

Students for Fair Admissions and the End of Racial Classification as We Know It

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The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*¹ likely marks the beginning of the end of the overt use of race in university admissions. The Court's decision, however, has much broader implications.

Harvard University and the University of North Carolina (UNC) classified applicants based on racial and ethnic categories adopted by the federal government in the 1970s. *SFFA* concluded that these classifications were so arbitrary as to be unconstitutional. *SFFA* therefore offers a broad new avenue of attack for litigants challenging racial preferences and other race-based policies based on these ubiquitous classifications. Any entity that is sued for engaging in discriminatory preferences or for otherwise allocating goods or services by race will need to explain why the racial classifications it relies upon don't fail the arbitrariness test.

Part I of this article briefly reviews the history of the use of racial preferences by universities starting in the 1960s. From the *Bakke* case in 1978 to the commencement of the *SFFA* litigation in 2014, universities were required, at least officially, to limit their racial preferences to those necessary to achieve "diversity" on campus. Universities divided their applicants by racial classifications concocted by the federal bureaucracy. They then gave admissions preferences to "underrepresented" groups—African Americans, Hispanics, and Native Americans—to enhance diversity. This meant, by logical necessity, disfavoring members of groups deemed to detract from diversity, namely whites and Asian Americans.

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¹ 143 S. Ct. 2141 (2023).

Part II of this article discusses how the *SFFA* case disrupted a cozy status quo, in which universities pretended to abide by the limitations the Court had imposed on the use of racial preferences and the Supreme Court pretended not to notice that universities were ignoring those limitations. While not officially overruling precedent, the *SFFA* Court finally applied, rather than pretended to apply, the requisite legal standard: “strict scrutiny.” This standard requires that racial classifications only be used to allocate benefits when those classifications serve a compelling government interest and are narrowly tailored to serve that interest. The Court found that Harvard and UNC’s way of using race in admissions failed this test on multiple grounds.

Part III of this article notes that, for the first time, a Supreme Court majority has concluded that the standard racial classifications used by universities and many other institutions are arbitrary and incoherent. This part reviews the discussion of this issue during oral argument, Chief Justice John Roberts’s holding on this issue in his majority opinion, and Justice Neil Gorsuch’s longer analysis in his concurring opinion regarding why the classifications in question were not narrowly tailored to achieve diversity.

The Court has now held that when the standard racial classifications are used to allocate benefits, the classifications must be narrowly tailored to achieve a lawful objective. This means that many other uses of racial classifications beyond university admissions are suddenly more vulnerable to legal challenge. That is the subject of Part IV of this article. It discusses potential challenges to the use of race-based preferences in government contracting; to the mandatory use of racial classifications in biomedical research; and to the arbitrary standards the government uses to classify people as American Indians.

I. Racial Classifications in University Admissions

American universities with selective admissions policies began using racial preferences for minority applicants in the 1960s. The primary impetus for these preferences was to increase the enrollment of African American students.² Some universities gave preferences

² See JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* (2005).

only to black applicants. Other universities favored a varied range of additional minorities.³

Over time, selective universities' policies regarding how to divide their applicant pool into racial and ethnic demographic categories converged, thanks to an obscure but very important federal regulation known as Statistical Policy Directive No. 15 (Directive 15).⁴ The directive created uniform standards for virtually all federal agencies charged with collecting racial and ethnic data. The American population was broken up into four racial classifications—white, black, Asian American/Pacific Islander, and American Indian—and one ethnic classification, Hispanic.⁵

When the federal Office of Management and Budget (OMB) published Directive 15 in the *Federal Register*, the directive came with the warning that the “classifications should not be interpreted as being scientific or anthropological in nature.”⁶ OMB also warned that the classifications should not be “viewed as determinants of eligibility for participation in any Federal program,” such as affirmative action programs.⁷ Nevertheless, these classifications spread throughout American society, greatly affecting both public policy and the perception of race in the United States. For example, few Americans thought of themselves, or of other Americans, as “Hispanic” before Directive 15. Most important for purposes of this article, the Directive 15 classifications became the baseline categories for affirmative action preferences in college admissions.

When Directive 15 was enacted, the most recent (1970) census showed that the country was still overwhelmingly black and

³ These included, alone or in combination, Chicanos, Mexican Americans, Filipino Americans, Asian Americans, Mexican Americans, Puerto Ricans, people with Spanish surnames, American Indians, and even Italian Americans. On Italian Americans, see Liana Kirillova, *The Ironies of Whiteness: Italian Americans Pursue Affirmative Action in the City University of New York, 1976–2015*, 51 *ESSAYS IN HISTORY* (2017).

⁴ Office of Management and Budget (OMB) Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19, 260 (May 4, 1978).

⁵ *Id.* In 1997, the Office of Management and Budget divided the Asian American/Pacific Islander group into two groups, Asian Americans and Native Hawaiian/Pacific Islanders. The latter classification is sufficiently small that it has not played a significant role in the controversy over affirmative action preferences.

⁶ *Id.*

⁷ *Id.*

white—about 81 percent white and 13 percent black. An additional 5 percent or so of Americans were of Spanish-speaking origin, but the federal government traditionally considered this to be a “white” ethnic classification.⁸

The bureaucracy failed to anticipate that Directive 15 classifications would be widely used for affirmative action purposes. It also failed to anticipate that large-scale immigration from Asia, Latin America, and Africa, plus a vast increase in intergroup coupling, would destabilize the Directive 15 classification scheme.

Today, thanks to immigration and in stark contrast to 1978, a large majority of members of the official Directive 15 minority classifications are Hispanic or Asian American. Increased intergroup coupling, meanwhile, has led to a large increase in people who can plausibly check a “minority” box but who have only partial and sometimes distant non-white ancestry. As a result of these forces, numerous programs that were originally meant to help descendants of American slaves instead now primarily assist post-1965 “minority” immigrants and their children, or individuals with only distant minority ancestry.

