Race, Affirmative Action, Antidiscrimination, and the Roberts Court

By
OLATUNDE JOHNSON

The Supreme Court's 2023 decision in *Students for Fair Admissions v. Harvard* realizes conceptions about race and the post–Civil War amendments present in the Roberts court's jurisprudence for several years including, notably, deep skepticism about the continuing need for civil rights remedies and a reading of colorblindness as the core purpose of the Fourteenth Amendment. Conservative litigation groups and the Trump administration are now using the *SFFA* decision to challenge race-conscious affirmative action programs and fundamental racial justice and civil rights laws and policies. While the Supreme Court has so far declined to adopt the farthest-reaching colorblindness arguments and has even expanded the reach of civil rights statutes in certain contexts, the next few years will likely be consequential for racial justice and antidiscrimination law. The court will almost certainly take up cases challenging the constitutionality of longstanding civil rights laws and recent racially reparative efforts.

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In *Students for Fair Admissions v. President and Fellows of Harvard College* (2023; *SFFA* hereafter), the Supreme Court held that the Fourteenth Amendment bars consideration of race as a factor in higher education admissions to advance diversity. If we consider President Trump's influence on the Roberts court as

Olatunde Johnson is Ruth Bader Ginsburg '59 Professor of Law at Columbia Law School, where she teaches and writes about antidiscrimination law, administrative law, courts, and democracy. She directs Columbia's Constitutional Democracy Initiative and codirects the Center on Constitutional Governance at Columbia Law School.

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Correspondence: olati.johnson@law.columbia.edu

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beginning with the appointments of Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, *SFFA* is likely the court's most important decision on race so far. The case announces a conception of the Fourteenth Amendment consistent with long-standing conservative ambitions. It is the fruit of a decades-long attack on the constitutionality of "racial preferences" by anti–affirmative action litigators in cases such as *Grutter v. Bollinger* (2003) and *Parents Involved in Community Schools v. Seattle School District, No.1* (2007). Consistent with the goals of this litigation campaign, *SFFA* produces a Fourteenth Amendment that is less concerned with advancing substantive racial equality or equal citizenship than with making the formal markers of race less visible. And that account of the case and the goals of the litigation movement is a relatively anodyne take on the *SFFA* ruling. Commentators have long understood that the equal protection doctrine often advanced "anticlassification" values more than antisubordination, in short, that it was concerned with limiting the explicit use of race or gender rather than in advancing substantive equality (Balkin and Siegel 2003; Fiss 1976; Siegel 2004). And after a set of rulings in the 2000s (*Fisher v. University of Texas at Austin* 2016; *Schuette v. Coalition to Defend Affirmative Action* [BAMN] 2014), it became clear that race-conscious affirmative action in higher education was hanging by a thread.

Still, *SFFA*'s overruling of *Grutter* reveals a court boldly willing to overturn precedent. The decision stands alongside other prominent decisions by the Roberts court, such as *Dobbs v. Jackson Women's Health Organization* (2022) and *Loper Bright Enterprises v. Raimondo* (2024), that alter core public law doctrines, unsettle long-standing rights, and have concrete and potentially devastating impacts on individuals and communities. *SFFA* along with earlier decisions, such as *Shelby County v. Holder* (2013), argue against the continuing need for laws addressing racial discrimination and inequality and instead seek to advance a set of competing values such as racial neutrality, colorblindness, fairness, or state sovereignty. A strong thread running through these decisions is that racial discrimination and segregation were salient in the past but that the interventions of an earlier era are no longer required (Boddie 2017; Joshi 2023).

The decision is already having a tremendous impact on the design of race-conscious programs, as well as on broader efforts to advance racial equality. While race-conscious affirmative action plays a role only at a relatively small number of highly selective educational institutions (DeSilver 2023), these institutions are important in shaping public life and leadership structures (Chetty et al. 2023). *SFFA* was brought by the same lawyers who brought *Shelby County*, the case that declined to uphold Congress's Voting Rights Act's coverage formula (Section 4) and that opened the door for greater restrictions on voting (Anderson 2018; Weiser and Dennie 2022). In addition, litigants and advocates are deploying the *SFFA* decision to advance a broader agenda of "colorblindness" in the private and public sphere. These groups employ a set of affirmative litigation tactics that mimic the rights litigation strategies of groups like the NAACP and NAACP Legal Defense Fund and claim the "civil rights" and "fairness" moniker for their efforts. They seek to challenge race-conscious affirmative action in a range of contexts, including workplaces, K–12 schools, housing, and economic

