not trigger strict scrutiny.[15] Thus, if a magnet school gave positive weight to economic disadvantage because that would likely benefit applicants disadvantaged by racial discrimination, such a policy should not be subject to strict scrutiny under ends-colorblindness even if it disproportionately benefited racial minorities.

Nor is it a racially discriminatory purpose to intentionally assemble a student body diverse in experiences, viewpoints, outlooks, perspectives, *ethnicities and cultures.*[16] Such traits, including ethnicity and culture, though often associated with racial diversity, are not inherently tied to race under the biological conception of race that constitutional law employs. Culture and ethnicity are learned, not genetically inherited, and a member of any race can identify with any ethnicity or culture. Adopting a race-neutral policy to affect the ethnic or cultural composition of a student body does not by itself establish an intent to affect the *racial* composition of a student body.[17]

The constitutional problem with using affirmative action to create a diverse student body arises when the affirmative-action policy considers race or, under ends-colorblindness, when a facially neutral policy's purpose is arguably racially discriminatory, such as seeking a *racially* diverse student body. If, however, a magnet school uses race-neutral criteria to assemble a student body that is diverse in ethnicities, cultures, experiences, and perspectives, such criteria should not be subject to strict scrutiny even if they would disproportionately benefit racial minorities. For example, if a magnet school gave positive admission weight to applicants from geographically diverse middle schools or neighborhoods; whose first language is other than English; or who describe unusual cultural identities or experiences in their application essays, such alternative action would not be subject to strict scrutiny if the purpose were to enhance cultural or experiential diversity, not racial diversity.

15. *See id.* at 2383-84; Washington v. Davis, 426 U.S. 229, 246 (1976).

16. *See* Forde-Mazrui, *supra* note 8, at 2387-88 (explaining why pursuing a diverse student body, including with cultures commonly associated with particular racial groups, is not a discriminatory purpose).

17. Even Justice Thomas, the Justice who is most likely to embrace ends-colorblindness, distinguishes between "racial" diversity on the one hand and "cultural or ideological" diversity on the other. *See SFFA*, 143 S. Ct. at 2189-90 (Thomas, J., concurring) (criticizing assertions by *amici* of the benefits of racial diversity by observing that "none of those assertions deals exclusively with *racial* diversity—as opposed to cultural or ideological diversity").

In sum, policies intended to achieve race-related ends but not intended to benefit or harm anyone or any group because of their race should not be subject to strict scrutiny because they do not have a racially discriminatory purpose.

II. Alternative Action That Should Satisfy Strict Scrutiny Under Ends-Colorblindness

My second claim is that alternative action *intended* to benefit racial minorities could withstand strict scrutiny under ends-colorblindness. I assume that, under ends-colorblindness, alternative action intended to benefit racial minorities would likely be considered "racially discriminatory" and subject to strict scrutiny. The Court has rejected certain governmental interests as not "compelling" under strict scrutiny because those interests were pursued through racially discriminatory means—which raise special concerns for the Court. However, if such interests were pursued through race-neutral means, they could be accepted as sufficiently compelling. Thus, interests like remedying societal racial discrimination or assembling a racially diverse student body could, even after *SFFA*, be considered sufficiently compelling to withstand strict scrutiny when pursued through race-neutral means.

For decades, the Court has declined to recognize remedying societal discrimination as a compelling governmental interest for purposes of strict scrutiny because that interest is insufficiently precise to justify use of a racial classification.[18] Similarly, in *SFFA*, the Court rejected Harvard's and the University of North Carolina's interest in pursuing a racially diverse student body because, the Court explained, such a goal is too imprecise and amorphous to justify race-based admissions practices.[19] If, however, racial diversity were pursued through race-neutral means, the Court could—consistent with precedent—hold that such an interest is sufficiently compelling to withstand strict scrutiny.