Even within the Black/African American classification, the benefits of affirmative action increasingly go to relatively new American families. At Harvard, for example, almost two-thirds of the university’s black undergraduates in 2004 were first- or second-generation immigrants, or to a lesser extent, children of interracial couples.⁹ Other elite schools have seen similar, albeit not quite as dramatic, increases in the percentage of such students. Admitting these students may have increased official “racial diversity,” but it did much less to satisfy the social justice impulses that originally led colleges to adopt affirmative action preferences.

When the Directive 15 categories went into effect, most government agencies responded by placing a two-part race/ethnicity question on demographic forms. These forms asked individuals if they were Hispanic and, separately, what race they saw themselves as belonging to (White, Black, Native American, or Asian American).

⁸ See DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA* 29–57 (2022).

⁹ Sara Rimer and Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), <https://tinyurl.com/2sck2day>.

The Department of Education, however, demurred. Its Office of Civil Rights left it up to the schools and universities gathering statistics about their applicants and student bodies to decide whether to use a two-part question or a one-part question. The one-part question asked individuals whether they were Black, White, Hispanic, Native American, or Asian.¹⁰

Universities overwhelmingly chose the one-question route, and applicants were only allowed to check one box. This made Hispanic status the equivalent of a racial status—for example, one could not be both Hispanic and White on these universities' admissions forms. The Department of Education did not change its rules to require a two-question ethnicity classification until 2007, about a decade after OMB told the Department it had to do so. By then, the notion that Hispanic affirmative action preferences in university admissions amounted to a "racial" preference was entrenched, not least in the Supreme Court.¹¹

No university has explained, in litigation or otherwise, why it chose to copy the Directive 15 classifications in pursuing affirmative action preferences for diversity. This is a significant oversight, given that the classifications were not created with such a purpose in mind. For example, why should a university give a preference to those of Spanish-speaking ancestry, regardless of racial background, but not to members of other groups that could add ethnic diversity and that have faced discrimination in American society, such as Arab, Armenian, or Iranian Americans?

Nevertheless, by the time the first Common Application was released in 1994, its demographic questions mimicked the Directive 15 classifications, except for having an additional Mexican American classification.¹² By the time *Students for Fair Admissions* sued Harvard and UNC, the classifications on the Common App mapped

¹⁰ See David E. Bernstein, *Why Does the Supreme Court Refer to Preferences for Hispanics/Latinos as "Racial Preferences?"*, VOLOKH CONSPIRACY (Jan. 24, 2022), <https://tinyurl.com/mrxbvjvw>.

¹¹ *Id.*

¹² Common Application, 1994–95 (on file with author). This separate category was a vestige of Mexican Americans, or at least those with discernable indigenous heritage, being singled out as a minority racial category on many civil rights forms starting in the 1950s. See BERNSTEIN, CLASSIFIED, *supra* note 8.

the Directive 15 classifications exactly, including by assigning “Hispanic” to a separate ethnicity category rather than a racial one.¹³

By the early 2000s, selective universities gave the greatest admissions preferences to black Americans, smaller preferences to Hispanics and Native Americans, and no preferences to whites, regardless of ethnic background. Many of these universities, meanwhile, were widely thought to be imposing soft quotas on, or otherwise discriminating against, Asian Americans, who were deemed “overrepresented.”¹⁴

A wide range of demographic groups, then, have been affected by affirmative action. Yet since the beginning of racial preferences in higher education, both sides of the affirmative action debate have focused primarily on whether it was appropriate to give African American applicants preferences over whites:¹⁵

- Opponents have described racial preferences in admissions as illicit, immoral “reverse discrimination”; proponents have argued that the preferences are compensation for centuries of systemic racism in American education that put African Americans in a worse position to be admitted to elite schools.
- Opponents have contended that preferences are illegal under the Fourteenth Amendment’s Equal Protection Clause and Title VI of the 1964 Civil Rights Act, each of which should be read to create an extremely strong legal presumption against

¹³ Common Application, 2014–15 (on file with author).

¹⁴ By 1987, the media was already reporting on perceived discrimination against Asian Americans in admissions. Eloise Salholz, *Do Colleges Set Asian Quotas?*, NEWSWEEK, Feb. 9, 1987, at 60. In the early 2000s, data began to appear that backed up this perception. Thomas J. Espenshade et al., *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 Soc. Sci. Q. 1422 (2004).

¹⁵ For example, books such as RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2015), and MELVIN I. UROFSKY, *THE AFFIRMATIVE ACTION PUZZLE: A LIVING HISTORY FROM RECONSTRUCTION TO TODAY* (2020), treat Hispanic participation in affirmative action as at best an afterthought. Yet by the time the authors were writing their books, more Hispanics than African Americans were likely benefiting from affirmative action.

In *SFFA*, Justice Thomas noted the same dynamic in Justice Jackson’s dissent: “While articulating her black and white world (literally), Justice Jackson ignores the experiences of other immigrant groups (like Asians, see *supra*, at 43–44) and white communities that have faced historic barriers.” *SFFA*, 143 S. Ct. at 2205 (Thomas, J., concurring).

decision-making based on an individual's race; proponents have responded that the Constitution and civil rights laws should be read in light of the underlying purpose of helping African Americans overcome centuries of oppression and discrimination, and thus to provide leeway for policies that remedy the exclusion of black Americans from elite educational institutions.

- Opponents have argued, more broadly, that the underlying command of the Equal Protection Clause was to get the government out of the business of divvying up benefits based on racial class and to have a colorblind Constitution; proponents have rejoined that the underlying purpose of the Clause was to undo the racial subordination of black Americans.

In 1978, Supreme Court Justice Lewis Powell cast the deciding vote in *Regents of the University of California v. Bakke*.¹⁶ His opinion concluded that universities could use racial preferences in admissions, but only if the preferences met the demanding legal test of strict scrutiny. This satisfied almost no one involved in the debates noted above.

