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The Remedial Rationale After *SFFA*

Olatunde C.A. Johnson*

INTRODUCTION

After the Supreme Court’s ruling in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*)¹ limiting the ability of higher education institutions to use race as a factor to advance diversity in the student body, at least one prominent commentator suggested that universities should now justify their affirmative action policies based not on diversity but on the need to *remedy* discrimination.² Chief Justice John Roberts’s majority opinion deems diversity—the rationale established in *Regents of the University of California v. Bakke* and affirmed in *Grutter v. Bollinger*³—a “commendable” goal.⁴ But the effect of the Court’s ruling is to either limit the rationale’s practical utility going forward or to entirely overrule it.⁵ With this new uncertainty, it is understandable that racial justice advocates would turn to the remedial rationale to justify the constitutionality of race-conscious affirmative action. Relying on a remedial rationale not only reflects a pragmatic imperative in light of *SFFA* but also a foundational critique of the diversity rationale from those who support race-conscious affirmative action: the argument that the diversity rationale rests on the notion of “enhanc[ing] the

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¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 143 S. Ct. 2141, 2175 (2023).

² See Richard Rothstein, *The Problem with Wealth-Based Affirmative Action*, THE ATL. (June 1, 2023), <https://www.theatlantic.com/ideas/archive/2023/06/affirmative-action-race-socioeconomic-supreme-court/674251>.

³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978); *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

⁴ *SFFA*, 143 S. Ct. at 2151.

⁵ See Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. REFLECTION 113, 113, 124–25 (2023) (“*SFFA* at least partially overruled *Grutter*[,] and . . . the Court’s failure to acknowledge this forthrightly should trouble us.”).

educational experience of White students” while the “real reason we need affirmative action is that it is an important part of our society’s ability to remedy the effects of past discrimination.”⁶ This critique of affirmative action has long-standing roots. After the ruling in *Bakke*, civil rights lawyers characterized the Court’s decision as a “devastating loss” for its rejection of the idea that the “[Fourteenth] Amendment, primarily enacted to bring [B]lack [A]mericans to full and equal citizenship, allowed colleges and universities to take deliberate steps aimed at remedying the effects of centuries of slavery and segregation.”⁷ More than two decades later in a pre-*Grutter* essay examining the civil rights community’s subsequent pragmatic embrace of the diversity rationale, Professor Charles Lawrence argued that race-conscious affirmative action should instead be justified by the “need to remedy past discrimination, address present discriminatory practices, and reexamine traditional notions of merit.”⁸

Despite the clarity with which many commentators embrace remedy as the *real* imperative for affirmative action, it is unclear what it would mean to develop new arguments based on the remedial rationale. The Supreme Court’s *SFFA* opinion adds very little to the doctrinal scope of the “remedial rationale,” doubling down on the parsimonious jurisprudence on the permissible scope of race-conscious remedies under the Fourteenth Amendment and admonishing the dissent for infusing remedial considerations into its understanding of the diversity rationale.⁹ Yet even with the constraints placed on remedy by the Supreme Court, much may rest on rebuilding a viable remedial rationale. The diversity rationale was never well-theorized or utilized beyond the elite higher education context. The actual stakes of affirmative action and the impact of *SFFA* will extend beyond higher education and threaten economic and racial

⁶ Rothstein, *supra* note 2.

⁷ See Theodore M. Shaw, *Race Still Matters*, THE WASH. POST (Feb. 28, 2003, 7:00 PM), <https://www.washingtonpost.com/archive/opinions/2003/03/01/race-still-matters/26ff18ff-dab1-487b-86c5-e5301ab5458f>.

⁸ Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001), <https://doi.org/10.2307/1123688>; see also Asad Rahim, *Diversity to Deradicalize*, 108 CALIF. L. REV. 1423, 1426 (2020), <https://doi.org/10.15779/Z38NZ80Q8S> (tracing the origins of Justice Powell’s diversity rationale to his desire to promote intellectual diversity on college campuses and weaken the power of left-wing campus groups).

⁹ See *infra* notes 60–70 and accompanying text.

integration efforts in elementary and secondary schools,¹⁰ programs to advance employment and economic equity,¹¹ remedies for Black land loss and housing segregation,¹² and environmental justice programs.¹³ The Court's narrow construction of the Fourteenth Amendment in *SFFA* risks the very idea of racial remedy. Particularly at risk are efforts to address racial inequality stemming from past and contemporary exclusionary policies and practices.¹⁴

This Article considers how to strengthen the forgotten remedial rationale with special attention to the role of housing. Diversity has been the prevailing rationale for higher education affirmative action, but in most other domains, the need to redress past or contemporary discrimination or exclusion justifies affirmative action. Federal, state, and local governments have launched powerful and innovative reparative initiatives in recent years.¹⁵ This Article examines the doctrinal and democratic space that remains for sustaining these programs under a remedial rationale.

Part I maps the key strands of the Court's pre-*SFFA* jurisprudence on race-conscious remedies: the Court's efforts to limit the practical

¹⁰ See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 880 (4th Cir. 2023) (arguing that a formally race-neutral program adopted to provide more socioeconomically equitable admissions to selective high school violates the Equal Protection Clause), *cert. denied*, 218 L. Ed. 2d 71 (2024).

¹¹ See, e.g., *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 20-CV-00041, 2023 WL 4633481, at *1, *3, *18 (E.D. Tenn. July 19, 2023) (finding post-*SFFA* that federal small business association (SBA) programs' rebuttable presumption that racially disadvantaged groups are "socially or economically disadvantaged" for purposes of receiving contracting awards violates the Equal Protection Clause).

¹² See, e.g., *Miller v. Vilsack*, No. 21-11271, 2022 WL 851782, at *1, *4 (5th Cir. Mar. 22, 2022) (per curiam) (remanding equal protection challenge by White farmers to American Rescue Plan Act loan program, which grants preferred loan to "socially disadvantaged farmer[s] . . . includ[ing] American Indians or Alaskan Natives; Asians; Blacks or African Americans; Native Hawaiians or other Pacific Islanders; and Hispanics or Latinos.").

¹³ See, e.g., *Louisiana v. U.S. Env't Prot. Agency*, No. 23-CV-00692, 2024 WL 250798, at *8, *11 (W.D. La. May 24, 2023) (challenging Environmental Protection Agency (EPA) enforcement action as exceeding constitutional and statutory authority); Kristoffer Tigue, *How the Affirmative Action Ban Affects Environmental Justice Policies*, MOTHER JONES (July 12, 2023), <https://www.motherjones.com/environment/2023/07/supreme-court-affirmative-action-ruling-environmental-justice-impacts> (describing potential effects of the decision on President Biden's Justice40 program, which directs a percentage of funds to combat environmental and climate harms to communities of color).

¹⁴ See David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 639 n.25 (2019).

¹⁵ See *infra* notes 98–103 and accompanying text.

scope of remedy in the desegregation context, the Court's rejection of remedying racial "societal discrimination" as a rationale, and an opening—though unclear how wide—that the jurisprudence leaves for remedying the effects of contemporary discrimination. This remedial jurisprudence echoes themes in other areas of the Court's jurisprudence: a consistent prioritization of the potential harm to White people over the completion of a project of racial repair¹⁶ and the limiting of the time frame in which remedies should be in place.¹⁷ This jurisprudence also contests the very need for racial remedy and the idea that remedying racial inequity or caste is the special charge of the Fourteenth Amendment.¹⁸ This move to constrain remedy often comes from characterizing a sharp break between past harm and present reality and, more specifically, the role of state action in maintaining forms of inequity.¹⁹ The Court's refusal to engage with the history and present realities of residential segregation often features prominently in these conceptions.

Part II considers the remedial rationale in the *SFFA* case. In the majority opinion, the case leaves the doctrine of remedy where it finds it, emphasizing the narrow circumstances in which race-conscious action can be justified on remedial grounds and permitting race-conscious policies only for specific identified discrimination.²⁰ Beyond that, the Court's majority rejects the efforts by the dissenters to

¹⁶ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715 (1993), <https://doi.org/10.2307/1341787> (introducing how the Court's jurisprudence provides "the legal legitimization of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of [W]hite privilege and domination"); Simson, *supra* note 14, at 639–40 ("Whiteness as Innocence ideology is the system of legal reasoning by which the formal principle of equality is filled with the substantive principle of [W]hite racial dominance via invocations of [W]hite innocence.").

