

## ROBERTS'S REVISIONS: A NARRATOLOGICAL READING OF THE AFFIRMATIVE ACTION CASES

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### INTRODUCTION

In law, one of the stories told by some scholars is that legal opinions are not stories.<sup>1</sup> The story goes: legal opinions are mere recitations of facts and legal principles applied to those facts; they are the end result of a contest between opposing sides that have brought the parties to an objective truth through a lawsuit.<sup>2</sup> In these scholars' eyes, legal opinions are objective, neutral, disinterested, and free from the emotion of narratives.<sup>3</sup> Yet, as feminist legal scholars, Critical Race scholars, and

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<sup>1</sup> See Richard A. Posner, *Narrative and Narratology in Classroom and Courtroom*, 21 PHIL. & LITERATURE 292, 293–300 (1997) (noting that "[j]udicial opinions have a story element, the narrative of the facts of the case that opens most opinions," *id.* at 293, and noting that "[s]ome judges try to cast their whole opinion as the story of the parties' dispute" by "using chronology rather than a logical or analytical structure to organize the opinion," *id.* at 294, but arguing that what distinguishes law, including judicial opinions, from narrative is its detachment from emotion, its truth-telling, and its measuredness); cf. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of Judge John G. Roberts, Jr.) (declaring that it is a Supreme Court Justice's "job to call balls and strikes, and not to pitch or bat"); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 385–89 (1989) (agreeing that legal language is "rational and calm, even dispassionate" and "[j]udicial opinions are generally well-controlled pieces of apparently rational discourse," but arguing that reading opinions as narratives can be dangerous because "[e]very judicial opinion is connected to violence" and thus, "[i]f reading opinions as narratives obscures that point, it is a pernicious endeavor," *id.* at 389).

<sup>2</sup> See Mario L. Barnes, *Black Women's Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 951 (2006); see also, e.g., Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 521 (1997) ("We are lawyers precisely because we do something more than listen to stories: we filter stories through the framework of legal doctrine. While it may be useful for lawyers to see the facts of a case as a narrative construction, or even to think of the law itself as a work of fiction, lawyers must look beyond stories to questions of doctrine, policy, and argument." (footnote omitted)).

<sup>3</sup> See Posner, *supra* note 1, at 293–303; see also Litowitz, *supra* note 2, at 521.

law-and-humanities scholars have long asserted, legal opinions themselves can also be read as narratives, narratives constructed in a way to offer one version of the facts and the legal principles applied to them as the objective truth.<sup>4</sup>

In a seminal article published nearly twenty years ago in the *Yale Journal of Law and the Humanities*, Professor Peter Brooks posed a critical yet underexplored question: “Does the [l]aw [n]eed a [n]arratology?”<sup>5</sup> In essence, he asked whether law as a field should have a framework for deconstructing and understanding how and why a legal opinion, including the events that the opinion is centered on, has been crafted and presented in a particular way.<sup>6</sup> After highlighting that “how a story is told can make a difference in legal outcomes,” Brooks encouraged legal actors to “talk narrative talk” and study “perspectives of telling.”<sup>7</sup> He invited lawyers and legal scholars to consider in their analyses of opinions “who sees and who tells,” what is the “explicit or implicit relation of the teller to what is told,” and “how cases come to the law and are settled by the law.”<sup>8</sup> According to Brooks, the more that lawyers begin to apply a narratology to the law, the more lawyers will be able to see the “constructedness” of narratives in opinions — to understand “how they are put together and what [lawyers] can learn from taking them apart.”<sup>9</sup> Similarly, he argued, the more lawyers accepted that the study of narrative in the law “demands analytic consideration in its own right,”<sup>10</sup> the more lawyers would see “how narrative discourse is never innocent but always presentational and perspectival.”<sup>11</sup>

Few things reveal the power and truth in Brooks’s call for a narratology in the law more than the line of U.S. Supreme Court cases

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<sup>4</sup> See Barnes, *supra* note 2, at 953–54; see also Peter Brooks, *Narrative Transactions — Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMANS.* 1, 11–13 (2006) (demonstrating how differing retellings of the facts among the opinions in a particular case are loaded with “point of view” on the “ways that things ‘are supposed to happen,’” *id.* at 11); cf. Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 *BUFF. L. REV.* 141, 142–43 (1997) (“Legal doctrine itself may be seen as a set of stories. The substantive law of contracts, for example, may be perceived as telling a story of free will and free choice. . . . Any given set of doctrinal rules might be said to dictate what stories may emerge and how they may emerge in potential cases involving those rules; the substantive law determines which facts will and which will not be deemed to bear on the problem at hand.”).

<sup>5</sup> Brooks, *supra* note 4, at 1.

<sup>6</sup> *Id.* at 2 (explaining that narratology “distinguishes between events in the world and the ways in which they are presented in narratives”); see also Gerald Prince, *Narrative Analysis and Narratology*, 13 *NEW LITERARY HIST.* 179, 181 (1982) (“Narratology studies the form and functioning of narrative and tries to account for narrative competence.”).

<sup>7</sup> Brooks, *supra* note 4, at 2.

<sup>8</sup> *Id.* at 2–3; accord Barnes, *supra* note 2, at 952 (asserting that understanding the production of narrative “helps us to understand in a world of competing facts and inferences, whose story is more likely to become officially adopted”).

<sup>9</sup> Brooks, *supra* note 4, at 25.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 25; see also Prince, *supra* note 6, at 179 (noting that while “people with widely different cultural backgrounds” may “often tell narratives that are very similar,” they also “often identify the same given sets of symbols as narratives and consider others as nonnarratives”).

concerning affirmative action in higher education. This year, in two cases that colleges and universities closely watched, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*,<sup>12</sup> the U.S. Supreme Court issued a joint opinion that reshaped nearly fifty years of precedent on race and admissions, holding that Harvard College and the University of North Carolina (UNC) violated the Equal Protection Clause of the Fourteenth Amendment in their use of race in their admissions processes.<sup>13</sup> In so ruling, the Court offered “a moment of narrative *peripeteia*, a reversal that forces a re-reading, an *anagnorisis* or recognition that makes the past bathe in a different light.”<sup>14</sup> That re-reading, specifically the re-reading of the line of opinions that culminated in the decision in the *Students for Fair Admissions, Inc. (SFFA)* opinion, highlights two critical revelations about the Court’s jurisprudence on race-based affirmative action in higher education.

First, the re-reading reveals how Chief Justice Roberts has forced a new understanding of what the Equal Protection Clause requires in the affirmative action landscape by revising history, precedent, and reality through omissions, misstatements, and untruths. Second, the re-reading exposes how the perspectives of telling and the “narrative glue”<sup>15</sup> in *SFFA* are rooted in what Professor Barbara Flagg defines as the “transparency phenomenon,” meaning an invisibility of whiteness, racism, and racism’s everyday impacts for everyone, whether advantaging or disadvantaging, to white people.<sup>16</sup> Specifically, it shows that the “*doxa*” that Chief Justice Roberts relied on in crafting the majority opinion — the “set of unexamined cultural beliefs that structure[d] [his] understanding of everyday happenings”<sup>17</sup> — involve a simplistic understanding of race and racism that is not grounded in the substantive realities of life for people of color. Such *doxa* include beliefs (1) that race is not socially constructed and is defined only by skin color; (2) that racism is aberrational; (3) that “Jim Crow racism”<sup>18</sup> is the only racism that law should redress; (4) that racism is so obvious that people of color, including teenagers applying to college, will know all the ways that they are being

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<sup>12</sup> 143 S. Ct. 2141 (2023).

<sup>13</sup> *Id.* at 2175.

<sup>14</sup> Brooks, *supra* note 4, at 28.

<sup>15</sup> *Id.* at 10 (defining “narrative ‘glue’” as “the way incidents and events are made to combine in a meaningful story”).

<sup>16</sup> Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (defining “transparency phenomenon” as “the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific” (emphasis omitted)).

<sup>17</sup> Brooks, *supra* note 4, at 11.

<sup>18</sup> Jim Crow racism is a racial ideology that overtly explains the social and economic standing of people of color, namely Blacks, as the result of their biological, intellectual, and moral inferiority. See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2–3 (6th ed. 2021).

discriminated against to discuss them in their essays; (5) that treating people “equally” and with “equality” requires treating them all exactly the same without accounting for history and context; (6) that the “traditional” means for measuring “merit” in admissions are race neutral and do not systemically advantage white people; (7) that white people do not still benefit from discrimination that occurred prior to *Brown v. Board of Education*,<sup>19</sup> (8) that affirmative action creates preferences for Black<sup>20</sup> and Latinx<sup>21</sup> people; and (9) that he and his majority colleagues are

<sup>19</sup> 347 U.S. 483 (1954).

<sup>20</sup> Throughout this piece, I follow the more commonly followed practice today of capitalizing the term “Black” whether it is used as an adjective or noun. As Professor Kimberlé Crenshaw has explained, using the uppercase “B” reflects the “view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982) (asserting that “Black” cannot be reduced to “merely a color of skin pigmentation, but as a heritage, an experience, a cultural and personal identity, the meaning of which becomes specifically stigmatic and/or glorious and/or ordinary under specific social conditions”)); see also 2 W.E.B. DU BOIS, *That Capital “N,”* in THE SEVENTH SON 12–13 (Julius Lester ed., 1971) (contending that the “N” in the word “Negro” was always capitalized until defenders of slavery began to use the lowercase “n” as a marker of Blacks’ status as property and as an insult to Black people). Here, as elsewhere, I use the term “Blacks,” rather than the term “African Americans,” when referring to the entire group of people who identify as part of the Black race in the United States because it is more inclusive. “For example, while the term ‘Blacks’ encompasses [B]lack permanent residents or other [B]lack noncitizens in the United States, the term ‘African Americans’ includes only those who are formally ‘Americans,’ whether by birth or naturalization.” Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1488 n.5 (2013). That said, given the historical nature of several parts of this Comment and in light of the fact that a large influx of Black immigrants did not occur in the United States until the 1960s and 1970s, I sometimes use the term “African American” where the term “Black” is not needed for inclusivity reasons. *Id.* (citing Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1484 (2002) (“The year 1965 thus marked the beginning of a much more diverse, far less European immigrant stream into this country.”)). I also use the term “African American” when researchers have used that term in their studies. Further, I capitalize the word “White” when used as a noun. I find that “[i]t is more convenient to invoke the terminological differentiation between black and white than say, between *African-American* and *Northern European-American*, which would be necessary to maintain semantic symmetry between the two typologies.” Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 n.4.

<sup>21</sup> Throughout this piece, I follow the more commonly used practice today of using the term “Latinx” to refer to individuals with ancestral or direct heritage in Latin America. See, e.g., Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 IND. L.J. 1455 *passim* (2022); Ediberto Román & Ernesto Sagás, *Rhetoric and the Creation of Hysteria*, 107 CORNELL L. REV. ONLINE 188, 216 (2022); Jasmine B. Gonzales Rose, *Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection*, 44 N.Y.U. REV. L. & SOC. CHANGE 309 *passim* (2020). I use the term “Latinx” instead of “Hispanic” because the term “Hispanic” is a reference to language, “referring to people from or with a heritage rooted in Spanish-speaking Latin American countries or Spain.” *Latine vs. Latinx: How and Why They’re Used*, DICTIONARY.COM (Sept. 26, 2022), <https://www.dictionary.com/e/latine-vs-latinx> [<https://perma.cc/H9YW-TZJ6>]; see also Bos. Univ. Ctr. for Antiracist Rsch., Comment Letter on Notice of Initial Proposals for Updating OMB’s Race and

simply “call[ing] balls and strikes”<sup>22</sup> (as opposed to choosing how to re-write past precedent and which facts to emphasize and ignore).

This Comment seeks to guide readers through this narratological re-reading by offering a critical examination of *SFFA*. Part I of this Comment provides a brief account of narratology, storytelling, and their imports. Part II delves into the doctrine of affirmative action in higher education, detailing the assumptions — the “*doxa*” — underlying the decision in *SFFA* and highlighting how the Chief Justice revised history, precedent, and reality to craft new doctrine about what the Fourteenth Amendment requires of colleges and universities in their admissions processes.

Part III then reveals a major danger in the majority’s presumption that the suppression of an applicant’s checked racial-identification box or boxes will somehow remove racial considerations in all aspects of an applicant’s file review except the essay portions. It does so by highlighting how race, a social construct,<sup>23</sup> and the effects of racism are

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Ethnicity Statistical Standards 4 n.15 (Apr. 25, 2023), <https://www.bu.edu/antiracism-center/files/2023/04/2023.4.25-BU-CAR-Comment-on-Proposals-for-Updating-Race-and-Ethnicity-Statistical-Standards.pdf> [<https://perma.cc/G8N9-UKAZ>] (“The Center recognizes that the terms ‘Hispanic’ and ‘Latino’ are controversial and debated. ‘Hispanic’ has a colonial history. The term de-emphasizes Latino / a / e connection to the Americas and emphasizes Spanish heritage over Indigenous and African heritage. ‘Hispanic’ also excludes the population descended from Latin America who do not share Spanish as a heritage language, but who may have similar racialized experiences in the United States.”). Individuals from Spain are not included in general references to people of color, and my arguments are referring to Hispanic individuals who are identified as people of color in the United States and who may have lived experiences as people of color in the United States. Also, many people who identify as Latinx object to “grouping Latinx people together under the language of their colonizers.” Sophie Yarin, *If Hispanics Hate the Term “Latinx,” Why Is It Still Used?*, BU TODAY (Oct. 7, 2022), <https://www.bu.edu/articles/2022/why-is-latinx-still-used-if-hispanics-hate-the-term> [<https://perma.cc/87PM-HZWM>] (quoting author Sandra Cisneros as once asserting: “To say Hispanic means you’re so colonized you don’t even know for yourself, or someone who named you never bothered to ask what you call yourself. It’s a repulsive slave name.”). I also prefer to use the term “Latinx” because it is more “inclusive of [people from] countries where Spanish is not the most widely spoken language, such as Brazil.” *Latine vs. Latinx: How and Why They’re Used*, *supra*. Furthermore, I use the term “Latinx” instead of “Latino” and “Latina,” which are the masculine and feminine forms, respectively, of the word, to avoid gendered language when my intention is to be gender-inclusive and to be inclusive of individuals who do not identify as either a man or a woman. *See id.* Although the term “Latinx” has no Spanish pronunciation and another term growing in favor “Latine” has a Spanish pronunciation, I use the term “Latinx” instead of “Latine” because “Latinx” is currently the more commonly used term in legal scholarship; thus, to my mind, it is more readily recognizable as an intentional use of a gender-neutral term. I use the term “Latinx” “here with an awareness that [it] may be imperfect.” *See* Bos. Univ. Ctr. for Antiracist Rsch., *supra*.

<sup>22</sup> *Roberts Confirmation Hearing*, *supra* note 1, at 56.

<sup>23</sup> As numerous sociologists and scholars have shown, race is socially constructed. *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 108–09 (3d ed. 2015) (asserting that racial formation is a “sociohistorical process by which racial identities are created, lived out, transformed,” *id.* at 109, and shaped by social, historical, and political forces, which in turn creates social meaning or meanings that are attached to different racialized groups (emphasis omitted)); *see also, e.g.*, Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, And Why Title VII Should Apply Even if Lakisha and Jamal*

frequently present in considerations of every applicant's file, whether or not an applicant's self-identified race is explicitly known by admissions-file reviewers. More importantly, Part III shows why the Court's move away from explicit race consciousness in admissions will work to deepen rather than lessen the impacts of racial bias. Specifically, Part III utilizes social science research to demonstrate why refusing to explicitly acknowledge race and, in fact, trying to suppress considerations of race will actually make it impossible to remove implicit, as well as explicit, racial bias from the admissions evaluation process. Implicit bias research reveals that making race salient in the assessment of people — as is done with the review of admissions files during a holistic review process — may be a necessary precursor to reducing the effects of nonconscious racial bias.<sup>24</sup> Furthermore, much like scholars such as Professors Devon Carbado, Cheryl Harris, Jonathan Feingold, and Stacy Hawkins have done and as Justices Sotomayor and Jackson did in their *SFFA* dissents, Part III argues that the discontinuation of the use of race in admissions will actually result in further racial discrimination against applicants of color, particularly Blacks, in the admissions process.<sup>25</sup> Finally, this Comment concludes with lessons on how future stories about race, racism, education, and admissions can and should be re-framed to ensure a truly equal society for all.

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*Are White*, 2005 WIS. L. REV. 1283, 1295 (“[R]ace, although considered primarily in terms of physical features, carries different meanings based upon societal understandings of particular groups.”). Chief Justice Roberts, however, treated race as a mere physical fact, defining it solely as skin color. See, e.g., *SFFA*, 143 S. Ct. at 2176 (referring to race as the color of a person's skin). Unlike Chief Justice Roberts, Justice Thomas noted that “race is a social construct,” asserting that “over time, these ephemeral, socially constructed categories have often shifted.” *Id.* at 2201 (Thomas, J., concurring).

<sup>24</sup> See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 606 (2006) (“Compared with participants in the race-neutral condition, participants who answered race-relevant jury selection questions were less likely to vote guilty before deliberating and gave lower estimates of the likelihood of the Black defendant's guilt.”); see also Samuel R. Sommers & Phoebe C. Ellsworth, “Race Salience” in *Juror Decision-Making: Misconceptions, Clarifications, and Unanswered Questions*, 27 BEHAV. SCIS. & L. 599, 599–601, 605 (2009) (detailing and explaining the researchers' findings across a number of studies that racial bias is reduced in jurors' decisionmaking when race is made salient among the issues at trial because race-relevant content makes salient for white people their concerns about not appearing prejudiced or living up to their expressed antiracist commitments and, conversely, that “racial bias is most likely to emerge absent salient racial issues at trial,” *id.* at 605, because Whites are less concerned about racism or appearing racist in non-race-salient situations). In fact, this requirement of race consciousness needed to reduce the effects of implicit bias also applies to any nonconscious bias that individual Asian American students could be experiencing during admissions processes. See *infra* section III.B, pp. 236–39.