Powell decided that universities had a compelling interest in the purported educational benefits of “diversity” and that achieving that goal through racial preferences satisfied strict scrutiny. Elite universities had long given admissions preferences to athletes, musicians, residents of rural areas, and other constituencies. Powell decreed that universities were allowed to similarly give a preference to applicants based on race or ethnicity without running afoul of the law. However, universities could not use quotas and were required to give applicants individualized consideration based on their entire application.

The practical result of Powell's compromise was that admissions officers at selective universities continued to do what they had been doing before *Bakke*, except without formal quotas. Admissions staff first determined a goal for the percentage of African Americans and other designated minorities they wished to admit. They then manipulated their admissions processes to achieve that goal.

¹⁶ 438 U.S. 265 (1978).

University leaders surmised, correctly, that if they did not create formal quotas and couched their admissions strategies in terms of “diversity,” they were unlikely to face lawsuits or punitive administrative actions. It helped that admissions practices at selective universities were almost universally opaque, and that any individual plaintiff who threatened to sue could be quietly admitted if the university believed the threat was serious.

Universities also correctly surmised that judges of a conservative temperament, themselves largely the products of elite, selective educational institutions, were going to be very reluctant to invalidate policies universally adopted by such institutions. Despite some close calls, affirmative action preferences in higher education withstood doubts about their legality for over 50 years. In *Grutter v. Bollinger*¹⁷ and *Fisher v. University of Texas*,¹⁸ a majority of the Court ignored strong evidence that the university defendants were essentially pursuing soft, informal racial quotas and otherwise ignoring the limits imposed by Powell in *Bakke*. The Court in both cases upheld the use of racial preferences as satisfying strict scrutiny. This brings us to *SFFA*.

II. *SFFA* Disrupts the Status Quo

The status quo was finally disrupted when Students for Fair Admissions (*SFFA*) filed a lawsuit against the University of North Carolina, an elite, selective public university, under the Fourteenth Amendment’s Equal Protection Clause and Title VI of the 1964 Civil Rights Act. *SFFA* filed a separate lawsuit against Harvard University, perhaps America’s most renowned private university, under Title VI. Supreme Court precedent dictated that the legal standard for illegal racial discrimination is identical under both Title VI and the Fourteenth Amendment, so the cases raised the same legal issues.

The timing of these cases was propitious. In the early years of affirmative action, some liberals vociferously opposed the use of racial preferences, while some relatively conservative figures, such as Richard Nixon, strongly favored them. Over time, however, proponents of affirmative action preferences became highly concentrated

¹⁷ 539 U.S. 306 (2003).

¹⁸ 579 U.S. 365 (2016).

on the political left, while conservatives overwhelming opposed them on both moral and legal grounds.¹⁹

In fall 2022, when the *SFFA* cases were argued before the Supreme Court, the Court had a 6–3 conservative majority for the first time in almost 100 years. Moreover, the Court’s majority had already overturned *Roe v. Wade* in the previous term, proving its willingness to issue a decision that both rejected longstanding precedent and upset the American establishment.²⁰

Meanwhile, over the previous decades the Supreme Court had consistently and increasingly emphatically told universities that they needed to use race in a narrowly tailored way, indeed only as a last resort.²¹ Nevertheless, like other universities, Harvard and UNC had acted as if they could do whatever they wanted so long as they didn’t use official quotas.

Indeed, Harvard had never even examined the viability of race-neutral alternatives before the *SFFA* litigation began.²² Harvard ultimately acknowledged that eliminating donor and alumni preferences, certain athletic preferences, and children-of-employee preferences would increase racial diversity without relying on racial preferences. Harvard’s attorneys argued, however, that it should not have to do these things, because that would interfere with its institutional prerogatives.²³

The six-vote majority in favor of the plaintiffs in both the Harvard and the UNC cases therefore came as no surprise. Much of Chief Justice Roberts’s majority opinion covered familiar territory. First, Roberts contended that racial preferences are illegal reverse discrimination. College admissions are “zero-sum” and thus a “benefit

¹⁹ As of June 2023, 80 percent of conservative Republicans disapproved of using race in college admissions, while 67 percent of liberal Democrats approved. *See More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity in Admissions Decisions*, PEW RSCH. CENTER (June 8, 2023), <https://tinyurl.com/wuuuc5dk>.

²⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

²¹ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (“The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”); *see also Grutter*, 539 U.S. at 339 (requiring that universities engage in “serious, good faith consideration of workable race-neutral alternatives” before resorting to racial preferences to achieve diversity).

²² Brief for Petitioner at 18, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (No. 20-1199).

²³ *See id.* at 33–35.

provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”²⁴

Second, the Equal Protection Clause, both in its original meaning and as its interpretation has evolved in the Supreme Court, creates an extremely strong presumption against racial classification. The notion that the Clause permits the use of race to achieve a racially “balanced” university class turns the Clause “on its head.”²⁵ Roberts noted that some critics dismiss the Court’s prior pronouncement that the Constitution is colorblind as “rhetorical flourishes,” but these, he argued, were actually the “proud pronouncements” of the Court’s cases.²⁶

Justices Sonia Sotomayor and Ketanji Brown Jackson both dissented (and Justice Elena Kagan joined both of their dissents). Both Justices abandoned the diversity rationale now that it no longer attracted a swing vote to uphold preferences, as it had in past cases. Instead, the Justices argued that the Fourteenth Amendment is properly interpreted to allow the government to use racial classification to redress the exclusion of underrepresented minorities, African Americans in particular.

Forty-five years after Justice Powell’s opinion in *Bakke* allowed for racial preferences in university admissions under a narrow diversity rationale, the debate in 2023 had returned to the debate among the eight other Justices in *Bakke*. The conservative Justices argued that the government may not rely on racial classification to allocate resources. The liberal Justices rejoined that while the government may not discriminate in favor of historically dominant groups, it may use race-based preferences to aid certain minority groups.

Three aspects of the *SFFA* opinions, however, are relatively novel. First, Justice Clarence Thomas, concurring, issued by far the Court’s most lengthy, detailed defense of the notion that the original meaning of the Equal Protection Clause required that state policy be colorblind.²⁷ In turn, Justice Sotomayor issued a rebuttal.²⁸ This article

²⁴ *SFFA*, 143 S. Ct. at 2169.