¹⁷ See Yuvraj Joshi, *Racial Time*, 90 U. CHI. L. REV. 1625, 1628 (2023) ("By inscribing a dominant group's experiences and expectations of time into law, the Supreme Court enforces unrealistic timelines for racial remedies and 'neutral' time standards that disproportionately burden minorities.").

¹⁸ See *infra* note 46–48 and accompanying text.

¹⁹ See *infra* notes 35–38 and accompanying text (discussing the Court's post-*Brown* school desegregation cases).

²⁰ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 143 S. Ct. 2141, 2162 (2023) ("[O]ur precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute."); see also *id.* at 2166 ("University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end.").

articulate a theory of racial remedy as consistent with the Fourteenth Amendment's central purpose and Justice Jackson's use of racial history as a way to bolster the diversity rationale.²¹ In that way, the majority opinion ignores important connections between the diversity rationale's forward-looking, integration-oriented ambition and the imperative of remedying contemporary and past discrimination.²² Part III considers three examples of racial remedies and how they might be sustained despite the Court's jurisprudence. This Part considers reparations for housing exclusion, interventions to repair the harms of residential segregation, and use of place (residential segregation) as a plus factor to address the cumulative harms of segregation. All pose distinct doctrinal and political challenges and possibilities, but grouping them introduces what is potentially at risk when the Court constrains relief. Part IV lays out considerations going forward for both the doctrine and the democratic (nonjudicial) project of advancing interventions to remedy racial inequality.

I. CONSTRAINTS ON RACIAL REMEDIES

Long before *SFFA*, the Court's jurisprudence has cabined the power of courts to offer remedies for historic and contemporary racial harm.²³ A jurisprudence emerges from contexts ranging from desegregation to race-based affirmative action, producing recurring and connected accounts that emphasize that racial remedies need to be limited. These themes—well explored in the literature on equal protection, racial justice, and federal courts—include a concern with limiting the scope of remedies to actual victims and preventing “harm” to third parties (White people in particular), skepticism that present disparities are traceable to past racial subordination, and a desire to terminate remedies whether or not the initial goals have been realized.²⁴ This Part also adds concepts that are present particularly in affirmative action cases, such as the notion that the harm of racism is not sufficiently distinct from other societal harms to warrant remedy.²⁵

The Court's post-*Brown v. Board of Education* jurisprudence is an important illustration of the Court's remedial equivocation and a starting point for understanding the Court's dominant approach to

²¹ *Id.* at 2172; *id.* at 2161–62.

²² See discussion *infra* Part II.

²³ See *infra* notes 35–38 and accompanying text (discussing the Court's post-*Brown* treatment of school desegregation cases).

²⁴ See discussion *infra* Part II.

²⁵ See discussion *infra* Part II.

racial remedy. The *SFFA* case invokes *Brown* as the location for pronouncing the meaning of the equality right of the Fourteenth Amendment, with the majority, concurrences, and dissents presenting different (and by now familiarly divergent) accounts on whether race consciousness violates the *Brown* principle.²⁶ For the majority, *Brown* is centrally about ensuring that law and policy are “color-blind.”²⁷ Similarly Justice Thomas in concurrence emphasizes that *Brown* forbids “all legal distinctions based on race”²⁸ By contrast, Justice Sotomayor argues in dissent that “*Brown* was a race-conscious decision[,]”²⁹ which requires that institutions take affirmative steps to promote inclusion and opportunity.³⁰

But the classic binaries of anticlassification versus antisubordination and race consciousness versus colorblindness are not the only fault lines running through *Brown*. *Brown* and the cases that follow also reveal a jurisprudence that equivocates on creating and implementing remedies for racial discrimination. Even when recognizing the problem of racial discrimination, the Court has been slow to activate remedies, has read its remedial power narrowly, and has pulled back on remedies even when they have not been fully

²⁶ For accounts of anticlassification and antisubordination in equal protection, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFS. 107, 107–08 (1976); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 9–10 (2003).

²⁷ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2160, 2175 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)); *id.* at 2176–77 (Thomas, J., concurring) (same); *see also id.* at 2182–83, 2195 (Thomas, J., concurring) (advancing colorblindness as a central conception of the Fourteenth Amendment and *Brown*).

²⁸ *Id.* at 2177 (Thomas, J., concurring) (citing Supplemental Brief for the United States on Reargument at 115, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1), *reprinted in* 46 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 981 (Philip B. Kurland & Gerhard Casper eds., 1975)).

²⁹ *Id.* at 2231 (Sotomayor, J., dissenting); *see also id.* at 2225 (“Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution’s guarantee of equality and have promoted *Brown*’s vision of a Nation with more inclusive schools.”); *id.* at 2232 (“The Court’s recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.”).

³⁰ *See id.* at 2232 (“[*Green*] made clear that indifference to race ‘is not an end in itself’ under that watershed decision. The ultimate goal is racial equality of opportunity.” (citation omitted) (citing *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 440 (1968))).

implemented.³¹ The problem begins with *Brown* itself, which famously does not grant a remedy, and after the ruling the Court asked the lawyers in the case to return to the Supreme Court to argue what would be known as *Brown II*. After additional briefing and argument, the Court ordered a desegregation remedy in *Brown II* to be administered with “all deliberate speed.”³² Many civil rights advocates at the time understood the phrase to require no specific plan or urgency by school districts, leaving development of specific remedies to the lower courts.³³ It was not until the *Swann v. Charlotte Mecklenburg Board of Education* decision, which allowed busing and other strategies to reassign students and promote integration, that the Court articulated a strong judicial power to order specific remedies.³⁴ But by the 1980s and 1990s the Court pulled back on these remedies. In 1991, the Court held that the vestiges of segregation must only be “eliminated to the extent practicable.”³⁵ Then in 1992, the Court held that school districts could be released from court orders before full compliance in order to serve the ultimate objective of “[r]eturning schools to the control of local authorities at the earliest practicable date.”³⁶

Milliken v. Bradley may be the apotheosis of limiting the scope of remedy. In *Milliken*, the Court declined to order an interdistrict

³¹ See generally MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 8 (2010), <https://doi.org/10.1093/oso/9780195171525.001.0001> (“Courts since *Brown* declare that enough time has passed since the elimination of intentional and explicit segregation to stop using judicial measures to remedy patterns of racial separation within public schools.”).

³² *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

³³ CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* 10 (2004) (“When asked to explain his view of ‘all deliberate speed,’ Thurgood Marshall frequently told anyone who would listen that the term meant S-L-O-W.”).

³⁴ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6–7 (1971) (explaining that two-thirds of the Black students in Mecklenburg County, North Carolina, attended schools that were overwhelmingly (99 percent) Black); see also Owen M. Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHIL. & PUB. AFFS. 3, 4–5 (1974) (stating that racial assignment to achieve integration at the elementary and secondary level is constitutionally permissible).

³⁵ *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249–50 (1991).

³⁶ *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); see also *Missouri v. Jenkins*, 515 U.S. 70, 97–98 (1995) (holding that the trial court could not order interdistrict remedies to achieve meaningful desegregation where liability was only intradistrict). The Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1* made it more difficult for school districts to pursue voluntary locally designed integration efforts. 551 U.S. 701, 712–23 (2007).

desegregation plan, reversing the ruling of the lower court.³⁷ The Court ignored or rejected the role that housing segregation—created in significant part from the decisions of state and local actors—played in creating racialized school and housing boundaries between cities and suburbs.³⁸ Instead, the Court expressed a pervasive concern with harms to innocent suburban parties, deference to local boundaries (despite the role of race in creating those boundaries), and limiting the role of courts in institutional reform.³⁹

As Professor Reva Siegel has noted, there is a connection between the Court's move away from full implementation of *Brown's* desegregation mandate and the rise of "anticlassification" discourse: "[t]he presumption that racial classifications are unconstitutional—and the reasons and commonsense understandings regulating the application of that presumption—are the product of social struggle over the project of disestablishing segregation that *Brown* inaugurated."⁴⁰ Professor Siegel argues that "[i]t was as the nation argued over *Brown's* justification and implementation that the Court began to rely on anticlassification discourse, first to express, and then to limit, antisubordination values."⁴¹

Affirmative action jurisprudence is powerfully about these contests between anticlassification and antisubordination values, a group-based versus individualized account of the Fourteenth Amendment, and colorblindness and color consciousness. The jurisprudence also turns tremendously, however, on the rejection of all but the narrowest remedies as a justification for affirmative action. When Justice Powell accepted that promoting diversity can serve as a compelling rationale in *Bakke*, he rejected a range of remedial rationales advanced by the university and civil rights groups that

³⁷ *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974); see generally Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 397–416 (2015) (providing a detailed account of the litigation history of the case).