<sup>25</sup> See generally Jonathan P. Feingold, *Colorblind Capture*, 102 B.U. L. REV. 1949, 1982–2004 (2022); Stacy Hawkins, *Race-Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?*, 43 J. COLL. & U.L. 151, 165–66 (2017); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1148 (2008).

## I. DEFINING NARRATOLOGY

*Narratology . . . pays attention to the parts of narrative and how they combine in a plot; to how we understand the initiation and completion of an action; to standard narrative sequences (stock stories, one might say); and to the movement of a narrative through a state of disequilibrium to a final outcome that re-establishes order.*

— Professor Peter Brooks<sup>26</sup>

Stories and storytelling play a critical role in the law.<sup>27</sup> Litigators work to develop stories that they can offer, both as an overall frame and as individual components, throughout their cases to help jurors and judges understand their arguments better and to ultimately convince them to side with their clients.<sup>28</sup> Clinical professors model and teach their students about the importance of constructing narratives for judges and juries.<sup>29</sup> Critical Race Theorists highlight the importance of outgroups telling their own individual and collective stories to provide counter-realities to the dominant narratives that have pervaded society and reinforced status quo hierarchies and oppressions.<sup>30</sup> In summary, stories are vital to lawyering and the legal profession because “the ways stories are told, and are judged to be told, make[] a difference in the law.”<sup>31</sup>

Narratology, the study of how events are presented through narratives, can help us understand not only how a telling has been constructed in parts, but also from whose lens the story and its parts have been told and, relatedly, whose perspectives and tellings were not included or were

<sup>26</sup> Brooks, *supra* note 4, at 2.

<sup>27</sup> See *id.* at 2–3.

<sup>28</sup> See *id.* at 2. But see Posner, *supra* note 1, at 293 (asserting that “[t]his is not how the law conceptualizes the trial process,” as “[t]he law requires the plaintiff to prove each element of his claim by a preponderance of the evidence (beyond a reasonable doubt if it is a criminal case)”).

<sup>29</sup> See, e.g., Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, From Clinic to the Classroom*, 7 J. ASS’N LEGAL WRITING DIRS. 37, 43–60 (2010) (discussing how the author uses narrative and storytelling to train future lawyers in clinical and doctrinal courses); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2111–12, 2119–20 (1991) (detailing not only the importance of a lawyer’s construction of narratives, but also the need to ensure that the narratives are in the voice or voices of the client or clients, particularly those who are vulnerable).

<sup>30</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) (stating that “stories of outgroups aim to subvert that ingroup reality”); see also Brooks, *supra* note 4, at 2 (noting that “legal storytelling has the virtue of presenting the lived experience of marginalized groups or individuals”); Tayyab Mahmud, *What’s Next? Counter-Stories and Theorizing Resistance*, 16 SEATTLE J. FOR SOC. JUST. 607, 617–19 (2018) (discussing the power of legal storytelling by marginalized individuals to unsettle dominant, often oppressive, narratives and worldviews).

<sup>31</sup> Brooks, *supra* note 4, at 3.

trivialized within the narrative.<sup>32</sup> Additionally, studying perspectives of telling can expose the “*doxa*” or the “set of unexamined cultural beliefs” that have structured the narrator’s “understanding of everyday happenings.”<sup>33</sup> Scrutinizing this set of unexamined beliefs is particularly important in a common law structure governed by a system of precedent that is designed to protect and reinforce the status quo.<sup>34</sup> After all, legal precedents inform what facts and even whose facts and perspectives, given that human beings write and develop case law, are relevant and valid for consideration. Examining the *doxa* in legal opinions is also critical in a society like ours where whiteness is the presumed norm; where people of color of all kinds are routinely “othered”; and where the experiences of white people, who have the privilege of remaining largely unaware of how race shapes their daily lives, undergird and control the narratives in opinions that govern all people in the nation.<sup>35</sup> As Professor Richard Delgado has explained, such “bundle[s] of presuppositions” tend to function “like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.”<sup>36</sup> In this way, these presuppositions, particularly when they are told and retold from the perspective of those in the dominant group, come to “seem fair and natural” (at least in the eyes of those on the inside), even as they exclude the realities of some individuals’ lives, realities very much linked to factors like race and racism.<sup>37</sup>

A narratological analysis also can reveal why a narrative has been developed and communicated in a particular way. It may uncover what Brooks calls the “narrative glue,” meaning why incidents, events, beliefs, and thoughts were brought together in a certain frame to offer a

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<sup>32</sup> See *id.* at 2.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> See Gabriela Vasquez, *American Exclusion Doctrine: A Response to Liberal Defenses of Stare Decisis*, 28 NAT’L BLACK L.J. 1, 10 (2022) (“Precedent allows courts to maintain a racist status quo, whether that means relying on prior legal rules that were based on racist reasoning, or ignoring good precedents . . .”).

<sup>35</sup> See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 639–45 (2008) (noting that “[w]hiteness [is] the [d]ominant [m]easure of [r]acial [n]orms” in society, *id.* at 639, and explaining that “[w]hite privilege establishes whiteness as society’s baseline or norm, ultimately determining who has presumptive access to citizenship, material goods, political power, and social standing”; that “white privilege remains largely unacknowledged”; and that the “existence of white privilege allows white people of good will — many with antiracist views — to benefit from the privileged white norms,” *id.* at 645); Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM, July–Aug. 1989, at 1, 3, [https://psychology.umbc.edu/wp-content/uploads/sites/57/2016/10/White-Privilege\\_McIntosh-1989.pdf](https://psychology.umbc.edu/wp-content/uploads/sites/57/2016/10/White-Privilege_McIntosh-1989.pdf) [<https://perma.cc/NV3N-RB3L>] (speaking generally regarding white people’s “obliviousness about white advantage,” *id.* at 3, and describing white privilege as “an invisible package of unearned assets which [she] can count on cashing in each day, but about which [she] was ‘meant’ to remain oblivious,” *id.* at 1).

<sup>36</sup> Delgado, *supra* note 30, at 2413.

<sup>37</sup> *Id.*



meaningful story.<sup>38</sup> In particular, it may reveal why precise parts of the story were selected to be included in the narrative and why other parts were omitted, ignored, and/or trivialized by the narrator.<sup>39</sup> Most importantly, it can highlight why certain narratives have grown into stock stories, meaning stories that those in power collectively cultivate and tell to “construct reality in ways favorable to”<sup>40</sup> them and to justify “the world as it is.”<sup>41</sup> All of these factors are critical to the interpretation of law and to an assessment of what legal doctrine can and should be on a wide variety of issues.

Critically, narratological reads of legal opinions can help lift the false veil of neutrality and pure objectivity that has been donned over the law.<sup>42</sup> They can, for example, make clear that “[t]he ‘facts of the case’ . . . never are neutral or innocent [ — that] their telling has a certain narrative design and intention.”<sup>43</sup> Narratological reads can expose how the prevailing mindset or assumed norms in a case may work to routinely advantage members of some groups while systematically working to disadvantage members of other groups.<sup>44</sup> In this sense, they can make way for the acknowledgment and acceptance of counterstories that challenge generally adopted beliefs about society or racial groups.<sup>45</sup> Furthermore, they may explain why modes of legal interpretation over a period of time have developed into “a generally accepted discourse” and understanding.<sup>46</sup>

Indeed, applying a narratology to *SFFA* helps to lay bare why Chief Justice Roberts constructed the majority opinion as he did. It reveals why he omitted key parts of history — specifically, the adapted and ever-evolving forms of structural and explicit racism encountered by Blacks and Latinxs in the United States from Reconstruction to the passage of the Civil Rights Act of 1964 — from his recounting of the history he argued mandated the holding in *SFFA*. Similarly, it exposes why and

<sup>38</sup> Brooks, *supra* note 4, at 10. Additionally, applying a narratology to law is important because laws often determine how narratives can be told. *Id.* at 20–21. For instance, “[a]ppellate courts are not supposed to second-guess,” reshape, or redetermine facts determined by the factfinder at the trial level, but instead reach pronouncements on the lower court’s nonerroneous facts under the appropriate standard of review. *Id.* at 21.

<sup>39</sup> See *id.* at 10; see also, e.g., Delgado, *supra* note 30, at 2421 (noting that a “stock story” in law often “picks and chooses from among the available facts to present a picture of what happened: an account that justifies the world as it is”).

<sup>40</sup> Delgado, *supra* note 30, at 2438.

<sup>41</sup> *Id.* at 2421.

<sup>42</sup> See Barnes, *supra* note 2, at 953–54; see also, e.g., Delgado, *supra* note 30, at 2418–35 (showing through the use of storytelling how narratives can unveil the “seeming neutrality” of a stock story, *id.* at 2422).

<sup>43</sup> Brooks, *supra* note 4, at 17.

<sup>44</sup> Delgado, *supra* note 30, at 2413 (arguing that the principal instrument for subordinating people of color is “the prevailing *mindset* by means of which members of the dominant group justify the world as it is, that is, with whites on top and browns and blacks at the bottom”).

<sup>45</sup> *Id.* at 2438–40.

<sup>46</sup> Brooks, *supra* note 4, at 20.

how Chief Justice Roberts misled his audience through the misuse of quotes and the recasting of words from prior opinions by the Court. It also demonstrates why the narrative that Chief Justice Roberts spun — a narrative emerging from his lived reality in the transparency phenomenon — may even “seem fair and natural,”<sup>47</sup> given the transparent frame with which even positive precedents like *Grutter v. Bollinger*<sup>48</sup> have been told.<sup>49</sup>

## II. UNVEILING A MAJORITY NARRATIVE ROOTED IN THE TRANSPARENCY PHENOMENON AND DETACHED FROM THE NATION’S ACTUAL RACIAL PAST AND PRESENT

*The selection of facts is the nonfiction narrator’s prerogative. The invention of facts, and only a little less culpably the omission of facts without which the narrative will mislead, is the nonfiction narrator’s temptation.*

— Judge Posner<sup>50</sup>

Examining *SFFA* with a narratological lens shows how the parts of the opinion’s narrative concerning race and admissions have been combined in a way that presumes, assumes, and reinforces the transparent racial lens through which many white people, including nearly all the Justices in the majority, view society. In *SFFA*, the *doxa* — the “set of

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<sup>47</sup> Delgado, *supra* note 30, at 2413.

<sup>48</sup> 539 U.S. 306 (2003).

<sup>49</sup> For instance, scholars have critiqued how the diversity rationale in *Grutter* centered more on the interests of Whites, such as the businesses that submitted amicus briefs, than the interests of Black and Latinx people in remedying past and current racism. See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003) (“Thus, it was diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers, that gained [Justice] O’Connor’s vote. Once again, blacks and Hispanics are the fortuitous beneficiaries of a ruling motivated by other interests that can and likely will change when different priorities assert themselves. When she perceived in the Michigan Law School’s admissions program an affirmative action plan that minimizes the importance of race while offering maximum protection to whites and those aspects of society with which she identifies, she supported it.”); see also Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 470 (2014) (“The diversity rationale as currently deployed, however, does not undermine this myth. Rather, it lends credence to notions of white innocence, affirms belief in a false meritocracy, promotes individualism inimical to understanding power differentials between racial groups, perpetuates the idea of white racial transparency, and reinforces a relationship of subordination between Whites and non-Whites.”); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J.C.R. & C.L. 171, 172–75 (2005) (discussing how justifying affirmative action through the benefits of diversity has been more palatable than rooting it in the need to “remedy past discrimination,” *id.* at 173, because it is “more forward-looking” and seems “more inclusive” and because “a wide range of persons can envision themselves as potential beneficiaries of such programs,” *id.* at 175).

<sup>50</sup> Posner, *supra* note 1, at 303.

unexamined cultural beliefs” that have structured the Court’s holding and reasoning — are the racialized-white view that race plays no meaningful role in “everyday happenings”<sup>51</sup> and, more specifically, that race will be salient in the review of an applicant’s file only once the applicant’s checked racial-identification box is explicitly noted through affirmative action. Indeed, the majority opinion in *SFFA*, along with some of the concurring opinions, spoke as if race is an identity that only people of color have. It narrowly defined race as being simply skin color.<sup>52</sup> It assumed that the only kind of racism is Jim Crow racism, and it presumed that racism is not an everyday occurrence. It also assumed history and individual context do not matter in defining merit in selective admissions, and it presumed that white people do not continue to benefit from past explicit racism against people of color. Generally, the opinion reflects an unconsciousness of whiteness and the general privileges attached to whiteness; more pointedly, it reveals an unawareness about the unearned advantages that may come to white individuals simply as a result of their race in the admissions process.<sup>53</sup> According to Flagg, the “transparency phenomenon”<sup>54</sup> is the tendency of Whites to not think about their whiteness; to not consider how norms, behaviors, perspectives, and expectations in our society have all been built around and defined around the experiences of Whites; and to fail to appreciate how those norms, perspectives, and expectations are then imposed upon people of color in ways that systemically disadvantage people of color and routinely advantage white people.<sup>55</sup> As Flagg further explains, “[t]ransparency operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites

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<sup>51</sup> Brooks, *supra* note 4, at 11.

<sup>52</sup> *SFFA*, 143 S. Ct. at 2175 (referring to a “judiciary that picks winners and losers based on the color of their skin”); *see also id.* at 2170 (suggesting, implicitly, that where someone is from, like a city or suburb, or how well someone plays the violin, shapes who they are in a way that race does not, and discounting how having to regularly grapple with the social meanings attached to Blackness, for example, might shape who a Black person is differently than it would a white student by asserting that it is demeaning to think that one’s racial experiences make them different from nonminority students in any way).

<sup>53</sup> *See* McIntosh, *supra* note 35, at 2–3 (“The pressure to avoid [white privilege in my realizations] is great, for in facing it I must give up the myth of meritocracy. If these things are true, this is not such a free country; one’s life is not what one makes it; many doors open for certain people through no virtues of their own. . . . This paper results from a process of coming to see that some of the power which I originally saw as attendant on being a human being in the U.S. consisted in *unearned advantage* and *conferred dominance*.”); *see also infra* section III.A, pp. 218–35 (detailing how social meanings attached to Blackness and perceived Blackness, and whiteness and perceived whiteness, can routinely disadvantage Black students and routinely advantage white students in the admissions process).

<sup>54</sup> Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2012–13 (1995); Flagg, *supra* note 16, at 957–60, 970.

<sup>55</sup> Flagg, *supra* note 16, at 957–58, 969–70; Flagg, *supra* note 54, at 2013 (“[W]hite people frequently interpret norms adopted by a dominantly white culture as racially neutral, and so fail to recognize the ways in which those norms may be in fact covertly race-specific.”).

over blacks even when decisionmakers intend to effect substantive racial justice.”<sup>56</sup>

This Part of the Comment applies a narratological reading to the *SFFA* decision, unveiling the *doxa* undergirding Chief Justice Roberts’s narrative, and exposing the facts, historical and otherwise, that he chose to emphasize and omit in order to buttress the majority’s holding. This Part also reveals how Chief Justice Roberts combined these *doxa* and omissions, pulled decontextualized quotes from past precedent, and re-wrote prior case law to force a new understanding of what the Equal Protection Clause requires in the affirmative action landscape.

Indeed, Chief Justice Roberts began his opinion in *SFFA* with a statement that made plain that he was viewing only Black and Latinx people as those with a race. In his introduction, he wrote in relevant part: “Gaining admission to Harvard is thus no easy feat. It can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on *your race*.”<sup>57</sup>

As the rest of the Chief Justice’s opinion made clear, the first three factors would survive constitutional scrutiny; only the fourth would not.<sup>58</sup> By “your race,” Chief Justice Roberts was not referring to white people, including the primarily white group of legacies who possess a disproportionately high chance of gaining admission into Harvard or UNC,<sup>59</sup> nor did he seem to be referring (in the negative) to Asian Americans, the very applicants upon whom Students for Fair Admissions, Inc. premised its claims of discrimination and unconstitutionality.<sup>60</sup> Rather, the Chief Justice’s words made clear that he was speaking of only Black and Latinx people. As he later wrote, “[i]n the Harvard admissions process, ‘race is a determinative tip for’ a significant percentage ‘of all admitted African American and Hispanic applicants.’”<sup>61</sup> When “your race” means the same race as the majority of applicants previously admitted since the institution’s founding, that is not a factor in gaining admission. It is simply *doxa*.

The *doxa* underlying the Chief Justice’s arguments — among them, the understanding of whiteness as racelessness and the belief that the

<sup>56</sup> Flagg, *supra* note 16, at 957.

<sup>57</sup> *SFFA*, 143 S. Ct. at 2154 (emphasis added) (citation omitted) (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 166–69 (1st Cir. 2020)).

<sup>58</sup> *Id.* at 2175.

<sup>59</sup> *Id.* at 2249–50 (Sotomayor, J., dissenting) (discussing athletes, legacies, applicants on the Dean’s Interest List, and the children of faculty or staff (ALDCs); noting that Whites comprise nearly 68% of those applicants while Blacks and Latinxs comprise only approximately 6% each of those applicants; and asserting that ALDCs “constitute ‘around 30% of the applicants admitted each year’ even though they make up less than 5% of the applicants to Harvard, *id.* at 2215 (quoting *SFFA*, 980 F.3d at 171)).

<sup>60</sup> See Flagg, *supra* note 54, at 2013 (noting that “whites tend to regard whiteness as racelessness”).