As Starr observes,[20] credible normative reasons support permitting race-neutral means to pursue benign race-related ends while prohibiting the pursuit of the same ends through race-based means. My own distinction between race-based and race-neutral means for benign ends relies on the Court's rationales for applying strict scrutiny to race-based affirmative action.[21] The Court has

18. *See* Forde-Mazrui, *supra* note 8, at 2369-71.
19. *See SFFA*, 143 S. Ct. at 2166-68 (explaining need for measurable, concrete, and non-amorphous governmental interest).
20. *See* Starr, *supra* note 1, at 247-52 (Part III.C.3).
21. *See* Forde-Mazrui, *supra* note 8, at 2354-59 (Court's concerns over racial classifications), 2359-64 (functions of strict scrutiny).

identified two categories of justifications for applying strict scrutiny to race-based policies: intent-based[22] and effects-based.[23] Regarding intent, the Court has stated that racial classifications raise an excessive risk that the intent behind them reflects or is animated by prejudice, stereotype, or racial politics.[24] As to effects, the Court has explained that race-based policies are too likely to express essentializing racial messages, reinforce prejudice and stereotypes, and exacerbate racial tensions.[25]

Alternative action, by contrast, does not raise the same risks of illegitimate intentions or harmful effects as race-based policies for the same ends. To the extent that alternative action benefits only those minority individuals who meet the policies' race-neutral criteria—not all members of the minority group—*and* also benefits non-minority members who meet the policies' race-neutral criteria, such policies are less likely to reflect racial favoritism or improper stereotyping.[26] Likewise, as to effects, because alternative action does not overtly express a racial preference or discriminate by race in its implementation, it is less likely to reinforce stereotypes or stoke racial division.[27] The Court would thus have intent- and effects-based grounds to uphold alternative action under ends-colorblindness even if it would not uphold race-based affirmative action for the same ends.

III. Alternative Action Under Originalism

My third claim is that originalism supports alternative action intended to benefit racial minorities more than Starr recognizes. Starr persuasively argues that originalist evidence does not support *invalidating* such policies.[28] For two reasons, I argue that originalist evidence in fact supports *upholding* such policies.

The first reason is that the historical record strongly suggests that segregation in education, especially in higher education, was consistent with the original public meaning of the Fourteenth Amendment. Originalism considers state laws and practices during and in the near aftermath of an

22. *See id.* at 2354-56 (explaining the Court's concern that racial classifications too often reflect improper intentions, such as prejudice, stereotypes, and racial politics).
23. *See id.* at 2356-58 (explaining the Court's concern that racial classifications have harmful effects, such as injuring individual members of non-preferred racial groups, reinforcing stereotypes, expressing harmful racial messages, and exacerbating racial tensions).
24. *See id.* at 2354-56.
25. *See id.* at 2356-58.
26. *See id.* at 2375-76.
27. *See id.* at 2371-75.
28. *See* Starr, *supra* note 1, at 258-65 (section III.C.5).

amendment's ratification as evidence of the public understanding or meaning of that amendment when it was originally ratified. The great majority of states, including in the North, racially segregated schoolchildren during—and for a long time after—the Fourteenth Amendment's ratification.[29] Moreover, virtually every southern state excluded Black people from flagship and other well-resourced, instituions of higher education until the Court and federal civil rights legislation required them to admit Black people in the mid-to-late twentieth century.[30] Indeed, Black people only gained meaningful access to higher education following the Fourteenth Amendment's ratification due to the creation of Black colleges and universities, which were often funded by private philanthropy and the Freedmen's Bureau.[31] If the Fourteenth Amendment was originally understood to allow segregation in primary and secondary schools and outright exclusion of Black people from most public higher education, it is implausible that the original meaning of the Fourteenth Amendment required colorblindness.

As such, segregating—or integrating—magnet-school students does not violate the Fourteenth Amendment's original meaning, so long as all races have access to education. The Justices who defended affirmative action in *SFFA* did not rely on the evidence of widespread segregation during and after Reconstruction, instead emphasizing federal and state practices during and after the Fourteenth Amendment's ratification that benefited Black people. Understandable reasons may explain their omission. They may not have wanted to lend support to the "separate but equal" doctrine that our nation rightfully repudiated in the 1950s and '60s. But the historical record is what it is. The weight of originalist evidence supports racial segregation in education

29. *See* Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1885-93 (1995) (canvassing states during and after the ratification of the Fourteenth Amendment and demonstrating that school segregation was the norm, not the exception, in both the North and South).