development, and increasingly seek to limit the reach of antidiscrimination statutes and regulations. In addition to these litigation efforts, the Trump social movement and conservative funders and activists are advancing legislation that seeks to dismantle diversity programs and the teaching and education about race in the U.S. (Schwartz 2021). Since taking office, the Trump administration has repealed long-standing administrative directives to promote racial equity and antidiscrimination in federal contracting and federally funded programs (Executive Order 14173 2025) and sought to curb what it terms "illegal DEIA" programs in corporations, workplaces, higher education, and schools (Executive Order 14173 2025; Trainor 2025). Some academic commentators have found that the electoral appeal of Trump is explained in part by white identity politics, whether this takes the form of group hostility to Black people, immigrants, and Muslims (Drutman 2017) or the protection of white people against threats from efforts to undo systemic racism (Buyuker et al. 2021; Fording and Schram 2023; Smith and King 2024). The aftermath of *SFFA* might be the beginning of a legal manifestation of that politics, which may become increasingly visible as a broader set of executive, administrative, legislative, and litigation efforts challenging racial justice and civil rights laws and policies unfold.

How far the court will go in accepting the arguments of this white identity project is still to be determined. A majority of the court rejected the attempt to argue that colorblindness should limit the effects test of Section 2 of the Voting Rights Act (VRA) (*Allen v. Milligan* 2023). In other statutory civil rights cases, including those related to race, age, LGBTQ identity, and gender, the court has sometimes expanded the meaning and efficacy of civil rights laws.

This article examines the *SFFA* case alongside the court's other recent jurisprudence on race and civil rights. It shows how the *SFFA* case realizes conceptions about race and the post–Civil War amendments that have coursed through the Roberts court's jurisprudence for years. It also connects that case to other strands of the court's methodology and mode of operation, including originalism, a willingness to overturn precedent, and a lack of deference to democratic actors. Still, it is too limited to understand *SFFA* within the confines of the court's jurisprudential claims. *SFFA* is also the product of a sustained and well-funded set of litigation and legislative efforts that seek to dismantle racial remedies and civil rights laws in a broad range of settings (Orakwue and Teichholtz 2022; Schwartz 2021). This article considers the effects of the court's ruling and the cases that are likely to come before it in the coming years.

The *SFFA* Litigation

In *Students for Fair Admissions v. Harvard* (consolidated with *Students for Fair Admissions v. University of North Carolina* and referred to collectively in this article as *SFFA*), the court held that the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 forbid colleges and universities from considering race and ethnicity as a "plus" factor in admissions to advance diversity. The court's

decision overturns (or at minimum weakens) precedent established in *Grutter v. Bollinger* (2003). While the *Grutter* decision held that promoting diversity in the student body was a compelling interest sufficient to survive strict scrutiny under the Fourteenth Amendment, the *SFFA* majority found that diversity, while "commendable," was too "amorphous" and incoherent to satisfy the strict scrutiny that the Equal Protection Clause demands. According to Chief Justice John Roberts's ruling, which was joined by five justices, the goals of diversity—the training of leaders, production of knowledge, and exchange of ideas—were not clearly measurable by courts and had no logical stopping point. Deference to university administrators was not warranted, according to the court, because of the high level of scrutiny demanded by the Fourteenth Amendment when racial classifications are in play. In addition, the consideration of race in both programs relied on broad racial categories without precision—by for instance lumping together Asian-American applicants from different countries and ethnic backgrounds. The majority was unconvinced by the universities' arguments that race was a relatively small factor in a holistic admissions program in which applicants were selected only after having achieved high test scores and grades. Instead, the court found that race operated as a "negative," citing, for instance, an 11 percent drop in the number of Asian American students at Harvard over the relevant period. Disagreeing with lower court factual findings, the Supreme Court found credible evidence that the university aimed for particular percentages of Black and Latine students each year, which, according to the court, defied the equal protection requirement that citizens be treated as "individuals, not simply as components of a racial, religious, sexual, or national class." This, according to Chief Justice Roberts's opinion, came close to "outright racial balancing," which was "patently unconstitutional."