³⁸ See *Milliken*, 418 U.S. at 721–22.

³⁹ Contra Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1538–40 (2004), <https://doi.org/10.2307/4093259> (arguing that *Grutter* reflects an antisubordination conception). See Richard Thompson Ford, *Affirmative-Action Jurisprudence Reflects American Racial Animosity but Is Also Unhappy in Its Own Special Way*, 2020 U. CHI. L. REV. ONLINE *110, *113 (2020) ("Correcting for this widespread and well-understood societal discrimination is enough to justify affirmative action, and a stronger and more widely applicable rationale than diversity.").

⁴⁰ See Siegel, *supra* note 39, at 1533.

⁴¹ *Id.*

affirmative action was necessary to address past discrimination.⁴² In particular, Justice Powell's opinion held that remedying what he termed "societal discrimination" can never be a compelling interest to justify race-conscious affirmative action.⁴³ According to Justice Powell's opinion, past societal discrimination, including compensation for harm done to the applicant or their ancestors as a "reparation by the 'majority' to a victimized group as a whole[,] was an insufficiently compelling rationale."⁴⁴ Justice Powell distinguished the desegregation cases as involving "specific instances of racial discrimination" identified by "judicial, legislative, or administrative findings of constitutional or statutory violations."⁴⁵ In the absence of such specific findings, the university had actually relied on what Justice Powell termed "societal discrimination," which he characterized as "an amorphous concept of injury that may be ageless in its reach into the past."⁴⁶ Justice Powell's case against "societal discrimination" reflects a concern about the inability to document or trace the history of discrimination with any specificity, and a concern about potential harm to innocent parties not responsible for past discrimination.⁴⁷ The opinion also suggests that the history of racial exclusion (as to African Americans primarily) is not sufficiently distinct from that of any other form of discrimination in American history.⁴⁸

The Court's employment and contracting decisions of the 1980s and 1990s repeat this rejection of a compelling interest in remedying "societal discrimination." In *Wygant v. Jackson Board of Education*, a plurality found unconstitutional a system that determined employee

⁴² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300–02, 315 (1978) (opinion of Powell, J.)

⁴³ *Id.* at 307–10.

⁴⁴ *Id.* at 306 n.43.

⁴⁵ *Id.* at 307.

⁴⁶ *Id.*

⁴⁷ *See id.* ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."); *see also id.* at 310 ("[T]he purpose of helping certain groups . . . does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.")

⁴⁸ *See Bakke*, 438 U.S. at 297 ("The kind of variable sociological and political analysis necessary to produce such rankings [of those affected by past discrimination] simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.")

layoffs based on the percentage of students of color enrolled in the school system.⁴⁹ The plurality rejected the argument that the students were in need of role models to counter past discrimination in society, and Justice Powell—again writing for the plurality—distinguished an interest in “societal discrimination” from that of remedying specific identified discrimination.⁵⁰ “Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”⁵¹ A few years later in *City of Richmond v. J.A. Croson Co.*, the Court confronted the issue of whether a city program requiring that 30 percent of certain city contracts be awarded to companies controlled and owned by “racial minorities” violated the Equal Protection Clause.⁵² Writing for a plurality, Justice O’Connor held that, as in *Wygant*, the city’s justifications did not support its race-conscious remedy: “the sorry history of both private and public discrimination . . . standing alone, cannot justify a racial quota in the awarding of public contracts”⁵³ The city’s reliance on a past discrimination rationale, Justice O’Connor contended, would “open the door to competing claims for ‘remedial relief’ for every disadvantaged group.”⁵⁴

By the time of the *Grutter v. Bollinger* litigation, the remedial rationale had largely disappeared from the public law landscape except in the cases of court-ordered remedies to discrimination. Amici and student-intervenors continued to urge a remedial approach in *Grutter* and later in *Fisher v. University of Texas*,⁵⁵ but the decisions in those cases make little reference to the rationale.

⁴⁹ 476 U.S. 267, 270, 283–84 (1986).

⁵⁰ *Id.* at 275–76.

⁵¹ *See id.* at 276.

⁵² *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476–78 (1989). A few years later in *Adarand Constructors, Inc. v. Peña*, the Court applied the *Croson* holding to find a federal contracting set-aside program unconstitutional under the Fourteenth Amendment. 515 U.S. 200, 227 (1995).

⁵³ *See Croson*, 488 U.S. at 499.

⁵⁴ *See id.* at 505.

⁵⁵ *See, e.g.*, Brief for the NAACP Legal Defense and Educational Fund, Inc. and the American Civil Liberties Union as Amici Curiae in Support of Respondents at 4, 22–24, 29–30, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter NAACP Brief for Respondents]; Brief for Howard University as Amicus Curiae in Support of Respondents at 17–20, 24–27, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) [hereinafter Howard University Brief for Respondents]; Brief of Students from the New York University School of Law Seminar on Critical Narratives in Civil Rights as Amici Curiae in Support of Respondents at 3, 13–14, *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (No. 14-981); Brief for the Civil Rights Clinic and the Education Rights

II. BETWEEN DIVERSITY AND REMEDY

The *SFFA* majority is largely dedicated to a critique of the diversity rationale; relatively little text is devoted to a discussion of the remedial rationale. Neither Harvard College (Harvard) nor the University of North Carolina (UNC) sought to defend their programs based on a remedial rationale, despite the fact that both had a history of explicit racially discriminatory exclusion.⁵⁶ Their exclusive reliance on the diversity rationale is consistent with university practice post-*Bakke*.⁵⁷ It may reflect a tactical decision that remedial rationales are unlikely to persuade the Court. Alternatively, it might speak to the actual motivations underlying colleges' use of race-conscious admissions, consistent with origins of the diversity rationale as an argument advanced by elite universities and connected to questions of academic freedom and the First Amendment.⁵⁸ Relatedly, universities may not want to risk exposing themselves to liability for their past and present discriminatory actions.⁵⁹ The effect of the universities' disinclination to raise the remedial rationale in post-*Bakke* litigation challenging affirmative action is to leave the jurisprudence of race-conscious remedies in higher education underdeveloped at the Supreme Court level. When the issue is raised, it is primarily in briefs from amici civil rights and racial justice organizations.⁶⁰ In this context, it is not altogether surprising that the Court has little discussion of the remedial rationale except to reaffirm the current doctrine.

Center at Howard University School of Law as Amici Curiae in Support of Respondents at 36–37, *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (No. 14-981).

⁵⁶ See, e.g., PRESIDENT & FELLOWS OF HARV. COLL., *HARVARD & THE LEGACY OF SLAVERY* 13–28, 44–55 (2022) (detailing Harvard University's ties to slavery and its history of racial exclusion); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2271 (2023) (Jackson, J., dissenting) (recounting the particular history of exclusion on the basis of race in North Carolina generally and at the University of North Carolina (UNC) specifically).

⁵⁷ See, e.g., *SFFA*, 143 S. Ct. 2174 n.8 (noting that neither university relied on the remedial rationale).

⁵⁸ See Brief of Columbia University et al. as Amici Curiae at 10–14, 32–34, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811); cf. *Rahim*, *supra* note 8, at 1426 (providing accounts of the diversity rationale).

⁵⁹ Cf. Cara McClellan, *When Claims Collide: Students for Fair Admissions v. Harvard and the Meaning of Discrimination*, 54 *LOY. U. CHI. L.J.* 953, 971–73 (2023) (noting that universities' overreliance on admissions criteria such as the SAT may lead to a racially disparate impact).