<sup>61</sup> *SFFA*, 143 S. Ct. at 2155 (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019)).

norms being applied in determining admissions are race neutral — in turn helped him craft a common stock story in *SFFA* about how considering race during the admissions process is nonmeritocratic and disturbs an otherwise race-neutral, meritocratic process.<sup>62</sup> Yet, to develop and narrate this stock story, the Chief Justice had to craft a revised account of this nation’s history, one that ignored, as Justice Jackson noted in her dissent, “the well-documented ‘intergenerational transmission of inequality’ that still plagues our citizenry.”<sup>63</sup> Specifically, Chief Justice Roberts chose to relay only part of the story of this nation’s history of racial oppression and subordination of Black and Latinx peoples and essentially none of this nation’s story about the continuing social significance of race and persistence of racism. Based on the Chief Justice’s telling, one could conclude only that race and racism are largely irrelevant to the story of the United States today. In fact, according to the Chief Justice’s articulation of this nation’s history — which did not even acknowledge its more than 200 years of enslavement of Black people<sup>64</sup> — following the Civil War, the proposal and ratification of the Fourteenth Amendment by Congress and the States gave “to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it [gave] to the most powerful, the most wealthy, or the most haughty.”<sup>65</sup> Then, according to Chief Justice Roberts, the nation overcame what he referred to as “a regrettable norm” of state-mandated racial segregation by overturning the separate-but-equal doctrine in *Plessy v. Ferguson*<sup>66</sup> through *Brown v. Board of Education*<sup>67</sup> (*Brown I*) in 1954.<sup>68</sup> In so doing, he highlighted language in the second *Brown v. Board of Education*<sup>69</sup> (*Brown II*), suggesting, and misleading readers to think, that *Brown II*’s requirement of “full compliance” with the mandate to desegregate<sup>70</sup> immediately resulted in integration and equality in this nation’s public schools, even though *Brown II* is widely criticized by historians as being so conciliatory that

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<sup>62</sup> See Brooks, *supra* note 4, at 11 (“Conversely, those *doxa* produce stock narratives, ways that things ‘are supposed to happen.’”). *But see infra* section III.A, pp. 218–35 (detailing how race may always be present during admissions processes).

<sup>63</sup> *SFFA*, 143 S. Ct. at 2264 (Jackson, J., dissenting) (quoting MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH / WHITE WEALTH* (2d. ed. 2006)).

<sup>64</sup> *But see id.* at 2226 (Sotomayor, J., dissenting) (discussing how the original Constitution protected the institution of slavery and the slave trade and counted Black people as three-fifths of a person for the purposes of determining white people’s electoral power, how slavery prohibited the education of Black people, and how “the freedom to learn was neither colorblind nor equal”).

<sup>65</sup> *Id.* at 2159 (majority opinion) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard)).

<sup>66</sup> 163 U.S. 537 (1896).

<sup>67</sup> 347 U.S. 483 (1954).

<sup>68</sup> *SFFA*, 143 S. Ct. at 2159.

<sup>69</sup> 349 U.S. 294 (1955).

<sup>70</sup> *Id.* at 295.

it instigated greater resistance and dissent from white southerners.<sup>71</sup> In making this declaration, the Chief Justice even drew a parallel between the affirmative action that he was lambasting in *SFFA* and past state-mandated racial segregation that was explicitly premised on Black inferiority, asserting that “the inherent folly of that approach — of trying to derive equality from inequality — soon became apparent.”<sup>72</sup> In all, the Chief Justice offered a stunning rearticulation of our nation’s history, a retelling that Justice Sotomayor described in her dissent as “nothing but revisionist history.”<sup>73</sup>

Ironically, in the midst of his own blistering critique of *SFFA*’s two dissenting opinions, Chief Justice Roberts did more than omit key parts of the United States’s full history: he also excluded important words from a previous Justice’s dissent, using this omission to bolster his narrative in *SFFA*. While declaring through another quote that “Justice Harlan knew better” than the other Justices,<sup>74</sup> Chief Justice Roberts highlighted the following language from Justice Harlan’s riveting dissent in *Plessy v. Ferguson*: “[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>75</sup>

But in sharing Justice Harlan’s words about colorblindness and the Constitution, the Chief Justice failed to acknowledge three important sentences that immediately preceded the famous quote from Justice Harlan, three sentences in which Justice Harlan himself seemed to pronounce the superiority of the white race. Indeed, right before Justice Harlan asserted that the Constitution was colorblind and that there was “no caste” in the United States in his dissent in *Plessy*, he wrote the following three sentences about the dominance of the “white race”:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains

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<sup>71</sup> *SFFA*, 143 S. Ct. at 2160. In Justice Thomas’s concurrence, he actually referred approvingly to the language “all deliberate speed” from *Brown II*. *Id.* at 2176 (Thomas, J., concurring). In doing so, Justice Thomas stated that “the Court finally corrected course in [*Brown I*], announcing that primary schools must either desegregate with all deliberate speed or else close their doors,” but Justice Thomas then claimed that the Court “pulled back in *Grutter v. Bollinger*, permitting universities to discriminate based on race.” *Id.* (citations omitted) (citing *Brown I*, 347 U.S. 483; *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003)). Historians have critiqued this purposefully conciliatory language from the Court as a “mistake” that invited greater resistance and defiance. See LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* 351 (1966); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 319, 335–442 (2004).

<sup>72</sup> *SFFA*, 143 S. Ct. at 2160.

<sup>73</sup> *Id.* at 2232 (Sotomayor, J., dissenting). Both Justices Sotomayor and Jackson offer more complete histories in their dissents. See generally *id.* at 2225–35; *id.* at 2264–70 (Jackson, J., dissenting).

<sup>74</sup> *Id.* at 2175 (majority opinion) (quoting *id.* at 2265 (Jackson, J., dissenting)).

<sup>75</sup> *Id.* (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

true to its great heritage and holds fast to the principles of constitutional liberty.<sup>76</sup>

As the field of narratology can teach us, the fact that the Chief Justice excluded this reference by Justice Harlan to the racial superiority of white people is not without meaning.<sup>77</sup> After all, as Brooks asserts, “[n]arratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results. And to do so they necessarily espouse some sort of ‘point of view’ or perspective, however hidden it may be, even from narrators themselves.”<sup>78</sup> Including these disconcerting words by Justice Harlan, words that make a nod to white superiority, would have disrupted the sanitized and simplistic narrative about the racial history of the United States that Chief Justice Roberts was telling to bolster the majority’s holding. In fact, the Chief Justice could have just as easily cited other words from Justice Harlan that expressed a clear view in favor of direct actions to enforce the Fourteenth Amendment and other Reconstruction Amendments by remedying past and lingering effects of racism caused during and by the enslavement of Black people. After all, just thirteen years prior to *Plessy*, in the *Civil Rights Cases*,<sup>79</sup> Justice Harlan had once before parted from the majority on the Court, a majority that, as Justice Jackson detailed, declared less than twenty years after the end of the Civil War that “there must be some stage . . . when [Black Americans] tak[e] the rank of a mere citizen, and ceas[e] to be the special favorite of the laws.”<sup>80</sup> In his dissent in the *Civil Rights Cases*, Justice Harlan wrote:

*It is, I submit, scarcely just to say that the colored race has been the special favorite of the laws. The statute of 1875, now adjudged to be unconstitutional, is for the benefit of every race and color. What the nation, through Congress, has sought to accomplish in reference to that race, is — what had already been done in every State of the Union for the white race — to secure and protect rights belonging to them as freemen and citizens . . .*<sup>81</sup>

<sup>76</sup> *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

<sup>77</sup> Brooks, *supra* note 4, at 25. There are different readings of Justice Harlan’s words concerning the dominance of the white race. For example, author Peter Canellos has offered some alternative readings of Justice Harlan’s words about the white race being the dominant race in this country that “will continue to be for all time.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting); see Peter S. Canellos, *We Shouldn’t Stop Talking About Justice John Marshall Harlan*, POLITICO (July 11, 2023, 4:58 AM), <https://www.politico.com/news/magazine/2023/07/11/supreme-court-justice-marshall-harlan-00105460> [https://perma.cc/93B3-9G9Y]. Canellos asserts: “One explanation would be that he was drawing a distinction between legal equality and individual achievements. Many people who advocated for an end to slavery and constitutional rights for Black people, including Abraham Lincoln, drew a line between legal and social equality, reminding white people that they didn’t have to like their neighbors to respect their rights.” *Id.*

<sup>78</sup> Brooks, *supra* note 4, at 13.

<sup>79</sup> 109 U.S. 3 (1883).

<sup>80</sup> *SFFA*, 143 S. Ct. at 2265 (Jackson, J., dissenting) (alteration in original) (quoting *The Civil Rights Cases*, 109 U.S. at 25).

<sup>81</sup> *The Civil Rights Cases*, 109 U.S. at 61 (Harlan, J., dissenting) (emphasis added).

But the Chief Justice ignored these critical words from Justice Harlan, words that reveal Justice Harlan really did know better on one point — that he knew “the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system.”<sup>82</sup>

Indeed, at no point during his *SFFA* narrative did the Chief Justice acknowledge the fuller histories that Justices Sotomayor and Jackson offered in their dissents. At no point did he describe how racism — including law’s role in defining and facilitating such racism — had morphed and adapted over significant periods of time to prevent Black people from attaining the same protections and rights that he claimed were granted and realized after the Civil War. Instead, the Chief Justice focused merely on formal rules — what the rules and laws said on paper after the Civil War, post-*Plessy*, and after the Civil Rights era — rather than the actual realities of race and rights in the United States — the substantive conditions under which Black, Latinx, Asian American, and Indigenous peoples operated from each of those moments on through to today. For instance, in describing the aftermath of *Brown*, he never referred to the massive resistance to desegregation efforts after *Brown* — the tyranny over and violence against Blacks in response to *Brown*,<sup>83</sup> the shutting down of schools in reaction to *Brown I* and *Brown II*,<sup>84</sup> the provision of state funds in southern states to send white children to private schools,<sup>85</sup> plus more. Instead, he described *Brown* simply as setting the Court “firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government.”<sup>86</sup> And, he did so without acknowledging, as Justice Sotomayor did in her dissent, that “*Brown* was a race-conscious decision that emphasized the importance of education in our society” and that *Brown*’s goal “was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness.”<sup>87</sup> In the eyes of the Chief Justice, the Court had done all that it could (and

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<sup>82</sup> *SFFA*, 143 S. Ct. at 2232 n.3 (Sotomayor, J., dissenting).

<sup>83</sup> See, e.g., MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* 28–29 (1987) (noting, in the four years following *Brown II*, more than 200 incidents of terrorization, including cross burnings, Klan rallies, death threats, and 225 anti-civil rights acts of brutality that involved six murders of Black people, twenty-nine armed assaults, and forty-four beatings in the eleven states of the old confederacy).

<sup>84</sup> See Sumi Cho, *From Massive Resistance, To Passive Resistance, To Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 815–16 (2005) (“Creative and common forms of administrative defiance of *Brown* that garnered the state of Virginia recognition as the ‘showplace for segregation devices’ included closing schools altogether rather than desegregating, cutting off funding for schools under integration orders, and providing tuition grants for white children to attend ‘private,’ i.e., white schools.” (footnotes omitted) (quoting GERALD N. ROSENBERG, *THE HOLLOW HOPE* 79 (1991))).

<sup>85</sup> See *id.*

<sup>86</sup> *SFFA*, 143 S. Ct. at 2160 (citing *Brown I*, 347 U.S. 483, 494–95 (1954)).

<sup>87</sup> *Id.* at 2231 (Sotomayor, J., dissenting).



should) do through the formal expression of equality under the law to live up to the commitments of a colorblind (though actually never colorblind) Constitution.

The Chief Justice then continued his narrative of how the law ensured equality following the adoption of the Fourteenth Amendment, noting how post-*Brown* cases “vindicate[d] the Constitution’s pledge of racial equality” in “parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries” — all with no acknowledgment of what the substantive realities of life under those cases and laws were like for Black people in the United States.<sup>88</sup> Again, he ignored many of the forms of discrimination and subordination that Justices Jackson and Sotomayor included in their fuller versions of the nation’s history (like redlining), denying the existence of anything other than Jim Crow separate-but-equal racism.

Chief Justice Roberts’s narrative in *SFFA* was nearly identical to the stock story of racial reform that Delgado explains has been used to rearticulate the historical narrative of the United States in ways that erase the experiences of Black people in the country. In his seminal article *Storytelling for Oppositionists and Others: A Plea for Narrative*, Delgado details a stock story of racial progress that begins with an acknowledgment of slavery as a “terrible” part of the nation’s “[e]arly . . . history” (though the Chief Justice never even mentioned slavery), moves on to the end of slavery after the Civil War, shifts to the purported end of racism after *Brown* and the passage of civil rights legislation during the 1960s, and finally ends with a story of current racial disparities with the blame placed on Black people for their purported “dependency and welfare mentality.”<sup>89</sup>

Not surprisingly, consistent with the ahistorical stock narrative that Chief Justice Roberts offered about racial reform in the United States, he persisted in the rest of his *SFFA* opinion to define “equally” or “equality” only in the formal sense, meaning to treat people exactly the same

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<sup>88</sup> *Id.* at 2161 (majority opinion).

<sup>89</sup> Delgado, *supra* note 30, at 2417. Here is the stock story as relayed by Delgado:

Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country’s racial sensitivity to blacks’ plight increased, the vestiges of slavery were gradually eliminated by federal statutes and case law. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent white victims of reverse discrimination. Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.

*Id.*

without any acknowledgment of context, and to ignore whether the formal rules were ever being honored in substance.<sup>90</sup> Throughout *SFFA*, he disregarded the real substantive differences between what Whites and people of color, particularly Black people, have experienced and experience around access to education, wealth, jobs, rights, livable wages, good healthcare, and a whole host of factors that shape the day-to-day lives of individuals based on structural racism in this country. In essence, the Chief Justice offered a narrative in *SFFA* that could “justify the world as it is, that is, with whites on top and browns and blacks at the bottom,”<sup>91</sup> whether or not it reflected realities of race other than his own and other Whites’.<sup>92</sup>

Most notably, Chief Justice Roberts rewrote precedent, specifically *Grutter v. Bollinger*, to bolster the majority’s holding and reasoning, cherrypicking language from the opinion and misrepresenting the opinion altogether. For example, at one point, the Chief Justice contended that the limits espoused by *Grutter* (for instance, bans on quotas or bans on insulating groups from competition for admissions) “were intended to guard against” the devolution of race into “illegitimate . . . stereotyp[ing].”<sup>93</sup> However, in so doing, the Chief Justice did not rely on *Grutter* at all; instead, he pulled a quote from *City of Richmond v. J.A. Croson Co.*,<sup>94</sup> which was endorsed by only a plurality of justices — like Justice Powell’s opinion in *Regents of the University of California v. Bakke*,<sup>95</sup> which the Chief Justice slighted in *SFFA* for being only a plurality opinion.<sup>96</sup> Just a sentence later, Chief Justice Roberts cited *Grutter* to support his conclusion that Harvard and UNC operated “their admissions programs on the ‘belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’”<sup>97</sup> Yet, a close reading of *Grutter* reveals two important ways in which the Chief Justice’s reliance on *Grutter* here was misleading. First, Harvard and UNC used race in their admissions programs in the same manner as the University of Michigan Law School did in *Grutter*, and the Court in *Grutter* praised the University of Michigan Law School precisely because it had not premised “its need for critical mass on ‘any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’”<sup>98</sup> Second, the Court in *Grutter* explicitly asserted that the force of stereotypes cannot be

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<sup>90</sup> *SFFA*, 143 S. Ct. at 2161.

<sup>91</sup> Delgado, *supra* note 30, at 2413.

<sup>92</sup> *Id.* at 2421, 2438.

<sup>93</sup> *SFFA*, 143 S. Ct. at 2165 (alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

<sup>94</sup> 488 U.S. 469 (1989).

<sup>95</sup> 438 U.S. 265 (1978).

<sup>96</sup> *SFFA*, 143 S. Ct. at 2165.

<sup>97</sup> *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

<sup>98</sup> *Grutter*, 539 U.S. at 333 (quoting Brief for Respondent at 30, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402236, at \*30).

diminished at schools “with only token numbers of minority students,” which *SFFA* is likely to yield at some schools.<sup>99</sup> In fact, the *Grutter* Court referred approvingly to the Chief Justice’s definition of racial stereotyping in *SFFA*, proclaiming: “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>100</sup>

Another illustration of the transparency phenomenon in Chief Justice Roberts’s *SFFA* opinion is his inability to see and understand the use of racial identifications in college and university admissions processes as anything other than a preference for Blacks and Latinxs. Yet, as Carbado, Feingold, and Professor Luke Harris argue, the view of race-based affirmative action practices as preferences is itself a flawed narrative; rather than creating preferences for certain racial groups, they contend, race-conscious admissions enable “fair[er] [and more accurate] appraisal[s] of each individual’s academic promise” precisely because of the many race-related disadvantages that Black students face in our society.<sup>101</sup> As Carbado explains, affirmative action enables a more accurate appraisal of a Black applicant’s individual academic promise by accounting for the ways in which Blacks are disadvantaged and Whites are advantaged by traditional definitions of merit in admissions processes. These advantages and disadvantages include the negative implicit racial biases against Black people and the corresponding assumptions of competence, deservedness, and excellence about white people; the negative impacts of stereotype threat on Black students and the absence of any such stereotype threat (based on race) for white people; plus so much more.<sup>102</sup> Indeed, as Carbado, Feingold, Cheryl Harris, and Luke Harris contend, relying solely or primarily on traditional merit criteria like standardized test scores and GPAs, which tend to underpredict the academic promise of Black students, without employing some

<sup>99</sup> *Id.*; cf. Vinay Harpalani, “Safe Spaces” and the Educational Benefits of Diversity, 13 DUKE J. CONST. L. & PUB. POL’Y 117, 151–52 (2017) (discussing how exposure to diversity within groups is critical to breaking down stereotypes).

<sup>100</sup> *Grutter*, 539 U.S. at 333.

<sup>101</sup> See Devon W. Carbado, Essay, *Footnote 43: Recovering Justice Powell’s Anti-preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1121–22 (2019) (contending such words from Justice Powell in footnote 43 of *Bakke* provide “a more appropriate understanding of affirmative action as a countermeasure”); see also Feingold, *supra* note 25, at 1957 (criticizing the Left for adopting a colorblind frame in responses to anti-affirmative action arguments, and noting how such a frame reproduces “a colorblind admissions story that insulates facially neutral processes from critique and rationalizes the over-representation of white (and often wealthy) students in elite institutions”); Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in the Regents of the University of California v. Bakke Decision*, 6 RSCH. POL. & SOC’Y 133, 145–47 (1999) (critiquing reliance on factors like standardized test scores in admissions where their predictive value is primarily limited to the first year and does not accurately predict the performance of Black students). See generally *infra* section III.A, pp. 218–35.