The decision does not depend entirely on an originalist case for colorblindness. The majority opinion can be contrasted to Justice Clarence Thomas's concurrence, in which he purports to provide an originalist defense of a colorblind reading of the Fourteenth Amendment. Instead, Chief Justice Roberts's opinion in *SFFA* relies heavily on *Brown v. Board of Education* (1954), citing that case, its briefs, and oral arguments more than a dozen times. The court anchors the legitimacy of its decision in *Brown*. It reads *Brown* not as an anticaste, antistigma, or equal citizenship case. Nor does it read *Brown* as requiring the government to take affirmative action to integrate institutions or even to remedy de jure segregation (in contrast to *Swann v. Charlotte-Mecklenburg Board of Education* 1971). Rather, for the majority, *Brown* becomes a decision about removing race-based classifications. Drawing on the plaintiffs' oral argument in *Brown*, Chief Justice Roberts emphasizes that "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens" (*SFFA* 2023, at 204).

Despite the court's embrace of race neutrality, Chief Justice Roberts leaves room for colleges and universities to consider on an individualized basis whether an applicant has overcome racial or other forms of discrimination. Roberts concludes the decision, stating: "At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an

applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise" (*SFFA* 2023, at 230).

The three Trump-appointed justices were critical in forming the 6–3 majority coalition that overruled *Grutter*. While little was known of the Trump appointees' positions on affirmative action (with the caveat that Justice Gorsuch struggled in his confirmation hearing in answering whether *Brown* was correctly decided [U.S. Senate Committee on the Judiciary 2017]), they seemed content to join the majority opinion and weighed in only to display more skepticism about race-conscious remedies. Justice Barrett did not write separately. Justice Gorsuch wrote separately to argue that Title VI of the 1964 Civil Rights Act, which applied to Harvard as a federal funding recipient and nongovernment actor, tolerates even less race-consciousness than the Fourteenth Amendment. The court had previously held in *Bakke* that the Equal Protection Clause and Title VI standards were coextensive, a holding that neither party in *SFFA* asked the court to reconsider. Justice Gorsuch's concurrence maintains that this part of *Bakke* was wrong and that the text of Title VI (which states that no person shall be "subjected to discrimination" by a federal funding recipient) operates as an absolute bar to differential treatment "without regard to any other reason or motive the recipient might assert" (*SFFA* 2023, at 290) such as furthering diversity or racial equality. In other words, Title VI (enacted to promote racial integration in school in the aftermath of *Brown*) was even more colorblind than the Fourteenth Amendment. Justice Kavanaugh wrote separately to emphasize that racial classifications should be time-limited, a point he makes again in the voting rights case discussed below. His concurrence specifically points to Justice Sandra Day O'Connor's *Grutter* opinion and its language that race-conscious affirmative action should terminate in 25 years. According to Justice Kavanaugh, this was not Justice O'Connor expressing a wish, it was a directive—an "important part of Justice O'Connor's nuanced opinion for the Court in *Grutter*" (*SFFA* 2023, at 315)—that should be applied going forward.

The dissents by Justices Sonia Sotomayor and Ketanji Brown Jackson, joined by Justice Elena Kagan, present a starkly different account of the Fourteenth Amendment and of the history and contemporary relevance of racial inequality in the U.S. They stress a compelling interest in racial and ethnic diversity. They emphasize the antisubordination and anticaste purpose of the Fourteenth Amendment rather than merely the goals of colorblindness or race neutrality. Justice Jackson's opinion in particular provides an account of the long history of racial subordination in the U.S., detailing the history of racial discrimination in education, land use and lending practices, health care, and other areas. Justice Jackson's dissent explains the role of government policies in creating the segregation and inequality that persist today. This dissent offers the history and contemporary reality of race discrimination and segregation as a counter to the majority's claim that the diversity goal is "amorphous." It seeks to tie the diversity rationale back to "the reality of race" in the face of a majority opinion that seems "unmoored from critical real-life circumstances" and that consigns "race-related historical happenings to the Court's own analytical dustbin" (*SFFA* 2023, at 410).

"Colorblindness for all" the dissent argues, is "detached . . . from this country's actual past and present experiences" (*SFFA* 2023, at 407).

The effect of the court's *SFFA* ruling is to either limit *Grutter*'s practical utility going forward or to entirely overrule it. No doubt, the 6–3 decision was made possible by the addition of Trump's appointees to the court. At the same time, these contestations about the meaning of the Fourteenth Amendment were in circulation well before *SFFA*. Chief Justice Roberts, the author of the *SFFA* case, was not on the court when *Grutter* was decided, but he authored *Parents Involved* striking down voluntary school integration programs. In that decision, he gave prominence to the colorblindness position when he concluded the opinion stating: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (*Parents Involved* 2007, at 748). In a set of decisions involving higher education affirmative action, *Fisher* and *Schuette*, several justices had signaled their continued dissatisfaction with the court's jurisprudence on affirmative action. *SFFA*'s reasoning also develops strands from Chief Justice Roberts in *Shelby County v. Holder* which, in finding Congress's coverage formula under the VRA unconstitutional, argued that the time for race-conscious remedies has ended.