30. *See* Dave Tomar & James Barham, *The History of HBCUs in America*, ACAD. INFLUENCE (updated July 28, 2023), https://perma.cc/NY4U-UTPG (explaining that Historically Black Colleges and Universities (HBCUs) were established between 1865 and 1964 "at a time when most Southern colleges refused to admit Black students and many Northern colleges enforced rigid racially-driven admission quotas."); *id.* (noting that "Black students were prevented from attending any of the Southern institutions founded in the wake of the 1862 Morrill Act providing for land grant colleges in every state."); *see also* "Key Events in Black Higher Education," J. BLACKS HIGHER ED., https://perma.cc/PAZ5-EYD4.

31. *See Emancipation and Educating the Newly Freed*, SMITHSONIAN NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://perma.cc/5A85-PRTY ("The first schools and colleges for African Americans were created largely through the support of civic and religious organizations, like the Freedmen's Bureau, the American Missionary Association, and the African Methodist Episcopal Church.").

and, by implication, supports the lesser discrimination of *race-neutral* policies designed to *include* underrepresented racial groups.

The second reason why originalism supports alternative action is that, before and after the Fourteenth Amendment's ratification, courts lacked authority to review the constitutionality of laws based on the purpose or motivation behind them. During the antebellum period through Reconstruction and well into the twentieth century, the general understanding of the power of judicial review was that it only extended to the objective content of law, not to legislative motivation.[32] That might explain why southern state conventions in the late nineteenth and early twentieth centuries were comfortable openly acknowledging that their adoption of race-neutral voting disqualifications in state constitutions were intended to disenfranchise Black people.[33] They may have understood that their racially discriminatory purposes were immune from judicial review.

Accordingly, the original meaning of the Fourteenth Amendment probably did not authorize courts to invalidate race-neutral laws designed to benefit racial minorities even if, however doubtful, the Fourteenth Amendment's original meaning required courts to invalidate express racial classifications designed to benefit racial minorities. Applied to alternative action, state or federal laws that require or authorize the use of race-neutral means to benefit racial minorities would not be subject to judicial review

32. According to Professor Caleb Nelson, prior to the 1870s, a strong consensus prevailed in the United Sates that courts had no authority to invalidate legislation based on purported impermissible motives or purposes, but were rather limited to reviewing the constitutionality of legislation based on its express classifications. *See* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790-91, 1795-1812 (2008). From the late nineteenth century to the 1970s, courts occasionally reviewed legislation for impermissible purposes, but even then, they generally only did so based on external facts capable of judicial notice that ruled out legitimate explanations for a statute and with a heavy burden of proof on those who would challenge the legislation based on its purposes. *Id.* at 1812-50. It was not until the 1970s that courts become consistently open to taking evidence of purposes reflected in internal legislative history. *Id.* at 1850-59.

33. As Professor Benno Schmidt describes, southern states in the late nineteenth and early twentieth centuries openly adopted race-neutral voting qualifications, such as poll taxes, literacy tests, and grandfather clauses, for the explicit purpose of excluding Black people from voting, confidently assuming that the use of race-neutral means made such laws constitutional. *See* Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disfranchisement from the KKK to the Grandfather Clause*, 82 COLUM. L. REV. 835, 845-47 (1982); *e.g.*, Hunter v. Underwood, 471 U.S. 222, 223-24, 229 (1985). (noting that "[t]he delegates to the all-white convention were not secretive about their purpose," and quoting the president of the convention's opening address that the 1901 disenfranchising amendments to the state constitution were "to establish white supremacy in this State"). Applying the Court's modern approach of inquiring into a law's purpose, the Court in *Hunter* invalidated Alabama's disenfranchisement provision under the Equal Protection Clause because it "was motivated by a desire to discriminate against blacks." *Id.* at 233.

under the consensus at the time of the Fourteenth Amendment's ratification. For example, Texas's Top Ten Percent Plan admits high school graduates in the top ten percent of their class to the state's university system in order to create racially diverse student bodies. This policy would not be subject to judicial review if the Court were to follow the understanding of judicial review when the Fourteenth Amendment was ratified. For magnet school admissions, the public understanding of judicial authority when the Fourteenth Amendment was ratified would not permit review of state laws that authorize or require schools to use race-neutral means to admit underrepresented racial groups to such schools.