⁶⁰ See, e.g., NAACP Brief for Respondents, *supra* note 55, at 4, 22–24, 29–30; Howard University Brief for Respondents, *supra* note 55, at 17–20, 24–27.

The *SFFA* majority introduces the question of remedy in its reminder that the Equal Protection Clause requires race-conscious action to submit to the “daunting two-step examination known in our cases as ‘strict scrutiny[,]’”⁶¹ and under that severe test, most racial classifications will fall. Besides imminent risks to safety, and the soon to be imperiled diversity rationale, the Court majority explains that racial classifications may be justified by the need to “remediat[e] specific, identified instances of past discrimination that violate the Constitution or a statute.”⁶² This type of narrow remedial program may survive strict scrutiny,⁶³ but the majority’s opinion goes on to make clear that the programs at Harvard and UNC do not present such a case. Indeed, the Court drops a footnote explaining it is unlikely that *any* race-conscious program in higher education could be justified through a remedial rationale.⁶⁴

Then later in the opinion, the Court again raises the remedial rationale in the context of critiquing the dissenting opinions. In the majority’s view, the dissenting opinions of Justices Sotomayor and Jackson sound less in diversity than in the “societal discrimination” rationale, which the Court rejected as a basis for race-conscious action in *Bakke* and in later cases such as *Croson*.⁶⁵ In stressing the impermissibility of “societal discrimination,” the Court invokes the caselaw’s standard objections: societal discrimination is potentially “‘ageless’ in its reach into the past,” places contemporary burdens on those who bear no responsibility for past harm, and opens the door to “competing claims for ‘remedial relief’” based on past disadvantage.⁶⁶

⁶¹ See *SFFA*, 143 S. Ct. at 2162.

⁶² *Id.*

⁶³ See *id.* at 2167 (“When it comes to work-place discrimination, courts can ask whether a race-based benefit makes members of the discriminated class ‘whole for [the] injuries [they] suffered.’ And in school segregation cases, courts can determine whether any race-based remedial action produces a distribution of students ‘compar[able] to what it would have been in the absence of such constitutional violations.’” (alteration in original) (citations omitted) (first quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976); and then quoting *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 420 (1977))).

⁶⁴ See *id.* at 2174 n.8 (“Nor has any decision of ours permitted a remedial justification for race-based college admissions.”).

⁶⁵ *Id.* at 2173.

⁶⁶ *Id.* at 2163, 2173 (first quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978); and then quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)).

The critique of the dissents as merely “remedial” does not seem entirely accurate or fair. Neither dissent purports to reinvigorate a remedial rationale for affirmative action. Indeed, Justice Jackson’s dissenting opinion emphasizes the interest in diversity in higher education, which she argues “helps *everyone*,”⁶⁷ not just those who are disadvantaged as a result of racial discrimination. All can benefit from the democratic and civic values ushered in by diversity programs. Justice Jackson’s dissent is perhaps vulnerable to the charge of being “remedial” because it provides an account of the long history of subordination in the United States, detailing the history of racial discrimination in education, land use and lending practices, health care, and other areas.⁶⁸ The opinion explains the role of government policies in creating the segregation and inequality that persist today.⁶⁹

The use of this history, however, is not offered to reargue the specific doctrinal question of whether race-conscious programs can be supported by an interest in remedying societal discrimination. Rather, it is to counter the majority’s advocacy of a conception of colorblindness as a goal for college admissions. It serves to tie the diversity rationale back to what Justice Jackson describes as “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.”⁷⁰ This history is a response to the Court’s “racial time”⁷¹—that idea that the time has come for race-conscious affirmative action to end.⁷² Justice Jackson’s dissent offers the history to argue that the long period of state-sponsored race discrimination should be contrasted with the brief period of affirmative action programs, which are “still needed” to address the “intergenerational race-based gaps in health, wealth, and well-being [that] stubbornly persist.”⁷³ This dissent casts the Court’s

⁶⁷ See *SFFA*, 143 S. Ct. at 2275 (Jackson, J., dissenting).

⁶⁸ See *id.* at 2268–69 (providing data showing the effects of home ownership gaps on wealth and income); *id.* at 2270 (“Health gaps track financial ones.”).

⁶⁹ *Id.* at 2268.

⁷⁰ *Id.* at 2263, 2278; see also *id.* at 2275 (“These programs respond to deep-rooted objectively measurable problems; their definite end will be when we succeed, together, in solving those problems.”).

⁷¹ Joshi, *supra* note 17, at 1635–37 (“‘Racial time’ encapsulates several ideas about how racial power dynamics shape group experiences and expectations of time.”).

⁷² See *SFFA*, 143 S. Ct. at 2165 (“‘[R]ace-conscious admissions programs [must] have a termination point’; they ‘must have reasonable durational limits’” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003))).

⁷³ See *id.* at 2278 (Jackson, J., dissenting).

opinion lauding “colorblindness for all” as “detached . . . from this country’s actual past and present experiences.”⁷⁴

Justice Jackson’s dissent also appears to offer this history as an anchor for the diversity rationale, a counter to the majority’s critique of the diversity interest as “commendable” but also amorphous, not measurable, and insufficiently “coherent” for judicial review.⁷⁵ Justice Jackson’s dissenting opinion instead draws attention to how our unequal racial history can shape our understanding of who “merits” admissions, better allowing colleges like UNC the opportunity to “assess” merit fully and accurately.⁷⁶ In that sense, Justice Jackson’s opinion forges a hybrid between diversity and remedy. Without understanding our racial history—and distinctly the state-created and state-sanctioned racism against African Americans—the diversity rationale will seem empty and without urgency.

This conception of diversity is not entirely new in the jurisprudence. In *Grutter*, Justice O’Connor relied on the past and present of racial inequality to shape her arguments that promoting racial diversity was a compelling interest, stating that racial inequality shaped the experiences of disadvantaged students of color and made them “less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”⁷⁷ For the *SFFA* majority, by contrast, racial remedy is a concept that is narrow, particularized, and backward-looking. And diversity in the majority’s conception is diffuse and denuded of any remedial purpose. The Court does not meaningfully engage any attempt to broaden the notion of remedy or to connect diversity to goals of remediating racial inequality.⁷⁸ Unexplored by the *SFFA* majority’s narrow formulation of remedy are more capacious notions of remedy that are broader than remedying *identified*

⁷⁴ See *id.* at 2277.

⁷⁵ See *id.* at 2166 (majority opinion) (“[T]he interests [the universities] view as compelling cannot be subject to meaningful judicial review.”).

⁷⁶ See *id.* at 2271 (Jackson, J., dissenting).

⁷⁷ *Grutter*, 539 U.S. at 338; Ford, *supra* note 39, at *113 (“[Justice O’Connor’s argument] sounds an awful lot like an acknowledgment that societal discrimination is relevant to university admissions because it explains why formally race-neutral admissions criteria do not accurately measure the potential of underrepresented racial minority applicants.”); see also Devon W. Carbado, *Footnote 43: Recovering Justice Powell’s Anti-Preference Framing of Affirmative Action*, 53 U.C. DAVIS L. REV. 1117, 1148 (2019) (arguing that correcting for racial bias in tests or other criteria could serve as a rationale for affirmative action).

⁷⁸ For an argument that Justice O’Connor’s *Grutter* opinion embodies an antisubordination conception, see Siegel, *supra* note 39, at 1538–40.

discrimination and that are both forward and backward looking. These could include providing race-conscious countermeasures to contemporary discrimination in merit assessment for constructing the relevant pool,⁷⁹ or race consciousness to avoid perpetuating segregation,⁸⁰ or to interrupt an entity's passive participation in discrimination.⁸¹ Or these notions could identify the diversity interest as a forward-looking goal of inclusion and integration that derives at least part of its meaning from the disruption of historical practices and current mechanisms that maintain a racially unequal status quo.