SFFA is the result of a decades-long litigation strategy by certain conservative groups intent on the termination of race-conscious affirmative action programs (Cokorinos 2003; Hinger 2018; Okechukwu 2019). After racial justice wins in *Grutter* and *Fisher*, lawyers shifted their legal strategy, bringing in claims centered on the argument that Asian American applicants were harmed by universities' race-conscious policies. This larger litigation and social movement context ensures that *SFFA* will not be the end of the matter. Drawing on the reasoning and holding of *SFFA*, groups have started challenges to programs in a wide range of contexts, including race-based employment fellowships, race-based scholarships, contracting programs for disadvantaged businesses, and corporate diversity initiatives (Ax 2023; Johnson 2024b).

The Future of Colorblindness and Equal Protection

How far the Trump court will take the *SFFA* interpretation of the Fourteenth Amendment is not yet clear. The court has pulled back on at least one attempt to instill a colorblind conception on antidiscrimination law when it preserved Section 2 of the VRA, which prohibits discrimination in voting. Specifically, in *Allen v. Milligan*, the court rejected arguments that the provision unconstitutionally exceeded Congress's power to enforce the Fourteenth and Fifteenth Amendments or that it demanded race-neutral standards of proof and remedies, or an intent instead of an "effects" standard. *Allen* involved a challenge by a group of plaintiffs alleging that the congressional map adopted by the State of Alabama for the 2022 congressional elections violated Section 2 of the VRA. After the 2020 decennial census, Alabama had drawn a voting map that produced only one district in which Black voters were a majority of the voting age population, despite

evidence that they could have drawn a second district without violating traditional districting principles. The litigation required a straightforward application of factors in *Thornburg v. Gingles* (1986), developed after Congress amended the VRA in 1982 to affirm that proof of discriminatory "effects" violated the statute (52 U.S.C. § 10301). The Supreme Court in *Gingles*, drawing on legislative history, outlined that a plaintiff could prevail in a Section 2 case by showing that "an electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunity enjoyed" by "minority" voters or works to "minimize" the ability of "minority voters" to elect their preferred candidate. Applying *Gingles*, a three-judge panel found that Alabama had violated Section 2 by failing to draw a second Black district, and they rejected Alabama's various constitutional challenges to the statute.

While not the easiest claim to establish, Section 2 had become increasingly important to civil rights litigants given the court's effective invalidation of Section 5 in *Shelby County.* And thus, when the case came to the Supreme Court, some voting rights advocates and court observers feared that the court would find Section 2 unconstitutional (Buksbaum 2023; Stinnett 2023). Instead, it rejected the state's arguments that the lower court's method of proving a Section 2 violation and the VRA's permissible remedies violated the Fourteenth and Fifteenth Amendments requirements of intentional discrimination, race neutrality, and colorblindness. The Supreme Court deferred to the lower court's findings on the application of *Gingles* to the facts at hand and rejected the broader constitutional challenges to Section 2.

Despite having authored *Shelby County*, Chief Justice Roberts here found that Alabama was misguided in its efforts to "remake our Section 2 jurisprudence" by inserting a new theory requiring a "race-neutral benchmark" for determining a Section 2 violation and rejected its arguments that *Gingles* requires racial proportionality in districting. In contrast to *Shelby County*, his opinion emphasized deference to Congress and adherence to precedent. The opinion deferred to the "hard-fought compromise that Congress struck" and reaffirmed *Gingles* and subsequent cases reaffirming the long-standing Section 2 test. The majority also rejected a statutory argument made by the state, and accepted by Justice Thomas in dissent, that Section 2 should not apply to single-member districting, a position that Justice Thomas had urged in *Holder v. Hall* (1994). In doing so, it reaffirmed its holding in *Brnovich v. Democratic National Committee* (2021) and an "unbroken line of decisions stretching four decades" that Section 2 applied to single-member districts.