IV. Alternative Action under Ends Colorblindness: A Predominant-Factor Test?

My fourth claim predicts an approach that the Court might apply to alternative action designed to benefit racial minorities. The Court may uphold such policies provided race does not play a *predominant* role in the policies' design. For example, the Court might uphold a plus factor in college admissions for applicants from *all* under-resourced high schools even if the college's choice of that factor was motivated in part to admit more minority applicants. But the Court would likely not uphold a plus factor limited to applicants from under-resourced high schools that have a high percentage of minority students. If under-resourced schools are to be used as a proxy for racial minorities, applicants from all under-resourced schools should benefit, including from schools that are majority white. Put another way, the Court might require (1) that race-neutral policies designed to benefit racial minorities also serve other race-neutral, legitimate goals, such as aiding people of low socioeconomic status, and (2) that the policies benefit people of all races who would serve those race-neutral goals.

I am not referring to "mixed-motive" policies. A mixed-motive policy would pursue both a racially discriminatory end and a legitimate, non-racial end where the non-racial end would have motivated the same policy without the racial end.[34] For example, if a magnet school adopted an admission plus factor for economic disadvantage to increase both racial and socioeconomic diversity, but the school *would have* adopted the exact same policy for economic diversity alone, then that would be a mixed-motive policy. Such a policy would not be problematic under long-standing constitutional doctrine. Instead, I am referring to alternative action that treats economic-disadvantage as an admission plus factor in order to increase racial and economic diversity, but

34. *See* Starr, *supra* note 1, at 232 n.341 (citing Hunter v. Underwood, 471 U.S. 222, 228, 232 (1985)) (explaining mixed-motive policies).

where the school *would not have* adopted the same policy for economic diversity alone. In that circumstance, I predict that the Court would uphold some alternative action if the racial purpose were not predominant or otherwise excessive even though race played a but-for causal role.

Such an approach would be akin to what the Court does with electoral districting, the only context in which the Court has directly analyzed the constitutionality of race-neutral policies designed to benefit racial minorities.[35] The Court subjects electoral districts designed to enhance racial minority representation to strict scrutiny only if it determines that race was a *predominant* or *overriding* factor in designing the district,[36] not just one of many factors. I agree with Starr that the electoral districting cases raise some issues that arguably distinguish districting from other race-neutral policies designed to benefit minorities.[37] I surmise, however, that the Court's compromise in the districting cases—strict scrutiny applies to race-neutral policies but only if race is a predominant factor—may reflect an approach the Court would take in a context in which it believes some racial purposes can be legitimately pursued through race-neutral means, so long as race is not prioritized over legitimate non-racial purposes. School admissions policies that use race-neutral means for benign racial ends may represent the kind of policies that call for such a compromise.

If the Court were inclined to adopt a predominant-factor test, a question would be whether race playing a predominant role would only trigger strict scrutiny or whether it would instead fail strict scrutiny. In the electoral districting context, strict scrutiny is triggered when race is a predominant

35. Starr recognizes the relevance of the electoral districting cases as involving equal-protection scrutiny of laws that are "facially neutral" in that they classify by land, not people. *See* Starr, *supra* note 1, at 190. However, she views such cases as involving issues that make them "readily distinguished" from other forms of race-conscious decision-making. *Id.* Starr also argues that the cases of *Parents Involved* and *Inclusive Communities* support the constitutionality of race-neutral affirmative-action policies. *Id.* at 183-90. While Starr's assessment is plausible, at best these cases provide indirect support for the validity of race-neutral policies for benign racial ends. *Parents Involved* did not involve a race-neutral policy and the statements about race-neutral policies were by Justice Kennedy alone, and *Inclusive Communities* was a statutory-interpretation case.