²⁵ *Id.* at 2251.

²⁶ *Id.* at 2174.

²⁷ *Id.* at 2178–89 (Thomas, J., concurring).

²⁸ *Id.* at 2225–30 (Sotomayor, J., dissenting).

will leave commentary on the Thomas-Sotomayor debate over originalism to others.

The second *SFFA* novelty was that the plaintiffs presented detailed evidence that Asian American applicants to Harvard had the lowest chance of admission among the various designated “racial” groups. Harvard admissions staff accomplished this result by arbitrarily assigning Asian Americans artificially low personality scores. The evidence of anti-Asian discrimination that the plaintiffs acquired in discovery was backed up by a telling statistic. In 1991, 21 percent of Harvard’s class was Asian American. Twenty-three years later, when the *SFFA* litigation commenced, the figure was 22 percent,²⁹ despite a large increase in the Asian American applicant pool.

Roberts’s opinion briefly alluded to this issue.³⁰ Thomas’s concurrence, meanwhile, hammered home the point that even though Asian Americans were historically subject to brutal discrimination,³¹ Harvard’s admissions policy disfavored them, just as it once disfavored Jews. Justice Sotomayor, straining credulity, retorted that Asian Americans benefit from racial preferences in higher education admissions provided to other groups.³²

The third and most important novelty of *SFFA* has been overlooked in most of the early commentary on the cases. For the first time, a Supreme Court majority surmised that the Directive 15 racial classifications used by universities (and throughout American law and society) are so arbitrary that using them to decide who gets preferential treatment is unconstitutional. The next section of this article discusses this aspect of the Court’s holding in more detail.

III. The *SFFA* Majority Questions the American System of Racial Classification

Prevailing Supreme Court doctrine before *SFFA* was that preferences given to members of certain racial classifications must meet the constitutional standard of “strict scrutiny.” To be deemed

²⁹ Jeremy Ashkenas et al., *Even with Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://tinyurl.com/2ak7x7wt>.

³⁰ *SFFA*, 143 S. Ct. at 2170–72.

³¹ *Id.* at 2199–2200 (Thomas, J., concurring).

³² *Id.* at 2258 (Sotomayor, J., dissenting).

compliant with constitutional requirements, preferences had to serve a compelling interest and be narrowly tailored to serve that interest. Using that test, the Court consistently focused, first, on whether “diversity” in higher education is a compelling government interest, and second, whether the preferences were narrowly tailored in the sense that the same objective could not have been met with race-neutral policies.

Until 2016, Supreme Court Justices did not question (outside sporadic, brief dicta³³) whether the classifications used by universities to pursue diversity—Asian American, Black, Hispanic, Native American, Native Hawaiian/Pacific Islander, and White—raised constitutional problems. This oversight neglected a rather obvious argument: The Directive 15 classifications arbitrarily combined multiple subgroups that do not have a common heritage or culture. Therefore, the classifications were not narrowly tailored to achieve real diversity.

The first Supreme Court opinion to address this issue in a significant way was Justice Samuel Alito’s dissenting opinion in *Fisher v. University of Texas*.³⁴ Alito argued that University of Texas’s (UT) method of classifying students in the admissions process was not narrowly tailored to achieve diversity. Alito noted, for example, that students labeled “Asian American” included students of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian, and other Asian backgrounds. “It would be ludicrous,” he wrote, “to suggest that all of these students have similar backgrounds and similar ideas and experiences to share. So why has UT lumped them together and concluded that it is appropriate to discriminate against

³³ Justice Powell briefly raised this issue in *Bakke*, though this was in the context of the University of California Davis Medical School’s quota system based on historic and current disadvantage, not diversity. “[T]he University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American-Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians [over 10 ten percent of the students, much higher than their share of the population] admitted through the regular admissions process.” *Bakke*, 438 U.S. at 309 n.45. Powell apparently believed that his opinion gave universities permission to consider *everyone’s* ethnic or racial background and how it might add to diversity, but that is not how it worked out.

³⁴ 579 U.S. 365 (2016).

Asian-American students because they are ‘overrepresented’ in the UT student body? UT has no good answer.”³⁵

Alito added that UT failed to “provide any definition of the various racial and ethnic groups”; classified multiracial students “as falling into only a single racial or ethnic group”; and failed to address the fact that an applicant who checks a minority box may have only “one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group.”³⁶ UT did not say whether it believed such students “reflect a distinctive perspective or set of experiences associated with that group.”³⁷ However, UT relied “on applicants to ‘classify themselves.’”³⁸ This necessarily gave any applicant who checked the preferred racial box favored admissions treatment for purportedly adding to classroom diversity.³⁹

Alito’s discussion of the classification issue came in a dissenting opinion, which meant *SFFA* marked the first time a *majority* opinion of the Supreme Court addressed the classification issue in some detail. This discussion was something of a surprise. At least until oral argument, it seemed that *SFFA* would follow the pattern of the Court largely ignoring the arbitrariness of the classifications used by universities to purportedly achieve diversity.

SFFA had not focused on this issue during the litigation, and it played no role in the lower courts’ decisions upholding Harvard’s and UNC’s racial preferences. *SFFA*’s brief to the Supreme Court only mentions the issue tangentially in a footnote: “*SFFA* uses the term ‘Asian American’ only because Harvard does. The term is incoherent, sweeping in ‘wildly disparate national groups’ with little in common.”⁴⁰ *SFFA*’s reply brief devoted a single line to the issue, noting that the boxes themselves are arbitrary—they lump totally different cultures together in categories that were never designed

³⁵ *Id.* at 414 (Alito, J., dissenting).

³⁶ *Id.* at 414–15.