Some commentators considered *Allen* a surprising win for civil rights advocates and a pause on a jurisprudence that after *Shelby County, Brnovich* (which narrowed the scope of Section 2), and *SFFA* seemed headed toward weakening the VRA. To be sure, the majority emphasized the limited scope of Section 2, noting that "Section 2 litigation in recent years has rarely been successful" (*Allen v. Milligan* 2023, at 29) as it requires the application of traditional districting principles. It also hinted that if racial considerations were "predominant" in redistricting, this might pose a constitutional problem, making clear that "there is a difference between being aware of racial considerations and being motivated

by them" (*Allen v. Milligan* 2023, at 30). Still, the majority rejected an extreme race-neutrality approach that was urged by Alabama, stating that "the contention that mapmakers must be entirely 'blind' to race has no footing in our Section 2 case law" (*Allen v. Milligan* 2023, at 33) and was unworkable. The majority also refused the state's attempt to insert a discriminatory intent standard—a standard much harder to prove than the current "totality of the circumstances" effects test—into the Section 2 framework. Chief Justice Roberts again invoked the institutional necessity of adhering to precedent and deference to Congress, stating that the "precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under [Section] 2" (*Allen v. Milligan* 2023, at 37). According to Roberts's opinion, precedent also foreclosed the state's argument that an effects test was inconsistent with the Fifteenth Amendment: The VRA's ban on practices that "are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment" (*Allen v. Milligan* 2023, at 41).

Chief Justice Roberts' decision to uphold the act is noteworthy given that as a young lawyer working for the Department of Justice, he had written memos arguing against the 1982 amendments, adding a "totality of the circumstances" effects test (Biskupic 2019, 72–74). His memos urged then–Attorney General William French Smith to press President Ronald Reagan to oppose the amendments on the theory that an effects test would lead to excessive litigation against state and local electoral systems nationwide and would create a right to "proportional racial representation" (Biskupic 2019, 75). Whether or not Chief Justice Roberts still holds skepticism about the VRA, his familiarity with the congressional record might have inclined him to some deference to Congress's actions four decades prior.

Yet, *Allen* reveals the uncertainty about what the court will hold in the future about the Voting Rights Act and whether it will continue to support the VRA or instead favor those arguments challenging its constitutionality. Of the Trump-appointed justices, only Justice Kavanaugh joined the majority opinion upholding the constitutionality of Section 2. The other Trump-appointed justices, Justices Gorsuch and Barrett, joined in pertinent part the dissenting opinion of Justice Thomas—a long-standing proponent of the position that Section 2 of the VRA is unconstitutional in that it mandates the predominant use of race in districting and encourages segregated and balkanized political systems. While joining the majority, Justice Kavanaugh authored a concurrence emphasizing, somewhat grudgingly, that precedent and deference to Congress justified continuing to uphold Section 2 of the VRA. He asserted that if the argument had been properly raised by Alabama, he would have been open to the state's argument that "race-based redistricting" would be allowed by Section 2 only with time limits. The short of it is that Justice Kavanaugh's opinion suggests that in the right case, he might be willing to entertain the proposition that Section 2 as currently applied and unconstrained by time limits violates the Fourteenth and Fifteenth Amendments.

Colorblindness Beyond Affirmative Action?

SFFA and *Allen* raise questions about how far the court will go in its embrace of arguments about colorblindness. A range of conservative litigation organizations are using the *SFFA* holding to challenge race-conscious affirmative action programs more broadly and also to challenge enforcement of antidiscrimination prohibitions in voting, education, and other areas. These efforts are deeply connected to a broader social movement and well-funded advocacy effort that is centered around white identity politics (McFadden 2021). Scholars debate how to characterize this politics of white identity. Some argue it is white nationalist in its goals, while others contend that at least some aspects of the movement are better understood as white-protective in the face of expanding programs to advance racial equity (Smith and King 2024). Without resolving this question about how to characterize the goals and motivation of the movement and the advocacy actors, I would suggest that these cases are occurring in a moment of heightened conflict around race in the U.S., one that is deeply intertwined with President Donald Trump's rise to power and his use of legal authority. President Trump used his first presidency to advance policies consistent with the goals of strengthening white national identity and power. These include the use of executive power to limit immigration to the U.S. and emphasize European migration. It also includes executive orders that would take away funding from programs that seek to advance diversity in workplaces and schools (Executive Order 13932 2020; Executive Order 13934 2020; Executive Order 13950 2020; Executive Order 13958 2020). At the state level, legislative efforts expanded after Trump's first presidency to end workplace diversity, equity, and inclusion (DEI) programs; ban books on racial, ethnic, and LGBTQ history and experiences; and defund schools that teach Black history, "divisive" concepts, or critical race theory (Adams and Chiwaya 2024; Alfonesca 2024; Garcia 2024; Reuters 2023; Telford 2024). And since taking office again in January 2025, President Trump and his administrative agencies have taken actions to target "illegal DEI" in education and workplaces, repealed executive orders and programs to advance environmental justice, and issued interpretations of the law that argue that a range of programs to advance inclusion at the K–12 and higher education levels are inconsistent with *SFFA* (Executive Order 14173 2025; Trainor 2025).