<sup>102</sup> Carbado, *supra* note 101, at 1122; see also *infra* section III.A, pp. 218–35.

form of affirmative action actually results in discrimination against Blacks.<sup>103</sup>

Despite Chief Justice Roberts’s statement near the end of *SFFA* that a “benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter,” he repeatedly demonstrated throughout the opinion that he had no ability to see this point in any way other than one that justified what he seemed to view as natural in the world.<sup>104</sup> Related to this point is the Chief Justice’s failure to recognize the built-in advantages that are invisibly and, in some cases, visibly, playing a role for white applicants during the admissions process.<sup>105</sup> Among these advantages is what Carbado, Professor Kate Turetsky, and Professor Valerie Purdie Greenaway call the “intergenerational value of whiteness,” meaning that when one is white in the United States, the individual “inherit[s] the historical badge of honor, privilege, respectability and positive social meanings associated with whiteness and white people.”<sup>106</sup> Among these advantages are all the ways in which white students are not burdened by the negative social meanings and stereotypes that get attached to being Black or Latinx; negative social meanings and stereotypes that can translate into greater scrutiny of one’s work, which can then result in overall lower evaluations and lower grades or second-rate reference letters; the racial isolation and negative institutional cultures that affect one’s performance in educational spaces;<sup>107</sup> and phenomena like stereotype threat,

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<sup>103</sup> Feingold, *supra* note 25, at 1992–2001 (detailing how reliance on traditional “merit” criteria results in discrimination against “negatively stereotyped racial groups,” *id.* at 1993–94, by “systematically understat[ing],” *id.* at 1993, their academic qualifications and showing how “affirmative action counters concrete and quantifiable racial advantages that flow to white applicants during the admissions process” *id.* at 1994); Carbado, *supra* note 101, at 1122 (citing Harris, *supra* note 101, at 145–47).

<sup>104</sup> *SFFA*, 143 S. Ct. at 2169; *see also* Delgado, *supra* note 30, at 2412 (“The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.”).

<sup>105</sup> *See infra* section III.A, pp. 218–35; *see also* Feingold, *supra* note 25, at 1993–2001.

<sup>106</sup> Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISCOURSE 174, 193 (2016).

<sup>107</sup> *See generally id.* at 192, 211–14; *see also* Kimberlé Williams Crenshaw, Foreword, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 2–3 (1988) (“While it seems relatively straightforward that objects, issues, and other phenomena are interpreted from the vantage point of the observer, many law classes are conducted as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view. . . . When this expectation is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation. To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts. The consequence of adopting this colorless mode is that when the discussion involves racial minorities, minority students are expected to stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the ‘they’ or ‘them’ being discussed is from their perspective ‘we’ or ‘us.’” (footnote omitted)).

which have been scientifically proven to negatively affect the performance of Black students on standardized tests.<sup>108</sup>

Critically, even though the Chief Justice recognized that an applicant should not be prohibited from discussing “how race [has] affected his or her life, be it through discrimination, inspiration, or otherwise,” and made clear that universities should not be prohibited from considering such discussions, he completely failed to appreciate how one’s race is not just skin color and, more so, that one’s race does more than just affect one’s experiences.<sup>109</sup> In fact, given how structural and attitudinal racism operate in society, race frequently shapes who a person is; it often plays a role in how a person may think about issues or how and why a person may respond to events in a particular situation.<sup>110</sup> The vast differences between the perspectives and overall framing in the opinions written by the Chief Justice, by Justices Gorsuch and Kavanaugh, and by Justice Thomas reveal as much.<sup>111</sup> In essence, as many of the students of color whom Justice Sotomayor quoted in her dissent explained, “to try to not see [their] race is to try to not see [them] simply because there is no part of [their] experience, no part of [their] journey, no part of [their] life that has been untouched by [their] race.”<sup>112</sup> The Chief Justice, however, failed to comprehend this point, precisely because he has had the lifelong privilege of thinking of himself as raceless and of not seeing (though it is always occurring) how race can shape “every experience” one has.<sup>113</sup>

Indeed, the manner in which the Chief Justice spoke about how schools could consider the impact of race on an applicant’s life exposes precisely how his perspectives on race, his belief in traditional definitions of merit as race neutral, and his view of racism as aberrational and presenting neither structural nor individual advantages to white people are mired in the transparency phenomenon. In a warning to all colleges and universities at the end of his opinion, Chief Justice Roberts stated:

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<sup>108</sup> See generally Carbado et al., *supra* note 106, at 192–94 (providing an overview of the numerous “structural racial disadvantages black applicants bring to or experience in the context of the admissions process”); see also *infra* section III.A, pp. 218–35.

<sup>109</sup> *SFFA*, 143 S. Ct. at 2176.

<sup>110</sup> See, e.g., Carbado & Harris, *supra* note 25, at 1148 (explaining how restrictions on race-consciousness harm students of color, many of whom could not tell their life stories without speaking about race and racism).

<sup>111</sup> See generally Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005) (detailing how Justice Thomas’s racial identity, as influenced by his lived realities, has shaped his thinking as a Black conservative and how his ideology and jurisprudence differed from that of his then-colleague on the Court, the late Justice Scalia, a white conservative).

<sup>112</sup> *SFFA*, 143 S. Ct. at 2251 (Sotomayor, J., dissenting) (quoting Joint Appendix Vol. II of IV at 932, *SFFA*, 143 S. Ct. 2141 (No. 20-1199) (testimony of Sarah Cole, a Black Harvard alumna)).

<sup>113</sup> *Id.* (quoting Joint Appendix II of IV, *supra* note 112, at 906) (testimony of Itzel Vasquez-Rodriguez, a Mexican American student of Cora descent, who “testified that her ethnoracial identity is a ‘core piece’ of who she is and has impacted ‘every experience’ she has had, such that she could not explain her ‘potential contributions to Harvard without any reference’ to it”).

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

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual’s identity is not challenges bested, skills built, or lessons learned but the color of their skin.<sup>114</sup>

This point not only reveals that the Chief Justice does not fully understand holistic admissions review,<sup>115</sup> but also bares his troubling assumptions underlying race and the belonging of Black and Latinx students at Harvard. Additionally, it reveals his even more troubling belief that students had been admitted simply because of their race. The Chief Justice — all while denigrating the dissenters, Harvard, and UNC for engaging in racial stereotyping — consistently engaged in his own harmful stereotyping. Throughout his opinion, he assumed that Black and Latinx students largely did not belong at either Harvard or UNC,<sup>116</sup> yet assumed — without any question (not even once) — that Whites and Asian Americans fully earned their spots without any benefits from racial advantage.<sup>117</sup> Consider, for instance, how the Chief Justice referred to the stories about race and its impacts that students of color can tell about their lives and how he said schools should evaluate those narratives.<sup>118</sup> The Chief Justice’s words betrayed what he really believes about the merit of most Black and Latinx students, suggesting that he does not view the very “challenges bested, skills built, or lessons learned” as part of the actual merit of a Black or Latinx student’s

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<sup>114</sup> *Id.* at 2176 (majority opinion) (citation omitted) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867)).

<sup>115</sup> Under holistic review, colleges and universities examine an applicant’s entire profile — all aspects of the individual — to assess the contributions that the person is likely to make to the community. Contrary to the Chief Justice’s suggestion, individuals are not admitted to schools because of their race; they are admitted to institutions because of what they may bring as a whole person — their full selves — to those communities. *See infra* Part III, pp. 216–39.

<sup>116</sup> *E.g.*, *SFFA*, 143 S. Ct. at 2155 (“In the Harvard admissions process, ‘race is a determinative tip for’ a significant percentage ‘of all admitted African American and Hispanic applicants.’” (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019))).

<sup>117</sup> *Cf. id.* at 2141 (discussing the share of students admitted to Harvard by race, with no discussion of racial advantage).

<sup>118</sup> *Id.* at 2176.

application — as some of the qualities that would be part of their overall evaluation under holistic review.<sup>119</sup> Instead, Chief Justice Roberts’s statements suggest that these qualities, which are assumed to be part of the overall evaluation for any white student, are merely a reason to give what he refers to, twice, as “a benefit to” a Black or Latinx student.<sup>120</sup> The Chief Justice’s statements reveal his inability to see Black and Latinx students as the whole beings they are.

Furthermore, the Chief Justice’s words about when these “benefits” can be given expose his own privilege to ignore how race can shape a person of color’s everyday experiences. To begin, his words suggest that he views racism as aberrational or extraordinary as opposed to a regular occurrence, or even that he views racism as being only Jim Crow racism. For example, underlying his statement about the “benefit” that can be given to “a student who *overcame racial discrimination*” is a presumption that racism is a rare occurrence that can be overcome, rather than a constant, structural force in a student’s everyday life.<sup>121</sup> Such a statement clearly exhibits the Chief Justice’s lack of awareness about the consistent impacts of racism on the lives of people of color. Although the individual acts of Jim Crow racism that the Chief Justice was imagining are still very much alive today, the racism that Black and Latinx students most frequently endure and battle is not as explicit as these acts tend to be; instead, it is usually structural.<sup>122</sup> Such racism can only truly be overcome by larger society, not any one individual. And, the individual acts of racism that tend to be most frequently encountered are microaggressive and subtle (meaning the colorblind racism, commonsense racism, and nice racism that Professors Eduardo Bonilla-Silva, Ian Haney López, and Robin DiAngelo have defined,

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (emphases added).

<sup>122</sup> See BONILLA-SILVA, *supra* note 18, at 19 (arguing that Jim Crow racism, while still present, is not the dominant form of racism today); see also Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65, 90 n.92 (2018) (“Structural racism is defined as the macrolevel systems, social forces, institutions, ideologies, and processes that interact with one another to generate and reinforce inequities among racial and ethnic groups[.]” (alteration in original) (quoting Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities: Old Issues, New Directions*, 8 DU BOIS REV. 115, 116 (2011))).

respectively);<sup>123</sup> worse, they tend to be further buttressed by regular gaslighting.<sup>124</sup>

Similarly, the Chief Justice's statement that the "*benefit*" that could be granted "to a student whose heritage or culture motivated him or her to assume a leadership role . . . must be tied to *that student's* unique ability to contribute to the university"<sup>125</sup> reflects a lack of understanding about the potential merit of a leadership role connected to an individual's identity. The attainment of a leadership position, particularly if it involved being the first member of an underrepresented community to occupy the role or if it involved an election by a primarily white electorate, could, in and of itself, be evidence of a student's unique ability to contribute to a community due to race, even if racial background did not motivate the action. For instance, in our society, where racism, including people's conscious and nonconscious perceptions of others, shapes life every day, just being elected as the first Black president of the *Harvard Law Review* or any Black president of the *Harvard Law Review* would signal unique talents that one could add to a community. Indeed, for any student, election as president of the *Law Review* would likely reveal unique talents and abilities to earn the respect and trust of their peers, communicate and engage with others, pay attention to detail, organize and lead a group, plus much more. But, for the first Black president, for example, it also would exhibit a unique ability to envision oneself in a role that no one else who looked like them had taken on and to make that trailblazing vision a reality without the privilege of seeing "people of [their] race widely represented" in prominent places or being regularly told and "shown that people of [their] color made [civilization] what it is."<sup>126</sup> It also might show an uncanny ability to reach across the

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<sup>123</sup> See BONILLA-SILVA, *supra* note 18, at 2–3 (explaining that colorblind racism "otherizes" more softly than Jim Crow racism); IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS 181 (2014) (describing commonsense racism as racial stereotypes, myths, and inequalities that are rationalized as being "just what they are, widely known, widely recognized, and not needing any further explanation"); ROBIN DIANGELO, NICE RACISM: HOW PROGRESSIVE WHITE PEOPLE PERPETUATE RACIAL HARM 58 (2021) (explicating that "nice racism," a term she coined, consists of the "common white moves" that well-meaning white individuals engage in that unwittingly reinforce racism and noting that "nice racism" causes and perpetuates "daily forms of racial harm" for people of color); see also DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 5 (2010) (defining racial microaggressions as "brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group" (citation omitted)).

<sup>124</sup> See Angelique M. Davis & Rose Ernst, *Racial Gaslighting*, 7 POL. GRPS. & IDENTITIES 761, 763 (2019) (defining "racial gaslighting" as "the political, social, economic and cultural process that perpetuates and normalizes a white supremacist reality through pathologizing those who resist" (emphasis omitted)).

<sup>125</sup> *SFFA*, 143 S. Ct. at 2176 (first emphasis added).

<sup>126</sup> McIntosh, *supra* note 35, at 1.



aisle in a society in which many white voters simply do not vote for Black candidates in political elections,<sup>127</sup> among many other things.

Relatedly, Chief Justice Roberts failed to recognize the interrelationship between race, racism, and the development of “courage and determination.”<sup>128</sup> For example, he failed to see how the various types of courage and determination that students of color may have developed throughout their lives are very much shaped and influenced by their experiences related to race and racism, including microaggressions, particularly in predominantly white schools.<sup>129</sup> It is not merely a one-way street, as he imagined it, by which courage and determination allow a person to “overcome racism.” Instead, the dynamic is mutually constitutive: regularly having to grapple with racism allows people to develop courage and determination. Yet, the Chief Justice again failed to understand this interrelationship between race, racism, and identity because the transparency phenomenon<sup>130</sup> has limited his view.

### III. MAKING THE INVISIBILITY OF RACE TRANSPARENT

*Instead, what the Court actually lands on is an understanding of the Constitution that is ‘colorblind’ sometimes, when the Court so chooses. Behind those choices lie the Court’s own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures.*

— Justice Sotomayor<sup>131</sup>

A common assumption underlying the majority’s rationale in *SFFA* is that racial considerations would be erased from all aspects of the admissions process except the review of an applicant’s essay if the racial-category box or boxes that the applicant checked were simply not made available to any admissions-file reviewers.<sup>132</sup> Preventing schools from explicitly knowing a checked racial-identification box, however, does not

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<sup>127</sup> Day to Day, *Black Candidates, White Voters: A Numbers Game*, NPR (July 11, 2006, 9:19 AM), <https://www.npr.org/templates/story/story.php?storyId=5548757> [<https://perma.cc/6AH6-G5MY>].

<sup>128</sup> *SFFA*, 143 S. Ct. at 2176.

<sup>129</sup> See Carbado & Harris, *supra* note 25, at 1201 (discussing negative racial experiences that nonwhite students experience in predominantly white schools as impacting whether students are similarly situated for purposes of university admissions).

<sup>130</sup> See *supra* note 16 and accompanying text.

<sup>131</sup> *SFFA*, 143 S. Ct. at 2248 (Sotomayor, J., dissenting).

<sup>132</sup> See Flagg, *supra* note 16, at 953. As Flagg explains in describing the transparency phenomenon among Whites, “the more certain we [Whites and, here, Chief Justice Roberts and Justices Gorsuch and Kavanaugh] are that race is never relevant to any assessment of an individual’s abilities or achievements, the more certain we are that we have overcome racism as we conceive of it.” *Id.*

at all remove race or the effects of racism — historically, currently, or in the very moments in which the candidate’s application is being read and evaluated — from the admissions process. The reality is that race (including, for example, how a student is perceived racially by others as well as how others attach social meanings to their perception of that individual applicant’s race) shapes so many aspects of each applicant’s record, including how the applicant’s work, both within and outside of the classroom, is evaluated and assessed before and during the application process. As Flagg and scholar and activist Peggy McIntosh both make very clear, this reality applies to Whites just as much as it applies to people of color.<sup>133</sup>

Just as importantly, because many Whites exist under the transparency phenomenon, proclaiming to admissions professionals, most of whom are white,<sup>134</sup> that their schools’ admissions processes are now race neutral is more likely to lead to increased harms from racial bias, both explicit and implicit, rather than decreased racial bias and discrimination. As social psychological research has repeatedly shown, making race salient<sup>135</sup> for individuals, particularly Whites, is critical to reducing the imposition of implicit racial biases in decisionmaking processes because it activates individuals’ desire to live up to their expressed anti-racist commitments.<sup>136</sup> But, if admissions professionals are told that race is no longer playing a role in the admissions process, they are less likely to consciously work to overcome their implicit racial biases when reviewing admissions applications. Because of how implicit and explicit racial biases can work to negatively impact Black and Latinx applicants through factors like the greater scrutinization of their work, including their applications, such action would only work to disadvantage Black and Latinx applicants in the admissions process, thereby increasing discrimination against them. Indeed, correcting for these disadvantages, which are very much tied to race, requires racial consciousness, not

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<sup>133</sup> See McIntosh, *supra* note 35, at 1 (“As a white person, I realized I had been taught about racism as something which puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.”); see also *infra* sections III.A–B, pp. 218–39.

<sup>134</sup> See Jeremy Bauer-Wolf, *Most College Admissions Staff Are White. What Should the Field Do About It?*, HIGHER ED DIVE (Mar. 28, 2022), <https://www.highereddive.com/news/most-college-admissions-staff-are-white-what-should-the-field-do-about-it/620900> [<https://perma.cc/G9LE-37PB>] (detailing that about three-quarters (seventy-five percent) of the members of the National Association for College Admission Counseling are white). To the extent that faculty also serve as reviewers on admissions committees, three-quarters of professors nationwide are white as well. See Liz Farmer, *3 in 4 Professors Are White. Here’s How Colleges Are Trying to Diversify Faculty*, HIGHER ED DIVE (Dec. 21, 2021), <https://www.highereddive.com/news/3-in-4-professors-are-white-heres-how-colleges-are-trying-to-diversify-fa/616424> [<https://perma.cc/5H3V-FM9H>].

<sup>135</sup> To make something racially salient to a white person is essentially to “remind[] [them] of the possibility of racial prejudice in an interaction.” Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCH. BULL. 1367, 1371 (2000).

<sup>136</sup> See *infra* section III.B, pp. 236–39.

racial blindness. It requires making race (and thus racial bias) salient in a way that ensures that admissions reviewers, most of whom have good intentions and do not proclaim any explicit biases, will consistently work to correct for their own implicit biases during admissions processes as well as account for other bias and discrimination, both explicit and structural, that Black and Latinx applicants may have encountered — discrimination that these young people are unlikely to even be aware of to discuss in their essays.