³⁷ *Id.* at 415.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Brief for Petitioner at 15 n.1, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (No. 20-1199).

to achieve educational benefits.⁴¹ The defendants and their amici ignored the issue almost entirely.⁴²

The classification issue was the focus of an amicus brief that I filed supporting the plaintiffs (which I'll call the Bernstein brief).⁴³ That brief, in turn, received substantial media attention, including a lengthy interview in the *Wall Street Journal*.⁴⁴ Given that over 100 amicus briefs were filed in the case, the attention given to the Bernstein brief suggested broad interest in the argument.

In any event, at oral argument the Justices showed some sustained interest in whether the classifications themselves undermined the defendant universities' diversity argument. Justice Alito asked UNC's attorney:

I'd like your response to the argument that these racial categories are so broad that any use of them is arbitrary and, therefore, unconstitutional. So what would you say to, for example, a student whose family came from Afghanistan and doesn't get in because the student doesn't get the plus factor that the student would get if the student's family had come from someplace else?

So you would say to the student: Well, we don't—we don't need you to contribute to a diversity of views at our school because we already have enough Asians. We have a lot of students whose families came from China or other Asian countries. And the student says:

Well, you don't have anybody like me, I'm from Afghanistan.

⁴¹ Reply Brief for Petitioner at 11, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (No. 20-1199).

⁴² The Asian American Legal Defense Fund addressed classification with regard to Asian Americans, and in doing so made a significant error. In the process of claiming that schools like Harvard and UNC are truly interested in more granular information than the standard classifications, the brief claims that "universities utilize broad categories like 'Asian' not by choice, but by federal mandate." That is true when it comes to reporting the race of students and staff. When it comes to college admissions, however, there is no federal law requiring universities to inquire about the race of applicants at all, much less dictating how such inquiries should proceed. See Brief of Amici Curiae Asian American Legal Defense and Education Fund et al., in Support of Respondent, *Students for Fair Admissions*, at 9.

⁴³ Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner, *Students for Fair Admissions*.

⁴⁴ Kyle Peterson, *Affirmative Action Mocks Ethnic Diversity*, WALL ST. J. (Oct. 28, 2022), <https://tinyurl.com/2s3dfrte>; see also, e.g., William McGurn, *Racial Discrimination and Harvard's Invidious Boxes*, WALL ST. J. (Aug. 22, 2022), <https://tinyurl.com/2vf4kccw>.

What—what similarity does a family background to the person from Afghanistan have with somebody whose family’s background is in, let’s say, Japan . . . ?

[W]hat is the justification for lumping together students whose families came from China with someone—with students whose families came from Afghanistan? What do they have in common? . . . [W]hy do you have them check a box that I’m Asian? What do you learn from the mere checking of the box?⁴⁵

Justice Brett Kavanaugh asked UNC’s attorney, North Carolina Solicitor General Ryan Park, how “applicants from Middle Eastern countries” are classified, “from Jordan, Iraq, Iran, Egypt and the like? . . . [I]f they honestly check one of the boxes, which one are they supposed to check?” Park responded, “I—I don’t—do not know the answer to that question.”⁴⁶

This was a remarkable colloquy. The Common App’s demographic questions explicitly treat Middle Eastern as a subset of “white” (and did so in 2014, when the litigation commenced). First, the form asks applicants to

[P]lease indicate how you identify yourself. (You may select one or more)
American Indian or Alaska Native
Asian
Black or African American
Native Hawaiian or Other Pacific Islander
White⁴⁷

If the applicant checks “White,” the form then asks,

Which best describes your White background? (You may select one or more)
Europe
Middle East
Other⁴⁸

⁴⁵ Transcript of Oral Argument at 94–96, *Students for Fair Admissions, Inc. v. University of North Carolina*, 143 S. Ct. 2141 (2023) (No. 21-707). The Common App is not clear on the matter, but federal policy dictates that Afghan Americans are considered white, not Asian. Alito’s confusion about this issue inadvertently reveals the arbitrariness of the classifications.

⁴⁶ *Id.* at 107–08.

⁴⁷ Common Application, *supra* note 13.

⁴⁸ *Id.*

Justice Kavanaugh also asked SFFA's attorney a question about an issue that had not been raised previously but is likely to be litigated in the future. If the Court were to decide that universities may not use race in admissions, could they instead implement a preference for descendants of American slaves as a nonracial classification?⁴⁹

The tenor of the oral arguments in both cases did not mislead. As was widely anticipated, the Court eventually ruled against both Harvard and UNC. In doing so, Chief Justice Roberts's opinion for the Court did not formally overrule precedent. Instead, he interpreted the relevant line of cases as holding that race-based college admissions are permissible only if they can be shown to meet a compelling interest. Meanwhile, a university may never use race as a stereotype or negative, and a university must expect its preferences to terminate within a reasonable time frame. Harvard's and UNC's admissions policies did not coherently advance a compelling interest, Roberts concluded, and they also failed the other two criteria. The preferences therefore violated the Equal Protection Clause of the Fourteenth Amendment and Title VI.

Roberts's exact language regarding why the classifications the universities used to divide applicants demographically were illicit is worth quoting in full:

For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South Asian* or *East Asian* students are adequately represented, so long as there is enough of one to compensate for a lack of the other. Meanwhile other racial categories, such as "Hispanic," are arbitrary or undefined. See, *e.g.*, M. Lopez, J. Krogstad, & J. Passel, Pew Research Center, *Who is Hispanic?* (Sept. 15, 2022) (referencing the "long history of changing labels [and] shifting categories . . . reflect[ing] evolving cultural norms about what it means to be Hispanic or Latino in the U. S. today"). And still other categories are underinclusive. When asked at oral argument "how are applicants from Middle Eastern countries classified, [such as] Jordan, Iraq, Iran,

⁴⁹ Transcript of Oral Argument at 44–45, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (No. 20-1199).

[and] Egypt,” UNC’s counsel responded, “[I] do not know the answer to that question.” Tr. of Oral Arg. in No. 21–707, p. 107; cf. *post*, at 6–7 (GORSUCH, J., concurring) (detailing the “incoherent” and “irrational stereotypes” that these racial categories further).

Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents’ goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. Yet “[i]t is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is ‘broadly diverse.’” *Parents Involved*, 551 U. S., at 724 (quoting *Grutter*, 539 U. S., at 329). And given the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities’ main response to these criticisms is, essentially, “trust us.” None of the questions recited above need answering, they say, because universities are “owed deference” when using race to benefit some applicants but not others. Brief for University Respondents in No. 21–707, at 39 (internal quotation marks omitted). It is true that our cases have recognized a “tradition of giving a degree of deference to a university’s academic decisions.” *Grutter*, 539 U. S., at 328. But we have been unmistakably clear that any deference must exist “within constitutionally prescribed limits,” *ibid.*, and that “deference does not imply abandonment or abdication of judicial review,” *Miller–El v. Cockrell*, 537 U. S. 322, 340 (2003). Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” *Gratz v. Bollinger*, 539 U. S. 244, 270 (2003) (internal quotation marks omitted). The programs at issue here do not satisfy that standard.⁵⁰

⁵⁰ *SFFA*, 143 S. Ct. at 2167–68.

Justice Thomas, concurring, also noted that Harvard and UNC relied on sorting students into one of “only a few reductionist racial groups”⁵¹ that are “vastly oversimplistic.”⁵² Applicants therefore would get illicitly siloed “into an artificial category.”⁵³

Roberts and Thomas each favorably cited a section of Justice Gorsuch’s concurrence in which Gorsuch criticized the classifications used by universities in greater detail. Gorsuch, relying heavily on the Bernstein brief, explained that these classifications are based on classifications that bureaucrats created via Directive 15 “without any input from anthropologists, sociologists, ethnologists, or other experts.”⁵⁴ Despite explicit warnings accompanying the publication of Directive 15 in the *Federal Register* that the classifications “should not be . . . viewed as determinants of eligibility for participation in any Federal program,” they were “eventually used . . . for that very purpose—to ‘sor[t] out winners and losers in a process that, by the end of the century, would grant preference[s] in jobs . . . and university admissions.”⁵⁵

The classifications, Gorsuch continued, “rest on incoherent stereotypes.”⁵⁶ He recounted several examples of this incoherence:

- The Asian American category “sweeps into one pile East Asians (e.g., Chinese, Korean, Japanese) and South Asians (e.g., Indian, Pakistani, Bangladeshi), even though together they constitute about 60% of the world’s population.”⁵⁷ The Native Hawaiian/Pacific Islander classification was separated from the Asian American classification in response to political lobbying in the 1990s, but this reform curiously left Filipino Americans in the Asian American classification, even though the Philippines are literally Pacific Islands.⁵⁸
- The “Hispanic” category covers those whose ancestral language is Spanish, Basque, or Catalan—but it also covers

⁵¹ *Id.* at 2201 (Thomas, J., concurring).

⁵² *Id.* at 2200 n.10.

⁵³ *Id.* at 2202.

⁵⁴ *Id.* at 2210 (Gorsuch, J., concurring).

⁵⁵ *Id.* (citations omitted) (emphasis deleted).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

individuals of Mayan, Mixtec, or Zapotec descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas.⁵⁹

- The “White” category “sweeps in anyone from ‘Europe, Asia west of India, and North Africa.’”⁶⁰ That includes “those of Welsh, Norwegian, Greek, Italian, Moroccan, Lebanese, Turkish, or Iranian descent. It embraces an Iraqi or Ukrainian refugee as much as a member of the British royal family.”⁶¹
- The “Black or African American” classification “covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb.”⁶²

Gorsuch added that “attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group.”⁶³ He then cited cases discussing who counts as Hispanic. These ranged from a decision denying Hispanic status to someone of Italian Argentine descent, to one granting Hispanic status to someone of Sephardic Jewish ancestry, to one giving partial Hispanic credit to a petitioner who had one Cuban grandparent.⁶⁴

“Given all this,” Gorsuch concluded, “is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity? Or that a cottage industry has sprung up to help college applicants do so?”⁶⁵ In particular, “one effect of lumping so many

⁵⁹ *Id.* at 2210–11.

⁶⁰ *Id.* at 2211.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

people of so many disparate backgrounds into the 'Asian' category is that many colleges consider 'Asians' to be 'overrepresented' in their admission pools."⁶⁶ Instead of explaining how their unique experiences and national origins add to diversity, Asian American applicants are therefore advised by admissions consultants to hide or downplay their identity.⁶⁷

Justice Sotomayor, dissenting, attacked the majority for questioning classifications that had been developed by "experts" and had been widely used and relied upon by the government and private actors in all sorts of contexts. But in fact, the classifications were developed in an ad hoc manner, and they were specifically intended *not* to be used for affirmative action in general, much less in university admissions specifically.

It's true, as Sotomayor pointed out, that census data relying on the same classifications is widely used. But that is because the Census Bureau gathers such data, making it cheap and easily available, not because it's the best possible data to use. In any event, contrary to Sotomayor's expressed concerns, the *SFFA* opinion only addresses classifying individuals by race, not looking at census data when making broad public policy.⁶⁸

Sotomayor did not make much of a legal, as opposed to policy, argument in this context. But translating her argument into legal terms, she essentially maintained that the "narrow tailoring" requirement should not apply to a university's choice of classifications. Rather, Sotomayor believed that the Court should have deferred to the universities in their choice to rely on the most widely used racial categories.

In any event, while the mundane collection and use of Directive 15 racial data by the Census Bureau, social scientists, and others is legally secure for now, Sotomayor was right to notice that the majority's attention to the arbitrariness issue has implications well beyond the context of university admissions. Some of those implications are addressed in the next section of this article.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 2254 (Sotomayor, J., dissenting).

IV. SFFA's Implications: The End of Racial Classification as We Know It?

A six-vote majority of the Supreme Court has declared that the racial and ethnic classifications used throughout government and American society are “plainly overbroad,” both “underinclusive” and “overinclusive,” and “arbitrary.” This holding provides an opportunity for litigants to challenge the classifications used to provide racial preferences, *inter alia*, in government contracting, in biomedical research by government dictate, and in laws that classify people by American Indian status and that rely on factors other than tribal membership.