The end goals of these social movements and elite actors vary. Conservative elites and social movements initially actively opposed the Supreme Court's *Brown* decision and its requirement of school desegregation (TerBeek 2021). They also opposed the 1964 Civil Rights Act and other antidiscrimination law (Hollis-Brusky, this volume; Perlman 2020). And for decades, conservative groups have coalesced in opposition to race-conscious affirmative action and diversity programs (Cokorinos 2003), with the legal activist Ed Blum as the most recent figure in this effort (Hayter 2023; Hinger 2018). As with Chief Justice Roberts's *SFFA* opinion, some claim that they are doing so as true heirs to the colorblind and nondiscrimination principles of *Brown* (Perlman 2020). In addition, the conservative legal establishment (including Chief Justice Roberts) has

advocated against disparate impact provisions of civil rights law and resisted efforts to strengthen of voting rights and fair housing laws (Biskupic 2023; Johnson 2014, 2019). The Trump movement's resistance to affirmative action and antidiscrimination law not only is in line with these long-standing conservative social movement goals but also flirts with eugenics, nativism, and white nationalism, which have deep roots in American politics (Churchwell 2018; Fording and Schram 2020; Gold 2023).

The persistence and the well-funded nature of the attack on affirmative action and civil rights laws suggests that the Supreme court is likely to soon face additional equal protection, civil rights, and race cases. What were once considered unlikely claims challenging basic and long-standing civil rights doctrines and statutes are now being entertained by federal trial and appellate appointments, often featuring Trump appointees.

While *SFFA* by its terms does not address race-conscious programs beyond higher education admissions, anti–affirmative action organizations have launched extensive litigation challenging a range of programs that seek to address racial inequality in employment, K–12 education, and government contracting (*American Alliance for Equal Rights v. Fearless Fund Management, LLC* 2024; Monea 2024). The cases bubbling through the courts will test how *SFFA* applies outside of the domain of education and the extent to which race-conscious affirmative action programs can be used for remedial (rather than only diversity) purposes (Johnson 2024b). One example is a challenge to the federal Department of Commerce's Minority Business Development Agency's program that provides assistance to "socially or economically disadvantaged individuals" (15 USC § 9501 (9)(A)). The statute establishing the program creates a presumption that certain groups are disadvantaged (including African Americans, Latines, American Indians, Asians, and Native Hawaiians and Pacific Islanders) and thus should receive assistance; other businesses not presumptively disadvantaged may "apply for a designation as socially or economically disadvantaged" (15 CFR § 1400). In April 2024, a Texas district court judge who had been appointed by Trump found the Minority Business Development Agency program unconstitutional by relying heavily on a Fourteenth Amendment originalism argument similar to the arguments articulated by Justice Thomas's concurrence in *SFFA*. Drawing on the historical record, the court concluded that the core purpose of the Fourteenth Amendment was "doing away with all governmentally imposed discrimination based on race" (*Nuziard v. Minority Business Development Agency* 2024, quoting *Palmore v. Sidoti* 1984). The court ignored considerable evidence in the historical record that the sponsors and drafters of the Fourteenth Amendment at minimum also sought to advance equal citizenship and racial subordination and that they advanced race-conscious remedial programs (Barnett 2011; Jones 2018; Roberts 2019; Rubenfeld 1997). The court also declined to defer to Congress's assessment that discrimination in the public and private market justified providing services for minority businesses.

There are also cases in lower courts that involve challenges to formally race-neutral programs. *Allen* may serve as an indication that the court is not yet willing to bite on far-reaching colorblindness arguments—as may the court's rejection of