This Part illustrates two critical points. First, section III.A shows why the purported race neutrality that Chief Justice Roberts imagined in admissions processes after *SFFA* is illusory by highlighting three distinct ways that race can continue to negatively influence admissions processes for Black and Latinx applicants even when their checked racial-identification box is suppressed. In so doing, this section also explicates why Black and Latinx applicants are unlikely to even know about the discrimination they may have faced from others, including teachers or counselors. Second, section III.B demonstrates why continuing to make race salient to admissions reviewers is needed to reduce the effects of implicit racial bias that will persist even when checked racial-identification boxes are unknown to them. In other words, for most admissions reviewers, unless race is made salient to them, they may not actively work to reduce their own nonconscious and other biases or account for the nonconscious biases that have already disadvantaged Black and Latinx students in their evaluations of all applications.

A. *Making Clear the Continuing Significance of Race in the Chief Justice's Imagined World*

*[D]eeming race irrelevant in law does not make it so in life.*

— Justice Jackson<sup>137</sup>

This section highlights three distinct ways in which race, even when an applicant's checked racial-identification box is not explicitly known by admissions reviewers, may frequently and unknowingly influence the admissions process. In so doing, it defines and addresses race in all of its complexity, not simply as skin color, as the majority in *SFFA* seemed to have narrowly defined race.

First, section III.A.1 reveals how race, and specifically racial bias, can invisibly rear its head in the review of students' admissions applications through purportedly objective factors like grade point average, honors placements, and the rigorousness of high school coursework. The fact is that race, including the social meanings that have attached to

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<sup>137</sup> *SFFA*, 143 S. Ct. at 2277 (Jackson, J., dissenting).

different racial groups<sup>138</sup> (such as the nonconscious associations regularly made between Blackness and inferior intellectual ability), shapes how people view each other as well as the work product that individuals create, such as the coursework of Black students. For Black students, such negative implicit biases frequently mean that the work they perform in their schools and in their jobs is undervalued and assessed much lower than it would be if the students were white and were operating under the presumption of competence that comes with whiteness. Indeed, studies have uncovered negative racial bias against Black students when it comes to counselors' decisions about placement in honors courses, teachers' and other supervisors' evaluations of Black people's work product, as well as words of praise used in letters of recommendation.<sup>139</sup>

Second, section III.A.2 details how race, even when an applicant's identification of race is unknown to admissions-file reviewers, can find its way into the evaluation of an applicant through factors that are frequently perceived as being linked to race such as name — both first names and surnames. In so doing, it shows how Black and Latinx applicants, especially Black applicants, can be negatively impacted by associations made between race and name and, implicitly, how white applicants are advantaged by such associations.

Finally, section III.A.3 highlights, just as Justice Jackson did in her dissent, how race sidles into the admissions process through actual admissions preferences such as legacy admissions, which are intrinsically linked to race precisely because Blacks were excluded from even attending many institutions of higher education until the late 1960s or early 1970s.<sup>140</sup> Section III.A.3 also discusses how preferences given to

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<sup>138</sup> In previous work, I have explained how race is not biological but instead socially constructed. I detailed that what is critical about understanding race is understanding the social meanings that have attached to different racial groups. See Angela Onwuachi-Willig, Opinion, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 6, 2016, 5:28 PM), <https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs> [<https://perma.cc/VV7L-WUP6>]; see also OMI & WINANT, *supra* note 23, at 110 (defining race as an “unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle”); Onwuachi-Willig & Barnes, *supra* note 23, at 1296–308.

<sup>139</sup> See *infra* section III.A.1, pp. 220–27.

<sup>140</sup> See Mary R. Jackman, *General and Applied Tolerance: Does Education Increase Commitment to Racial Integration?*, 22 AM. J. POL. SCI. 302, 302 (1978) (“[H]igher education produced more rapid adoption of abstract support for racial integration from 1964 to 1972 . . . .”); see also *SFFA*, 143 S. Ct. at 2237 (Sotomayor, J., dissenting) (noting, for example, that UNC was forced to integrate by court order in 1955, but that the first Black woman to enroll in the university did not do so until 1963 and that “UNC officials openly resisted racial integration well into the 1980s”); Feingold, *supra* note 25, at 1989 (“As late as 1969, fifteen years after *Brown* and five years after Congress passed the Civil Rights Act of 1964, UNC remained, in all meaningful respects, an all-white institution.” (footnotes omitted)); cf. *SFFA*, 143 S. Ct. at 2264, 2270–71 (Jackson, J., dissenting) (revealing how and why race matters by comparing two imagined college applicants from North Carolina, John, a

athletes, applicants on the Dean's Interest List, and children of the faculty and staff are very much tied to race.

*I. Eracing the Impact of Racial Implicit Bias from Teachers and Counselors.* — One major assumption in Chief Justice Roberts's opinion in *SFFA* is that Harvard College's and UNC's affirmative action programs are what made race present in and relevant to their admissions processes and that race would disappear from those processes, except through the consideration of college essays, once those programs were eliminated. For instance, while critiquing what he views as the indeterminacy of both Harvard's and UNC's race-conscious admissions programs, the Chief Justice proclaimed, "[t]heir admissions programs 'effectively assure[] that race will always be relevant . . . and that the ultimate goal of eliminating' race as a criterion" — not the ultimate goal of equality of access to education or equality itself — "will never be achieved."<sup>141</sup> Core to the Chief Justice's assertion is his belief that racism against people of color is only Jim Crow racism; that racism against people of color is aberrational; that traditional means for measuring merit are race neutral; and that white people, unless they personally enslaved someone or directly created the laws that deprived people of color, particularly Black people, of accumulating wealth and thereby engaging in intergenerational transfers of wealth, do not regularly benefit from all the invisible privileges that attach to whiteness.<sup>142</sup> Yet, as Justice Sotomayor so eloquently made clear in her dissent, "race is one small piece of a much larger admissions puzzle where most of the pieces disfavor underrepresented racial minorities."<sup>143</sup> But not once in his opinion did the Chief Justice consider any of these invisible ways that race can enter into the admissions process even if a candidate's racial identification is never explicitly known to an admissions reviewer.

For example, Chief Justice Roberts never once considered how racial bias from admissions readers, teachers, and counselors — all very relevant to the relative strengths of a candidate's application — plays a role in the selective college-admissions processes at Harvard and UNC. Instead, he merely presumed the objectivity and neutrality of factors like "academic performance and rigor," "extracurricular involvement," and "standardized testing results"<sup>144</sup> while insinuating that the admissions process was being rigged for Black and Latinx students through

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white male who would be the seventh generation from his family to graduate from UNC — a legacy — and James, a Black male who would be the first in his family to attend and graduate from UNC in part because UNC forbade the enrollment of Blacks for most of those generations and in part because of a plethora of other forms of formalized and structural racism and state-sanctioned and facilitated racial discrimination, violence, and more).

<sup>141</sup> *SFFA*, 143 S. Ct. at 2172 (majority opinion) (second alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (opinion of O'Connor, J.)).

<sup>142</sup> See generally McIntosh, *supra* note 35.

<sup>143</sup> *SFFA*, 143 S. Ct. at 2250 (Sotomayor, J., dissenting).

<sup>144</sup> *Id.* at 2155 (majority opinion) (citing *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 600 (M.D.N.C. 2021)).

personal ratings.<sup>145</sup> Indeed, in describing the admissions process for UNC, Chief Justice Roberts asserted: “During the years at issue in this litigation, underrepresented minority students were ‘more likely to score [highly] on their personal ratings than their white and Asian American peers,’ but were more likely to be ‘rated lower by UNC readers on their academic program, academic performance, . . . extracurricular activities,’ and essays.”<sup>146</sup>

Yet, research has shown that Black and Latinx students experience discrimination that can negatively impact their ability to compete on purportedly objective criteria, such as the rigorousness of one’s coursework based on honors placements. For example, one study of counselors’ decisions to place students in Advanced Placement (AP) courses in high school revealed a combination of racial and gender bias, specifically bias against Black women.<sup>147</sup> Advanced coursework placement is critical during the college-admissions process because taking the most rigorous courses available affects the perceived strength of a student’s application.<sup>148</sup> In one study, Professors Dania V. Francis, Angela C.M. de Oliveira, and Carey Dimmitt asked school counselors to evaluate student transcripts to assess whether the student should be recommended for placement in an AP Calculus course.<sup>149</sup> The student transcripts were identical to each other except for the name on the transcript, which was varied randomly to be suggestive of race and gender for each student, using indicators such as names validly tested to suggest African American or white and male or female identity.<sup>150</sup> A group of the counselors also received transcripts with “no names” to enable a comparison to decisions where there were “blind” reviews of transcripts, and all

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<sup>145</sup> See *id.*

<sup>146</sup> *Id.* (alteration in original) (quoting *SFFA*, 567 F. Supp. 3d at 616–17).

<sup>147</sup> Dania V. Francis, Angela C.M. de Oliveira & Carey Dimmitt, *Do School Counselors Exhibit Bias in Recommending Students for Advanced Coursework?*, 19 B.E.J. ECON. ANALYSIS & POL’Y, Oct. 2019, art. 20180189, at 1–2.

<sup>148</sup> To account for the inequity in the availability of AP courses between the hypersegregated schools that a majority of Black and Latinx students attend and majority-white schools, many colleges and universities assess students on whether they have taken the most rigorous coursework that is available to them rather than on whether they have taken AP courses. See Michael N. Bastedo, Joseph E. Howard & Allyson Flaster, *Holistic Admissions After Affirmative Action: Does “Maximizing” the High School Curriculum Matter?*, 38 EDUC. EVALUATION & POL’Y ANALYSIS 389, 389–90 (2016) (detailing universities’ declared use of holistic review to contextualize applications).

<sup>149</sup> Francis et al., *supra* note 147, at 1–2.

<sup>150</sup> *Id.* at 6–7. These validly tested names included “Deja Jackson” as a Black female name, “DeAndre Washington” as a Black male name, “Hannah Douglas” as a white female name, and “Jake Connor” as a white male name. *Id.* at 7. The researchers explained that one weakness of their study was that their Black male and female names were viewed as suggesting lower-income status more frequently than the white male and female names. Specifically, they noted that “45% of the Amazon Mechanical Turk survey respondents thought Deja Jackson was most likely low income and 38% though[t] DeAndre Washington was most likely low income, while the corresponding figures for Hannah Douglas and Jake Connor were 4% and 7%.” *Id.* The study therefore did not “fully disentangle” the contributions of race and income status toward counselors’ bias. *Id.*

participants received two baseline transcripts that were not meant to be indicative of any particular racial group.<sup>151</sup>

The school counselor participants were attendees of a national conference who were presented with six student academic profiles to review for recommendation for AP Calculus.<sup>152</sup> The transcripts also included four different levels of quality/strength: (1) Strong Academic, Strong Behavioral (SASB); (2) Borderline Academic, Strong Behavioral (BASB); (3) Strong Academic, Borderline Behavioral (SABB); and (4) Borderline Academic, Borderline Behavioral (BABB).<sup>153</sup> All were potentially viable for recommendation to the AP course. Not surprisingly, overall, the strongest profile, SASB, was recommended for the AP course 95% of the time, compared to 90% for SABB, 83% for BASB, and 65% for BABB.<sup>154</sup> However, the study revealed meaningful bias and discrimination against Black women, with Black women being the least likely to be recommended for advanced coursework.<sup>155</sup> For instance, although SASB candidates were recommended for the AP course 95% of the time overall and 100% of the time in the “blinded” transcript reviews, they were recommended only 79% of the time when the transcript was a Black female transcript.<sup>156</sup> This percentage, which is lower than the overall percentage of recommendations for AP Calculus for three of the types of transcripts, SASB, SABB, and BASB, suggests “that even the strongest black female candidates may face significant barriers to entry into AP Calculus courses that their white or male counterparts do not face.”<sup>157</sup> Furthermore, that 79% figure, representing how likely Black females were to be recommended for advanced coursework, was the same as the percentage of recommendations given for the weakest transcript profile in the “blinded” reviews.<sup>158</sup>

On top of that, even though the transcripts were identical, the Black female students received the lowest preparedness scores by counselors for both the strongest and weakest profiles.<sup>159</sup> This study’s findings are critical not only because Black and Latinx students are underrepresented in AP and honors courses in high schools overall, which contributes to racial inequality in terms of access to high-quality education,<sup>160</sup> but also because Black students and female students are more likely

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<sup>151</sup> *Id.* at 5 (noting “Michelle Fuller” and “Michael Collins” as examples of baseline names).

<sup>152</sup> Although school counselors nationwide are overwhelmingly white (at 78% compared to 10% Black and 13% Hispanic of any race), the sample of participants in this study were more racially diverse, with 71% white counselors, 17% Black counselors, and 15% Hispanic counselors of any race. *Id.* at 8.

<sup>153</sup> *Id.* at 6.

<sup>154</sup> *Id.* at 9.

<sup>155</sup> *Id.* at 13.

<sup>156</sup> *Id.* at 9, 12.

<sup>157</sup> *Id.* at 12.

<sup>158</sup> *Id.* at 12, 14.

<sup>159</sup> *Id.* at 13.

<sup>160</sup> *Id.* at 1.

than other students to seek out advice on preparing for college from counselors.<sup>161</sup> Furthermore, the study is critical because it and other studies reveal how race, and the social meanings and biases attached to a person’s race or perceived race, can disadvantage Black students based on a purportedly objective factor of merit in admissions.<sup>162</sup>

Other studies reveal that grade point average, another factor that the Chief Justice suggested is race neutral, is also very much tainted by racial bias against Black and Latinx students. For example, one study in a different context exposed the ways in which the work of Black people is overscrutinized and then judged and assessed more harshly as a result.<sup>163</sup> In this study, researchers distributed a memorandum from a hypothetical third-year litigation associate with twenty-two deliberately inserted errors (seven spelling/grammar errors, six substantive technical writing errors, five errors in fact, and four errors in the analysis of the facts) to sixty different law firm partners, all of whom had agreed to participate in a “writing analysis study” concerning the “writing competencies of young attorneys.”<sup>164</sup> The memorandum given to each partner was identical except half of the partners received a memorandum with a cover page that indicated that the associate was African American and the others were given the same memorandum with an indication that the associate was white.<sup>165</sup>

*Name:* Thomas Meyer

*Seniority:* 3rd Year Associate

*Alma Mater:* NYU Law School

*Race/Ethnicity:* African American

*Name:* Thomas Meyer

*Seniority:* 3rd Year Associate

*Alma Mater:* NYU Law School

*Race/Ethnicity:* Caucasian<sup>166</sup>

The cover email asked the partners, who were also given all the research materials used to prepare the memorandum, to “edit the memo for all factual, technical, and substantive errors” and then asked them to rate the overall quality of the memorandum from one to five, with one indicating a poorly written memorandum and five indicating a

<sup>161</sup> *Id.*

<sup>162</sup> *See id.* at 14; *see also* Jason A. Grissom & Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2 AERA OPEN, Jan.–Mar. 2016, at 1, 1 (noting that Black students, including those with very high standardized test scores, are referred to gifted programs “at significantly lower rates when taught by non-Black teachers, a concerning result given the relatively low incidence of assignment to own-race teachers among Black students”).

<sup>163</sup> *See* ARIN N. REEVES, NEXTIONS, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS 2–5 (2014), <https://nextions.com/wp-content/uploads/2022/06/2014-04-01-14-Written-in-Black-and-White-Yellow-Paper-Series-ANR-Differences-Based-on-Race-Implicit-Bias-Bias-Breakers-Effective-Recruiting-and-Hiring.pdf> [<https://perma.cc/LT8T-78SQ>].

<sup>164</sup> *Id.* at 2–3.

<sup>165</sup> *Id.* at 2.

<sup>166</sup> *Id.* (reprinting the words from the two different cover pages that were used in this study).



memorandum that was extremely well written.<sup>167</sup> After having seven weeks to review the memorandum, fifty-three of the sixty partners (88.33%) completed the requested tasks; of the fifty-three partners, twenty-four received the memorandum from the African American Thomas Meyer, and twenty-nine received the memorandum from the white Thomas Meyer.<sup>168</sup> The researchers found unconscious confirmation bias by the partners in highlighting the errors, with the partners finding more of the errors in the same brief when the writer was the African American Thomas Meyer than when he was the white Thomas Meyer.<sup>169</sup> For example, the partners found an average of 2.9 of the 7 spelling/grammar errors in the white Thomas Meyer's memorandum compared to 5.8 of the 7 spelling/grammar errors in the African American Thomas Meyer's memorandum.<sup>170</sup> Additionally, the overall score on the memorandum was lower for the African American associate than the white associate — 3.2 out of 5 compared to 4.1 out of 5.<sup>171</sup> Furthermore, qualitative comments on the memorandum for the white associate were more positive.<sup>172</sup> For example, comments for the white Thomas Meyer included statements like “generally good writer but needs to work on . . .,” “has potential,” and “good analytical skills” while comments for the African American Thomas Meyer on the exact same memorandum read “needs lots of work,” “can’t believe he went to NYU,” and “average at best.”<sup>173</sup> The researchers even found differences in ratings on an aspect of the brief they did not request any commentary on: formatting. Specifically, they found that forty-one of the fifty-three partners gratuitously offered feedback on formatting; of those forty-one, eleven partners left comments for the white Thomas Meyer while twenty-nine left comments for the African American Thomas Meyer.<sup>174</sup>

Much like this fictional Black associate, Black high school, college, and other students are likely to face implicit racial bias (as well as explicit racial bias) in how their work is scrutinized and graded by their teachers, which in turn can affect their grade point average — a factor that Chief Justice Roberts assumed to be race neutral.<sup>175</sup> Race and racial disadvantage will, in turn, be a part of any college or graduate school application process because selective universities tend to examine

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<sup>167</sup> *Id.* at 3.