A. Racial Preferences in Government Contracting

New challenges to racial preferences in government contracting seem inevitable.

For over 30 years, the relevant precedents have allowed plaintiffs to challenge these preferences on the grounds that they are only permitted when they target a specific past intentional discrimination that the government itself had a hand in, with the discrimination continuing to have lingering effects.⁶⁹

In practice, governments have found that if courts invalidated their racial preference policies, they could simply reenact them. They just had to purport to rely on a “disparity study” from a paid consultant. These studies inevitably showed the requisite history in the jurisdiction of discrimination in contracting, combined with the continuing effects of that discrimination. Government officials would even “admit” that they were still engaging in discrimination, regardless of the truth, to ensure that the disparity study came out the “right” way.

Faced with willful government officials determined to continue using racial preferences, potential plaintiffs eventually either gave up or found a way to take advantage of the preferences themselves.⁷⁰ Racial preferences in government contracting are currently more common than ever.

⁶⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁷⁰ See MARTIN J. SWEET, *MERELY JUDGMENT: IGNORING, EVADING, AND TRUMPING THE SUPREME COURT* (2010).

Before *SFFA*, plaintiffs rarely raised the arbitrariness of the classifications when they challenged racial preferences in government contracting. In turn, courts had few opportunities to discuss whether courts should defer to the classifications used in minority-preference programs in government contracting, or whether strict scrutiny should apply to the classifications.⁷¹ After *SFFA*, and assuming that willing plaintiffs are found, litigation will likely cause the end of preferences for “minority business enterprises.” Directive 15 classifications are even more arbitrary in allocating government contracts than in pursuing diversity in higher education. For example, there were very few Asian Indians in the United States until the 1970s. Asian Indian Americans therefore have not experienced generations of discrimination. Moreover, on average they have much higher incomes and educational achievement than Americans in general. Nevertheless, they get preferences in government contracting as members of the “Asian American” classification. Meanwhile, anyone classified as white gets no preference. The latter classification includes Italian, Lebanese, Armenian, and other Americans whose ancestors faced significant discrimination in the pre-civil rights era and beyond.

Further, businesses owned by white Argentine and Spanish Americans get preferences via what Chief Justice Roberts called “arbitrary or undefined” Hispanic ethnic classification, but Afghan- and Iranian-American-owned businesses are deemed white-owned and get no preferences. Under federal law, a man who is 1/1024th Cherokee and is from a wealthy, well-established white family gets an automatic preference for his business so long as he is a

⁷¹ See *Builders Ass’n of Greater Chi. v. Cnty. of Cook*, 256 F.3d 642, 647 (7th Cir. 2001) (concluding that preferences were overinclusive in including Spanish Americans, though not specifically applying strict scrutiny); *Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 206 n.5 (2d Cir. 2006) (holding that a claim of underinclusiveness of the classifications used must lose, because allowing such claims would undermine Supreme Court precedent stating that racial preference programs should be as narrow as possible); *Ritchey Produce Co. v. State of Ohio Dep’t of Admin. Servs.*, 1997 WL 629965 at *2 (Ohio Ct. App. 1997) (holding that strict scrutiny applied and that the preferences were not narrowly tailored because they arbitrarily favored certain groups), *rev’d*, 707 N.E.2d 871, 928 (Ohio 1999). In *Vitolo v. Guzman*, 999 F.3d 353, 360–61 (6th Cir. 2021), a case involving racial preferences in the distribution of coronavirus relief funds, the court found that the classifications relied upon by the government were arbitrary and for that reason held that the preferences were not narrowly tailored and failed strict scrutiny.

tribal member. A man from an impoverished Appalachian family who grew up in a shack with an alcoholic single mother gets no such automatic preference.

The original impetus for government contracting preferences was to bring previously excluded black Americans into the economic mainstream. Yet less than one-fifth of the federal transportation dollars covered by racial preferences go to black-owned businesses, including those owned by immigrants.⁷² Most of the racial preferences go to first- or second-generation immigrants from all over the world. It would seem to be virtually impossible to show that such preferences are narrowly tailored to help victims of historical patterns of discrimination that have effects bleeding into today.

B. Biomedical Research

Hopefully, *SSFA* will also doom federal “diversity” requirements imposed on biomedical researchers.⁷³ The Directive 15 classifications came with an explicit warning that these “classifications should not be interpreted as being scientific or anthropological in nature.”⁷⁴ And indeed, the classifications have no valid scientific or anthropological basis.⁷⁵ Yet the Food and Drug Administration and the National Institutes of Health require medical researchers to classify study participants by Directive 15 categories.⁷⁶

The problems with using these classifications in biomedical research have been discussed elsewhere. In short, scientists have been forced to use these classifications even though no valid studies suggest they should be used for the relevant purposes.⁷⁷ And the classifications mask vast genetic differences within each category.

The “compelling interest” that is served by the use of these classifications in biomedical research is, at best, unclear. There was, for

⁷² Editorial, *Philly, Fraud and “Equity” Gone Wrong*, WALL ST. J. (April 11, 2023), <https://tinyurl.com/46b6tcxu>.

⁷³ *SSFA* will also hopefully doom nascent dangerous and ill-conceived efforts to pursue “equity” by giving individuals belonging to certain Directive 15 classifications preferential access to medical care.

⁷⁴ Directive No. 15, *supra* note 4.

⁷⁵ See BERNSTEIN, *CLASSIFIED*, *supra* note 8, at 141–67.