certiorari in a case challenging a formally race-neutral high school admissions program (*Coalition for TJ v. Fairfax County School Board* 2023). The case involved Thomas Jefferson High School, a magnet high school that historically selected students based on an admissions process consisting of standardized tests and late-stage holistic review. The student body was typically composed of students from a limited group of "feeder" middle schools in Fairfax County, Virginia, that were predominantly white, Asian, and middle- to high-income, and the admitted students included few low-income students or Black and Latine students. The board revised its admissions program in 2020 to draw from each of the counties' middle schools but was formally race-neutral in that it did "not seek to achieve any specific racial or ethnic mix, balance or targets" (*Coalition for TJ* 2023, at 875). The new admissions program changed the profile of the students admitted and enrolling at the magnet school, resulting in more applicants, higher GPAs of applicants, and more low-income students, English language–learners, and girls. The percentage of Asian American applicants receiving offers decreased (from 65–75 percent in past years to 54 percent), while the number of offers increased sixfold among Asian American students from underrepresented schools and from 1 to 51 among low-income Asian American students (*Coalition for TJ* 2023, at 876). The number of Black and Latine students also increased. A coalition of parents represented by the Pacific Legal Foundation, a leading conservative organization that litigates against race-conscious affirmative action, challenged the program as motivated by the racially discriminatory purpose of reducing the percentage of Asian American students. The district court accepted the claim, but a divided panel of the 4th Circuit reversed. It rejected the argument that the policy had a significant adverse impact on Asian Americans, who had the highest admissions rates of any group. The 4th Circuit also declined to adopt the plaintiff's argument that the prior government's admissions policy represented the appropriate baseline for measuring the disparate effect of an admission policy. In the end, the 4th Circuit found no evidence that the race-blind admissions program was motivated by a specific intent to discriminate against Asian Americans. On petition to the Supreme Court a few months after the *SFFA* decision, the court denied review.

As Sonya Starr has noted, the *Coalition for TJ* litigation and other challenges to race-blind magnet school admissions programs differ from challenges to race-conscious affirmative action in that they seek to advance "'ends-colorblindness': the position that, even absent classification or individual-level disparate treatment, any race-related objective itself renders a policy suspect and almost certainly invalid—whether that objective is to reduce racial inequality or increase it, to integrate or segregate, to include or exclude" (Starr 2024).

The Supreme Court has so far not accepted the invitation to forbid "ends-colorblindness," an approach that would render core aspects of civil rights law constitutionally suspect. However, challenges are beginning to emerge in federal lower courts populated with Trump appointees. A case arising out of Louisiana illustrates the challenge to civil rights law enforcement. In recent years, the Environmental Protection Agency (EPA) has announced its intent to enforce Title VI of the Civil Rights Act to address environmental harms facing

communities of color. Specifically, the EPA indicated that it would enforce the long-standing Title VI disparate impact regulations, which prevent states and localities receiving federal funds from engaging in actions with an unjustified disparate impact on Black communities. The EPA (2023) also issued guidance stating that it would assess environmental harm in such a way that it takes consideration of the cumulative impacts on racial groups. Environmental justice groups filed a complaint with the EPA against agencies in Louisiana for the permitting of a facility in St. John the Baptist Parish, a predominantly Black community located in the 58-mile-long corridor known as Cancer Alley. After receiving the complaint, Louisiana commenced litigation against the EPA, claiming that the disparate impact and cumulative impact regulations exceeded the EPA's authority (drawing on administrative law cases such as *West Virginia v. Environmental Protection Agency* [2022] and *Loper Bright*). They argued also that enforcement of the EPA rules would violate *SFFA*'s statutory and constitutional notions of colorblindness by requiring state agencies to perform a race-conscious analysis of disparate impact, an argument that parallels the arguments made by Alabama in *Allen*. The district court judge, appointed by Trump, ultimately accepted the state's arguments and enjoined the state from enforcing the disparate impact regulations and cumulative assessment guidelines (*Louisiana v. Environmental Protection Agency* 2024). The Department of Justice, representing the EPA, declined to appeal the case to a conservative 5th Circuit Court. After this ruling, 22 state attorneys general from states with conservative attorneys general submitted a rulemaking petition asking the EPA to rescind its disparate impact regulations (Moody 2024).

As indicated above, disparate impact has long been a target of the conservative legal movement. Most recently in 2015, the court sustained the disparate impact theory in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project* (2015), when it held that the Fair Housing Act's notion of discrimination forbade not just intentional discrimination but unjustified disparate impacts. This ruling was prior to the appointment of the Trump justices, and conservative advocates are likely hoping that *SFFA* and other cases create an opening for new arguments challenging disparate impact.