<sup>168</sup> *Id.*

<sup>169</sup> *See id.* at 4.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* One partner was excluded from the final count, though the authors did not explain why. *See id.*

<sup>175</sup> *See SFFA*, 143 S. Ct. at 2154 (“Gaining admission to Harvard . . . can depend on having excellent grades, glowing recommendation letters, or overcoming significant adversity. It can also depend on your race.” (citation omitted) (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 166–69 (1st Cir. 2020))).

grade point average in making their decisions;<sup>176</sup> such influence negates the Chief Justice's assumption that eliminating affirmative action programs will eliminate the influence of race from the admissions process.<sup>177</sup> To the contrary, eliminating affirmative action programs deepens the harms caused by implicit racial biases against Black and Latinx students.<sup>178</sup> Critically, just as Black and Latinx students may be disadvantaged by such racial biases in the assessment of their work, white students are advantaged by assumptions of their competence as well as by assumptions that Black and Latinx students are less competent.

Although Chief Justice Roberts tried in *SFFA* to account for some racism by asserting that schools can consider “an applicant’s discussion of how race affected his or her life,”<sup>179</sup> the Chief Justice failed to see three important realities that make this concession less meaningful than it initially seemed. First, he failed to account for the fact that much of the racism and discrimination that people of color experience is unknown to them, particularly when it is the result of implicit bias and even when it is the result of explicit bias. One of the reasons why Chief Justice Roberts made this mistake was the *doxa* underlying his conclusions, which stem from his view mired in the transparency phenomenon. Indeed, he assumed that students can discuss the effects of racism precisely because he imagined Jim Crow racism, which is explicit and out in the open, when in fact most racism is structural, implicit, or, ironically, what Bonilla-Silva terms “colorblind racism.”<sup>180</sup> A Black high school student, for example, is unlikely to even be aware of the fact that they have been discriminated against in counselors’ decisions about AP placement or in teachers’ assessments of their work through grades. Even though studies show that students are good at perceiving teachers’ expectations,<sup>181</sup> a student of color, including one who sensed such negative expectations, would have difficulty individually proving such discrimination or, more pointedly, would find it difficult to discuss such effects of racism in an essay in a way that would help them, rather than harm them, during the admissions process.

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<sup>176</sup> See, e.g., MELISSA CLINEDINST, NAT’L ASS’N FOR COLL. ADMISSION COUNSELING, 2019 STATE OF COLLEGE ADMISSION REPORT 4 (2019), [https://nacacnet.org/wp-content/uploads/2022/10/soca2019\\_all.pdf](https://nacacnet.org/wp-content/uploads/2022/10/soca2019_all.pdf) [<https://perma.cc/U7Z2-9EHD>].

<sup>177</sup> *SFFA*, 143 S. Ct. at 2176.

<sup>178</sup> See *id.* at 2263 (Sotomayor, J., dissenting) (asserting that the “majority’s vision of race neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored”); *id.* at 2264 (Jackson, J., dissenting) (noting that “[o]ur country has never been colorblind”).

<sup>179</sup> *Id.* at 2176 (majority opinion).

<sup>180</sup> BONILLA-SILVA, *supra* note 18, at 2–3. Colorblind racism/commonsense racism is a racial ideology through which individuals rationalize racial disparities and inequities as being the result of “market dynamics, naturally occurring phenomena,” and the “imputed cultural limitations” of particular racial groups. *Id.* at 2.

<sup>181</sup> E.g., Mark J. Chin et al., *Bias in the Air: A Nationwide Exploration of Teachers’ Implicit Racial Attitudes, Aggregate Bias, and Student Outcomes*, 49 EDUC. RESEARCHER 566, 567 (2020).

Moreover, Chief Justice Roberts failed to appreciate that Black and Latinx students may not know what discrimination they have encountered in life in part because their parents or guardians were likely the ones fighting those very battles with the students' schools or with local officials in their neighborhoods but did not tell their children about those instances of racism.<sup>182</sup> As Justice Sotomayor explained in her dissent, parents of Black children, for example, are often forced to involuntarily diminish their children's childhood by engaging in discussions like "The Talk"<sup>183</sup> with them in order to increase their chances of survival in the event of police encounters, which are more likely to occur for them solely because they are Black.<sup>184</sup> Caretakers of Black and Latinx children must have many discussions about race and racism with their children just to ensure their very survival or sense of being. As the parents and guardians of students of color know, however, those discussions, which must be done out of necessity, take their toll. They transmit burdens that white children do not have to bear. Understandably, caretakers for Black and Latinx children are slow to disrupt childhood for the children in their care by further burdening their children with additional knowledge about the ways they have encountered daily obstacles because of race.

Finally, what the Chief Justice failed to appreciate is that high school students are not learned scholars about race, racism, discrimination, and all the complexities thereof simply by virtue of their being people of color. One can see how difficult it can be to understand the complexities of race given how Justice Gorsuch struggled to understand race as a social construct.<sup>185</sup> Yet, the Chief Justice's effort to restrict reviewers' ability to see and understand applicants as full human beings in any place but their essays places a special burden on students of color to be specialists in a field about which professors spend years developing scholarly expertise. It also essentially restricts the topics about which

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<sup>182</sup> See, e.g., Courtney McKinney, *Young, Gifted, and Black? Prepare to Fight for Your Education*, ED POST (May 12, 2017), <https://www.edpost.com/stories/young-gifted-and-black-prepare-to-fight-for-your-education> [<https://perma.cc/88PM-K6T5>] (revealing one of many examples of parents of Black children who had to fight to get their "gifted" children into advanced programs, noting that those "parents [who] had the resources and confidence to advocate on their behalf . . . still found themselves navigating an education system that did not and does not value them equally," and asserting that "[p]arent savvy should not be a prerequisite for kids to have their needs met in the education system").

<sup>183</sup> David W. Janey, *Black Parents Give Their Kids "The Talk." What If White Parents Did, Too?*, WBUR (Apr. 12, 2021), <https://www.wbur.org/cognoscenti/2021/04/12/the-talk-racism-black-parents-children-david-w-janey> [<https://perma.cc/QLV2-BJVG>].

<sup>184</sup> *SFFA*, 143 S. Ct. at 2252 (Sotomayor, J., dissenting).

<sup>185</sup> See *id.* at 2210–12 (Gorsuch, J., concurring). In his opinion, Justice Gorsuch expressed confusion about racial categories, detailing his dismay at how people with such vastly different experiences could be in the same racial group. (It is worth noting that the breaking down of stereotypes is one of the goals of affirmative action.) Overall, Justice Gorsuch's words presumed that race is biological and must mean that everyone in a racial group has similar experiences. He generally revealed a lack of understanding about what it means for race to be a social construct. See *id.*

candidates of color must write if they want to ensure that reviewers will understand all of who they are, just as white applicants are understood.

2. *Race-ing by Name.* — Furthermore, even if admissions-file reviewers cannot directly see the box that an applicant checked to identify their race, race will likely nevertheless inform the evaluation process in both conscious and nonconscious ways. People, in trying to understand who other individuals are, even before they ever “see”<sup>186</sup> those individuals, work to determine the various different social cues that they may use as mental shortcuts to make judgments about those people.<sup>187</sup> One of the cues that individuals routinely use to assess others and their being is the race or the perceived race of other individuals.<sup>188</sup>

As this author and Professor Mario Barnes detail in the article *By Any Other Name?: On Being “Regarded as” Black, And Why Title VII Should Apply Even if Lakisha and Jamal Are White*, among the many cues that people use to try to determine someone’s race, and thus assess something about them based on that cue, is the very first thing that an admissions officer might see on an application: name — first, last, and middle.<sup>189</sup> Although race is most commonly viewed as being defined by morphological features, such as skin color or eye shape, racial formation, as Professors Michael Omi and Howard Winant make clear, is a “sociohistorical process by which [race is] created, lived out, transformed, and destroyed” by social, historical, and political forces, which in turn create social meaning or meanings that are attached to different racialized groups.<sup>190</sup> As many scholars have demonstrated, those social meanings have material consequences for how people are treated and how goods are distributed, including in terms of how people are viewed

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<sup>186</sup> See Onwuachi-Willig & Barnes, *supra* note 23, at 1297–308 (detailing how people have imagined the racial identities of people based on their names and how they have treated them based upon those assumed racial identities). I place “see” in quotations here because Professor Osagie Obasogie’s research reveals that even people who have been blind from birth not only care very much about race, but also understand and think about race visually. Obasogie’s research helps demonstrate that racial formation is a social process. As his research reveals, even those who cannot visually perceive the physical markers that are commonly thought to make up a person’s race learn the social meanings attached to different racial groups and treat people differently according to those social meanings. See generally OSAGIE K. OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2014).

<sup>187</sup> Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 278, 280 (2014) (noting that we “rely on mental shortcuts, which psychologists often refer to as ‘heuristics’ or ‘schemas,’ to make complex decisions”).

<sup>188</sup> See, e.g., Eve Willadsen-Jensen & Tiffany A. Ito, *The Effect of Context on Responses to Racially Ambiguous Faces: Changes in Perception and Evaluation*, 10 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 885, 885 (2015) (showing that “racial perception can be changed by an external cue and this, in turn, influences subsequent evaluative reactions”).

<sup>189</sup> Onwuachi-Willig & Barnes, *supra* note 23, at 1297–308.

<sup>190</sup> OMI & WINANT, *supra* note 23, at 108–09 (emphasis omitted); see also Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–28 (1994).

regarding intelligence, belonging, and fit within an institution of higher education.<sup>191</sup>

Indeed, research has repeatedly shown that the negative meanings that have attached to Blackness in our society are likely to be imposed on people who have an “African American-sounding” name like Lakisha or Jamal.<sup>192</sup> For example, in a well-known study entitled *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, economists Marianne Bertrand and Sendhil Mullainathan uncovered differential treatment of fictitious job applicants based on race, and specifically, based on whether the individuals had an “African American-sounding name” or “White-sounding name.”<sup>193</sup> To reach these findings, the two researchers conducted a field experiment that involved sending nearly 5,000 resumes to employers in response to more than 1,300 help-wanted advertisements in Boston, Massachusetts, and Chicago, Illinois.<sup>194</sup> Half of these resumes were randomly assigned “very White-sounding names (such as Emily Walsh or Greg Baker),” while the other half were randomly assigned “very African-American-sounding names (such as Lakisha Washington or Jamal Jones).”<sup>195</sup>

Overall, Bertrand and Mullainathan found significant racial differences in the callback rates for jobs. Specifically, they found a fifty-percent difference between callback rates for applicants with white-sounding names and African American-sounding names, suggesting that applicants with white-sounding names may need to send approximately ten resumes to get one callback while candidates with Black-sounding names may need to send approximately fifteen resumes to get

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<sup>191</sup> See, e.g., Onwuachi-Willig & Barnes, *supra* note 23, 1295–312.

<sup>192</sup> *Id.* at 1298; see also *id.* at 1295, 1297 (asserting that, for some employers, the skin color of many Black people signifies “laziness, unproductivity, and other stereotypes that have wrongfully been associated with all” Black people, *id.* at 1295, and that the same stereotypes have been attached to people due to “name or voice,” *id.* at 1297); Michele Goodwin, *Race as Proxy: An Introduction*, 53 DEPAUL L. REV. 931, 933 (2004) (stating that Blackness “is linked with laziness, incompetence, and hostility, as well as disfavored political viewpoints, such as a lack of patriotism and disloyalty to the United States”).

<sup>193</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992, 997–1009 (2004).

<sup>194</sup> *Id.* at 996.

<sup>195</sup> *Id.* at 992. They also experimentally varied the quality of the resumes they sent, with some being “higher-quality,” and some being “lower-quality,” and they sent approximately four resumes (two higher-quality and two lower-quality) in response to each advertisement. *Id.* at 992, 999 (describing higher-quality resumes as resumes that include “more labor market experience and fewer holes in their employment history” and stating that higher-quality applicants were “also more likely to have an e-mail address, have completed some certification degree, possess foreign language skills, or have been awarded some honors,” *id.* at 992). The jobs that the researchers sent applications to fell within four occupational categories — sales, administrative support, clerical services, and customer services — and ranged “from cashier work at retail establishments and clerical work in a mail room, to office and sales management positions.” *Id.* at 992, 994.

just one callback.<sup>196</sup> Measured another way, based on their finding that one additional year of labor market experience increases the likelihood of a callback by 0.4%, the return rate for a white-sounding name was equivalent to about eight additional years of work experience.<sup>197</sup> Importantly, they found that the “racial gaps in callback [we]re statistically indistinguishable across all the occupation and industry categories covered in the experiment.”<sup>198</sup>

Bertrand and Mullainathan further found that the gap between those with white-sounding and Black-sounding names widened with resume quality, with higher-quality resumes having a smaller effect for African Americans in terms of receiving callbacks than they did for white applicants.<sup>199</sup>

Other scholars have reached similar findings in their studies of the associations made between racial identity and name.<sup>200</sup> For example, scholars Charles Crabtree, S. Michael Gaddis, John B. Holbein, and Edvard Nergård Larsen conducted five different studies of 11,530 respondents’ perceptions based on 1,000 different combinations of racialized first and last names among white, Black, Asian American or Pacific Islander, and Hispanic people with findings that offer support for Bertrand and Mullainathan’s work on race.<sup>201</sup> Specifically, in four of their studies, the researchers found that “respondents perceive educational attainment, income, and social class from names in a racially tiered pattern: White and Asian people are perceived at the top of the social class hierarchy, followed by Black people and then Hispanic people.”<sup>202</sup> They further found, in their fifth study, that even when they presented respondents “with an explicit signal of educational attainment, respondents perceived individuals with names commonly used by

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<sup>196</sup> *Id.* at 998. To select African American-sounding and white-sounding names to use in their study, Bertrand and Mullainathan utilized “name frequency data calculated from birth certificates of all babies born in Massachusetts between 1974 and 1979” and tabulated the names by race “to determine which names are distinctively White and which are distinctively African-American,” meaning which names had the “highest ratio of frequency in one racial group to frequency in the other racial group.” *Id.* at 995. They also conducted a survey in several public areas of Chicago to assess how people might identify their selected names, finding that respondents readily attributed “the expected race for the person” based on name, with just a few exceptions. *See id.*

<sup>197</sup> *Id.* at 998.

<sup>198</sup> *Id.* at 992.

<sup>199</sup> *Id.* at 992, 1000–01. Bertrand and Mullainathan discovered that there was a statistically significant difference of 2.29 percentage points (or 27%) for white applicants with higher-quality resumes compared to white applicants with lower-quality resumes (10.8% versus 8.5%), but that the difference between callback rates for Black applicants with higher-quality resumes compared to Black applicants with lower-quality resumes was not statistically significant, with only a 0.51 percentage point (or 8%) difference. *Id.* at 1000–01. The researchers viewed this finding as notable because “one may have expected improved credentials to alleviate employers’ fear that African-American applicants are deficient in some unobservable skills.” *Id.* at 992.

<sup>200</sup> *See, e.g.,* Charles Crabtree et al., *Racially Distinctive Names Signal Both Race/Ethnicity and Social Class*, 9 SOCIO. SCI. 454, 456, 461–62 (2022).

<sup>201</sup> *Id.* at 456.

<sup>202</sup> *Id.*

Black people as of a lower social class than individuals with names commonly used by White people.”<sup>203</sup>

Another study by Gaddis and Professor Raj Ghoshal revealed discrimination on the housing market by millennials,<sup>204</sup> the second-most racially diverse generation in the United States — second only to Generation Z<sup>205</sup> — and a generation that has been labeled as more racially open-minded and inclusive than previous generations.<sup>206</sup> In this study, the two researchers sent over 4,000 inquiries to over 1,500 Craigslist advertisements from millennials who were seeking roommates in the Boston, Chicago, and Philadelphia metropolitan areas to test whether response rates would vary based on names that signaled either an Asian, Black, Hispanic, or white racial background as well as immigrant generational status or perceived assimilation.<sup>207</sup> Each of their inquiries included the same information for the prospective roomseekers on job and college-degree status — that the prospective seekers were college-educated and employed full-time.<sup>208</sup> Ultimately, their results uncovered a tiered pattern of discrimination, with white roomseekers faring the best in terms of response ratios when compared to Blacks and to Asian and Hispanic individuals with both first names and last names that are Asian-sounding or Hispanic-sounding, respectively.<sup>209</sup> Indeed, individuals with a perceived South Asian Indian background received

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<sup>203</sup> *Id.* In selecting the names for their study, the researchers used names from previous data sets that had already been verified as associated with particular races by other scholars for studies one through three. For studies four and five, they used first names from prior data sets by other scholars and “selected last names using frequently occurring surnames from the 2000 Census, which lists the population racial composition of last names in the United States.” *Id.* at 457–58.

<sup>204</sup> S. Michael Gaddis & Raj Ghoshal, *Searching for a Roommate: A Correspondence Audit Examining Racial/Ethnic and Immigrant Discrimination Among Millennials*, 6 *SOCIUS* 1 (2020).

<sup>205</sup> See RICHARD FRY & KIM PARKER, PEW RSCH. CTR., *EARLY BENCHMARKS SHOW “POST-MILLENNIALS” ON TRACK TO BE MOST DIVERSE, BEST-EDUCATED GENERATION YET* 3 (2018).

<sup>206</sup> See Gaddis & Ghoshal, *supra* note 204, at 2; see also Michelle E. Feldman & Allyson J. Weseley, *Which Name Unlocks the Door? The Effect of Tenant Race/Ethnicity on Landlord Response*, 43 *J. APPLIED SOC. PSYCH.* 416, 416 (2013) (finding that the race/ethnicity of prospective tenants influenced responses from landlords, with Asian Americans receiving the most positive responses at 45.2%; Hispanics and Whites receiving a similar response rate of 34.7% and 34%, respectively; and African Americans receiving the fewest responses at 16%, which was approximately a third of the response to Asian Americans and less than half the response to Hispanics and Whites).