⁷⁶ *Id.*

⁷⁷ Janet K. Shim et al., *Race and Ancestry in the Age of Inclusion: Technique and Meaning in Post-Genomic Science*, 55 J. HEALTH & SOC. BEHAV. 504 (2014).

example, no plausible scientific reason for government bureaucrats to delay approval of Moderna's COVID-19 vaccine until the company recruited "enough" study subjects from the official minority classifications.⁷⁸

C. *American Indian Classifications*

Finally, *SFFA* may have a significant influence on classifications of American Indians in American law. The Supreme Court has long held that tribal membership is not a racial classification. The government may therefore treat tribal members differently than others without being subject to strict scrutiny.⁷⁹

Some federal laws, however, recognize individuals as American Indian based on factors other than tribal membership. These include community recognition, community affiliation, descent from indigenous Americans, "blood quantum,"⁸⁰ and even discretionary designation as Indian by the Secretary of the Interior.⁸¹

New challenges to at least some of these laws and regulations are likely, especially to laws that sometimes operate to the detriment of individual Indians. An example of such a law is the Major Crimes Act,⁸² which often exposes people deemed "Indian" to long federal sentences for illegal acts that state courts would treat less harshly.⁸³

⁷⁸ Meg Tirrell & Leanne Miller, *Moderna Slows Coronavirus Vaccine Trial Enrollment to Ensure Minority Representation, CEO Says*, CNBC (Sept. 4, 2020), <https://tinyurl.com/mrx4dbpz>.

Some prominent government officials have argued that if the subjects in vaccine testing studies are not "representative," the public will not trust the vaccines. But this reasoning is circular. If indeed Americans would not "trust" a vaccine unless its research subjects were sufficiently "diverse," that is largely because the government insists that vaccines should not be deemed trustworthy unless they have been tested on a diverse population—as defined by the unscientific Directive 15 categories. One doesn't see Icelanders, Ashkenazic Jews, or other groups with distinct genetic heritages expressing concern about vaccines; yet if anything, they should be more concerned than, say, "Hispanics."

⁷⁹ *Morton v. Mancari*, 417 U.S. 535, 548–49 (1974).

⁸⁰ The Department of the Interior even issues "Certificates of Indian Blood Quantum" to facilitate this policy. BUREAU OF INDIAN AFFAIRS, CERTIFICATE OF DEGREE OF INDIAN OR ALASKA NATIVE BLOOD INSTRUCTIONS, <https://tinyurl.com/39pcz5ad> (last accessed Aug. 16, 2023).

⁸¹ See BERNSTEIN, CLASSIFIED, *supra* note 8, at 117–40.

⁸² 18 U.S.C. § 1153 (1994).

⁸³ BERNSTEIN, CLASSIFIED, *supra* note 8, at 117–40.

A challenge is also undoubtedly forthcoming to the Indian Child Welfare Act (ICWA).⁸⁴ ICWA arbitrarily deems any child who is “eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe” to be exclusively an “Indian” for purposes of the Act.

The Supreme Court recently stated that the purpose of ICWA is “to keep Indian children connected to Indian families.”⁸⁵ To the extent that’s a valid government interest, the child should need to have some meaningful ties to his hereditary Indian tribal community for ICWA to apply. Yet under ICWA, a child could be, for example, 3/256th Cherokee on his father’s side,⁸⁶ with no cultural connections to the tribe, and nonetheless be arbitrarily deemed an Indian for purposes of ICWA.

Relatedly, under ICWA, any Indian tribe can intervene on behalf of a child who is deemed to be an Indian, so long as the child’s own tribe chooses not to intervene in the proceedings. In other words, the Sioux tribe can intervene to insist, for example, that a Hopi child be placed with a Sioux family rather than with a non-Indian family. This is true even though the Sioux and the Hopi have nothing in common except being “racially” Indian.

In the *Brackeen* case, the Court found that the plaintiffs had no standing to assert an equal protection claim. However, Justice Kavanaugh wrote a concurring opinion that virtually invited plaintiffs to bring such a claim in the future. Kavanaugh noted that ICWA raises troubling questions about race-based decisionmaking.⁸⁷ When such a case eventually arises, the Court will likely conclude that keeping Indian children attached to their heritage is a compelling government interest. But the Court will still have to address the arbitrary manner in which (1) ICWA deems children of mixed heritage to be Indian in a way that trumps any other identity they may have; and (2) “Indian” is treated as a singular class despite vast differences in tribal cultures, histories, religions, and so on. The Court will have to decide whether this arbitrary treatment shows that ICWA is not narrowly tailored to achieve its stated objective.

⁸⁴ 25 U.S.C. §§ 1901–1963.

⁸⁵ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1623 (2023).

⁸⁶ See *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (child who was only 3/256th Cherokee came under ICWA jurisdiction because her father was a member of the Cherokee tribe).

⁸⁷ *Brackeen*, 143 S. Ct. at 1661 (Kavanaugh, J., concurring).

Conclusion

When the U.S. government created the Directive 15 racial classifications in 1978, relevant officials thought that they were simply ensuring uniformity in data collection across government agencies. They had no inkling that these classifications would be used by institutions throughout American society to indefinitely divide Americans into demographic groups, with some receiving preferential treatment based on their classification.

In the ensuing 45 years, the United States has become more tolerant and more ethnically diverse, including a large population of people of mixed heritage. Nevertheless, the establishment—government, big business, universities, and the media, among others—has tenaciously clung to using the Directive 15 classifications for diversity and other purposes. At the grassroots level, Americans are increasingly adopting a multiethnic, multiracial American identity. At the elite level, corporate “affinity” groups, segregated orientations, graduations, and dorms, and overt racial discrimination in favor of certain Directive 15 groups have increasingly become the norm.

Until 2023, the Supreme Court watched these developments from afar, declining to intervene. Finally, in *SFFA*, the Court stepped in to condemn the Directive 15 classifications as unlawfully arbitrary, divisive, incoherent, poorly or ambiguously defined, gameable, and, most important, unsuited to serving a compelling interest in diversity in higher education.

In fact, the Directive 15 classifications are generally unsuited for almost anything, beyond creating artificial interest groups seeking to defend and expand their turf. *SFFA* marked the opening salvo in what is sure to be a much longer battle to stop government and other powerful entities from determining people’s fate based on nonsensical, government-dictated racial classifications. There is reason to hope that *SFFA* marks the beginning of the end of racial classification as we know it.