Racial justice, progressive organizations, and "blue" states certainly push back on these legal developments and on the arguments advanced by conservative legal organizations. For instance, environmental groups and states have filed their own arguments opposing the petition for rescinding Title VI's disparate impact ruling (Chizewer and Cahn 2024; James 2024). Racial justice, civil liberties, and civil rights organizations have also challenged the "anti-woke" laws that seek to ban books, direct the teaching of history, and prohibit DEI, already with some success in lower courts (*Honeyfund.com Inc v. Governor, State of Florida* 2024). Racial justice groups are launching broader efforts to contest the theory of "colorblindness" and assert instead antisubordination, anticaste, and equal citizenship as central to the purposes of the Fourteenth Amendment. And dozens of states and localities are engaged in racially reparative efforts despite conservative efforts to advance colorblindness and race neutrality (California Task Force 2023; Johnson 2024a). Given these competing domains of activity, it seems likely that

additional challenges to programs addressing racial inequality will percolate in the lower courts and eventually arrive at a Supreme Court that has been shaped by Trump.

Antidiscrimination Statutes and Religion

While so far this article has focused on the impact of the court's equal protection race cases, the trend is not always toward conservative outcomes or polarized decisions in other contexts involving civil rights. In *Comcast Corp v. National Association of African American-Owned Media* (2020), the court held that a plaintiff who sues for racial discrimination in contracting under the Reconstruction-era statute Section 1981 bears the burden of showing that race was a but-for-cause of their injury, rather than the more lenient "motivating factor" test used in Title VII of the 1964 Civil Rights Act. The case increases the burdens on plaintiffs in Section 1981 cases, but it was a unanimous decision—a departure from the polarized race cases in the equal protection and voting rights contexts.

The court has expanded antidiscrimination laws outside the race context. In *Bostock v. Clayton County, Georgia* (2020), the court held that Title VII's prohibition on "sex" discrimination in employment encompasses discrimination based on sexual orientation and gender identity. Written by Justice Gorsuch, the decision expanded civil rights protections and did so over the objection of the conservative Justices Samuel Alito, Thomas, and Kavanaugh. At the same time, the decision purports to use a textualist methodology favored by conservatives, and Justice Gorsuch invokes *Bostock*'s textualism in his concurrence in *SFFA* to suggest that the text of Title VI permits *no* race-conscious affirmative action, while declining to discuss the act's legislative history, which shows that Congress sought to encourage race-conscious school desegregation.

The greatest recent expansions of antidiscrimination protections by the Supreme Court have come in the area of religion. A separate article in this volume discusses religion (Muñoz, this volume). But it is worth mentioning briefly here because the court's treatment of religious rights has implications for antidiscrimination law. The court has expanded antidiscrimination protection for religious individuals in some cases but in other cases has sought to protect religious autonomy in ways that limit the reach of antidiscrimination statutes. For instance, in 2023, the court in *Groff v. DeJoy* (2023) made it easier for plaintiffs to obtain religious accommodations in Title VII cases. Yet in *Our Lady of Guadalupe School v. Morrissey-Berru* (2020), it expanded the First Amendment's ministerial exception to two teachers at a Catholic school, thus preventing them from bringing age discrimination and disability discrimination lawsuits. The most notorious cases were the public accomodation cases involving gay weddings. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), the Supreme Court held 7–2 that the Colorado Civil Rights Commission may have displayed hostility to religion in adjudicating a baker's claim that he religiously objected to having to provide certain bakery services to gay couples. In *303 Creative LLC v. Elenis*

(2023), the court ruled 6–3 on the question avoided in *Masterpiece Cakeshop. 303 Creative* found that the First Amendment prohibited Colorado from requiring a website designer who opposed same-sex marriage to create same-sex wedding content on her website (which is considered a public accommodation).

The court's holding opens the door for more extensive invocation of religious exemptions to generally applicable antidiscrimination law (Karlan 2019), particularly in the area of LGBTQ, gender, and abortion rights. There is substantial litigation in the lower courts on these questions, and we may soon see the impact of the Trump court's receptivity to religious exemptions from enforcement of various aspects of antidiscrimination law.

Conclusion

SFFA's overturning of *Grutter* and recasting of *Brown* as a decision advancing colorblindness make plain the impact of the Trump appointees on the court's race jurisprudence. The decision is already altering the policies and practices of schools and universities and, due to the number of lawsuits brought by conservative legal movements in the aftermath, will likely affect a broader range of public and private sector programs. Some of President Trump's appointees to the federal appellate and district courts have been receptive to claims that would greatly weaken the scope of long-standing civil rights laws. Racial justice and progressive organizations are engaged in their own policy and legal mobilization to counter the policies, arguments, and conceptions of equality advanced by the conservative legal movement. With the election of President Trump, the court is likely to play a massive role in determining the future of these contestations over racial justice and antidiscrimination law.

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