III. SUSTAINING REMEDY: THE CASE OF RESIDENTIAL SEGREGATION

The practical effect of *SFFA* is to render a range of programs vulnerable to legal challenge even if they do not involve higher education affirmative action. While *SFFA* by its terms does not address race-conscious programs beyond higher education admissions, well-funded, libertarian, and anti-affirmative action organizations have launched extensive litigation challenging a range of programs that seek to address racial inequality in employment, economic development, K-12 education, and housing.⁸² This Part considers the

⁷⁹ See Ford, *supra* note 39, at 113 (“Correcting for this widespread and well-understood societal discrimination [that results in failure to accurately measure the potential of underrepresented students of color] is enough to justify affirmative action, and a stronger and more widely applicable rationale than diversity.”); cf. Carbado, *supra* note 77, at 1122; Ricci v. DeStefano, 557 U.S. 557, 563 (2009) (holding that Title VII permits race-conscious action, where there is a “strong basis in evidence” (drawing on *Croson*) that the failure to take such action would lead to a racially disparate impact).

⁸⁰ 24 C.F.R. § 100.500(a) (2017) (“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increase, reinforces, or perpetuates segregated housing patterns because of race”); see *United States v. City of Black Jack*, 508 F.2d 1179, 1186 (8th Cir. 1974) (holding that the discriminatory effect of a housing policy must be assessed with reference to whether it “would contribute to the perpetuation of segregation in a community which was 99 percent [W]hite”).

⁸¹ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 502–03 (1989) (endorsing race consciousness to avoid the localities’ passive participation in private discrimination).

⁸² See, e.g., *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-cv00278-P, 2024 WL 965299, *1–3, *49 (N.D. Tex. Mar. 5, 2024) (granting a permanent injunction against the federal Minority Business Development Agency’s statutory presumption that minority business are socially and economically disadvantaged for the purposes of federal funding assistance); Nino C. Monea, *Next on the Chopping Block: The Litigation Campaign Against Race-Conscious Policies Beyond Affirmative Action in University Admission*, 33 B.U. PUB. INT. J. (forthcoming 2024) (manuscript at 8–10),

likely impact of *SFFA* on racial remedies for housing discrimination and segregation, and for addressing how segregation structures access to other social goods such as education and environmental justice programs. The goal for litigators and racial justice advocates should be to sustain racial remedy as core to the meaning and purpose of the Fourteenth Amendment, and there are opportunities to do so in affirmative litigation challenging existing spatial segregation and land loss, as well in defensive litigation when affirmative action opponents challenge race-conscious remedies.

In the post-*SFFA* landscape, race-based employment fellowships, contracting set-asides, and corporate diversity initiatives have emerged as a first target of litigation.⁸³ And there is evidence that fear of litigation is already shaping how governments are structuring remedies for housing segregation and its effects on education, environmental harms, and other domains.⁸⁴ This Part focuses on housing because it is an important linchpin for explaining racial inequality in the United States, particularly the status of African Americans.⁸⁵ Housing policy provides a throughline between slavery, Jim Crow, and existing inequalities, and thus is important for countering what the Court has negatively called “societal discrimination” and described as

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4440549 (describing litigation efforts and strategy to dismantle race-conscious programs). Some of these challenges predated the *SFFA* case. *See, e.g.*, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 880–81 (4th Cir. 2023) (rejecting a challenge to a formally race-neutral program adopted to provide more socioeconomically equitable admissions to a selective high school as a violation of the Equal Protection Clause), *cert. denied*, 218 L. Ed. 2d 71 (Feb. 20, 2024).

⁸³ *See* Monea, *supra* note 82, at 7, 27–30, 60; Brief for Appellees, *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-1318 (11th Cir. Dec. 6, 2023); Riddhi Setty & Khorri Atkinson, *Diversity Program Foes Turn to Civil War-Era Law in Court (1)*, BLOOMBERG L. (Aug. 31, 2023, 10:49 AM), <https://news.bloomberglaw.com/daily-labor-report/diversity-program-opponents-turn-to-civil-war-era-law-in-court>; *Alliance for Fair Board Recruitment v. SEC*, 85 F.4th 226 (5th Cir. 2023).

⁸⁴ *See* Tigie, *supra* note 13 (describing the Justice40 Environmental Protection Agency (EPA) programs); Monea, *supra* note 82, at 11–12 (describing Wisconsin’s decision to remove from its post-pandemic homeowners assistance program after receiving a letter from a litigation group that opposes affirmative action).

⁸⁵ *See* Douglas S. Massey, *Residential Segregation Is the Linchpin of Racial Stratification*, 15 CITY & CMTY. 1, 4 (2016), <https://doi.org/10.1111/cico.12145> (“Three decades of research have amply confirmed [Thomas] Pettigrew’s prescient observation that residential segregation constitutes the ‘structural linchpin’ of racial stratification in the United States.” (citation omitted) (citing Thomas F. Pettigrew, *Racial Change and Social Policy*, 441 ANNALS AAPSS 114 (1979), <https://doi.org/10.1177/000271627944100109>).

“amorphous”⁸⁶ and “ageless in its reach into the past.”⁸⁷ Redressing housing segregation and how housing shapes access to social goods sometimes requires race-conscious action: “diversity” is less an imperative for these programs, which are more accurately described as compensating or countering past and present discrimination. Thus, a revived remedial rationale—in addition to compelling interests in promoting integration⁸⁸—might need to play a big part in sustaining race-conscious housing interventions and remedies.

Three areas of housing remedies, which are promising and vibrant locations for addressing generational harms, are important locations to confront the potential impact of *SFFA* and the role of remedial arguments. These are (1) court ordered race-conscious remedies, (2) compensation or reparations to the direct descendants of exclusionary housing policies, and (3) the use of place (residential segregation) as a factor to design access to social goods. This Part examines these categories of remedial action, and Part IV suggests some principles for invigorating the remedial rationale going forward. The goal is not to extensively survey the pending cases, but instead to identify some of the key legal and policy concerns.

A. *Race-Conscious Litigation Remedies*

SFFA should not affect race-conscious remedies in litigation where courts have found discrimination and found that race-conscious solutions are necessary to compensate or address the harms of the plaintiffs in the case. As indicated above, *SFFA* reaffirmed long-standing case law that race-conscious relief could be justified as a remedy for court-identified discrimination.⁸⁹ Thus, if for instance, a court determines that a state’s or city’s housing policies have created or maintained racialized housing segregation in violation of the Fair Housing Act⁹⁰ or Title VI of the Civil Rights Act of 1964,⁹¹ race-

⁸⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); *Milliken v. Bradley*, 418 U.S. 717, 756 n.2 (1974) (Stewart, J., concurring).

⁸⁷ *Bakke*, 438 U.S. at 307; *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2163, 2173 (2023).

⁸⁸ *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (Kennedy, J., concurring) (finding a compelling interest in racial integration); *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 546–47 (2015).

⁸⁹ See *SFFA*, 143 S. Ct. at 2162.

⁹⁰ Fair Housing Act, 42 U.S.C. § 3601.

⁹¹ 42 U.S.C. § 2000d.

conscious relief would be justified. To be sure, such remedies have been challenged in the past, and will likely continue to be litigated. These challenges reflect the political resistance to remedying discrimination even when that discrimination has been adjudicated.⁹² An example is the litigation in the 1980s and 1990s against the Dallas public housing authority and the federal Department of Housing and Urban Development (HUD) for race-based tenant selection and public housing site selection that resulted in housing segregation, where the district court ordered a race-conscious remedy.⁹³ Specifically, the district court ordered the construction of public housing in “predominantly [W]hite” Dallas neighborhoods to remedy the racial discrimination of the Dallas Housing Authority (DHA) and HUD.⁹⁴ White homeowners who lived near the proposed site challenged the district court’s race-conscious remedial order as violating constitutional limitations on the use of race set in cases like *Adarand Constructors, Inc. v. Peña*.⁹⁵ Applying strict scrutiny and relying on *Adarand* and other cases, the district court found the race-conscious remedial order unconstitutional: “the criterion is not narrowly tailored, and it is premature to utilize such a last-resort measure.”⁹⁶ But, the Fifth Circuit cleared the way for race-conscious remedies when it rejected an equal protection challenge to the DHA’s race-conscious remedial plan to construct public housing in a predominantly White suburb.⁹⁷

This litigation reveals the persistence of courts’ attention to formal race neutrality even after the adjudication that government action created the racial geography of neighborhoods. The practical

⁹² See *Walker v. HUD—Dallas Public Housing Desegregation*, DANIEL & BESHARA, P.C., <https://www.danielbesharalawfirm.com/walker-v-hud-dallas-public-housing-desegregation> (last visited Apr. 5, 2024) (describing community and political resistance to integration remedies in housing desegregation cases); *id.* (“Once the 1987 consent decree began to be implemented, the first wave of neighborhood-based opposition to public housing development . . . outside of Black neighborhoods also arose. Similar opposition continued to arise throughout the remainder of the case and was directly responsible for the current Settlement Voucher program as a substitute for the development of 3,200 units of public housing in predominantly [W]hite areas.”).