My point is that the electoral districting cases *directly* hold that race-neutral districting laws purposely designed to create majority-minority districts are subject to strict scrutiny if race plays a predominant role. I found no other context in which the Court has directly analyzed the constitutionality of race-neutral laws designed to benefit racial minorities.

36. *See* Miller v. Johnson, 515 U.S. 900, 915-20 (1995) (holding that strict scrutiny applies when race is a predominant factor in designing electoral districts); Shaw v. Hunt, 517 U.S. 899, 907 (1996) (Shaw II) (holding that strict scrutiny applies when race is a factor "that could not be compromised"); Cooper v. Harris, 581 U.S. 285, 291-92 (2017) (explaining predominant-factor test and proof framework).

37. *See* Starr, *supra* note 1, at 190-192.

factor in a district's design. Whether such a district can withstand such scrutiny is a separate question. Applied to alternative action intended to benefit minorities, this approach would subject such a policy to strict scrutiny if race was found to be a predominant factor in the policy's design. The other approach would subject to strict scrutiny alternative action intended to benefit minorities whenever race played *any* motivating role, and would invalidate the policy if race was a predominant factor. That approach—race as a factor triggers strict scrutiny but the tailoring prong would be satisfied unless race were predominant—would be analogous to the Court's approach to race-based affirmative action from *Bakke*[38] through *Fisher II*,[39] in which the Court applied strict scrutiny to any use of race but upheld it if race were sufficiently limited among other factors.

Which approach will the Court take? Reasons support both. The Court may want to rely on the electoral-districting cases as precedent for analyzing alternative action intended to benefit racial minorities. On the other hand, the Court may want to follow the approach it applied to race-based affirmative action before *SFFA* by subjecting to strict scrutiny alternative-action intended to benefit minorities, but tolerate such a policy as narrowly tailored when race is not a predominant factor. That approach would give the Court more control over the analysis by enabling it to decide, from context to context, whether the purpose served by alternative action is compelling and whether the use of race is properly tailored. I suspect the latter but, either way, I anticipate that the Court will be open to upholding alternative action designed to benefit minorities when legitimate, non-racial interests play a significant role in designing the policy and people of all races who serve those interests are benefited by the policy.

Conclusion

In *Magnet-School Wars,* Professor Sonja Starr calls on us to recognize that race-neutral efforts to integrate schools—and a broad range of other efforts to

38. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.) (explaining that an individual of any racial background who is discriminated against by race-based affirmative action is entitled to strict scrutiny); *id.* at 315 (explaining that constitutional interest in diversity includes race as one factor among "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element").

39. *See* Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 376 (2016) (explaining that use of race by a university must withstand strict scrutiny) (citation omitted); *id.* at 375 (noting with approval the trial court's finding that "race is but a 'factor of a factor of a factor' in the holistic-review calculus") (citation omitted); *id.* at 384-85 (observing that "the fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring").

advance racial equality—are under attack and, given the colorblind trend of Supreme Court jurisprudence, are in real jeopardy. I raised a similar alarm two decades ago,[40] but the Court surprised me in *Grutter*[41] and *Fisher II*[42] by upholding race-based affirmative action. In *SFFA*, the Court lived up to my pessimism, essentially forbidding the use of racial classifications to integrate schools of higher education and other settings. But the Court has not ruled out the use of race-neutral policies to rectify racial inequality and to racially integrate American society.

As Starr and I have argued, the Court has principled options to distinguish alternative action from race-based affirmative action. The Court could uphold alternative action under principles based in precedent or originalism, both of which support alternative action. I would wager that the Court will uphold at least some alternative action. But my wager would be modest.

40. *See* Forde-Mazrui, *supra* note 8, at 2338 (warning that, given the trajectory of equal-protection caselaw, racial preferences are no longer constitutionally permissible means for remedying discrimination or pursuing diversity).

41. *See* Grutter v. Bollinger, 539 U.S. 306, 343-44 (2003).

42. *See* Fisher, 579 U.S. at 388-89.