<sup>207</sup> See Gaddis & Ghoshal, *supra* note 204, at 1–2, 4. The researchers “carefully selected each first name by examining populated-based [sic] race/ethnicity and social class naming patterns from New York State Department of Health birth records spanning 1994 to 2012. . . . For White, Black, Indian, and Chinese roomseekers, [they] chose first names of children born predominantly to mothers of the corresponding race/ethnicity. . . . [They] then used census data on the most common last names by race to choose last names. All first and last names selected were both racially distinctive and relatively common.” *Id.* at 4 (citation omitted). They also worked to select names across racial groups with similar average educational attainment for the mother to enable them to isolate the impact of race from social class. *Id.* at 5.

<sup>208</sup> *Id.* at 6.

<sup>209</sup> *Id.* at 9.

approximately eighty-three responses for every 100 responses that a white roomseeker received (0.83), while the response ratio was 0.76 for individuals with a Chinese background, 0.74 for Hispanic individuals, and 0.63 for Black individuals.<sup>210</sup> As Gaddis and Ghoshal explain, these responses indicated that “a Black room-seeker would need to send about [fifty] percent more inquiries to receive the same number of responses as a White room-seeker.”<sup>211</sup> Although inquiries from Asian or Hispanic roomseekers with Americanized first names but Asian-sounding and Hispanic-sounding last names, respectively, did not have a statistically significant lower response rate than those inquiries from Whites, the study still showed discrimination against those who were perceived as being less assimilated within those racial groups.<sup>212</sup> Critically, Black roomseekers, who were generally perceived by respondents to be American, fared the worst of all the groups.<sup>213</sup>

Given the plethora of studies that reveal associational links that people frequently make between name and racial identity and the negative judgments they make from those associations, Chief Justice Roberts is absolutely wrong in his presumption that race, and racial stereotyping, would disappear from the admissions evaluation process simply because an applicant’s checked racial-identification box was unknown to the readers. Contrary to what the Chief Justice thinks as a result of viewing race through the transparency phenomenon, race is everywhere. Admissions-file reviewers, just like the respondents in these studies — indeed, all of us — are likely to read race into different people’s applications simply based on name alone. No doubt, based on name alone, Karen Walsh is likely to be presumed white, while Kwame Jackson is likely to be viewed as Black. Similarly, Jorge Gonzalez is likely to be seen as Latinx just as Jiyeon Kim is likely to be identified as Asian American.

Without direct action that explicitly acknowledges race and takes it into account, admissions officers are just as susceptible to acting on harmful racial biases based on names against those from more commonly negatively stereotyped racial groups. As many researchers have noted, implicit biases often result in conduct that does not align with an individual’s explicitly expressed or avowed beliefs; for example, it is not uncommon for individuals who sincerely profess a belief in the equality of all people and claim to have no racial prejudice to then act in non-conscious, racially discriminatory ways against outgroup members.<sup>214</sup>

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<sup>210</sup> *Id.* at 8.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 5, 9.

<sup>213</sup> *Id.* at 8, 9.

<sup>214</sup> See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 360–61 (2007) (“[P]eople who display strong implicit biases are



As scholar Nicole Negowetti has explained, implicit biases “are automatic, unconscious mental processes” that “are rooted in the basic way in which humans understand the complex flood of information from the world” — through “schemas” that allow an individual to make judgments about or understand new people, circumstances, things, and more “by using an existing framework of stored knowledge based on prior experiences” or lessons.<sup>215</sup> Stereotypes, in particular, are difficult to change in people’s subconsciouses because people “give more consideration to information that is consonant with a stereotype and give less credence to information that is stereotype-inconsistent.”<sup>216</sup> Indeed, years of results from the Implicit Association Test by Professors Mahzarin Banaji, Anthony Greenwald, and Brian Nosek demonstrate systemic existence of implicit racial biases, with racial bias against Black people showing up in approximately seventy to seventy-five percent of all individuals who take the test in the United States.<sup>217</sup>

In this case, given what is known about how individuals may read race into names and, more so, about the negative associations that individuals may make when evaluating people with names that invoke thoughts of Black identity and to a lesser extent Latinx identity, there is great reason to fear what racial stereotypes and negative associations may be activated when admissions officers simply see a name on the file unless direct action is taken to combat such biases. As social science research on priming — meaning the act of exposing participants to one stimulus to see how that exposure influences their response to subsequent stimuli — has taught us, “stereotypes are activated easily, automatically, and often unconsciously.”<sup>218</sup> Furthermore, research shows that “once people have been primed, it [can] affect[] the way they make decisions in racially stereotyped ways.”<sup>219</sup> We know that it “is extremely difficult for [an] individual to deviate from what [a particular event scheme or] script has taught her about the world because the outcome suggested by the script will seem to be a natural result of precedent events.”<sup>220</sup> Critically, as section III.B reveals, one of the best ways to

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often not the same people who demonstrate strong explicit biases.” *Id.* at 360.); *see also* Negowetti, *supra* note 187, at 281 (noting that “studies have shown that when a person believes himself to be objective, he is more susceptible to biases”).

<sup>215</sup> Negowetti, *supra* note 187, at 284–85.

<sup>216</sup> *Id.* at 287; *see also* Levinson, *supra* note 214, at 354, 418 (noting that “people possess attitudes and stereotypes over which they have little or no ‘conscious, intentional control,’” *id.* at 354, and that stereotypes “become socially ingrained and resistant to change at a very early age,” *id.* at 418).

<sup>217</sup> *See* Betsy Mason, *Making People Aware of Their Implicit Biases Doesn’t Usually Change Their Minds. But Here’s What Does Work*, PBS (June 10, 2020, 7:00 PM), <https://www.pbs.org/newshour/nation/making-people-aware-of-their-implicit-biases-doesnt-usually-change-minds-but-heres-what-does-work> [<https://perma.cc/57LV-SEDA>].

<sup>218</sup> Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 326–27 (2010).

<sup>219</sup> *Id.* at 327.

<sup>220</sup> Negowetti, *supra* note 187, at 286–87.

combat such biases is to make race salient, meaning to make known the possibility of racial prejudice in a scenario so the actors can work to correct for their implicit and explicit biases.<sup>221</sup>

3. *Ignoring the Race to the Top by Legacy and Other Applicants.* — Finally, although Justice Gorsuch mentioned it in his concurrence,<sup>222</sup> Chief Justice Roberts failed to even acknowledge in the majority opinion how race will very much continue to needle its way into a purportedly non-race-conscious admissions process through processes such as favorable “tips”<sup>223</sup> for athletes; legacy applicants; applicants on the Dean’s Interest List, who are primarily connected to major donors; and the children of faculty or staff (ALDCs). As Justice Sotomayor highlighted in her dissent, these applicants are admitted to Harvard at a disproportionately high rate.<sup>224</sup> Although ALDCs comprise only 5% of the applicants to Harvard, they constitute approximately 30% — six times their representation in the entire pool — of the students who are admitted to Harvard.<sup>225</sup> The pool of ALDC applicants at Harvard is around 67.8% white compared to only 11.4% Asian American, 6% Black, and 5.6% Latinx, while the pool of non-ALDC applicants is 40.3% white, 28.3% Asian American, 11% Black, and 12.6% Latinx.<sup>226</sup>

Even the one group from the ALDCs that many people might assume would include a significant percentage of people of color — athletes — is an overwhelmingly white group.<sup>227</sup> The overwhelming whiteness of the group is in part due to the types of varsity sports offered at Harvard and UNC. For example, varsity sports at Harvard include baseball, basketball, crew, cross-country, fencing, field hockey, football, golf, ice hockey, lacrosse, rugby, sailing, soccer, skiing, softball, squash, swimming and diving, tennis, track and field, volleyball, water polo, and wrestling.<sup>228</sup> Overall, National Collegiate Athletic Association (NCAA) statistics reveal that, as of 2022, the majority of college athletes are white,<sup>229</sup> with Whites constituting 55% of all NCAA Division I

<sup>221</sup> See *infra* section III.B, pp. 236–39.

<sup>222</sup> *SFFA*, 143 S. Ct. at 2215 (Gorsuch, J., concurring).

<sup>223</sup> See *id.*

<sup>224</sup> *Id.* at 2249–50 (Sotomayor, J., dissenting); see also Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard*, 40 J. LAB. ECON. 133, 137 (2022).

<sup>225</sup> *SFFA*, 143 S. Ct. at 2250 (Sotomayor, J., dissenting).

<sup>226</sup> *Id.* at 2249–50.

<sup>227</sup> See Arcidiacono et al., *supra* note 224, at 138.

<sup>228</sup> *Student Activities*, HARV. COLL., <https://college.harvard.edu/admissions/why-harvard/student-activities> [<https://perma.cc/F6VS-JRVS>]. The list of sports at UNC Chapel Hill is similar to that at Harvard, except that it excludes ice hockey, rugby, sailing, skiing, squash, and water polo and includes gymnastics. See *Sport-by-Sport Historical Briefs*, UNIV. OF N.C. AT CHAPEL HILL ATHLETICS (Jul. 31, 2023), <https://goheels.com/news/2023/7/31/209747230> [<https://perma.cc/N58Y-JPDW>].

<sup>229</sup> *NCAA Demographics Database*, NAT’L COLLEGIATE ATHLETICS ASS’N (Dec. 2022), <https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database> [<https://perma.cc/RJN5-5XLR>] (showing that Whites constitute 62% of all NCAA athletes while Blacks constitute 16%, Latinxs comprise 7%, and Asian Americans comprise 2% of all NCAA athletes).

athletes while Blacks constitute 20%, Latinxs comprise 6%, and Asian Americans comprise 2% of all NCAA Division 1 athletes.<sup>230</sup> Indeed, many collegiate varsity sports skew significantly white, in spite of a few high-profile exceptions. For example, although sports like basketball (approximately 38% white versus 44% Black for men and approximately 50% white versus 30% Black for women), football (approximately 44% white versus 40% Black), and track and field (approximately 60% white versus 20% Black for men and women) tend to have meaningful percentages of Black players in the United States,<sup>231</sup> other sports offered by Harvard, such as skiing and ice hockey, tend to be played by an overwhelmingly white population. For instance, the NCAA Demographics Database reveals that, in 2022, men's ice hockey was 75% white, 1% Black, and 24% other, with no specification of race or ethnicity for other racial groups, and women's ice hockey was 76% white, 1% Black, and 23% other.<sup>232</sup> Similarly, in lacrosse, which has grown by more than 50% at the college level in the last decade,<sup>233</sup> 83% of players in men's lacrosse were white while only 4% were Black and 13% fell in the Other category in 2022, and 83% of players in women's lacrosse were white while only 3% were Black players and 14% fell in the Other category.<sup>234</sup>

Even for sports like soccer and baseball that are popular worldwide and played by what many would consider racially diverse groups of people in the United States,<sup>235</sup> Whites overwhelmingly comprise the pool of these NCAA athletes, with both white men and women comprising 62% of the soccer athlete population in the United States while Black men and women make up only 6% of the same group and with white men and women comprising 78% and 73% of the baseball and softball populations, respectively, compared to Black men and women who respectively comprise just 5% and 6% of them.<sup>236</sup>

Furthermore, while Justice Thomas chastised Justice Jackson for speaking about racial wealth disparities,<sup>237</sup> which continue to play a significant role in competition for admission to selective colleges and

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<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> Terry Foy, *Analyzing 2020 NCAA Demographic Survey: Lacrosse Is 40% More Diverse than in 2012*, INSIDE LACROSSE (Aug. 17, 2021, 8:30 AM), <https://www.insidelacrosse.com/article/analyzing-2020-ncaa-demographic-survey-lacrosse-is-40-more-diverse-than-in-2012/58299> [https://perma.cc/L2EC-QEXP].

<sup>234</sup> NCAA Demographics Database, *supra* note 229.

<sup>235</sup> See Christopher Clarey, *Soccer Returns to Its Roots in Africa*, N.Y. TIMES (June 9, 2010), <https://www.nytimes.com/2010/06/10/sports/soccer/10iht-SRHISTORY.html> [https://perma.cc/VX3H-SGYL] (quoting DAVID GOLDBLATT, *THE BALL IS ROUND* 480 (2006)) (adopting David Goldblatt's designation of soccer as "Africa's game"); *How Latin American Players Have Conquered MLB*, FAST PHILLY SPORTS (Oct. 26, 2020), <https://fastphillysports.com/how-latin-american-players-have-conquered-mlb> [https://perma.cc/BFS3-F8A2].

<sup>236</sup> NCAA Demographics Database, *supra* note 229.

<sup>237</sup> See *SFFA*, 143 S. Ct. at 2202 (Thomas, J., concurring).

universities,<sup>238</sup> neither he nor any of the other Justices in the majority can deny that such wealth disparities, disparities very much rooted in our nation's past history of discrimination (from enslavement to the post-Civil Rights era),<sup>239</sup> also play a critical role in who can give donations that are significant enough to an institution to obtain placement on the interest lists of deans. Indeed, at Harvard, Whites make up nearly 70% of donor-related applicants.<sup>240</sup> During the period from 2014 to 2019, these specific applicants at Harvard were seven times more likely to be admitted to the prestigious institution than applicants without any relationship to a donor.<sup>241</sup>

As Justices Sotomayor and Jackson highlighted in their dissents, legacies themselves are an overwhelmingly white group.<sup>242</sup> Again, at Harvard, Whites comprise 70% of the legacy applicant pool,<sup>243</sup> a pool in which membership affords numerous admissions advantages. For instance, legacy applicants are not only twenty times more likely to be interviewed by an admissions officer from the University than nonlegacy applicants, most of whom are interviewed by alumni;<sup>244</sup> but they also are significantly more likely to gain admission to Harvard.<sup>245</sup> Indeed, during the period from 2014 to 2019, Harvard's admissions rate for non-legacies was approximately 6%, but the rate of admission for legacies was about 34%.<sup>246</sup>

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<sup>238</sup> Raj Chetty, David J. Deming & John N. Friedman, *Diversifying Society's Leaders? The Causal Effects of Admission to Highly Selective Private Colleges* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31492, 2023), <https://www.nber.org/papers/w31492> [<https://perma.cc/ENB5-GQ6P>] (finding that "[c]hildren from families in the top 1% are more than twice as likely to attend an Ivy-Plus college (Ivy League, Stanford, MIT, Duke, and Chicago) as those from middle-class families with comparable SAT/ACT scores" and determining that the "high-income admissions advantage at private colleges is driven by three factors: (1) preferences for children of alumni, (2) weight placed on non-academic credentials, which tend to be stronger for students applying from private high schools that have affluent student bodies, and (3) recruitment of athletes, who tend to come from higher-income families"); see also Allison C. Morgan et al., *Socioeconomic Roots of Academic Faculty*, 6 NATURE HUM. BEHAV. 1625, 1625 (2022) ("Students completing degrees at highly selective institutions are more likely to come from the top 1% of the US income distribution than from the bottom 50%.").

<sup>239</sup> See generally OLIVER & SHAPIRO, *supra* note 63; *SFFA*, 143 S. Ct. at 2265–69 (Jackson, J., dissenting).

<sup>240</sup> Complaint Under Title VI of the Civil Rights Act of 1964 at 2, *Chica Project v. President & Fellows of Harvard Coll.* (U.S. Dep't of Educ. Off. of C.R. filed July 3, 2023) [hereinafter *Chica Project Complaint*], <http://lawyersforcivilrights.org/wp-content/uploads/2023/07/Federal-Civil-Rights-Complaint-Against-Harvard.pdf> [<https://perma.cc/T4D3-NBTR>].

<sup>241</sup> *Id.* Harvard's admissions rate for nondonor applicants was approximately 6%, but the rate of admission for donor applicants was 42%. See *id.* at 15.

<sup>242</sup> See sources cited *supra* notes 59, 140 and accompanying text.

<sup>243</sup> *Chica Project Complaint*, *supra* note 240, at 2.

<sup>244</sup> *Id.* at 14.

<sup>245</sup> *Id.* at 15.

<sup>246</sup> See *id.* Even the preferences given to the children of faculty and staff are more likely to go to white people. See Arcidiacono et al., *supra* note 224, at 138 (finding that between 2014 to 2019, approximately 52% of children of faculty and staff admitted at Harvard were white). For

*B. Making Race Salient: Why Race Consciousness Is the  
Best Means for Reducing the Effects of Bias*

*Ignoring race will not equalize a society that is racially unequal.  
What was true in the 1860s, and again in 1954, is true today:  
Equality requires acknowledgment of inequality.*

— Justice Sotomayor<sup>247</sup>

Following section III.A, which shows how race can find its way into admissions processes even when a candidate’s racial-identification box is not made known to admissions reviewers, this section, III.B, shows exactly why racial saliency is so critical to ensuring fairness in admissions processes. To do so, it highlights research regarding two of the most effective methods for combatting implicit racial bias: racial salience and the facilitation of a counterstereotypic community. Specifically, section III.B describes research showing that making race salient, rather than ignoring race, is the best way for individuals — in this case, admissions reviewers — to overcome any nonconscious biases they may have against members of different racial groups and, critically, to counteract any implicit racial biases that already may have negatively affected important parts of the applications of Black and Latinx students. In so doing, section III.B also notes how racial salience — such as making reviewers aware of potential racial bias in the alumni-interview process and in the recommendation component of applications — would also decrease the likelihood of any implicit racial biases occurring in this manner against Asian Americans.

One of the harms of Chief Justice Roberts’s incorrect assumption that *SFFA* will remove racial considerations from the admissions process (except from applicants’ essays) is that it is in direct tension with the means through which negative implicit racial bias might be most

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example, at Harvard, 78% of the tenured faculty is white. *2023 Harvard Faculty Demographics*, HARV. UNIV., [https://faculty.harvard.edu/sites/hwpi.harvard.edu/files/faculty-diversity/files/ay2023\\_faculty\\_demographics.pdf?m=1671128990](https://faculty.harvard.edu/sites/hwpi.harvard.edu/files/faculty-diversity/files/ay2023_faculty_demographics.pdf?m=1671128990) [<https://perma.cc/XC7T-N9Z6>]. Ironically, without affirmative action at Harvard, the pool is likely to remain the same. Like at many elite schools, if one peruses the websites of just about any department at Harvard, one will see that many of the faculty are also graduates of Harvard or similarly elite schools. See Morgan et al., *supra* note 238, at 1629 (“Nearly a third of faculty at top-ranked universities report that their parent holds a Ph.D. (29.8%), versus a fifth (19.0%) at lower-ranked institutions. This pattern represents a significant source of social reproduction at the highest levels of academic attainment.”); see also K. Hunter Wapman, Sam Zhang, Aaron Clauset & Daniel B. Larremore, *Quantifying Hierarchy and Dynamics in US Faculty Hiring and Retention*, 610 NATURE 120, 121 (2022) (noting that “80% of all domestically trained faculty in [their] data were trained at just 20.4% of universities” and proclaiming that one out of every eight domestically trained faculty graduated from just five doctoral universities — “UC Berkeley, Harvard, University of Michigan, University of Wisconsin-Madison and Stanford”).