⁹³ *Walker v. U.S. Dep’t of Hous. & Urb. Dev.*, No. 3:85-CV-1210-R, 1997 WL 33177466, at *8–10, *55 (N.D. Tex. Oct. 6, 1997), *rev’d in part, vacated in part sub nom.* *Walker v. City of Mesquite*, 169 F.3d 973 (5th Cir. 1999).

⁹⁴ *Id.*

⁹⁵ *Walker*, 169 F.3d at 975–76.

⁹⁶ *Id.* at 987.

⁹⁷ See *Walker v. City of Mesquite*, 402 F.3d 532, 535–36 (5th Cir. 2005).

effect in these cases makes it more difficult to implement desegregation remedies and privileges the objections of White communities over the urgent need to remedy the harm of racial segregation. Nevertheless, the doctrine as it lies is that where the remedy is the result of a court imposed desegregation order, courts can order “race-conscious” remedies but only after considering “race-neutral” remedies. In many cases, there will not be a fully “race-neutral” remedy given the nature of the harm (e.g., race discrimination in site selection or assignment).

B. *Legislative Remedies to Victims/Descendants of Racist Housing or Land Use Policies*

The past decade in particular has seen an intensification of social movement efforts as well as public and private initiatives to seek compensation through courts for the descendants of victims of land theft by localities,⁹⁸ and Black farmers for the failure of the US Department of Agriculture (USDA) to grant them loans necessary to preserve their farms.⁹⁹ Quite apart from litigation, jurisdictions that denied loans, engaged in exclusionary zoning, or segregated Black homeowners are studying, or beginning to adopt, reparative programs to compensate victims of discrimination and land theft.¹⁰⁰ For

⁹⁸ See, e.g., Brendan O’Brien, *Los Angeles County to Pay Black Family \$20 Million to Buy Back Wrongly Seized Beach*, REUTERS (Jan. 4, 2023, 11:35 AM), <https://www.reuters.com/world/us/los-angeles-county-pay-black-family-20-million-buy-back-wrongly-seized-beach-2023-01-04>.

⁹⁹ See, e.g., Settlement Agreement, *In re Black Farmers Discrimination Litig. (Pigford II)*, No. 1:08-mc-00511-PLF (D.D.C. May 13, 2011), ECF No. 170-2, <https://blackfarmercase.com/Documents/SettlementAgreement.pdf>; see also Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 14012(c)(2), 122 Stat. 1651, 2209–10.

¹⁰⁰ See Brooke Simone, Note, *Municipal Reparations: Considerations and Constitutionality*, 120 MICH. L. REV. 345, 345 (2021), <https://doi.org/10.36644/mlr.120.2.municipal> (examining the constitutionality of emerging municipal reparations plans); Rachel Treisman, *In Likely First, Chicago Suburb of Evanston Approves Reparations for Black Residents*, NPR (Mar. 23, 2021, 2:36 PM), <https://www.npr.org/2021/03/23/980277688/in-likely-first-chicago-suburb-of-evanston-approves-reparations-for-black-reside>; Madeleine List, *Providence Mayor Signs Order to Pursue Truth, Reparations for Black, Indigenous People*, THE PROVIDENCE J. (July 16, 2020, 12:01 AM), <https://www.providencejournal.com/story/news/2020/07/16/providence-mayor-signs-order-to-pursue-truth-reparations-for-black-indigenous-people/42496067>; Thai Jones, *Slavery Reparations Seem Impossible. In Many Places, They’re Already Happening*, WASH. POST (Jan. 31, 2020), <https://www.washingtonpost.com/outlook/2020/01/31/slavery-reparations-seem->

example, the city of Evanston's program provides direct payments to victims and direct descendants of the city's discrimination and redlining practices.¹⁰¹ After several years of examination into the city's discriminatory practices, the city developed a range of reparative policies, including the development of the Local Reparations Restorative Housing Program.¹⁰² The program disburses direct payments and mortgage assistance to verified descendants of those excluded from housing opportunities in Evanston.¹⁰³ Even under the current narrow formulation of the remedial rationale in federal case law, the race consciousness of these programs as a remedy to a "finding" of discrimination by a government is likely to be held permissible by a court. Programs designed in this way appear to be narrowly tailored to compensate victims and direct descendants.

Similarly, California in its Reparations Program made extensive findings on housing discrimination, racially restrictive covenants, redlining, "slum clearance" racial terrorism, highway construction, and other practices that produced residential racial segregation.¹⁰⁴

impossible-many-places-theyre-already-happening. Leading scholars of reparations, William Darity and Kirsten Mullen, argue that municipal and local policies should not be called "reparations": "Local reparations are an impossibility, a virtual oxymoron. . . . These varied local and state acts of atonement will not eliminate the racial wealth gap and should not be labeled 'reparations.'" William A. Darity Jr. & A. Kirsten Mullen, *On the Black Reparations Highway: Avoiding the Detours*, in THE BLACK REPARATIONS PROJECT: A HANDBOOK FOR RACIAL JUSTICE 200, 202 (William A. Darity Jr. et al. eds., 2023).

¹⁰¹ See *Evanston Local Reparations*, CITY OF EVANSTON, <https://www.cityofevanston.org/government/city-council/reparations> [<https://perma.cc/UD5N-ENGD>] (last visited Apr. 5, 2024); Simone, *supra* note 100, at 361–62 (describing the origins and structure of the Evanston Reparations program); EVANSTON CITY COUNCIL, RES. 37-R-21, A RESOLUTION AUTHORIZING THE LOCAL REPARATIONS RESTORATIVE HOUSING PROGRAM (Mar. 22, 2021), <https://www.cityofevanston.org/home/showpublisheddocument/63401/637907172322730000>.

¹⁰² See *City Distributes over \$1 Million in Reparations Funding*, CITY OF EVANSTON (Aug. 16, 2023, 3:05 PM), <https://www.cityofevanston.org/Home/Components/News/News/6062/17>.

¹⁰³ *Id.* ("To date, the [c]ity has disbursed \$1,092,924 in reparations through the Local Reparations Restorative Housing Program. An additional \$439,397 is pending disbursement for mortgage assistance and/or construction and remodeling projects.")

¹⁰⁴ See CALIFORNIA TASK FORCE TO STUDY AND DEVELOP REPARATION PROPOSALS FOR AFRICAN AMERICANS, FINAL REPORT 200–25 (2023), <https://oag.ca.gov/system/files/media/full-ca-reparations.pdf>; see also *id.* at 16 ("Government actors, working with private individuals, actively segregated America into African American and [W]hite neighborhoods. In California, federal, state, and

The report documents how these practices led to racial disparities in wealth, health, exposure to environmental harms, and access to affordable housing that persist today.¹⁰⁵ The proposed remedy includes direct payments limited to “those individuals who are able to demonstrate that they are the descendant of either an enslaved African American in the United States, or a free African American living in the United States prior to 1900.”¹⁰⁶ Structured in this way and justified by extensive findings, one can argue that the programs are narrowly tailored to the remedial purpose, and can survive strict scrutiny. Under the current doctrine, which sharply scrutinizes the fit between the violation and the remedy, the compensation will be most safe from legal challenge if it is limited to remedying the discrimination that the government actor helped to create or in which they acted as a passive participant.¹⁰⁷

To the extent that compensation programs enact race-conscious remedies that go beyond direct victims to address the ways in which these practices shaped disparities, they will require a broader approach to the remedial rationale than the Court articulates in *SFFA*.¹⁰⁸ For instance if a legislature expands beyond descendants, it will have to explain how the identified harm of discrimination and segregation in housing impacts the broader class. This is possible in the area of housing, where Black residents regardless of their income, and even those who are not descendants, are more likely to live in segregated

local governments created segregation where none had previously existed through discriminatory federal housing policies, zoning ordinances, school siting decisions, and discriminatory federal mortgage policies known as redlining. Funded by the federal government, the California state and local government also destroyed African American homes and communities through park and highway construction, urban renewal, and by other means.”).

¹⁰⁵ *Id.* at 225–28.

¹⁰⁶ *Id.* at 41.

¹⁰⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). A caution however is that a recent district court case creates a high barrier for the government to show passive participation in private sector discrimination, and declines to grant deference to the government’s findings that it passively participated in creating discrimination in credit markets. See *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-cv00278-P, 2024 WL 965299, *24 & n.54, *26–29 (N.D. Tex. Mar. 5, 2024).

¹⁰⁸ After the government authorized debt relief for “socially disadvantaged farmer[s]” following *In re Black Farmers Litigation*, White farmers have been successful in bringing equal protection challenges arguing that the remedies go beyond the class of those who are descendants of farmers discriminatorily denied loans by the USDA. See *American Rescue Plan Act of 2021*, Pub. L. No. 117-2, § 1005(a), 135 Stat. 4, 12–13 (2021); *Miller v. Vilsack*, No. 4:21-CV-0595, 2021 WL 6129207, at *1 (N.D. Tex. Dec. 8, 2021).

neighborhoods and face housing discrimination. Residential segregation is “race-making”—with harms that extend beyond those who were subject to redlining and that endure today.¹⁰⁹

C. *Residential Segregation and the Race-Conscious Design of Government Programs*

In 2022, the Biden Administration took race out of a key environmental justice screening tool for determining access to federal funds and other programs to mitigate the risk of climate harms.¹¹⁰ The Environmental Protection Agency (EPA) took this action despite the documented connection between majority Black neighborhoods, environmental harms, and climate risks.¹¹¹ This example raises the question of the extent to which government agencies can correct for harms that attend residential segregation without running afoul of

¹⁰⁹ See David R. James, *The Racial Ghetto as a Race-making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 413 (1994), <https://doi.org/10.1086/492466> (“[R]acially segregated neighborhoods are the most important social situations maintaining racial identities and racial prejudices.”); Massey, *supra* note 85, at 6 (“The active, ongoing production of residential segregation today occurs within a context of sharply rising inequality and growing segregation on the basis of wealth and income, thereby creating a new and more complex urban ecology in which race and class interact powerfully to determine individual and family well-being.” (citations omitted)); see also Pettigrew, *supra* note 85, at 114, 122 (describing segregation as the “structural linchpin” of racial stratification in the United States).

¹¹⁰ Drew Costley, *Exclusion of Race in Federal Climate Justice Screening Tool Could Worsen Disparities, Analysis Says*, ASSOCIATED PRESS (July 20, 2023, 2:02 PM), <https://apnews.com/article/environment-climate-pollution-biden-justice40-air-633392b2f4f50bbaaff8880746783966>; Lisa Friedman, *White House Takes Aim at Environmental Racism, but Won’t Mention Race*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/climate/biden-environment-race-pollution.html>.

¹¹¹ See, e.g., Daniel Cusick & E&E News, *Past Racist “Redlining” Practices Increased Climate Burden on Minority Neighborhoods*, SCI. AM. (Jan. 21, 2020), <https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods>; Claire Conzelmann et al., *Long-term Effects of Redlining on Climate Risk Exposure 1* (Fed. Rsrv. Bank of Richmond, Working Paper No. 22-09R, 2023), <https://doi.org/10.21144/wp22-09> (“[The] study examines 202 [US] cities and reveals that neighborhoods that were redlined in the 1930s–1940s by the Home Owners’ Loan Corporation face disproportionately higher risks of both current and future flooding and extreme heat.”); News Release, Env’t Prot. Agency, *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States* (Sept. 2, 2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable> (showing that people of color are particularly vulnerable to climate change).

equal protection requirements. Indeed, the EPA appears to have moved away from including race because it was concerned about potential equal protection challenges.¹¹²

Conversely, groups have targeted programs that use residential segregation instead of race to structure fair access to social goods. An example, challenged in the Fourth Circuit, used geography to help determine admissions to selective high schools.¹¹³ The school district reformulated admissions criteria to its most selective high school the summer after law enforcement murdered George Floyd, in order to provide admissions to students based on geographic and socioeconomic statuses. Specifically, the school adopted a new policy in which the top test takers would be selected from each middle school, which, because of residential and school segregation, had the effect of increasing the number of Black and Latinx students at the high school, as well as low-income Asian-American students.¹¹⁴ A district court ruled that the changes violated the Equal Protection Clause, but the Fourth Circuit reversed, holding that the program was constitutional, and the Supreme Court denied certiorari.¹¹⁵

These examples implicate the question of whether one can remedy racial and gender inequality by taking into account arrangements that are the result of residential segregation. Where programs do not explicitly use race, such as in the selective high school case from Virginia, these programs should be able to avoid strict

¹¹² Hannah Perls, *Environmental Justice and Equity*, HARV. ENV'T & ENERGY L. PROGRAM n.7 (Sept. 26, 2022), <https://eelp.law.harvard.edu/2022/09/environmental-justice-equity> (“White farmers used a similar argument in June 2021 to block a USDA loan relief program that sought to provide debt relief to farmers and ranchers that had been ‘subjected to racial or ethnic prejudice’ under the American Rescue Plan Act. The District Court for the Middle District of Florida agreed with the farmers’ arguments and issued a preliminary injunction preventing the relief program from going into effect.” (first citing *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1275, 1295 (M.D. Fla. 2021); then citing *Faust v. Vilsack*, 519 F. Supp. 3d 470, 473–75, 478 (E.D. Wis. 2021) (granting White farmers’ motion to block the USDA loan-forgiveness program); and then citing *Miller v. Vilsack*, No. 4:21-CV-00595, 2021 WL 6129207, at *1–3 (N.D. Tex. Dec. 8, 2021) (granting White farmers’ preliminary injunction in class action))).

¹¹³ *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 871–72, 874–75 (4th Cir. 2023).

¹¹⁴ See Sheryll Cashin, *The Risk of Colorblind Absolutism*, POLITICO (June 14, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/06/14/colorblind-absolutism-affirmative-action-00101754> (noting the increase in representation of low-income students of all races).

¹¹⁵ *Coal. for TJ*, 68 F.4th at 871; *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 880–81 (4th Cir. 2023), *cert. denied*, 218 L. Ed. 2d 71 (Feb. 20, 2024).

scrutiny entirely. Applying strict scrutiny to a program that does not employ a racial classification but is motivated by a concern about racial inequality would be a “novel and dangerous” extension of equal protection law.¹¹⁶

Those programs that use race as an explicit factor to address the interrelated effects of residential segregation and environmental, health, or educational disparities might also be sustained if there is “a strong basis in evidence” that structuring the program without considering race would itself cause a disparate impact in the distribution of the social good.¹¹⁷ The doctrine, as explained by two commentators, might be borrowed from the contracting context, which is to allow remedial use of racial classifications, where “(1) the discrimination [is] identified with some degree of specificity . . . and (2) the institution that makes the racial distinction [has] a ‘strong basis in evidence’ to conclude that race-based remedial action is necessary.”¹¹⁸ Thus, assuming that the Court does not erode this standard or adopt a more far-reaching colorblindness view of the Equal Protection Clause that would forbid the goal of reducing racial inequality, then programs that seek to correct for existing racial disparities should be constitutional.

IV. BUILDING DEMOCRATIC SPACE FOR RACIAL REMEDY

SFFA imperils a range of policies to address racial inequality. It is unlikely that the current Court will rethink its approach to the Equal Protection Clause by, for instance, adopting an antisubordination or anticaste conception. And the current Court is unlikely to revisit its *Bakke* doctrine, reaffirmed by *SFFA*, that allows remedy only for

¹¹⁶ Sonja B. Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161, 164–65 (2024) (“But the position of the *Coalition for TJ* plaintiff and district court goes much [farther than colorblindness]. It demands what I call “ends-colorblindness”: the position that, even absent classifications or individual-level disparate treatment, any race-related objective itself renders a policy suspect and almost certainly invalid—whether that objective is to reduce racial inequality or increase it, to integrate or segregate, to include or exclude. This is novel and dangerous.”).