<sup>247</sup> *SFFA*, 143 S. Ct. at 2234 (Sotomayor, J., dissenting).

effectively counteracted and reduced: making race salient in an evaluative process.<sup>248</sup> Racial salience is not simply the fact of knowing someone's race, but knowing that race is a central issue, one that could result in bias being applied in judgments.<sup>249</sup> Although performed in a courtroom context instead of an admissions context, research in social psychology suggests that racial salience tends to attenuate the potentially stereotypic influence of an individual's race in white decisionmakers' judgments.<sup>250</sup>

For example, in a study of Black and white mock jurors for trials involving a packet of trial summaries where half involved an interracial crime with either a Black or white defendant, psychologists Samuel Sommers and Phoebe Ellsworth found that white jurors were more likely to rate the Black defendant as more guilty, aggressive, and violent than the white defendant in interracial cases where race was not made salient, meaning when white people were not "reminded of the possibility of racial prejudice in an interaction."<sup>251</sup> However, when racial norms were made salient for white jurors, the jurors exhibited no differences in their judgments between the white and Black defendants.<sup>252</sup> Sommers and Ellsworth explained that, because of the shift of most white Americans from "'old-fashioned' or 'red-necked' racism to a less overt form of prejudice, one that exemplifies the conflict between an egalitarian value system and unacknowledged negative beliefs about Blacks," Whites will "work to inhibit their own racial biases" if they are made salient to them, but "if [Whites] are not reminded [about the salience of race], they might not notice, and their biases will often be expressed."<sup>253</sup>

Similarly, research shows that making race salient — here, exposing potential implicit racial biases — can play a role in decreasing harmful

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<sup>248</sup> See Sommers & Ellsworth, *supra* note 135, at 1371.

<sup>249</sup> See *id.* at 1375.

<sup>250</sup> See Sommers, *supra* note 24, at 600 ("[R]ecent research has begun to reconcile inconsistent findings, converging on the hypothesis that activating White jurors' concerns about prejudice attenuates the influence of a defendant's race on judgments." (citations omitted)).

<sup>251</sup> Sommers & Ellsworth, *supra* note 135, at 1371; see also Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCH. PUB. POL'Y & L. 201, 225 (2001) (concluding that "White jurors are more likely to demonstrate racial bias in cases that do not raise blatantly racial trial issues").

<sup>252</sup> Sommers & Ellsworth, *supra* note 251, at 220. Black jurors demonstrated the same result or judgment whether race was made salient to them; Sommers and Ellsworth posited that was because "racial issues are generally salient in the minds of Black jurors in interracial cases with Black defendants." Sommers & Ellsworth, *supra* note 135, at 1367.

<sup>253</sup> Sommers & Ellsworth, *supra* note 135, at 1371; see also Sommers & Ellsworth, *supra* note 24, at 605 (making clear that, even though research suggests that "racial bias is most likely to emerge absent salient racial issues at trial, psychological theory does not suggest that it disappears in racially charged cases").

impacts caused by implicit racial biases rooted in stereotypes.<sup>254</sup> For example, in one study, researchers simulated an online chat during which participants were asked to provide their impressions about several pictures and statements that were designed to invoke some racial stereotypes.<sup>255</sup> Once participants reacted to the images, an experimenter pretending to be another participant directly questioned the participants' stereotypic and potentially racist responses.<sup>256</sup> After race had been made salient, the participants took another test measuring their stereotypic responses to similar images and sentences, but this time without a collaborator purposefully placed in their presence to raise questions about their responses; thereafter, they were given a confidential stereotype test.<sup>257</sup> The researchers found that those participants who had encountered statements that highlighted their stereotype-consistent responses were less likely to make stereotypic responses than those who had not been so confronted.<sup>258</sup>

Yet, *SFFA* makes it unlikely that racial salience will be used as a means of continually reducing implicit racial biases of admissions reviewers. Indeed, throughout *SFFA*, the Chief Justice assumed that the centrality of race in a person's life should be limited to only one part of the application process: the review of essays,<sup>259</sup> even though race itself is salient for so many people of color throughout aspects of their daily lives that cannot be captured in the limited space of an admissions essay but that do impact other aspects of a person's application. Again, as Justice Jackson proclaimed in her dissent, "deeming race irrelevant in law does not make it so in life."<sup>260</sup> It only makes it difficult for those who are making admissions decisions to acknowledge and counter their own implicit biases in ways that may counteract and make up for such discrimination. Making race salient is not only important for combating biases that Black and Latinx students may face during the admissions process, but also could be critical to addressing the biases that the complaints in these affirmative action cases argued had occurred against Asian Americans through aspects like alumni interviews. Here again, it would be race consciousness and awareness of how racism and bias might be invisibly operating to the disadvantage of a person of color that could stimulate action to correct for any biases.

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<sup>254</sup> See, e.g., Alexander M. Czopp et al., *Standing Up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCH. 784, 800 (2006); see also Levinson, *supra* note 214, at 413–14.

<sup>255</sup> See Czopp et al., *supra* note 254, at 787–88, 792.

<sup>256</sup> See *id.* at 788. A sample confrontation was as follows: "[M]aybe it would be good to think about Blacks in other ways that are a little more fair? [I]t just seems that a lot of times Blacks don't get equal treatment in our society. [Y]ou know what [I] mean?" *Id.*

<sup>257</sup> See *id.*

<sup>258</sup> See *id.* at 794.

<sup>259</sup> *SFFA*, 143 S. Ct. at 2176 ("[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 . . .").

<sup>260</sup> *Id.* at 2277 (Jackson, J., dissenting).

The majority's decision in *SFFA* has even broader implications for our society in the fight to reduce and, ultimately, eliminate racial bias and harm against people of color. The other means by which implicit racial bias might be temporarily reduced is through the facilitation of a more counterstereotypic community. Research has shown, for example, that exposing people to more individuals who contradict widely held stereotypes about particular racial groups helps to temporarily reduce implicit biases.<sup>261</sup> Again, however, *SFFA* makes it unlikely that this approach can be utilized to reduce implicit racial bias. As Justices Sotomayor and Jackson predicted in their dissents, *SFFA* increases the chances that racial and ethnic diversity at selective colleges and universities nationwide will decrease, thereby “reserving ‘positions of influence, affluence, and prestige in America’ for a predominantly white pool of college graduates.”<sup>262</sup> Because racial diversity on campuses with selective admissions is likely to decrease as a result of *SFFA*, white students on such campuses are less likely to encounter significant numbers of counterstereotypic peers in their classrooms and activities, thus resulting in less regular disruption to their commonly held implicit racial biases and to their ways of understanding the world.

The final way to reduce and, in fact, eliminate implicit bias is through “a sustained process of cultural change.”<sup>263</sup> Such cultural change, however, cannot occur without a richly diverse community. As school leaders, administrators, and educators know far too well, “[r]acial and class-based isolation prevents the hearing of diverse stories and counterstories” and keeps people, particularly those whose positionality allows them to remain oblivious to race and racism, from overcoming “the unthinking conviction that [their] way of seeing the world is the only one — that the way things are is inevitable, natural, just, and best.”<sup>264</sup>

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<sup>261</sup> See Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800, 806 (2001); see also Levinson, *supra* note 214, at 412–13.

<sup>262</sup> *SFFA*, 143 S. Ct. at 2263 (Sotomayor, J., dissenting) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 401 (1978) (opinion of Marshall, J.)); see also *id.* at 2277 (Jackson, J., dissenting) (“Although formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today’s ruling makes things worse, not better.”).

<sup>263</sup> Levinson, *supra* note 214, at 417–18.

<sup>264</sup> Delgado, *supra* note 30, at 2439.



## CONCLUSION

*I put myself back in the narrative . . . .*

— Elizabeth “Eliza” Schuyler Hamilton (as imagined by Lin-Manuel Miranda)<sup>265</sup>

In the musical *Hamilton*, playwright Lin-Manuel Miranda ends his narrative about Alexander Hamilton with the song “Who Lives, Who Dies, Who Tells Your Story.”<sup>266</sup> Among the many teachings in this song is the lesson that those who may find themselves on the outside looking in often have very little control over how their story, their narrative, is remembered and told, particularly after death. Only those who survive long enough and are empowered with voice truly have the opportunity to shape how their histories and narratives are told and remembered — that is, unless someone else close to them who survived longer and had access to the tools for telling and disseminating stories later chose to take on the task of relaying their narratives.

In *Hamilton*, the story of Alexander Hamilton, though not as celebrated as the stories of Founding Fathers like Thomas Jefferson, gains prominence on the national stage in part because of the work of his wife, Eliza, who puts herself “back in the narrative,” stops “wasting time on tears,” uses her additional fifty years of time to tell her husband’s tale, and relies on allies like her sister to push forward both Alexander Hamilton’s and her story.<sup>267</sup> Although it took more than 150 years after Eliza Hamilton’s death in 1854 before Ron Chernow’s book *Alexander Hamilton*<sup>268</sup> would inspire Miranda’s masterpiece<sup>269</sup> and Miranda’s play would make Alexander Hamilton’s life and narrative more of a household story, audience members are able to catch a glimpse of the power of putting oneself back into the narrative through Eliza’s, Chernow’s, and Miranda’s work.

At the same time, *Hamilton*, like many other narratives, left key stories untold.<sup>270</sup> Indeed, critics lamented the play’s failure to even grapple with its hero’s more complicated connections to the enslavement of

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<sup>265</sup> CAST OF HAMILTON, *Who Lives, Who Dies, Who Tells Your Story*, at 1:03, on HAMILTON: AN AMERICAN MUSICAL (Atl. Recording Corp. 2015).

<sup>266</sup> *See id.*

<sup>267</sup> *Id.*

<sup>268</sup> RON CHERNOW, ALEXANDER HAMILTON (2004).

<sup>269</sup> LIN-MANUEL MIRANDA, HAMILTON: THE REVOLUTION 277 (2016).

<sup>270</sup> *See, e.g.*, Aja Romano, *Why Hamilton Is as Frustrating as It Is Brilliant — And Impossible to Pin Down*, VOX (July 3, 2020, 9:20 AM), <https://www.vox.com/culture/21305967/hamilton-debate-controversy-historical-accuracy-explained> [<https://perma.cc/CUZ6-L4VA>]; Ishmael Reed, “Hamilton” Is a Bad Jingoistic History, But Nice Eye Candy, S.F. CHRON.: DATEBOOK (July 6, 2020, 10:53 AM), <https://datebook.sfchronicle.com/theater/ishmael-reed-says-hamilton-is-a-bad-jingoistic-history-but-nice-eye-candy> [<https://perma.cc/5328-CLV5>].

Black people, whether they were through his in-laws or his mentor, President George Washington, all of whom owned enslaved people.<sup>271</sup> Critics also decried the play's embellished portrayal of Hamilton as an abolitionist.<sup>272</sup> Others argued that the play *Hamilton* "use[d] the talents, bodies, and voices of [B]lack artists to mask an erasure of people of color from the actual story of the American Revolution."<sup>273</sup> In fact, some bemoaned the exclusion of people of color from *Hamilton*'s overall story about the nation's founding and revolt against England and wondered why their stories could not have also been centered in this narrative of beginnings.<sup>274</sup> In this sense, one can see through *Hamilton* the ways in which the lives of people of color, particularly Black people, have been disregarded, unacknowledged, and set aside to offer a new optimistic story that does not include them.<sup>275</sup> In *SFFA*, Chief Justice Roberts did just that: he offered a revisionist and whitewashed narrative about a colorblind Constitution, country, and Court that did not and does not at all comport with the lived realities of people of color in this nation. In fact, he did worse. He offered the type of single story about Black and Latinx people that author Chimamanda Ngozi Adichie has warned against. As Adichie so eloquently explained in her TED talk, by creating a single story about Black and Latinx people — by "show[ing] [Black and Latinx students] as one thing, as only one thing, over and over again,"<sup>276</sup> Chief Justice Roberts is helping to transform that story into the definitive story of Black and Latinx people in the eyes of all who have accepted and embraced his narrative in *SFFA*. Ironically, in all his talk about how affirmative action legitimates stereotypes, the Chief Justice has helped to reify them. As Adichie explained: "The single story creates stereotypes, and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make one story

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<sup>271</sup> See Reed, *supra* note 270.

<sup>272</sup> See, e.g., *id.*

<sup>273</sup> Lyra D. Monteiro, *How to Love Problematic Pop Culture*, MEDIUM (Aug. 27, 2017), <https://intersectionist.medium.com/how-to-love-problematic-pop-culture-4f9ab9161836> [https://perma.cc/6N48-ANYF]; see also Romano, *supra* note 270 (quoting Professor Lyra Monteiro).

<sup>274</sup> Romano, *supra* note 270 (quoting from and referring to critiques of *Hamilton*); see also Lyra D. Monteiro, *Race-Conscious Casting and the Erasure of the Black Past in Lin-Manuel Miranda's Hamilton*, 38 PUB. HISTORIAN 89, 90 (2016) ("With a cast dominated by actors of color, the play is nonetheless yet another rendition of the 'exclusive past,' with its focus on the deeds of 'great white men' and its silencing of the presence and contributions of people of color in the Revolutionary era.").

<sup>275</sup> Romano, *supra* note 270.

<sup>276</sup> Chimamanda Ngozi Adichie, *The Danger of a Single Story*, TED (July 2009), [https://www.ted.com/talks/chimamanda\\_ngozi\\_adichie\\_the\\_danger\\_of\\_a\\_single\\_story](https://www.ted.com/talks/chimamanda_ngozi_adichie_the_danger_of_a_single_story) [https://perma.cc/8HFB-86KB].

become the only story.”<sup>277</sup> For this reason, for many, *SFFA* signified an erasure of many nonwhite stories in the future.<sup>278</sup>

Yet, such an erasure is not inevitable. For instance, just as *Hamilton* disappointed some of its audiences, it also offered joy and hope for possibilities of greater inclusion for different voices and stories.<sup>279</sup> Indeed, one of the most inspiring aspects of *Hamilton* is how Miranda was able to push his audiences to explore and even reimagine future possibilities. To look at and hear old stories from long-ignored faces and bodies in the present. To take in old voices through new mouths, words, and rhythms in the play. Indeed, Miranda, a playwright of color, used narrative devices created by Black people, hip hop and rap, and assembled a cast of nearly all people of color, to share a story of a white widow, Eliza, and her white-Caribbean husband in ways that highlighted the longstanding and consistent contributions of immigrant communities and that aligned with contemporary movements like those against racialized police profiling and brutality and anti-immigrant sentiments and actions.<sup>280</sup>

Similarly, just as *SFFA* may work to stifle diversity at some institutions and silence certain voices of color, it also offers a powerful reminder, especially through the voices of Justices Sotomayor and Jackson, but also subtly in the majority opinion, of the need for outsiders to persist in telling the nation’s complete histories and their own narratives. As Delgado once proclaimed, “stories and counterstories can serve an equally important destructive function. . . . They can help us understand when it is time to reallocate power,”<sup>281</sup> and they can “attack” the “complacency” that comes from “comforting stories” and can help to deconstruct harmful stock stories.<sup>282</sup> Despite its deep misunderstanding of racism and its revisions of history and reality, Chief Justice Roberts’s opinion in *SFFA* explicitly instructed people of color to share stories about race and racism in their lives, stories that have the power to disrupt and contest stock stories that have long centered whiteness and that can pull the narrativity of law out from “under erasure.”<sup>283</sup> As such stories are told, the narrators of these accounts and reports must, like narratology does, pay attention to the various parts of their narratives, considering and understanding how their narratives can and should combine in a plot to convey particular meanings and implications, and

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<sup>277</sup> *Id.*

<sup>278</sup> See Shera S. Avi-Yonah et al., “An Act of Erasure”: Harvard Students Argue Against Race-Blind Admissions in Court, HARV. CRIMSON (Oct. 30, 2018), <https://www.thecrimson.com/article/2018/10/30/trial-students-testify> [<https://perma.cc/S4HW-UMAZ>] (noting that, in the district court proceedings of *SFFA*, one Harvard student testified that “[r]ace-blind admissions is an act of erasure”).

<sup>279</sup> See Romano, *supra* note 270.

<sup>280</sup> See *id.*

<sup>281</sup> Delgado, *supra* note 30, at 2415.

<sup>282</sup> *Id.* at 2438.

<sup>283</sup> Brooks, *supra* note 4, at 21.

must share collective stories in ways that line up with their lived realities, as opposed to the “formalize[d] conditions of telling” that the Chief Justice offered through his imagined world in *SFFA*.<sup>284</sup> After all, as Brooks proclaimed, narratives do more than simply detail the events that have occurred; they “give them a point, argue their import, proclaim their results.”<sup>285</sup> In short, students, faculty, staff, and administrators who value diversity, inclusion, equity, and belonging must reinsert themselves back into these narratives, sharing their own and others’ compelling life stories, boldly and unabashedly, in admissions essays, in classrooms, in media interviews, in courtrooms, plus more, to create a record that can and will continually work to reshape the dominant narratives of exclusion and that will continue to reshape the perspectives and lessons of those who are listening and reading.

Similarly, even as students’ checked racial-identification boxes become suppressed in admissions processes, institutions must make efforts to make race, and the realities of racism, salient for decisionmakers in their communities, particularly for those who have lived their lives operating under the transparency phenomenon. Only with that type of consciousness, and the corrective actions that tend to follow from it, will we truly move towards achieving equality.

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<sup>284</sup> *Id.* at 20.

<sup>285</sup> *Id.* at 13.