¹¹⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)) (articulating the “strong basis in evidence” standard for remedial action in constitutional cases); see also *Ricci v. DeStefano*, 557 U.S. 557, 563 (2009) (adopting a “strong basis in evidence” standard for race-conscious actions to avoid disparate impact under Title VII).

¹¹⁸ Chris Chambers Goodman & Natalie Antounian, *Dismantling the Master’s House: Establishing a New Compelling Interest in Remediating Systemic Discrimination*, 73 HASTINGS L.J. 437, 451 (2022).

identified discrimination for which the government actor is wholly responsible, and grouping all other efforts to address structural and systemic discrimination under the vague, disfavored category of “societal discrimination.”¹¹⁹ Still, for those who believe it imperative to redress past and ongoing racial inequality, resting in a “defensive crouch” based on what is acceptable to the current Supreme Court is an untenable and disheartening strategy.¹²⁰ An alternative strategy might be to attend to the pragmatic work of preserving these doctrines, while also building a new doctrinal foundation for racial remedy, as well as new policy and political economy approaches to address inequality and promote inclusion. This entails preserving and extending the democratic space for vital programs for civic institutions and federal, state, and local institutions to attend to the problems of addressing racial inequality and engage in racial repair, despite *SFFA*’s threat to delimit that space.

A first idea is for advocates seeking to design racial inequality programs to determine whether race-conscious categories are even required. This is not to suggest “proxies” for race as a way to circumvent the limitations of the current caselaw or accede to the *SFFA*’s fixation on facially colorblind solutions. Nor is it to pervasively replace a race analysis of inequality with a “class” based analysis. Class can be an imperfect lens for solving race-contingent problems, obscure the intersectional operation of race and class subjugation, and suggest that one can build cross-racial, class solidarity without confronting the reality of racism.¹²¹ And yet, where the barrier to opportunity is about poverty or income, underresourced social goods, wealth disparities, or unequal schools and neighborhoods, targeting those sites directly may be better than broadly deploying “race.” This allows advocates to rethink the Virginia selective high school case for instance. Though

¹¹⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 300–02, 307 (1978) (opinion of Powell, J.).

¹²⁰ See Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> (citing *Bakke* as an example of a case that was “wrong the day it was decided”).

¹²¹ See generally Samuel R. Bagenstos, *On Class-Not-Race*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50*, at 105, 105 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015) (arguing that the racial inequality overlaps with but is distinct from economic disadvantage); Rothstein, *supra* note 2 (arguing that wealth-based preferences are not an adequate substitute for race-based affirmative action, as they “exclude deserving middle-class Black students” and do not account for “the historical harms that made affirmative action necessary in the first place”).

the policy at issue concerned racial inequality, more accurately it can be said to be driven by the imperative to address educational inequality that is mapped onto the race and class geography of school districts and neighborhoods. Indeed, that inequality takes this spatial form makes the new socioeconomic and geographic weighting strategy imperative in a publicly funded educational system. It also creates an imperative of going much further than redesigning admissions policies. That not all middle schools are sending students to the highest-performing, selective high school reflects inequities in the middle schools (and beyond). Once that question is opened up, the solution lies not just in channeling students to a selective high school through any kind of new weighting but also in investigating and addressing the residential and school policies and decisions that sustain those inequities in the first instance.

Second, and conversely, is to recognize that in some cases, compensation or remedies should be directed to an even more specific category. If it is Black residents that were excluded from towns like Evanston, it is Black people who should get the remedy, and sometimes even just Black descendants who suffered the specific harm.¹²² “Remedy” is a capacious term used throughout this Article that can be invoked to describe a range of racial justice programs to address past and present discrimination and subjugation. But at times those who benefit from a remedy should be delineated more narrowly. This may be tricky given social movement desires to develop solutions that cut across racial categories so as to build cross-racial support. But it forces us to consider the limitations of designing a broad remedy when the harm has in fact been inflicted on a particular subgroup. The Court’s remedial doctrine often traps racial justice advocates who design programs to benefit a much larger class of people of color, with the notion that the beneficiaries are too broadly defined.¹²³ The approach suggested here responds not only to the doctrine’s constraints but also ensures that compensation and repair flows to those most directly and deeply affected. Determining when such a narrower approach is called for is certainly not an easy task, but it may be a necessary one to ensure some level of compensation for victims and their descendants.

¹²² See *supra* note 98 and accompanying text (discussing the work of the California Reparations Committee).

¹²³ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (referring to the inclusion of Aleut people); see also *Miller v. Vilsack*, No. 4:21-CV-0595, 2021 WL 6129207, at *3 (N.D. Tex. Dec. 8, 2021) (granting White farmers’ preliminary injunction to race-conscious debt relief program).

A third strategy asks legislators and administrators to trace and document systemic discrimination and exclusion to support remedial action. The doctrine instructs that race-conscious action can be taken to remedy the discrimination identified by government actors even outside of litigation.¹²⁴ The doctrine here is less developed, apart from perhaps the contracting context, in which legislators and administrators use disparity studies to establish the underutilization of government contractors. The current doctrine also faults “societal discrimination” as too imprecise. Yet the Court’s difficulty in identifying structural racial inequality stands at odds with numerous empirical and historical studies that show the causes of contemporary racial inequality and their traceability to slavery, Jim Crow, housing segregation, twentieth-century exclusions, and other policies and practices.¹²⁵ What if governments at every level did an accounting similar to those undertaken by Evanston and California, making the broad category of “societal discrimination” less amorphous?¹²⁶ Perhaps it would help in future challenges to specific remedial or compensatory action. And, more, it could play a role in the present public discourse that seeks to deny the impact of these racist policies, or minimize their continuing impact.¹²⁷

¹²⁴ See *supra* note 79–81 and accompanying text (arguing for a broader doctrinal notion of remedy).

¹²⁵ See generally SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* (2021) (detailing contemporary effects of racial segregation in housing); WILLIAM A. DARITY, JR. & A. KIRSTEN MULLEN, *FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY* (2020) (arguing for reparations to remedy racial wealth disparities traceable to slavery and twentieth-century discrimination); KATHERINE FRANKE, *REPAIR: REDEEMING THE PROMISE OF ABOLITION* (2019) (discussing black land loss in South Carolina); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (tracing how federal, state, and local governments created housing segregation); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (arguing that federal, state, and local policies in the twentieth century created high-poverty racially segregated neighborhoods).

¹²⁶ Cf. Robin A. Lenhardt, *Race Audits*, 62 *HASTINGS L.J.* 1527, 1534, 1569 (2011) (arguing for municipal race audits in which cities would document how their “systems and procedures, past and present, may have contributed to racial inequity within their borders”).

¹²⁷ See, e.g., Vivian E. Hamilton, *Reform, Retrench, Repeat: The Campaign Against Critical Race Theory, Through the Lens of Critical Race Theory*, 28 *WM. & MARY J. RACE GENDER & SOC. JUST.* 61, 73–78 (2021) (detailing the rise of anti-critical race theory legislation and similar proposals as a backlash to interventions adopted after the protests of 2020).

CONCLUSION

In the wake of the *SFFA* decision, is it useful for advocates seeking to preserve and expand race-conscious remedies in housing programs to advance a remedial rationale? This Article's answer is almost certainly, yes. While the "remedial rationale" as articulated in the Court's jurisprudence has been a finite and wanting concept, there are nevertheless opportunities for using openings in the caselaw to bolster programs facing equal protection challenges. The imperative for advocates, however, is to conscientiously document racial inequality—its impact, what maintains it, and the remedies needed to address it—despite the Court's doctrine. The current Court is unlikely to rethink its approach to equal protection. The hope is that this work will sustain racial remedies, invigorate coalitions and groups that better understand the continuing role of race, help design new strategies for addressing racial inequality, and build future courts that are receptive to the complex task of racial repair.